Contemporary Piracy and Maritime Terrorism: Towards An Effective International Legal Response

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CONTEMPORARY PIRACY AND MARITIME TERRORISM:
TOWARDS AN EFFECTIVE INTERNATIONAL LEGAL RESPONSE

by

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ABSTRACT

Piracy at sea has been a threat which has plagued the mariner since the earliest trading vessels took to the sea more than two thousand years ago. To those outside of the maritime community, the notion of piracy likely conjures up visions of Captain Kidd and Blackbeard, the sort of lifestyle, popularized in the Errol Flynn movies of the 1930s, which has long since passed into history. In reality, violence and robbery at sea is alive and well in certain geographic locations around the globe. In the past decade, the problem of piratic attack upon merchant vessels has become especially acute in the Singapore Strait, one of the world’s most important commercial and strategic waterways. Today’s conventional international law of piracy provides for universal jurisdiction over piracy which occurs on the "high seas." The conventional law of piracy is largely the product of customary and municipal concepts of the crime, jurisdiction, and international relations which existed in the eighteenth century. However other aspects of the law of the sea have gradually evolved in response to changing international political and economic notions. New concepts such as the introduction of the Exclusive Economic Zone, expanded territorial seas, and archipelagic waters, have effectively reduced the areal extent of the "high seas," and consequently, have rendered the existing conventional law of piracy inadequate to respond to most of the piratic activity which is occurring in the world today.

This paper examines the development of the international law of piracy, and the effect that contemporary notions of the law of the sea and international relations have on the existing conventional law. The terrorist attack on the cruise ship Achille Lauro is cited as an example of the shortcomings of the existing conventional law’s definition of the offense of piracy in the modern age. The present situation in the Singapore Strait is cited as an example of how contemporary notions of littoral state sovereignty militate against an effective international response to "traditional" piratic activity occurring in an international strait. Recommendations for improving the international community’s ability to address the problems posed by contemporary piracy and maritime terrorism are offered.
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CHAPTER I. INTRODUCTION

The maritime world is fraught with hazards. Since the inception of navigation, nature has pitched an unrelenting assault on the mariner. It has imperiled him with violent storms and waves, frustrated him with tricky currents and unfavorable winds, and impaled him on hidden rocks and shoals, forcing him always to adapt to its fickle and dangerous moods. Over time, the maritime community has responded to nature's challenges through advancing technology, both in the design and construction of vessels, and in the art and science of navigation.

The forces of nature are not the only hazards in the maritime world. Piracy at sea has been a threat which has plagued the mariner since the earliest trading vessels took to the sea more than two thousand years ago. Mentioning the term "piracy" today, particularly to those outside of the maritime community, is likely to conjure up vivid images of swashbucklers and buccaneers, Captain Kidd, Blackbeard, and treasures of the Spanish Main. Indeed, these concepts, embellished in legend and literature, now provide the popular romanticized perception of piracy typified by the Errol Flynn films of the 1930s, i.e., private individuals loyal to no state cruising the high seas and attacking indiscriminately in a career of robbery and violence.

Precisely because of this romanticized vision of outlaw brigands plundering on the high seas, there has been a general feeling that maritime piracy has passed into history, and is no longer a part of the modern world. One might speculate that many aspects of modern civilization have, over time, severely impacted upon the practice of piracy. There are today of course far fewer
uninhabited regions which could serve as hideouts for pirates. Other contemporary developments such as satellite links which provide instantaneous telecommunications capability between ship and shore, modern navies and coast guards, and the size and speed of modern merchant vessels, would all seemingly conspire against the practice of piracy today.

THE CONTEMPORARY RELEVANCE OF PIRACY

In fact however, the "traditional" form of piracy, robbery and violence against merchant vessels at sea is alive and well in specific geographic regions of the globe. In the past ten years, piratic attacks have been reported off the coasts of West Africa, Brazil, Colombia, and Ecuador. In the South China Sea, which has historically been a hotbed of piracy, piratic activity is especially prevalent today in the vicinity of the Anambas, Natunas, and Spratly Islands, as well as in the vicinity of the Philippines. Many of the most notorious pirate attacks have occurred within the Straits of Malacca and Singapore. Much as in the past, geography and economics have combined to make piracy an attractive occupation in these regions; the heavily vegetated shorelines and small islands in these areas provide ample cover for attack, and the subsistence level economies of these Third World regions makes the practice of piracy financially rewarding.

In addition to the "traditional" form of piracy which is still occurring, there has been another "piratic" threat to the maritime community which has resurfaced in a contemporary context: the concept of maritime terrorism, or politically motivated piracy. The October 1985 terrorist attack on the Italian cruise liner the Achille Lauro, which resulted in the murder of an
American citizen, received global attention and provided a chilling example of this phenomenon. In contrast to "traditional" piracy which is motivated largely by a desire for private economic gain, maritime terrorists embrace the disruption of international shipping as an effective tactic by which to further their particular public or political objectives. Regardless of the specific goals, the presence of the maritime terrorist poses as much danger to the maritime community as does the contemporary "traditional" pirate.

**THE CRIME OF PIRACY AND THE CHANGING CONCEPT OF "HIGH SEAS"**

As the maritime community has evolved through the ages and developed technology to respond to the natural hazards to navigation, so has it concurrently developed jurisprudential concepts to define the elements of the offense of piracy, and applied enforcement mechanisms to repress the crime of piracy at sea. The cornerstone of the international law of piracy has been the "high seas" element of the offense, which provides the basis for universal jurisdiction over piracy.

However, the law of the sea has gradually evolved in response to changing international political and economic notions. New concepts, particularly the introduction of the Exclusive Economic Zone (EEZ) in the Third United Nations Conference on the Law of the Sea,\(^1\) and its resultant treaty (hereinafter 1982 Law of the Sea Convention) have had a profound impact on the areal extent of application of the international law of piracy, which has remained essentially unchanged since the 1958 Geneva Convention on the High Seas\(^2\) (hereinafter High Seas Convention). Specifically, Article 86 of Part VII of the 1982 Law of the Sea Convention, which defines the applicability of the High Seas
provisions of the Convention, states that the High Seas provisions apply only
to those parts of the sea which are not included in the EEZ, territorial sea,
internal waters, or archipelagic waters of an archipelagic state. Because the
piracy provisions of the 1982 Law of the Sea Convention are located within
Part VII, arguably, they would not apply in the EEZ. However, the matter is
rendered ambiguous by the clause in Article 58 of Part V of the 1982 Law of
the Sea Convention which holds, in relevant part, that the High Seas articles
(Articles 88-115) and other pertinent rules of international law apply to the
EEZ in so far as they are not incompatible with Part V.

As the sovereignty and sovereign rights of littoral states have grown over
the past several decades, ocean regions formerly considered the "high seas"
have been eliminated. Thus, although contemporary piracy can often be every
bit as violent and ruthless as the plunderings of yesteryear, the important
factor distinguishing contemporary piratic attacks from their historical
antecedents is the absence of the "high seas" element of the offense. Piratic
activity which physically occurred on what was once the "high seas" and thus,
according to customary and conventional international law would have been
within the jurisdiction of any powerful state to repress, now falls within the
enforcement jurisdiction of various littoral states, which may not have the
requisite economic or technical resources to deal effectively with the
problem.

THE PROBLEM OF PIRACY REPRESSION UNDER THE CONVENTIONAL LAW OF THE SEA

Today's "traditional" form of piracy, as well as the emerging problem of
maritime terrorism, present difficult enforcement challenges to a conventional
international piracy doctrine which traces its genesis to an era when piracy repression was unencumbered by such modern developments as expanded territorial seas, archipelagic waters, EEZs, open registry shipping, and post-colonial sensitivities regarding national sovereignty which have arisen under the guise of the new international economic order. The definition of piracy provided in the existing High Seas Convention and the 1982 Law of the Sea Convention is limited because these Conventions mandate its locus on the high seas, require two ships to be involved, and stipulate that the action be for private motives only. As result, these Conventions effectively preclude universal jurisdiction over the vast majority of piratic activity which is occurring, or is likely to occur, in the world today.

THE NEED TO ESTABLISH AN EFFECTIVE INTERNATIONAL RESPONSE TO PIRACY

Maritime commerce is perhaps the most international of human endeavors, and piracy is arguably the most international of crimes. It is the international aspect of piracy which provides its intrigue and serves to complicate enforcement strategies. The current piracy situation in the Singapore Strait provides an excellent example of how contemporary concepts of maritime sovereignty militate against the resolution of an international problem. There, indiscriminant attacks are being made on the world's commercial vessels exercising their rights of transit passage through portions of an international strait which lies wholly within the territorial waters of a single nation. Absent the "high seas" element of the offense, the victimized vessels' flag states are unable to exercise their legal rights to pursue and capture pirates themselves, because the legal authority to combat piracy has moved from the international sphere to the municipal sphere of the littoral
The consequences of uncontrolled piracy in the Straits region go far beyond the potential for injury or loss of life to ship’s crews, and the economic losses associated with sea robbery. The Singapore Strait is one of the most important commercial and strategic waterways in the world. It is a vital corridor for the shipment of crude oil from the Persian Gulf to Japan, and as such, experiences a large volume of Very Large Crude Carrier (VLCC) traffic. These low, slow moving vessels are, by an internationally sanctioned traffic separation scheme, restricted to specifically designated traffic lanes. As a result they are especially susceptible to attack during a transit passage in the Strait which takes them through Indonesian territorial waters. A pirate attack frequently diverts the crew’s attention from the safe navigation of the vessel, thereby increasing the likelihood of a grounding or collision in this densely trafficked, narrow waterway. Thus the potential for a major oil or hazardous chemical spill, or blockage of a traffic lane, is a disturbing possibility. The international ecological and economic consequences from such a scenario are readily apparent.

The case to be made, of course, is that the safety of navigation in this waterway is of international concern. Unfortunately, the existing conventional law permits direct law enforcement action only by Indonesia, the littoral state in whose territorial waters the most attack prone part of the Strait’s traffic lane is located.

Concerns about the adequacy of the international law of piracy to deal with
situations of maritime terrorism were raised in the wake of the Achille Lauro affair. Since terrorist attacks generally occur for some political or public purpose, as opposed to a private purpose, many authorities believe that the existing conventional piracy doctrine, with its public purposes exclusion, is inapplicable in situations like that involving the Achille Lauro. As the popularity of cruising continues to rise, cruise vessels may be viewed by terrorists as increasingly attractive targets.

Clearly, there is now an urgent need to examine the international law of piracy, and develop new enforcement strategies which will respect the sovereignty concerns of littoral states, yet yield effective results against this international criminal menace.

PURPOSE AND METHODOLOGY

The purpose of this paper is to identify the shortcomings of the existing conventional law of piracy vis-a'-vis the current nature of the problem, and to explore anti-piracy enforcement strategies which will prove viable within the paradigm of today's notions of the law of the sea and international relations. Accordingly, it is appropriate first to examine the history of law of piracy, and observe how the law was shaped by the various maritime states' desires for, and notions of, maritime order. Therefore Chapter II examines the nascent law of piracy as applied in the ancient Mediterranean, introduces the concept of pirates as hostes humani generis, or enemies of the human race, and explores the emergence of the concept of freedom of the seas and the development of the idea of universal jurisdiction over pirates.
Chapter III examines the evolution of the customary law of piracy under the impact of municipal law. The concepts of municipal and international law are first distinguished. Then, citing English and American court cases as precedents, the evolution of the elements of the offense of piracy and the scope of piracy jurisdiction under the impact of the municipal laws of these nations are examined.

Chapter IV addresses the codification of the international law of piracy. It begins with a discussion of the League of Nations' efforts in the early 1920s, and continues with an examination of the work of the 1932 Harvard Research in International Law Draft Convention on Piracy. The Harvard Draft provided the foundation for the subsequent High Seas and 1982 Law of the Sea Conventions' piracy provisions. The International Law Commission's work on the development of the piracy articles found in the High Seas and 1982 Law of the Sea Conventions is explored in some detail for insight into some of the political considerations which affected the language of the Conventions' articles.

Chapter V critiques the efficacy of the piracy doctrine articulated in the existing conventional law when applied in the context of maritime terrorism, and examines the next generation of international measures developed in response to maritime terrorism. The Santa Maria and Achille Lauro cases are studied as examples of maritime terrorism as a contemporary aspect of piracy. The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation\(^3\) (hereinafter 1988 Rome Convention), developed in the wake of the Achille Lauro incident, will be reviewed to highlight its improvement over the previous conventional piracy articles as regards
responding to incidences of maritime terrorism.

In Chapter VI the piratic attacks in the Strait of Malacca and Singapore Strait are analyzed as examples of "traditional" piracy in the modern geopolitical environment. The jurisdictional issues which have hampered enforcement efforts in the region will be reviewed. Recent anti-piracy measures being developed and implemented in the Straits region are discussed and suggestions for improving the anti-piracy measures in the region will be offered.

Finally, Chapter VII concludes with a look to the future. Forthcoming IMO proposals are cited, and a call is made for more states to ratify the 1988 Rome Convention.
CHAPTER II. THE NASCENT LAW OF PIRACY

THREAT AND RESPONSE IN THE ANCIENT MEDITERRANEAN

Piracy has been a troubling aspect of maritime life since antiquity. It has been observed that "in the Homeric age the practice [of piracy] was looked upon as a creditable...means of enrichment."\(^4\), and in the ancient world piracy became "a common trade, as was inevitable in a period when there was no organized maritime power strong enough to put it down."\(^5\) Early Greek references using the word "pierato" and its derivatives date from about 140 B.C., and were applied to some specific political and economic communities of the Eastern Mediterranean. However, analysis of the usage of this term suggests an appellation describing small communities of fighting men capable of forming alliances and participating in wars, rather than the classical notions of brigands outside the legal order.\(^6\)

Nonetheless, disruptions to the maritime order of the ancient world by the existence of pirate communities warranted attention by those states sufficiently powerful to take action against them. Thus, King Minos of Crete, in order to secure his revenues, took action to suppress piracy in the Eastern Mediterranean in the fifteenth century B.C.\(^7\) The growth of Athenian sea power prompted it to police the seas between the end of the Persian War in 479 B.C. and the beginning of the Peloponnesian War in 431 B.C. In the fifth century B.C., Solon imposed rules which legalized, but regulated, certain piratical organizations, in recognition of the mercenary value of such organizations in time of war.\(^8\) Agreements among states for the suppression and control of piracy in the Eastern Mediterranean were also implemented. By the end of the third century B.C., Rhodes and the Cretan state of Hierapytna
entered into a treaty which, *inter alia*, provided for mutual aid against pirates. The Hierapytnians were to assist the Rhodians in suppressing piracy in the neighboring seas, with the captured vessels brought to Rhodes and the booty to be shared between the parties to the treaty. However, Roman inroads against Rhodian naval power by the mid second century B.C. rendered the latter’s anti-piracy efforts ineffectual.

**THE CONCEPT OF HOSTES HUMANI GENERIS**

The expansion of Roman hegemony by the first century B.C. made the existence of pirate communities unacceptable, particularly when piratical depredations on Rome’s maritime commerce became too costly to ignore. The Roman Senate passed a law in 68 B.C. whereby Pompey the Great was commissioned to “take the seas away from the pirates”, and in the process destroyed the dockyards and arsenals of the Cilician pirate villages in Crete. It was about this time that the noted Roman lawyer and political contemporary of Julius Caesar, Marcus Tullius Cicero, evaluating the legal power given Pompey to deal with the pirates, first introduced the concept that pirates were the enemies (*hostes*) of all communities. The concept of *hostes humani generis*, or "common enemies of all mankind" would, by the seventeenth century, provide the foundation for establishing piracy as an offense over which jurisdiction was universal. Thus Sir William Blackstone was to observe in 1790:

"Lastly, the crime of Piracy, or robbery and depredation upon the high seas, is an offense against the universal law of society; a pirate being, according to Sir Edward Coke, hostis humani generis. As therefore, he has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him: so that every community hath a right, by the rule of self defence, to inflict that punishment upon him which every individual would in a state of nature have been otherwise entitled to do, for any invasion of his person or
Indeed, the term *hostes humani generis* itself became at times, synonymous with the definition of piracy. This prompted the seventeenth century British Admiralty jurist Dr. Matthew Tindall to correct this misuse. Tindall noted that "it is neither a definition nor as much as a description of a pirate, but a rhetorical invective." 12

In actuality, Cicero applied the term in a somewhat more restrictive context. He denied any legal obligation to keep oaths to pirates on the grounds that by being enemies (*hostes*) of all communities, they are not subject to the law of universal society that makes oaths binding between different communities. 13 Therefore no ransom need be delivered to a pirate even if one had sworn to do so because the pirate was not a legal enemy but the common enemy of all mankind. 14

**JUSTINIAN’S DIGEST AND THE RHODIAN CODE**

With the spread of Roman power around the Mediterranean, piratical disruptions diminished. They did not become a serious problem until the fifth century, when the Roman fleets, which had provided an effective piracy deterrent, collapsed in the face of the various barbarian invasions throughout the Empire. The nascent law of piracy as evidenced through international treaties, maritime custom, and national law, had by the end of the Roman Empire, become "meagre and uneven." 15 Justinian’s Digest of A.D. 534, often cited by commentators on piracy 16 for its historical relevance, concerned the disposition of persons who had been captured by pirates and robbers, rather than a broad based proscription of the practice. Similarly, the
Rhodian Code dealt principally with the financial consequences of piratic activity rather than its suppression. Thus it has been summarized that the thrust of the law during this period,

"...was to regulate from the shore in order to mitigate the consequences of piracy rather than repress upon the sea. This approach reflected the relative weakness of states and their typical lack of sensitivity to the depredations of pirates. Moreover, the idea of sustained repression was inconsistent with conventional notions about proper state activity and the prospects for maritime order."  

INTERNATIONALISM ARRIVES: FREEDOM OF THE SEAS AND THE EMERGENCE OF UNIVERSAL JURISDICTION

The growth of international maritime commerce during the Renaissance, and the subsequent emergence of the Grotian view of international society in the seventeenth century, would come to have profound implications in the development of the legal rules against piracy. In this regard, it has been observed that piracy is the oldest and perhaps only crime over which universal jurisdiction was generally recognized under customary international law. In 1612, Alberico Gentili, an Italian Professor of Civil Law at Oxford, cited as the first writer of "lasting eminence" to equate piracy with outlawry forbidden by international law, observed:

"Pirates are common enemies, and they are attacked with impunity by all, because they are without the pale of the law. They are scorners of the law of nations; hence they find no protection in that law. They ought to be crushed by us...and by all men. This is a warfare shared by all nations."  

By the seventeenth century, maritime powers began to accept the doctrine of freedom of the seas as a logical derivative of the economic necessity to maintain the freedom of navigation necessary to undertake trade with the New World. Piracy, insofar as it represented a threat to the international
trade of the day, was viewed as a danger to the freedom of navigation which impacted upon the international community as a whole. As pirates attacked merchant vessels indiscriminately, they were considered *hostes humani generis.* Because they were not subject to the authority of any state, and no state could be held responsible for their acts, it became accepted by all states that jurisdiction over pirates should be universal. As one commentator concludes, "the increasing economic sensitivity of Europe to commercial disruptions ensured that piracy was widely viewed as a great offense, for the restraint of which states controlled growing military and political resources." The need to protect community interests in economic development and humanitarian standards thus formed the basis of the international law establishing piracy *jure gentium* (by the law of nations). As a result, any state could apprehend pirates, and any state into whose jurisdiction they were brought could punish them under their own laws, irrespective of the fact that the crime was committed on the high seas.

GROTIUS AND THE THEORY OF EFFECTIVE OCCUPATION

Authority to bring to bear military and political resources against pirates received support within the emerging municipal law systems of the various European states. In an analysis of the Grotian view of international society as reflected in *De Jure Belli ac Pacis* (On the Law of War and Peace), Professor Rubin cites a passage which suggests a foundation for the extension of municipal criminal law to the activities of foreigners in certain locations: the theory of effective occupation:

"Sovereignty over a part of the sea is acquired in the same way as sovereignty elsewhere, that is...through the instrumentality of persons and territory. It is gained through the instrumentality of persons if, for example, a fleet, which is an army afloat, is
stationed at some point of the sea; by means of territory, insofar
as those who sail over the part of the sea along the coast may be
constrained from the land no less than if they should be upon the
land itself."\textsuperscript{25}

Thus, applying the theory of effective occupation, extension of a state’s
municipal laws could be successfully accomplished by the presence of its
warships in those regions of the sea within the military control of that
vessel. This philosophy was embraced by the English courts of the seventeenth
century, which asserted jurisdiction over piracy \textit{jure gentium} under common
law, and as such determined for themselves the specific elements of the
offense of piracy \textit{jure gentium}.

\textbf{THE ELEMENTS OF PIRACY: PRIVATE MOTIVES AND INDISCRIMINANT ATTACK}

English jurists of the day wrestled with various aspects of the concept of
piracy. These included questions of property rights, the validity of
commissions associated with the then widespread practice of privateering,\textsuperscript{26}
and the legal classifications of unrecognized or rebellious communities such
as the notorious Barbary states. However, of primary significance in this
analysis is the courts’ determination that central to the definition of the
English municipal law crime of piracy were two important elements: first, the
accused must be acting \textit{amino furandi} (for private motives) and not as part of
a struggle for political power, and secondly, the accused’s behavior must be
\textit{hostes humani generis}, i.e., the accused must have been engaged in attacking
all lucrative targets rather than singling out a specific national flag victim
or a narrowly prescribed group of allied flags. Indeed, in contrast to the
previously cited comment of Dr. Tindall dismissing the epithet as mere
"rhetorical invective", his fellow jurist Robert Walton in 1693 argued that
the concept of permanent and general predation was an essential element of the charge of piracy, and thus to warrant the term *hostes humani generis* the accused must have robbed the vessels of all nations irrespective of flag.27

The 1696 case *Rex v. Dawson* illustrates the English jurisprudential thinking on the definition of piracy. In his charge to the jury, Admiralty Court judge Sir Charles Hedges noted:

"Now piracy is only a sea-term for robbery, piracy being a robbery committed within the jurisdiction of the Admiralty. If any man be assaulted within that jurisdiction, and his ship or goods violently taken away without legal authority, this is robbery and piracy. If the mariners of any ship shall violently dispossess the master, and afterwards carry away the ship itself, or any of the goods, or tackle, apparel, or furniture, with felonious intention, in any place where the lord Admiral hath, or pretends to have jurisdiction, this is also robbery and piracy. The intention will, in these cases, appear by considering the end for which the fact was committed; and the end will be known, if the evidence shall shew you what hath been done."28

**EXPANDING JURISDICTION: NATIONALITY AND NATIONAL INTEREST**

Turning to the jurisdictional limits of the English courts, the noted English scholar Charles Molloy, commenting on the jurisdiction of the tribunals established under the authority of the Offenses at Sea Act of 1536,29 opined that such jurisdiction extended over all Englishmen on the basis of nationality alone, provided the offense took place within the jurisdiction of the English Admiral.30 Further, the scope of the Act could be extended to foreigners provided that there was some basis for English legal interest in their actions, such as the victim being of English nationality, or if the victim and the accused pirate were both physically present in England and the matter had not been previously resolved in the victim's own country,
or finally, on the basis of the Crown’s claim at the time to territorial jurisdiction over large parts of the English Channel. With regard to incidents occurring beyond the scope of English jurisdiction, on the "Ocean", Molloy observed:

"If Piracy be committed on the Ocean, and the Pirats in the attempt there happen to be overcome, the Captors are not obliged to bring them to any Port, but may expose them immediately to punishment, by hanging them up at the main Yard end before a departure..."

"So likewise, if a ship shall be assaulted by Pirates and in the Attempt the Pirates shall be overcome, if the Captors bring them to the next port, and the Judge openly rejects the Trial, or the Captors cannot wait for a Judge without certain peril or loss, Justice may be done upon them by the Law of Nature and the same may be there executed by the captors."32

EXPANDING JURISDICTION: UNIVERSAL JURISDICTION

The view that piracy was an offense over which universal jurisdiction was appropriate was introduced by Sir Leoline Jenkins, judge at the Common Law and later Privy Councillor to King Charles II, in a 1668 jury charge which declared:

"You are therefore to enquire of all Pirates and Sea-rovers, they are in the Eye of the Law Hostes humani generis, Enemies not of one Nation...only, but of all mankind. They are outlawed, as I may say, by the Laws of all Nations; that is out of the Protection of all Princes and of all Laws whatsoever. Every Body is commissioned, and is to be armed against them, as Rebels and Traytors, to subdue and to root them out."33

The theme of universal jurisdiction suggested by Jenkins was employed by Hedges in the Dawson case previously cited, and though the facts of this case did not concern foreigners as defendants, it is noteworthy for its far reaching concepts of jurisdiction:

"The King of England hath not only an empire and sovereignty over the British seas, but also an undoubted jurisdiction and power, in
currency with other princes and states, for the punishment of all
piracies and robberies at sea, in the most remote parts of the
world; so that if any person whatsoever, native or foreigner,
Christian or Infidel, Turk or Pagan, with whose country we have no
war, with whom we hold trade and correspondence, and are in amity
shall be robbed or spoiled in the Narrow Seas, the Mediterranean,
Atlantic, Southern, or any other seas, or the branches thereof,
either on this or the other side of the line, it is piracy within
the limits of your enquiry, and the cognizance of this court."

EXPANDING JURISDICTION: THE ABSENCE OF STATE AUTHORITY

The noted Dutch jurist of the eighteenth century, Cornelius Bynkershoek,
also addressed the question of the elements of the offense and the scope of
jurisdiction. His arguments, dealing with the issues of privateering and the
validity of commissions, served to incorporate the concept of absence of state
authority as an essential element in the definition of piracy. Under the
applicable Dutch municipal law, he asserted, "We punish as pirates those who
sail out to plunder the enemy without a commission from the admiral, and
without complying with...the rules of the Admiralty of...1597." However,
it has been suggested that Bynkershoek equivocated when addressing the
jurisdictional question of the authority of Dutch courts to hear cases
involving depredations by one foreigner against another, appearing somewhat
less willing than his English counterparts to apply his nation's municipal law
proscriptions against piracy to piratic activity occurring exclusively between
foreigners.
CHAPTER III. THE CUSTOMARY INTERNATIONAL LAW OF PIRACY

MUNICIPAL AND INTERNATIONAL LAW DISTINGUISHED

Beyond the aspect of its early heritage, piracy is unique because it is considered both a crime under the municipal laws of the various states, and a crime under international law. Commentators have been quick to observe that confusion has arisen because of the use of the two terms: international law piracy and municipal law piracy. Though virtually all of the modern maritime nations have enacted municipal laws against piratical activity to protect their maritime commerce, "...the authorities show that the word 'piracy' is one capable of various shades of meaning, and that, even when used strictly as a legal term, it may cover different subject matters according as it is considered from the point of view of international or that of municipal lawyers..." As cautioned in the Harvard Research Draft:

"It suffices here to give advance warning of the great variety of opinions as to the scope of the term and to emphasize the important difference between piracy in the sense of the law of nations and piracy under municipal law...International law piracy is committed beyond all territorial jurisdiction. Municipal law piracy may include offenses committed in the territory of the state. It is to be noted, then, that piracy under the law of nations and piracy under municipal law are entirely different subject matters and that there is no necessary coincidence of fact-categories covered by the term in any two systems of law." 40

Some scholars have taken the position that international law is strictly a rule of conduct for international persons or entities, who alone may violate its provisions. Under this view the law of nations is a law between states only, and the rights, duties, privileges and powers which it defines appertain only to states; there is no legal universal society of private persons regulated by international law. In the opinion of one of the leading legal commentators of the nineteenth century, Chancellor James Kent,
while considering piracy, "one of the most injurious offenses against the law of nations," nevertheless concluded that offenses that can be committed by individuals are to be enforced by the "sanctions of municipal law."  

On the contrary there have been jurists who have contended that the law of nations is akin to municipal law, with individuals being held to be "subjects" of international law, as states are normally considered to be, rather than "objects" of international law, as individuals are typically regarded.

Consider the position of James Lorimer, writing in 1872:

"...when the law of nations exercises criminal jurisdiction directly, it deals with persons whom it claims as its own citizens. When it punishes pirates, it does not punish the citizens of the State to which the pirates belonged, but cosmopolitan criminals, whom it regards as having ceased to be State citizens altogether in consequence of their having broken the laws of humanity as a whole, and become enemies of the human race. Citizen criminals, on the other hand, it simply hands over to the States whose laws they have broken."  

In a more contemporary vein, Professor Clingan has commented:

"The more modern concept of international law, however, tends in one way or another, directly or indirectly, to recognize the status of individuals. This is particularly so in the case of international human rights. Although this is a comparatively new evolution, it may be that an individual, under international law, bears internationally punishable responsibilities as well as rights."  

The exceptional jurisdictional status of pirates under international law holds that they may be punished by any nation into whose jurisdiction they may fall. Pirate ships relinquish their nationality and can be brought before the courts of any nation. This has suggested to one contemporary observer an attempt to integrate a rule of expediency into the existing body of international law, whereby piracy jure gentium directly prescribes rules both
for state conduct as well as the conduct of the individual pirate, the effective result being international law regulating the conduct of both the individual and the state.\textsuperscript{48} This squares well with the position taken by the U.S. Supreme Court in the 1820 \textit{Smith} case, to be discussed subsequently.

\section*{Municipal Law Affects International Law}

To discern elements of the offense of piracy under customary international law one must distinguish between the elements of piracy unique to individual states, and the elements of piracy common to all states.\textsuperscript{49} Cautions one commentator, "In every country the international law applied by its courts tends to become involved with its municipal law. This is particularly true of the common law countries."\textsuperscript{50} Hence, this task is complicated by the fact that municipal law piracy has been characterized by "periodic additions according to the legislative whims of the respective nations"\textsuperscript{51} who "broaden or narrow the definition of piracy under their own municipal laws to achieve their own ends."\textsuperscript{52}

\section*{The Impact of English Municipal Law}

As one of the world's dominant sea powers the British have had a profound influence on the development of maritime law. Their contribution to the development of the law of piracy has been especially significant, owing in no small measure to their common law system. Accordingly, an examination of the English jurisprudential and political thought concerning piracy is appropriate to place the international law definition in proper context.

As Blackstone characterized the English perception of the customary law on
the subject in the late eighteenth century:

"By the ancient common law, piracy, if committed by a subject, was held to be a species of treason, being contrary to his natural allegiance; and by an alien, to be a felony only; but now, since the statute of treason, 25 Edw. III, c.2, it is held to be only felony in a subject... The offense of piracy, by common law, consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there. But, by statute, some other offenses are made piracy also..."53

The English statutes of the day also deemed as "piracy": any acts of hostility committed on the high seas by natural born subjects under foreign commissions against other English subjects; barratry;54 mutiny;55 and aiding and abetting such offenses.56

THE SERHASSAN CASE: SHORE BASED GROUPS AS PIRATES

By the mid-nineteenth century, the British had expanded their definition of piracy and their scope of jurisdiction further still. As the British East India Company expanded its affairs on the Malay Peninsula and surrounding waters, the British were forced to come to grips with the various Peninsular Sultanates, whose activities of "tax collection" and privateering in the region were viewed by the British as a piratic nuisance to their commercial endeavors.57 In 1843 Captain Henry Keppel of H.M.S. Dido attacked some Dyak villages on north Borneo which he considered to be "piratical." When he subsequently sought the bounty provided under the Bounty Act of 1825 for an engagement with "pirates", the British Court of Admiralty was forced to resolve the question whether the term "pirate" applied to organized groups operating on land as well as the sea. In the 1852 case known as Serhassan (Pirates)58 noted Admiralty jurist Dr. Steven Lushington rendered the decision of the court in the affirmative, holding that indeed shore based
persons could commit piratic acts when they engaged British naval or amphibious forces.

INSURGENTS, BELLIGERENTS, AND THE LAW OF PIRACY

Mention of the concept of insurgents and belligerents is appropriate at this point as further illustration of the evolving nature of the customary law. By the late nineteenth century, the problem of opposition movements became especially prevalent due to the numerous revolutions of the period. Under the customary international law of that time, the rights and legitimacy of opposition forces in an internal war were determined by the opposition’s status, as determined by third states neutral to the conflict. Thus if the third state recognized the opposition as "belligerents" then the internal war took on the character of an international war between two states, each of which had recognized rights and duties under the laws of war. Inherent in this concept is the distinction between private and public ends. In the prevailing view of the day, among the rights attributed to belligerents was that their actions were for public ends rather than private ends, and thus could not be considered within the scope of piracy.

THE MAGELLAN PIRATES CASE

In the 1853 case of the Magellan Pirates, a British ship, the Eliza Cornish, was at anchor in the Straits of Magellan undergoing repairs when it was seized by inmates of a nearby Chilean convict settlement. The convicts took the vessel to sea, in the process killing the master and a passenger who was part owner of the vessel, whereupon it was recaptured by the British. As it was being returned to England the Eliza Cornish foundered and was sold in
Portugal. Initial legal action in this case was in fact an Admiralty proceeding, wherein the original British owners sought to have the sale to Portugal annulled on the grounds that the British master exceeded his statutory authority to dispose of the foundered vessel. While this aspect is not directly on point as regards the piracy aspects, it is noteworthy for its reflection of the British interpretation of universal natural laws. Dr. Lushington held for the British owners, finding the British statutory rule limiting the master's power to dispose of the vessel more reflective of a universal natural law of nations than the Portuguese rule, which vested broader authority in the master, and would have been more favorable to the interests of the Portuguese.

The "piracy" aspects of the case turned on application of the British Bounty Act of 1850, which, if the Chilean convicts were deemed to be "pirates", would have required the Crown to pay the Eliza Cornish's captors, but if the convicts were considered "insurgents", then Chile would be responsible for the costs associated with the temporary loss of the vessel. Dr. Lushington held that English law considered all persons who were guilty of piratical acts to be pirates, and piratical acts were robbery and murder on the high seas. Dr. Lushington then addressed the international law definition, finding:

"Though the municipal law of different countries may and does differ, in many respects, as to its definition of piracy, yet I apprehend that all nations agree in this: that acts, such as those which I have mentioned, when committed upon the high seas, are piratical acts, and contrary to the law of nations."60

Dr. Lushington also rejected both the notion that attacks had to be conducted indiscriminately in order to be considered piratic, and that the actions by the Chilean convicts were acts of insurrection or rebellion. In a
passage of his decision which has been variously cited\textsuperscript{61} Dr. Lushington opined:

"Even an independent state may, in my opinion, be guilty of piratical acts. What were the Barbary pirates of older times? What are many of the African tribes at this moment? It is, I believe, notorious, that tribes now inhabiting the African coast of the Mediterranean will send out their boats and capture any ships becalmed upon their coasts. Are they not pirates, because, perhaps, their whole livelihood may not depend on piratical acts? I am well aware that it has been said that a state cannot be piratical; but I am not disposed to assent to such dictum as a universal proposition."\textsuperscript{62}

Because however, in the final analysis, no British criminal jurisdiction was involved, the primary significance of the case rests on its attempt to apply the British municipal interpretations of international law regarding the freedom of navigation to promote worldwide British assertions of naval power.\textsuperscript{63} However, Dr. Lushington's dicta foreshadowed aspects of jurisprudential thought relevant to the twentieth century phenomenon of the "terrorist state". As noted international law scholar Sir Hersch Lauterpacht would observe nearly a century after Dr. Lushington:

"It is impossible to admit that individuals, by grouping themselves into States and thus increasing immeasurably their potentialities for evil, can confer upon themselves a degree of immunity from criminal liability and its consequences which they do not enjoy when acting in isolation."\textsuperscript{64}

**INSURRECTIONISTS AND PIRATES DISTINGUISHED**

In the 1909 case, Republic of Bolivia v. Indemnity Mutual Marine Assurance Co.\textsuperscript{65} the British held that rebels were not pirates when they acted only against the government they were opposing. In reaching a conclusion that the insurrectionists in this case were not pirates, the court distinguished their actions from those of common pirates, citing that there was an organized expedition for the purpose of establishing a government in a particular
territory, and that interference with property was only intended, and only
effectected, so far as was necessary for that purpose, and not for plundering
everyone indifferently. Therefore, the insurrectionists were not pirates
because they acted for public ends and limited their actions to a single
government.66

ATTEMPTED ROBBERY IS PIRACY

In the 1934 landmark case In Re Piracy Jure Gentium67 the Judicial
Committee of the Privy Council remarked on the evolving definition of piracy,
obsering that,

"a careful examination of the subject shows a gradual widening of
the earlier definition of piracy to bring it from time to time
more in consonance with situations either not thought of or not in
existence when the older jurisconsults were expressing their
opinions."68

Thus when two Chinese junks were interrupted in their pursuit and attack of
a third junk by a British naval vessel on the high seas, and brought into Hong
Kong, the question became whether actual robbery is an essential element in
the crime of piracy jure gentium, or whether a frustrated attempt to commit a
piratical robbery is not equally piracy jure gentium. Lord Viscount Sankey
concluded that actual robbery is not an essential element in the crime of
piracy jure gentium, and supported the proposition that piracy be expanded to
include any acts of violence committed in time of peace on the high seas:

"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 on
board another vessel, sailing under a national flag, without
committing the crime of piracy unless they stole, say, an article
worth six-pence, their Lordships are almost tempted to say that a
little common sense is a valuable quality in the interpretation of
international law."69
THE LAW OF PIRACY IN THE UNITED STATES

In the United States, pursuant to Article I, Section 8 of the Constitution, Congress is empowered to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations. Pursuant to Article III, Section 2, the federal judicial power is extended to all cases of admiralty and maritime jurisdiction. Owing to these provisions and the legislation enacted pursuant thereto, i.e. the Judiciary Act of 24 September 1789 which gave the several District courts civil jurisdiction in all civil cases of admiralty and maritime jurisdiction, the piracy law of the United States is exclusively federal. Since in Federal law there are no common law or non statutory crimes, it was necessary that piracy be made an offense by statute.

Thus the Maritime Offenses Act of April 30, 1790 was enacted, the relevant portion being Section 8 which states:

"...That if any person shall commit upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state, murder or robbery, or any other offense which if committed within the body of a county, would by the laws of the United States be punishable with death; or if any captain or mariner of any ship or other vessel, shall piratically and feloniously run away with such ship or vessel, or any goods or merchandise to the value of fifty dollars, or yield up such a ship or vessel voluntarily to any pirate; or if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in the defense of his ship or goods committed to his trust, or shall make revolt in the ship; every such offender shall be deemed, taken and adjudged to be a pirate and felon and being thereof convicted, shall suffer death..."70

DEFINING THE ELEMENTS OF THE OFFENSE: MURDER AND ROBBERY

Section 8 of this Act first came under judicial scrutiny in the 1818 case of United States v. Palmer et. al.71 The facts indicated that John Palmer of
Boston and two accomplices boarded the Spanish vessel *Industria Raffaelli* on the high seas and "then and there piratically and feloniously did put the [Raffaelli's crew] in corporal fear and danger of their lives" and took certain valuable merchandise from the vessel. The case was originally heard in the circuit court in Boston, which developed a series of eleven questions which had to be answered in order to render a decision on the facts. These eleven questions were then certified to the Supreme Court. The first four questions concerned the legislative intent of Section 8, including whether a robbery committed upon the high seas should be considered piracy subject to the death penalty, even though such an act, if committed on land, would not be punishable by death. The argument being made here is that Congress did not intend to make a capital offense on the high seas, that which is not a capital offense on land. Other matters certified questioned whether the common law definition of robbery could apply to the crime of robbery cited in Section 8, or was it necessary to specifically define it by another act of Congress; and whether or not robbery committed on the high seas, if committed by aliens against a United States vessel, or by Americans against an alien vessel, could be considered a robbery and piracy within the meaning of Section 8. The remaining questions related to the validity of commissions issued by unrecognized sovereigns.

Chief Justice Marshall delivered the opinion of the court. Marshall conceded the notion that Congress did not intend to make a capital offense on the high seas that which is not a capital offense on land was an argument, "entitled to great respect on every account; and to the more, because, in expounding a law which inflicts capital punishment, no over rigid construction
ought to be admitted." Nonetheless, he deemed the grammatical structure of the Section at issue precise enough to conclude: "The legislature having specified murder and robbery particularly, are understood to indicate clearly the intention that those offenses shall amount to piracy; there could be no other motive for specifying them." Concerning the definition of the term robbery under the statute, Marshall found no problem in applying the term, "in the sense which it is recognized and defined at common law."

SCOPE OF JURISDICTION: CITIZENSHIP

The next issue was whether this Act applied to persons who were not American citizens, nor sailing under the US flag, nor offending against US vessels or citizens. Marshall, cautious of the impact that an overbroad interpretation would have with respect to affairs exclusively within the realm of foreign princes and the sovereigns within his dominion, reasoned that "it would seem that offenses against the United States, not offenses against the human race, were the crimes which the legislature intended by this law to punish." Thus the Court ruled that the crime of robbery, committed by a person on the high seas, on board of any ship or vessel belonging exclusively to subjects of a foreign state, on persons within a vessel belonging exclusively to subjects of a foreign state, is not piracy within the true intent and meaning of the act for the punishment of certain crimes against the United States.

In a separate opinion, Justice Johnson, who regarded only two of the eleven certified questions as being material to the case, was disinclined to accept Marshall's interpretation of the grammatical structure of Section 8. Johnson cited "several inconsistencies growing out of a construction unfavorable to
the prisoners." The first, noted Johnson, was,

"the sanguinary character that it gives to this law in its operation; for it is literally true, that under it a whole ship's crew may be consigned to the gallows, for robbing a vessel of a single chicken, even though a robbery committed on land for thousands, may not have been made punishable beyond whipping or confinement. If natural reason is not to be consulted on this point, at least the mild and benignant spirit of the laws of the United States merits attention." 78

While conceding that Congress can inflict punishment on offenses committed on board American vessels or by citizens of the US anywhere, Johnson asserted that Congress cannot make piracy that which is not piracy by the law of nations, in order to give jurisdiction to its own courts over such offenses.

JURISDICTION OVER STATELESS VESSELS

The Act of 1790's jurisdiction over non-nationals who committed offenses beyond the territorial jurisdiction of the US was limited by the Palmer holding to those offenses committed against the United States. The authority of the statute was broadened somewhat in 1820 in United States v. Klintock 79. In this case an American, Ralph Klintock, was placed in command of a vessel, the Young Spartan, which was commissioned by one, Aury, the self-proclaimed, but legally unrecognized, "Brigadier of the Mexican Republic and Generalissimo of the Floridas". While cruising in the Young Spartan, Klintock came upon the Danish vessel, the Norberg, and during the subsequent boarding of the Norberg, had his second officer conceal Spanish papers on the vessel. Klintock then affected to have found the Spanish papers aboard, whereupon he took possession of the Norberg, debarked the vessel's crew in Cuba, and directed his second officer to sail the Norberg into Savannah, where he, Klintock, rendezvoused later in the Young Spartan.
Klintock argued that Aury's commission exempted him from the charge of piracy, and that although a fraud was practiced upon the Danish vessel, it was not in any sense piracy. Chief Justice Marshall disagreed, stating that Aury had no authority, as an unrecognized "Brigadier of the Mexican Republic or Generalissimo of the Floridas", to issue commissions to authorize private or public vessels to make captures at sea, and that the whole transaction taken together was not a belligerent capture but rather a robbery at sea. While the fraud practiced upon the Danish ship, "may not of itself constitute piracy...it is an ingredient in the transaction which has no tendency to mitigate the character of the offense."80

Turning to the jurisdictional scope of the 1790 Act, in a reconsideration of his opinion in the Palmer case, Marshall expanded his position that the Act must be limited in its operation to offenses committed by, or upon, the citizens of the United States, ruling:

"...that general piracy, or murder, or robbery, committed in the places described in the eighth section, by persons on board of a vessel not at the time belonging to the subjects of any foreign power, but in possession of a crew acting in defiance of all law, and acknowledging obedience to no government whatever, is within the true meaning of this act, and is punishable in the courts of the United States. Persons of this description are proper objects for the penal code of all nations; and we think the general words of the act of congress applying to all persons whatsoever, though they ought not to be so construed as to extend to persons under the acknowledged authority of a foreign state, ought to be so construed as to comprehend those who acknowledge the authority of no state. Those general terms ought not to be applied to offenses committed against the particular sovereignty of a foreign power; but we think they ought to be applied to offenses committed against all nations, including the United States, by persons who by common consent are equally amenable to the laws of all nations."81
THE PIRACY ACT OF 1819

The Klintock case notwithstanding, Justice Johnson's assertion in the Palmer case relative to the jurisdictional scope of Section 8, was to have a profound impact on the direction of subsequent anti-piracy legislation. The Piracy Act of 3 March 1819, "an Act to protect the commerce of the United States, and punish the crime of piracy", provided, inter alia, authorization for public armed vessels to protect merchant vessels from piratic depredations, allowed merchant vessels to capture and subdue pirate ships, and provided for the disposition of captured pirate vessels in American admiralty courts. The most significant aspect of this Act was Section 5, which was drafted in response to the jurisdictional constraints imposed on the 1790 Act following the Palmer decision. Section 5 declared:

"That if any person or persons soever, shall, on the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders, shall afterwards be brought into or found in the United States, every such offender or offenders, shall, upon conviction thereof...be punished with death."83

THE CORNERSTONE OF AMERICAN PIRACY LAW: U.S.v. SMITH

The 1820 case of United States v. Smith has been frequently cited as America's leading case in defining piracy, and as was previously observed, serves to support the proposition that international law can regulate the conduct of both the individual and the state. Thomas Smith was a crewmember of the vessel Creollo, which was commissioned by the government of Buenos Ayres [sic], then a colony at war with Spain. In March 1819, as the Creollo was in the port of Margaritta, Smith and others mutinied aboard the Creollo, departed that vessel and seized a vessel lying nearby, the Irresistible, which was commissioned by the government of Artigas, who was also at war with Spain.
Smith took off on a cruise with the *Irresistible*, without any documents or commission, and proceeded to plunder and rob a Spanish vessel.

The case was originally brought before the circuit court of Virginia, which certified the case to the Supreme Court to decide if Smith's actions were "piracy as defined by the law of nations" so as to be punishable under the Piracy Act of 3 March 1819. The first issue in the case, argued Daniel Webster, counsel for the defendant, was whether the Congress was bound to specifically define the offense of piracy and not leave it to be ascertained by judicial interpretation. Writing for the majority, Justice Story held that Congress indeed had the power to define and punish felonies on the high seas, and offenses against the law of nations, and "there is nothing which restricts it to a mere logical enumeration in detail of all the facts constituting the offense. Congress may as well define by using a term of a known and determinate meaning, as by an express enumeration of all the particulars included in that term." This of course led to the next question, whether the crime of piracy is defined by the law of nations with reasonable certainty.

Story held that despite the diversity of definitions, one constant is that robbery, or forcible depredations upon the sea, *animo furandi*, is piracy. Story further observed that the common law recognized piracy not as a crime against a state's own municipal code, but as a crime against the law of nations. Citing the opinions of numerous jurists including Sir Charles Hedges, Sir Leoline Jenkins, and Sir William Blackstone, Story noted:

"...whether we advert to writers on the common law, or the maritime law, or the law of nations, we shall find, that they..."
universally treat of piracy as an offense against the law of nations, and that its true definition by that law is robbery upon the sea. And the general practice of all nations in punishing all persons, whether natives or foreigners, who have committed this offense against any persons whatsoever, with whom they are in amity, is a conclusive proof, that the offense is supposed to depend, not upon the particular provisions of any municipal code, but upon the law of nations, both for its definition and punishment.\textsuperscript{86}

Thus, Story ruled that "piracy, by the law of nations, is robbery upon the sea, and that it is sufficiently and constitutionally defined by the fifth section of the act of 1819,"\textsuperscript{87} and that Smith's actions as charged in the indictment, "completely fit the definition."\textsuperscript{88}

To scholars who subscribe to the view that individuals can not violate international law, the fact that the Court did not make any distinction between piracy at municipal law and piracy under the law of nations, has been regarded as the case's great weakness.\textsuperscript{89} In dissent, Justice Livingston rejected the majority's view that piracy according to international law could be the basis of a nation's jurisdiction, arguing that "if in criminal cases everything is sufficiently certain, which by reference may be rendered so, which was an argument used at bar, it is not perceived why a reference to the laws of China, or to any other foreign code, would not have answered the purpose quite as well as the one which has been resorted to in this case."\textsuperscript{90}

EXPANDING THE ELEMENTS OF THE OFFENSE: PRIVATEERING

While the Smith case established that, at least from the American perspective, piracy by the law of nations meant robbery at sea \textit{animo furandi}, that was by no means the only criteria. Following the Smith case the Court continued to hear piracy cases with an eye towards defining the jurisdictional
and evidentiary scope of the offense as intended by statute, particularly as it applied to the then ubiquitous practice of privateering. In 1820, the Court ruled in *U.S. v. Griffen and Brailsford*\(^9\) that a commission from a foreign belligerent would not protect an American from punishment for his offenses against vessels of the US. Especially interesting in this case was the Court's finding that a vessel within one marine league of the shore, at anchor in an open roadstead where vessels only ride under the shelter of the land, is "upon the high seas" for the purpose of applying Section 8 of the Crimes Act of 1790.\(^9\)

**ABSENCE OF A VALID COMMISSION OR LACK OF NATIONAL CHARACTER**

In the 1820 case *U.S. v. Holmes*,\(^93\) the Court again returned to the jurisdictional question posed by a murder on the high seas on a vessel not belonging to citizens of the US. Briefly, a Spanish vessel was seized by two privateers out of Buenos Ayres, and a prize crew placed aboard. The prize master was murdered by the members of the prize crew; one was an American and the others were foreigners. Writing for the majority, Justice Washington reasoned that murder or robbery committed on the high seas may be an offense cognizable by the courts of the US under certain circumstances, regardless of the fact that it may have been committed on board a vessel not belonging to citizens of the US, and without a national character, possessed by pirates or persons not lawfully sailing under the flag of any foreign country. Applying the rationale laid out in the *Klintock* case, Justice Washington held that if an act of murder be committed either by a citizen or a foreigner, on board a piratical vessel, "the offense is equally cognizable by the courts of the United States under the statute concerning piracy."\(^94\) The key to this case,
as in *Klintock*, was that the vessel was not recognized as having a national character, or valid commission. In a series of cases consolidated during the February 1820 term under the rubric *US v. Pirates*\(^95\), the Court held, *inter alia*, that a vessel loses her national character by assuming a piratical character, and a piracy committed by a foreigner, from on board such a vessel, upon any other vessel whatever is punishable under Section 8 of the Act of 1790.

**DEFINING "PIRATIONAL CHARACTER"**

In adjudging what constitutes piratical character two Supreme Court cases are illustrative. In 1821, the US warship *Alligator*, engaged in a cruise against pirates and slave traders, encountered the Portuguese trader the *Marianna Flora* off of the coast of Africa. Shortly after the meeting the *Marianna Flora* shortened her sail and hove to, and together with other maneuvers, suggested to the captain of the *Alligator* that the former vessel was in distress or wished information. As the *Alligator* approached, the Portuguese vessel fired upon her, whereupon the *Alligator* captured the trader and brought her to Boston as a captured pirate ship. In writing for the Court Justice Story held that a piratical aggression by an armed vessel, sailing under a flag of any nation, may be subjected to the penalty of confiscation for such a gross breach of the law of nations. However, he noted, "every hostile attack, in a time of peace, is not necessarily piratical. It may be a mistake, or in necessary self defense, or to repel a supposed meditated attack by pirates."\(^96\) The Court decreed the return of the vessel to its Portuguese owners, but released the *Alligator*’s captain from liability for damages resulting from the wrongful, but reasonable, seizure.
A year after the Marianna Flora incident, the Palmyra, a Spanish privateer, was taken into custody by an American vessel, after having plundered two French vessels. There were defects in the Spaniard's commission, in that it had been issued to a different vessel under a different captain, and had in any event expired; it was reissued to the Palmyra by a minor Spanish official of undocumented authority. The Palmyra's owners sued the American captors for damages, claiming unjustified interference with her voyage. (It should be noted that this was an in rem proceeding, vice a criminal adjudication). Accordingly, Justice Story held that the captors had not met the evidentiary burden of proving the Palmyra was a pirate, because the mere irregularity of the vessel's papers and her actions against the two French vessels did not constitute piracy for a criminal prosecution. Insofar as the in rem proceeding was concerned, Story found that, "taking the circumstances together, the Court thinks that they presented, prima facie, a case of piratical aggression...within the acts of Congress, open to explanation indeed." Significant in this case however is an extension of American jurisdiction to foreign vessels suspected of "robbery at sea" against other foreign vessels with no clear American interest in the transaction.

Justice Story further expanded the definition of piracy, as well as the scope of America's jurisdiction, in the 1844 in rem case U.S. v. Brig Malek Adhel. The pertinent facts here are that the American brig Malek Adhel, while on a commercial voyage from New York to California, apparently attacked at least five other vessels of various nationalities; actual depredation and plunder was alleged with regard to only one of the vessels, however the others were fired on to sink or harass them. Addressing first the jurisdictional
issue, Story found that the reference in Section 4 of the Act of 1819 to "any vessel or boat from which any piratical aggression...[shall be made]" extended equally to all armed vessels which commit the unlawful acts specified therein.

Concerning the question of whether the action complained of was piratical within the purview of the Act, Story rejected the claimants argument that the Act did not intend to punish any aggression, which if carried into complete execution, would not amount to positive piracy in contemplation of law. Finding that piratic acts must be done animo furandi or lucri causa and with a view to plunder a "narrow and limited interpretation", Story instead viewed the general law of nations to apply the term "piratical",

"in a general sense; importing that the aggression is unauthorized by the law of nations, hostile in character, wanton and criminal in its commission and utterly without sanction from any public authority or sovereign power. In short it means that the act belongs to the class of offenses which pirates are in the habit of perpetrating, whether they do it for purposes of plunder, or for purposes of hatred, revenge, or wanton abuse of power...If he willfully sinks or destroys an innocent merchant ship, without any other object than to gratify his lawless appetite for mischief, it is just as much a piratical aggression, in the sense of the law of nations, and of the act of Congress, as if he did it solely and exclusively for the sake of plunder, lucri causa. The law looks to it as an act of hostility, and being committed by a vessel not commissioned and engaged in lawful warfare, it treats it as the act of a pirate, and of one who is emphatically hostis humani generis."102

INSURGENTS AS PIRATES

In the 1885 case United States v. The Ambrose Light 103 a district court, in refusing to exempt insurgents from being considered pirates, stated,

"the liability of the vessel to seizure, as piratical, turns wholly upon the question whether the insurgents had or had not obtained any previous recognition of belligerent rights, either from their own government, or from the political or executive department of any other nation; and in the absence of recognition by any government whatever, the tribunals of other nations must hold such expeditions as this to be technically piratical."
The court further held that insurgents who,

"send out vessels of war are, in legal contemplation, merely combinations of private persons engaged in unlawful depredations on the high seas;...that in blockading ports which all nations are entitled to enter, they attack the rights of all mankind;...that such acts are therefore piratical, and entitle the ships and tribunals of every nation whose interests are attacked or menaced, to suppress, at their discretion, such unauthorized warfare by the seizure and confiscation of the vessels engaged in it."104

PIRACY DEFINED BY AN AMERICAN COLONIAL COURT APPLYING FOREIGN LAW

In what was perhaps the most expansive American pronouncement on the scope of piracy jurisdiction came in the 1922 case, People v. Lol-Lo and Saraw105. The facts indicate that a Filipino boarded a Dutch vessel in the territorial waters of the Dutch East Indies, then raped the women and sank the vessel with the men still aboard. An American colonial court in the Philippines applying Philippine law, affirmed a conviction for piracy. The court rejected an appeal on the grounds of lack of jurisdiction, holding irrelevant the fact that the crime occurred within the jurisdictional three mile limit of a foreign state because "the jurisdiction of piracy unlike all other crimes has no territorial limits."106

THE IMPACT OF A BROADENED CUSTOMARY DEFINITION OF PIRACY

As the forgoing discussion of case law has indicated, the "pertinent international doctrine has varied in interpretation and application based on national attitudes and perceptions towards piracy and politics."107 As the customary definition of piracy broadened under the impact of municipal laws, conflicts developed over the treatment of piracy. By the conclusion of the first World War, there was a considerable confusion of opinion among scholars on the issue of piracy, owing primarily to the distinction of piracy in the
strict sense of the word, as defined by international law, and piracy as
defined by the municipal laws and treaties among individual states.108
CHAPTER IV. CODIFICATION OF THE INTERNATIONAL LAW OF PIRACY

THE LEAGUE OF NATIONS’ INITIATIVE

In 1924, the League of Nations’ Committee of Experts for the Progressive Codification of International Law examined piracy as one of the subjects of international law for which regulation by international agreement would be desirable and realizable. On 26 January 1926, under the direction of Rapporteur M. Matsuda of Japan, the Committee developed eight articles, the "Draft Provisions for the Suppression of Piracy,"109 which in Professor Rubin’s analysis, reflected the assumption that there is a single conception of piracy in the international legal order reflecting a stable natural law that did not change over time.110 Significant points of the Draft were that it restricted acts of piracy to the high seas, limited them to private acts by private ships, exempted acts committed for a purely political objective, and allowed third party states to make determinations regarding belligerency status independent of the determination made by the insurgent’s own government, although insurgents’ actions not inspired by purely political motives would be considered piratical. Article 5 permitted foreign vessels to engage in hot pursuit of pirates from the high seas into the territorial waters of a littoral state in instances where the littoral state was unable to continue the pursuit itself, provided that the "affair shall be remitted for judgement to the competent authorities of the littoral state."111

Unfortunately, it appeared that the international community of the day thought that piracy had become less than a pressing issue, and given that the Draft did not engender universal agreement, the topic was dropped from the League’s subsequent Codification Conference.112
INSURGENCY AND BELLIGERENCY REVISITED: PIRACY BY ANALOGY

While the issue of piracy did not result in the adoption of a treaty on the subject by the League's Codification Conference, it did, nevertheless, surface in connection with the laws of war being debated at the time, in the context of "piracy by analogy". At the Washington Conference of 1922 on the Limitation of Armaments, a consensus developed among several of the participating states that the customary international law of war forbade the destruction of a merchant vessel unless the vessel's crew and passengers had first been placed in safety. They specifically affirmed that this concept applied to belligerent submarines. A product of the Conference was the Treaty Relating to the Use of Submarines and Noxious Gases in Wartime. In pertinent part the Treaty held that:

"Any person in the service of any power who shall violate any of those rules, whether or not such person is under orders of a governmental superior, shall be deemed to have violated the laws of war and shall be liable to trial and punishment as if for an act of piracy [italics mine] and may be brought to trial before the civil or military authorities of any Power within the jurisdiction of which he may be found." 114

The Nyon Agreement of 1937, 115 also adopted the "piracy by analogy" concept. The Agreement was concluded among nine states in response to attacks on merchant vessels in the Mediterranean by unidentified aircraft and submarines acting on behalf of insurgents during the Spanish civil war. The Preamble of the Agreement states, "Whereas these attacks are violations of the rules of international law...and constitute acts contrary to the most elementary dictates of humanity, which should be justly treated as acts of piracy..." 116

In the Americas, the Havana Convention on Civil Strife 117 dealt with the
issue of piracy and insurgency, and provided, inter alia: "The declaration of piracy against vessels which have risen in arms, emanating from a Government, is not binding upon the other States." Further provisions of the Convention allowed States injured by insurgents' warships to capture them, but return them to their state of origin for trial, whereas insurgent merchantmen may be captured by the injured State and be subject to the penal codes of the injured State.

Commentators have criticized the Washington and Nyon approaches as unjustified, inappropriate, and unnecessary attempts to extend the scope of piracy jure gentium. At best these measures achieved some propaganda effect based upon the stigma value of applying the epithet "pirate" to instances of belligerent submarine attacks. The specifications laid out in the Havana Convention lacked the force of anti-piracy laws since they fell short of prescribing a universal jurisdiction against political insurgents.

CORNERSTONE OF THE MODERN CONVENTIONAL LAW: THE HARVARD RESEARCH DRAFT

The efforts of the League of Nations' Committee of Experts preparatory to the Codification Conference prompted Harvard Law School to undertake its own research efforts to contribute to the Conference. The Harvard Research program was organized, and a committee was set up to explore the issue of piracy independently from Matsuda and the League. The result of the effort was a full draft convention of nineteen Articles published in 1932, which would provide the foundation for the piracy provisions adopted in subsequent international conventions.
JURISDICTION OVER PIRACY: NATURALISTS VS. POSITIVISTS

One of the first matters to be debated by the Harvard Drafters was the question of whether piracy was in fact an international crime over which universal jurisdiction could be asserted. It has been observed previously in this paper that there have been publicists who contend that individuals can be "subjects" of international law. Thus, according to this "naturalist" jurisprudential thought, the international law of piracy is a valid set of rules established by universal reason which is immediately applicable to individuals, but because the international community has no tribunal whereby private individuals can be prosecuted for crimes against the international community, it is left to the individual states to punish the offenders. The other viewpoint previously discussed is the "positivist" position, i.e. that only states are the proper subjects of international law, therefore there are no international crimes for which individuals may be punished. Only states have the legal capacity to enforce their domestic laws over their citizens. Under the positivist position then, the international law of piracy is not an expression of an international crime, but rather recognition by the international community of the propriety of individual states extending their jurisdictions to apply their municipal law upon the high seas irrespective of the nationality of the offender.122

The Harvard Drafters adopted a positivist stance, arguing that since there was no international agency to capture and prosecute pirates, nor did the various state municipal codes all provide for the punishment of pirates whose offenses took place outside of the state's ordinary jurisdiction, piracy could not be a crime by the law of nations in the sense which a strict technical
interpretation would give the term.\textsuperscript{123} Thus rejecting the notion of an international crime subject to a universality of jurisdiction, the Drafters instead found piracy by the law of nations to be, "a special, common basis of jurisdiction beyond the familiar grounds of personal allegiance, territorial dominion, dominion over ships, and injuries to interests under the state's protection."\textsuperscript{124} The theory of the draft convention was that piracy was not a crime by the law of nations but rather,

"...the basis of an extraordinary jurisdiction in every state to seize and to prosecute and punish persons, and to seize and dispose of property, for factual offences which are committed outside the territorial and other ordinary jurisdiction of the prosecuting state and which do not involve attacks on its peculiar interests."\textsuperscript{125}

The purpose of the convention was thus to define the extraordinary jurisdiction in general outline. In doing so the Drafters examined the concept of the common jurisdiction of all states to prosecute and punish pirates and were influenced by the writings of the German positivist, Paul Stiel. Stiel's thesis was that a "special authority" over piracy was a matter of "sea policing" consisting of the permissibility and other legal effects of state acts on the high seas with respect to foreign ships, property, and persons, which, absent the "special authority" over piracy, would be violations of international law. Stiel defined piracy as, "a non political professional course of robbery against nearly all countries undertaken at sea,"\textsuperscript{126} and it was this piratical lifestyle that each state was presumed to have the authority to suppress by its sea policing.\textsuperscript{127} The Drafters then reconciled Stiel's view with the traditional Anglo-American view that piracy is a special basis of jurisdiction to prosecute and punish foreigners for offenses committed beyond the state's ordinary authority, and resolved
that the draft convention should include the recognition of a special authority, or jurisdiction, to prosecute piracy. The Drafters ultimately concluded that, "piracy, however it is defined, is a special basis of jurisdiction, judicial, legislative, executive, and administrative."  

PIRACY DEFINED

While a detailed analysis of all nineteen articles of the Draft will not be attempted here, it is relevant to briefly review the definitional and jurisdictional articles, as they provided an important jurisprudential foundation for subsequent international codification efforts. Thus:

ARTICLE 2: Every state has jurisdiction to prevent piracy and punish persons and to seize and dispose of property because of piracy...

ARTICLE 3: Piracy is any of the following acts, committed in a place not within the territorial jurisdiction of any state:

1. Any act of violence or depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person 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 or 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 national character.

2. Any act of voluntary participation in the operation of a ship with 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.

The Drafters conceded that the definitional article was the most important and difficult one of the convention, in large part because of the "chaos of expert opinion as to what the law of nations includes, or should include, in piracy," there was no authoritative definition of piracy. The drafters evaluated some sixteen different acts which could occur on the high seas.
These included: appropriation of a ship for unlawful private ends by mutiny of the crew or passengers; using a ship to attack another for some political purpose provided the attack is not made under authority or protection of any state or recognized belligerent government; and any unjustifiable act of violence or depredation committed for private ends on board a pirate ship or a ship which is not under the peculiar jurisdiction and protection of some state. The Drafters also considered elements of the offense, such as it being a menace to the commerce or other interests of all states, in settling on the above definition.

Central to the Drafters' thinking was that expediency should be the chief guide in the formulation of a convention. As a result, certain earlier concepts of piracy, including cases of wrongful attacks on persons or property for political ends, whether they were made on behalf of states, recognized belligerent organizations, or unrecognized revolutionary bands, were thought by the Drafters to be better left to the jurisdiction of the injured state, the state or recognized government on whose behalf the forces were acting, or the states of nationality and domicile of the offender, and therefore were omitted from the draft convention definition. Also, cognizant of the need to avoid encroachment on the exclusive jurisdiction of an individual state, the Drafters were careful to denominate the basis upon which common jurisdiction could be asserted. Limitations were designed to exclude offenses committed in a place subject to the ordinary jurisdiction of a state, as the Drafters considered that the prevailing professional opinion did not sanction an extension of the common jurisdiction of all states to cover those offenses committed entirely on board an individual vessel, which under international
law, is under the exclusive jurisdiction of its flag state. Hence, the Drafters maintained that if an attack or attempt takes place from on shipboard there must also be involved a pirate ship, or one without national character.

As has been argued by several contemporary commentators, the failure of the Drafters to include in their definition unlawful attacks on persons or property for public purposes, and the implicit requirement that more than one ship be involved, were limitations, which when adopted into subsequent conventions, rendered conventional law ineffective when dealing with present day situations involving maritime terrorism. 130

TERRITORIAL JURISDICTION AND HOT PURSUIT OF PIRATES

ARTICLE 4: 1. A ship is a pirate ship when it is devoted by the persons in dominant control to the purpose of committing an act described in the first sentence of paragraph 1 of Article 3, or to the purpose of committing any similar act within the territory of a state by descent from the high seas, provided in either case that the purposes of the persons in dominant control are not definitely limited to committing such acts against ships or territory subject to the jurisdiction of the state to which the ship belongs.

2. A ship does not cease to be a pirate ship after the commission of an act described in paragraph 1 of Article 3, or after the commission of any similar act within the territory of a state by descent from the high seas, as long as it continues under the same control.

ARTICLE 6: In a place not within the territorial jurisdiction of another state, a state may seize a pirate ship or a ship taken by piracy and possessed by pirates, and things or persons on board.

ARTICLE 7: 1. In a place within the territorial jurisdiction of another state, a state may not pursue or seize a pirate ship or a ship taken by piracy and possessed by pirates; except that if pursuit of such a ship is commenced by a state within its own territorial jurisdiction or in a place not within the territorial jurisdiction of any state, the pursuit may be continued into or over the territorial sea of another state and seizure may be made there, unless prohibited by the other state.

2. If a seizure is made within the territorial jurisdiction of
another state in accordance with the provisions of paragraph 1 of this article, the state making the seizure shall give prompt notice to the other state, and shall tender possession of the ship and other things seized and the custody of the persons seized.

The intent here was to prevent the escape of pirates who attempted to elude pursuers by entering territorial waters, and thus could not be lawfully captured. The Drafters acknowledged a diversity of legal opinion on the issue of hot pursuit of pirates. Some authorities assert that the law of nations authorizes the pursuit of pirates into foreign territorial waters in situations where the littoral state has no capability to apprehend the pirates and does not prohibit the pursuit, while other authorities contend that the pursuit is legal even if the littoral state protests. Nonetheless, the Drafters thought that article 7 struck a satisfactory balance between the rights of the pursuing state and the sovereignty rights of the littoral state.

THE RIGHT OF VISIT

ARTICLE 9: If a seizure because of piracy is made by a state in violation of the jurisdiction of another state, the state making the seizure shall, upon the demand of the other state, surrender or release the ship, things and persons seized, and shall make appropriate restitution.

ARTICLE 11: 1. In a place not within the territorial jurisdiction of any state, a foreign ship may be approached and on reasonable suspicion that it is a pirate ship or a ship taken by pirates, it may be stopped and questioned to ascertain its character.

2. If the ship is neither a pirate ship nor a ship taken in piracy and possessed by pirates, and if it is not subject to such interference on other grounds, the state making the interference shall be liable to the state to which the ship belongs for any damage caused by the interference.

These provisions found their way into the draft convention in recognition of the common acceptance in earlier times, when piracy was rampant, of warships'
authority to stop and search other vessels on the high seas upon suspicion of piracy, without liability. However, the Drafters also believed that in modern times the right of search as a police measure was no longer of pressing importance, and in any event, would be met with resistance by states objecting to foreign interference with their commerce on the high seas. Hence the liability clause was included.

CAPTURE AND PROSECUTION OF PIRATES

ARTICLE 14: 1. A state which has lawful custody of a person suspected of piracy may prosecute and punish that person.
2. Subject to the provisions of this convention, the law of the state which exercises such jurisdiction defines the crime, governs the procedure and prescribes the penalty...
4. A state may intercede diplomatically to assure this protection to one of its nationals who is accused in another state.

This article was included to ensure that the capturing state had jurisdiction to prosecute pirates. The Drafters acknowledged that the legality of the seizure depends primarily upon the law of nations, i.e., under the customary international law of the day, any state could capture pirates upon the high seas, and the tribunals of any state into whose jurisdiction the pirates were brought, could try and sentence pirates. The legal power of the state to effect a seizure in areas other than the high seas may be enlarged or restricted by its agreements with other states.

ILLEGAL FORCIBLE ACTS FOR POLITICAL PURPOSES

ARTICLE 16: The provisions of this convention do not diminish a state's right under international law to take measures for the protection of its nationals, its ships and its commerce against interference on or over the high sea, when such measures are not based upon jurisdiction over piracy.
This article was included by the Drafters in recognition of the problem of illegal forcible acts for political ends against foreign commerce, committed by unrecognized organizations; in effect it offset the "private ends" requirement. Article 16 is noteworthy as a matter of prescience. While the Drafters realized that the traditional notion of piracy, i.e. attacks by roving brigands on the high seas was largely a phenomenon of a previous century (insofar as such attacks were now confined to specific geographic regions, typically within the territorial jurisdiction of a single state), new methods and reasons for committing piratic, or now terrorist, acts supplanted the traditional notion. However, rather than accepting the argument that attacks by revolutionary organizations be classified as piratic in the international law sense, the Drafters felt that such incidents were not cases falling under the common jurisdiction of all states as piracy under customary law, but were special offenses for which the perpetrators may be punished by the offended state as it saw fit. Because of the political ramifications of these modern types of cases, the Drafters were reluctant to concede jurisdiction on the grounds of piracy in the international sense to states not threatened or offended by the incident. Thus this article does not dictate a specific course of action, but merely preserves such criminal or police jurisdiction as is provided by customary law.

THE IMPACT OF THE HARVARD RESEARCH DRAFT

In the final analysis, the work of the Harvard Researchers had a profound impact on the development of subsequent international legal efforts because it demonstrated both the theoretical and practical problems which would confront the international community if it was desirous of developing a convention on
the subject of piracy.\textsuperscript{131} While commentators, in light of such modern incidents as the \textit{Santa Maria} and \textit{Achille Lauro} cases, have criticized the Drafters’ work for its public purposes exclusion and two ship requirement, it must be borne in mind that this work was not intended to be a static, terminal effort. As the Drafters themselves advised:

"A codification of the jurisdiction of states under the law of nations should not be drafted to fit only cases raised by present conditions of business, the arts, and criminal operations. Continual amendment should be obviated by foresight as far as possible."\textsuperscript{132}

\textbf{THE INTERNATIONAL LAW COMMISSION: PIRACY AND THE LAW OF THE SEA}

The International Law Commission (ILC), an organ of the United Nations, was established pursuant to General Assembly Resolution 174(II) of 21 November 1947, to, \textit{inter alia}, prepare draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States. In 1954, the UN tasked the ILC with preparing a text which could form the basis for an international agreement on the law of the sea. A text entitled "Regime of the High Seas" was prepared by the ILC’s Special Reporter J.P.A. Francois. Published in March 1954, it contained six articles dealing directly with piracy.\textsuperscript{133} Francois developed the six piracy articles based on the work of the Harvard Researchers.

\textbf{PIRACY AND POLITICS}

The ILC began to discuss Francois’ substantive piracy provisions at its 290\textsuperscript{th} meeting on 12 May 1955. It became clear very quickly that the topic of piracy was subject to a variety of political considerations. As discussions
began concerning Francois' Article 23, the definition of piracy (Francois' French translation of the Harvard Research Draft Article 3), the Polish government submitted its formal observations, which in essence accused the Republic of China (ROC) of piracy. Briefly, between the period of August 1949 and December 1953 some 70 merchantmen of various flags were being stopped on the high seas in the South China Sea enroute to the People's Republic of China (PRC), by warships of the ROC. Two Polish merchantmen, the Praca and Prezydent Gottwald were seized on the high seas and brought to Taiwan. According to Poland:

"The circumstances of the seizure of both Polish ships clearly shows that violence was used against them. This is thus the main evidence that the act committed against Polish vessels has marks of piracy...In these concrete cases there was also animus furandi- i.e. the intent to plunder for gain confirmed by many lawyers as an element of piracy...The seizure of Polish ships which finds no justification in international law is qualified as piracy, as delictum jure gentium, and it should be treated accordingly...The formulation of Article 23 of the draft is in conflict with established views on piracy. It should be clear that "bona fide purpose of asserting a claim of right" cannot be used in connexion with such acts as robbery, rape, wounding, enslavement and killing. It should be clear, for instance, that robbery or enslavement, being by their nature illegal and criminal, could not be committed with a bona fide purpose. Similarly the words "for private ends" should be omitted, since no ends, even when described by the perpetrators as not being "private" (i.e. public) can justify acts of piracy. The present wording of Article 23, if accepted and embodied in an international convention, could be used by pirates to justify an action by maintaining that their action had the bona fide "purpose of asserting a claim of right, and that they were not acting "for private ends"."

While it was ultimately determined that the Polish note was a complaint against the ROC outside the scope of the ILC agenda, it nevertheless prompted debate on the concept of animus furandi as an essential element of the international offense of piracy. It is also significant to illustrate the various positions that nations could take concerning alleged piratical acts on
the high seas. 137

**MUTINY AND "STATE PIRACY"**

The drafting committee debated a variety of other issues as well. Concerning the proper distinction between piracy and mutiny, the committee accepted the opinion of the United Kingdom's representative Sir Gerald Fitzmaurice. He concluded that mutiny was a matter of flag state jurisdiction and that it could not be regarded as piracy until the actions of the mutineers were directed towards another vessel, or persons on board another vessel. This position thereby further ingrained the two ship philosophy into the modern international definition of piracy. 138

Representatives from the Soviet Union and Czechoslovakia relied upon the Nyon Agreement to push for a view which would have recognized as "state piracy" actions such as the Nationalist Chinese seizures of Polish merchantmen. This view was defeated however, thus ensuring the "for private ends" concept would be incorporated into future codification efforts as well. 139

**DUTY TO REPRESS PIRACY**

The ILC presented its piracy articles, which reflected in general an endorsement of the findings of the Harvard Research effort, at the conclusion of the Seventh Session in 1955. 140 The piracy section began with a general policy statement:

**ARTICLE 13:** All states shall co-operate to the fullest extent possible in the repression of piracy on the high seas.
The ILC's commentary to this article regarded as "sound principle" that "any State having an opportunity of taking measures against piracy and neglecting to do so would be failing in a duty laid upon it by international law." The Commission qualified this however, noting "obviously, the State must be allowed a certain latitude as to the measures it should take to this end in any individual instance."

THE ILC'S DEFINITION OF PIRACY

ARTICLE 14: Piracy is any of the following acts:

1. Any illegal act of violence, detention, or any act of depredation directed against persons or property and committed for private ends by the crew or the passengers of a private vessel or private aircraft:
   (a) Against a vessel on the high seas other than that on which the act is committed, or
   (b) Against vessels, persons or property in territory outside the jurisdiction of any State.

2. Any act of voluntary participation in the operation of a ship or aircraft with knowledge of facts which make the ship or aircraft a pirate ship or aircraft...

In its official commentary the Commission acknowledged consideration of certain controversial points. It first concluded that the intention to rob, animus furandi, is not required insofar as acts of piracy may be motivated by feelings of hatred or revenge, and not merely by the desire for gain. Secondly, it resolved that the acts must be committed for private ends. The Commission's third comment: "Save in the case provided for in article 15, piracy can be committed only by merchant vessels, not by warships," was a rejection of the argument used by certain members of the Commission that the Nyon Agreement, "endorsed a new right in the process of development", i.e. the right to repress as piracy acts perpetrated by warships. Rather, the
Commission concluded:

"In view of the immunity from interference by other ships which warships are entitled to claim, the seizures of such vessels on suspicion of piracy might involve the gravest of consequences. Hence the Commission feels that to assimilate unlawful acts committed by warships to acts of piracy would be prejudicial to the interests of the international community."¹⁴⁵

The Commission also held that piracy can only be committed on the high seas or outside the territorial jurisdiction of any state. While recognizing some dissenting opinions on the matter, the Commission nevertheless felt that, "where the attack takes place within the territory of a State, including its territorial sea, the general rule should be applied that it is a matter for the State affected to take the necessary measures for the repression of the acts committed within its territory."¹⁴⁶

The Commission also acknowledged that aircraft could commit acts of piracy. Finally, it concluded that acts committed on board a vessel by the crew or passengers and directed against the vessel itself, or against the persons or property on the vessel are not acts of piracy. The Commission’s rationale here was that this view, "tallies with the opinions of most writers".¹⁴⁷

ADDITIONAL DRAFT ARTICLES

The Commission developed additional articles which provided for, inter alia: the assimilation of acts of piracy committed by a warship whose crew has mutinied to acts of piracy committed by private vessels (Article 15); the definition of a pirate ship (Article 16); the retention of the national character of a vessel or aircraft even though it has become a pirate vessel (Article 17); the seizure of pirate vessels on the high seas or places not
within the territorial jurisdiction of another state (Article 18); the liability for damages to the flag state of a vessel detained by another state's vessel on suspicion of piracy, when that suspicion is unfounded (Article 19); the restriction of the right to seize to warships and military aircraft (Article 20); and the rules for the rights of visit on the high seas and the circumstances appertaining thereto (Article 21).

THE ULTIMATE RESULT: TODAY'S CONVENTIONAL PIRACY ARTICLES

The Commission's draft and commentary were distributed to the various governments, and following several additional rounds of discussion, a report to the General Assembly was made which incorporated the revisions suggested during the discussions.

POLICY STATEMENT

The original policy statement, Article 13, was amended at the urging of the Greek delegate to include the phrase, "or in any other place outside the jurisdiction of any State", to cover the case of piracy on desert islands. It was adopted without change as Article 14 of the High Seas Convention:

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.

This provision was transferred verbatim as Article 100, duty to co-operate in the repression of piracy, to the 1982 Law of the Sea Convention.

THE HIGH SEAS CONVENTION'S DEFINITION OF PIRACY

In debate over the definitional article, the Czech, Jaroslav Zourek, made a
final appeal to consider the acts of violence and depredation referred to in Article 14 as acts of piracy even when committed for political ends by warships or military aircraft, from the high seas against ships, persons, or goods situated in territorial waters, or against the land. In retrospect, one can appreciate the utility that a definition of this breadth could provide in terms of applying piracy doctrine in the context of maritime terrorism as defined by the Achille Lauro incident, however Zourek’s recommendation was not adopted by the drafting committee. Hence the Commission’s definitional article became Article 15 in the High Seas Convention:

Piracy consists of any of the following acts:

(1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
   (a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
   (b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(3) Any act of inciting or of intentionally facilitating an act described in sub-paragraph (1) or sub-paragraph (2) of this article.

This Article became Article 101 in the 1982 Law of the Sea Convention.

PIRACY BY A WARSHIP OR GOVERNMENT SHIP WHOSE CREW HAS MUTINIED

Article 15 of the Commission’s draft assimilated acts against third country vessels whose crews had mutinied to acts of pirate ships. After comments by the Netherlands government relative to the status of state owned non-commercial vessels which were not warships, drafting changes were made and this article became Article 16 in the High Seas Convention:
The acts of piracy, as defined in article 15, 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.

This Article became Article 102 in the 1982 Law of the Sea Convention.

DEFINITION OF A PIRATE SHIP OR AIRCRAFT

Following suggestions from the government of Belgium concerning apparent time limitations on the right to search and seize suspected pirate vessels on the high seas inherent in the language of the Commission’s original draft, it was reworded and became Article 17 in the High Seas Convention:

A ship or aircraft is 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 15. 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.

This Article became Article 103 in the 1982 Law of the Sea Convention.

RETENTION OR LOSS OF NATIONALITY OF A PIRATE SHIP OR AIRCRAFT

The Commission’s view that retention or loss of national character of vessels is determined by the law of the State from which it was originally derived, Article 17, was accepted without debate, and became Article 18 in the High Seas Convention:

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.

This Article became Article 104 in the 1982 Law of the Sea Convention.

SEIZURE OF A PIRATE SHIP OR AIRCRAFT

Article 18 in the Commission’s draft dealt with the seizure and disposition
of pirate vessels and aircraft and the property therein. After minor drafting
corrections recommended by the Mexican delegate to clear up any confusion
surrounding the question of property on pirate vessels,\textsuperscript{153} it became

\textbf{Article 19} in the High Seas Convention:

\begin{quote}
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 taken by piracy and 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 ships, aircraft or property, subject to the
rights of third parties acting in good faith.
\end{quote}

This Article became \textbf{Article 105} in the 1982 Law of the Sea Convention.

\textbf{DEFINITION AND JURISDICTION: THE TROUBLESOME REFERENCE TO "HIGH SEAS"}

Articles 15 and 19 of the High Seas Convention (Articles 101 and 105
respectively in the 1982 Law of the Sea Convention) provide the most
troublesome aspects of the conventional law today: the use of the term "high
seas" to define the nature of the offense and the jurisdictional limits
pertaining thereto. As observed in the introduction, jurisdictional concepts
introduced in the 1982 Law of the Sea Convention, notably the EEZ, have had a
profound impact on the areal extent of what is now considered "high seas." To
the degree that the 1982 Law of the Sea Convention may be considered
declarative on the matter of EEZs, in effect the "high seas" now begin 200
miles from the territorial sea baseline of the littoral state (Article 57,
1982 Law of the Sea Convention). In today’s world, few incidences of piratic
attack occur more than 200 miles from any coast.\textsuperscript{154}

Assuming, \textit{arguendo}, that pursuant to Article 58 of the 1982 Law of the Sea
Convention the piracy provisions are applicable in the EEZ, the geographic
scope of universal jurisdiction over piracy has nonetheless been reduced by other provisions in the Convention. The twelve mile territorial sea (Part II, Article 3) and archipelagic states concept (Part V, Articles 46-54) have significantly reduced the geographic extent of the "high seas." As noted, many piratic attacks today are taking place within twelve miles of coastal states, or within archipelagic waters. Absent the "high seas" element of the offense, the universal jurisdiction accorded to "any state" to pursue and capture pirates is supplanted by coastal state jurisdiction in the territorial sea or archipelagic waters. This has caused problems because many states lack the economic or technical resources to mount an effective anti-piracy enforcement program in the waters under their jurisdiction.

LIABILITY FOR SEIZURE WITHOUT ADEQUATE GROUNDS

Liability for the unauthorized seizure of vessels suspected of piracy was the subject of draft Article 19. Comments received from the Norwegian and Netherlands delegations cited some language inconsistencies with respect to subsequent provisions in the "Right to Visit" clause included elsewhere in the draft. Following the necessary amendments, this Article appeared as Article 20 in the High Seas Convention:

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.

This Article became Article 106 in the 1982 Law of the Sea Convention.

SEIZURES ON ACCOUNT OF PIRACY

The Commission addressed the issue of the right of stoppage, i.e., the authority to stop, investigate, and if appropriate, seize vessels suspected of
piracy, in draft Article 20. In debate over the scope of the right of stoppage, authority for which was specifically reserved to warships, the Government of the Union of South Africa recommended including the stipulation that if a vessel is attacked by a pirate, but repulses the attack, it may seize the pirate vessel pending the arrival of a warship. The French delegate, Mr. Scelle, opined that the draft text in its present form exceeded the rules of municipal law concerning legitimate self defense, since it allowed a vessel which had repulsed a pirate attack to exercise provisionally the police powers of a warship. However, he ultimately accepted the Special Rapporteur’s theory that in the absence of public authorities, their functions could be discharged by someone else who was in a position to do so.\textsuperscript{156} While the wording of draft Article 20 was retained as originally proposed, a statement was placed in the official commentary indicating that “seizure” within the meaning of this article did not apply in the case of a merchant vessel, while in the course of exercising its legitimate right of self defense, captures the pirate vessel, and subsequently hands it over to a warship or authorities of the coastal state.\textsuperscript{157} Thus, this article became Article 21 in the High Seas Convention:

A seizure on account of piracy may only be carried out by warships or military aircraft, or other ships or aircraft on government service authorized to that effect.

Minor changes were made to this clause when it appeared as Article 107 in the 1982 Law of the Sea Convention:

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 authorized to that effect.
RIGHT OF VISIT

The Commission’s final piracy draft article, number 21, concerned the right of visit; this dealt with the conditions which justify the boarding of merchant vessels by warships or government vessels. In commenting on this Article, the Commission acknowledged that international law provided certain exceptions to the principle that merchant vessels could be boarded on the high seas only by warships flying the same flag. The exceptions included situations where there is reasonable ground for suspecting that the vessel is engaged in piracy, or that the vessel is engaged in the slave trade. Concerning the latter case, the right to visit derived from treaties for the repression of the slave trade, such as the Brussels Act of 1890, which assimilated slavery to piracy. However, these treaties limited their application to narrowly prescribed maritime zones which were regarded as suspect in connection with the slave trade. The ILC article specifically limited the right to visit based upon suspected involvement in the slave trade to those geographic regions specified in international treaties, however this restrictive wording was absent in the relevant High Seas Convention provision, Article 22:

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting:
   (a) That the ship is engaged in piracy; or
   (b) That the ship is engaged in the slave trade; or
   (c) That, though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

2. In the cases provided for in sub-paragraphs (a), (b) and (c) above, the warship may proceed to verify the ship’s right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all
possible consideration.

3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may be sustained.

The 1982 Law of the Sea Convention version of this provision, Article 110, is essentially similar, having been modified slightly to come into conformity with other aspects of the convention which have evolved since 1958, thus:

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:
   (a) the ship is engaged in piracy;
   (b) the ship is engaged in the slave trade;
   (c) the ship is engaged in unauthorized broadcasting and the flag state has jurisdiction under article 109;
   (d) the ship is without nationality; or
   (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship...

4. These provisions apply mutatis mutandis to military aircraft.

5. These provisions also apply to any other duly authorized ships or aircraft clearly marked and identifiable as being on government service.

THE CONVENTIONAL LAW IN REVIEW: SETTING THE STAGE FOR FAILURE

The foregoing discussions concerning the evolution of the municipal law on the subject, and the subsequent efforts at international codification, illustrate the difficulty inherent in settling on an acceptable definition in conventional international law of a concept which has been variously defined in municipal and customary law on the basis of specific national attitudes, actions, and intentions. As the concept evolved over the years in the courts, the elements of the offense were expanded from simple robbery at sea to include "any illegal acts of violence or depredation"; perpetrators were defined variously to include, originally, outlaw brigands loyal to no state,
then unrecognized belligerents and insurgents who attacked uninvolved parties, and finally, if it served a particular political objective, even sovereign states themselves. Similarly, the scope of jurisdiction under municipal laws broadened to authorize police actions on the high seas to protect the nation's merchant fleet, then at its most extreme, to justify politico-military adventures against land based groups at the far flung reaches of colonial empires.

The current international piracy doctrine, as reflected in the 1958 High Seas Convention (and the 1982 Law of the Sea Convention insofar as it parrots its predecessor's anti-piracy provisions) finds its genesis in the work of the Harvard Research Group, as modified by the International Law Commission. Hence, the conception of piracy as defined in the Harvard Research Draft: an act of violence or depredation on the high seas or terra nullius, carried out for private ends, by a private ship, beyond the jurisdiction of any State, against another ship, form the basis of the current conventional anti-piracy doctrine.

The Harvard Research Draft is noteworthy for its extensive compilation of jurisprudential commentaries on the scope of piracy jurisdiction and the definition of the elements of the offense. Unfortunately however, the Harvard Drafters' acquiescence to the dictates of expediency, particularly with regard to the public versus private ends debate surrounding belligerent activity, and their reluctance to extend piracy jurisdiction to single ship incidents, were flaws which enfeebled those subsequent codification efforts which relied so heavily upon the Harvard product.
Premised upon a view of the maritime industry and jurisdictional concepts as they existed in a by-gone era, today's conventional piracy provisions thus have been rendered ill-equipped to deal with the current security threats facing today's international maritime community. The comparatively recent phenomenon of "maritime terrorism", and the more traditional form of piratic activity, i.e. violent robbery at sea, now occurring in the vicinity of the Singapore Strait, both pose unique and difficult problems for a conventional international law conceptualized prior to the advent of open registry shipping and the expanding territorial sovereignty of littoral Third World states. The remaining chapters of this paper will discuss the inadequacies of the conventional and customary piracy law vis-à-vis these two troubling contemporary maritime security issues, and will explore the next generation of solutions offered to combat these problems.
CHAPTER V. THE CONVENTIONAL LAW AND MARITIME TERRORISM

THE SANTA MARIA INCIDENT

The Santa Maria incident became the first significant test of the efficacy of the piracy doctrine enunciated in the 1958 Geneva Convention (although in fact the Convention was not yet in force at time of the incident). The incident is also noteworthy because it may be regarded as ushering in the modern concept of maritime terrorism. The Santa Maria was a Portuguese cruise ship which was seized on the high seas by a band of some 71 insurgents, led by Enrique Galvao, on 22 January 1961. Galvao was a well known opponent of the Salazar Government of Portugal, and intended the seizing of the vessel to be the first step in overthrowing Salazar. Galvao and his band boarded the vessel under the guise of passengers, and during the seizure killed one of the ship's officers and wounded eight other crew; the crew and passengers, of which some 42 were American, became veritable hostages. Galvao claimed to be representing an international junta of liberals presided over by General Humberto Delgado, president elect of the Portuguese Republic. In a radio message to Delgado, Galvao requested that Delgado obtain recognition of an insurrectional act and consequently, of a state of belligerence.

The Portuguese government reacted by labelling the insurgents "pirates" and requested American, British, and Dutch help in recovering the vessel. Galvao threatened to scuttle the vessel if warships approached. The Santa Maria was eventually sighted in international waters by British and American naval vessels, and arrangements were made for RADM Smith of the US Navy to board the ship outside of Brazilian waters for negotiations. Galvao and his followers eventually accepted asylum in Brazil, and surrendered the vessel to Brazilian
authorities, who then returned the vessel to Portugal. After the vessel was securely anchored in Brazil, the State Department announced that the United States had acted under the international laws against piracy. 160

INSURGENCY OR PIRACY?

The incident caused disagreement among commentators as to whether the seizure constituted piracy. The first issue was whether Galvao’s claim of insurgency placed him outside the scope of the customary law of piracy by giving him the specialized status of a belligerent. G.C. Fenwick opined in the negative, claiming the law of insurgency applies to armed conflict between a group in rebellion and the government in which it is rebelling, and cannot justify attacks upon civilian lives and property. Galvao’s conduct, concluded Fenwick, was not justified by the law of insurgency, and therefore was piracy. 161 In contrast, L.C. Green argued that the seizure did not constitute piracy because it was not directed against any interest other than the Portuguese government. 162

Concerning the conventional law aspects, Green regarded the provision in Article 15 of the High Seas Convention, which requires the action to be against another ship, as sufficiently disqualifying Galvao from being considered a pirate. Green further noted “the statements made by Captain Galvao and General Delgado, made it perfectly clear that this seizure was not made for private ends.” 163 B.H. Brittin also rejected the piracy concept in this case on the grounds that Galvao’s actions were not private acts. He reasoned that it was difficult to sustain a private goal in the affair; the act had tremendous propaganda value and certainly served as a possible
catalyst for actual revolution. Further, Galvao was negotiated with at length after being intercepted, and after surrendering was granted political asylum, prompting Brittin to comment that: "No 'pirate' had ever been treated in such a gentlemanly way." The conclusion to be drawn then is that Galvao's actions were for a public end.

As noted, Galvao ultimately received asylum in Brazil, thus rendering the piracy question academic. Nonetheless, the Santa Maria incident aptly illustrates how the "two ship" criteria and the "private ends" criteria embodied in the present conventional law definitions of piracy can restrict the degree of international response to situations involving insurgent passengers on the high seas, when the jurisdictional authority of the international community is based upon existing conventional piracy doctrine.

THE ACHILLE LAURO INCIDENT

On the morning of 7 October 1985, four Palestinians hijacked the Italian cruise liner Achille Lauro on the high seas some 30 miles from Port Said, Egypt, and held the crew and passengers hostage. At the time there were 97 passengers on board, including twelve Americans. The hijackers, who boarded the vessel in Genoa posing as legitimate passengers, demanded the release of fifty Palestinians being held in Israeli jails. They threatened to blow up the ship if intervention was attempted, and to start to kill the passengers if their demands were not met. Following unsuccessful negotiations, the hijackers made good on their threat, and killed a crippled American passenger, Leon Klinghoffer, and threw his body overboard. After being denied entry to Cyprus, the Palestinians sailed back to Port Said, where having negotiated
safe passage from Egypt, they surrendered to Egyptian officials. The Egyptians, who disclaimed any knowledge of the killing, promised safe passage to the Palestinians, and refused to detain, try, or extradite them. President Reagan ordered U.S. forces to intercept the plane carrying the Palestinians, and on the evening of 10 October 1985, four Navy jets diverted the plane from its course and forced it to land at a US-Italian NATO base in Sicily. The Italians took custody of the Palestinians and subsequently charged them for offenses related to the hijacking of the ship and the death of Mr. Klinghoffer. However, they refused a request from the United States for the Palestinians extradition.

The U.S. had issued an arrest warrant, charging hostage taking, piracy on the high seas, and conspiracy (murder was not included, there being no federal law making the killing of an American, beyond U.S. territorial jurisdiction, illegal at the time) under applicable U.S. laws. The charge of piracy on the high seas is difficult to substantiate. The piracy charge under U.S. law, 18 USC 1651, is based on the concept of piracy jure gentium, and reads: "Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life." The arrest warrant for the Palestinians specifically charged them with piracy under the law of nations, alleging that they had without any legitimate authority seized control of the Achille Lauro by use and threat of violence, and that they had done so for private ends.

As recalled from the earlier discussion of the Smith case, American
municipal law on the matter turns on the international definition of piracy. Unfortunately, applying the international definitions, as articulated in the 1958 High Seas Convention, the applicable conventional law insofar as the US was concerned, or the 1982 Law of the Sea Convention, if the piracy provisions therein may be regarded as being declarative on the matter, the Palestinians actions do not qualify as piracy. First, since their actions were confined solely to the Achille Lauro, the requirement of 'another ship' is lacking. Secondly, although the warrant alleged that the Palestinians acted for private ends, it is difficult to accept that the actions of the Palestinians in this case were devoid of any public or political character.

PIRACY AND POLITICAL ACTS UNDER THE CONVENTIONAL LAW

There has, however, been considerable difference of opinion among commentators over whether the seizure of a ship on the high seas for a political cause constitutes piracy under the High Seas Convention. It will be recalled from the previous analysis of the travaux preparatoires that distinguishing private from political ends was one of the controversial points debated during the development of the ILC's definitional article. The Soviet delegate S.B. Krylov recommended that the original statement in the definitional article: "Acts committed for political ends cannot be regarded as piratical acts", be deleted because "it was impossible to establish a criterion to distinguish acts committed for private ends and acts committed for political ends." This recommendation was accepted by the Commission. The British delegate, Sir Gerald Fitzmaurice, went as far as suggesting the need to find a better expression than "for private ends". He argued that "the real antithesis which needed to be brought out was between
authorized and unauthorized acts and acts committed in a public or private capacity. An act committed in a private capacity could have a political purpose but be unauthorized—as for example the seizure of a vessel by a member of an opposition party.”

Thus Professor Halberstam suggests that the definitions of piracy in the High Seas Convention and the 1982 Law of the Sea Convention were not intended to exclude indiscriminate attacks by terrorists:

"Although "for private ends" can certainly be interpreted as excluding any acts that have a political purpose and there is language in the travaux preparatoires contrasting "private ends" with "political ends," it appears fairly clear that the term "political ends" was used to refer to acts by "a revolutionary organization that had not been recognized as a belligerent by the offended state". Thus one may reasonably take the position, based on an analysis of the travaux preparatoires, that "for private ends" was only intended to exclude acts by insurgents who had not yet achieved the status of belligerents (but whose acts would be lawful if done by belligerents), and acts by state vessels that had been authorized by a state and for which that state assumed responsibility.”

Constantinople distinguishes the Santa Maria case from the Achille Lauro incident, and would exempt the former case because it involved the seizure of a ship belonging to an opposition state by persons who confined their actions to that state. Conversely, in the Achille Lauro incident, the perpetrators seized a ship of a third state and held hostage and killed citizens of another third state, and this type of incident should be within the purview of piracy. Constantinople called for a modernized definition of piracy which would distinguish between acts done for public ends as legitimate (nonpiratical) or illegitimate (piratical) on the basis of action and not on the basis of status. In his view acts done for public ends, which otherwise meet the definition of piracy, if directed towards the ships, property, or nationals of
a third state neutral to an internal conflict, should be considered piratical.

A tortuous academic dissection of the travaux preparatoires may give limited support to the proposition that existing conventional piracy law did not intend to proscribe universal jurisdiction against indiscriminate acts of maritime terrorism on the high seas (though a much stronger case could be made on the basis of customary piracy law). However, other conventional aspects, notably the two ship rule and jurisdictional constraints, severely limit the ability of the existing conventional law to address the growing threat that organized insurgents, national liberation organizations, or individuals pose to the maritime community.173

THE INTERNATIONAL RESPONSE: THE IMO CONVENTION ON MARITIME SAFETY

While the seizure of the Achille Lauro and the connected crimes were described in the press and by the United States government as piracy on the high seas, the definitional shortcomings found in the High Seas Convention and 1982 Law of the Sea Convention’s piracy provisions as applied to maritime terrorism were well recognized by the international community.174 This incident ultimately led to a resolution on terrorism by the U.N. General Assembly which requested the International Maritime Organization (IMO) to “study the problem of terrorism aboard or against ships with a view to making recommendations on appropriate measures.”175 Italy, later joined by Austria and Egypt, proposed a draft convention against maritime terrorism modeled on existing conventions, notably the Hague and Montreal Conventions against airplane hijacking and sabotage,176 and the Hostage Convention.177 This draft was submitted to the IMO. The comparatively
short period of time involved in the development of this Convention has been attributed to the decision of the IMO Council to establish an Ad Hoc Preparatory Committee open to all states, which "encouraged the formation of delegations with a broad range of expertise in a variety of legal fields, including in many cases experience of negotiating "prosecute or extradite" conventions." This avoided delays which might have accrued had the matter been submitted to the IMO's overburdened Legal Committee, which ordinarily would have considered the matter. In the opinion of one IMO Committee member:

"The fact of negotiation taking place within the auspices of the IMO had some impact on the content of the texts themselves, notably in the inclusion of the standard IMO provision for a review conference...Its greatest impact, however, was in relation to the political aspects of the negotiations. The IMO is a small, specialized agency of the UN system. It seeks to avoid the alignment of delegations along the lines of political blocs or groupings present in many other inter-governmental organisations and nurtures an "IMO spirit", which exhorts delegations to an efficient, practical approach to tasks, not generally consistent with the introduction of extraneous political considerations."

A Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (together with an optional Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf) was adopted and opened for signature in Rome between 1 and 10 March 1988. While a detailed analysis of this Convention will not be undertaken here, a brief look at the improvements that this Convention provides over the piracy articles of the High Seas Convention and 1982 Law of the Sea Convention relative to maritime terrorism is appropriate.
THE "SECTORIAL APPROACH"

In contradistinction to its High Seas and Law of the Sea predecessors, the Rome Convention does not try to include unlawful acts against the safety of navigation within the notion of international piracy. It adopts instead what has been described as the "sectorial approach" characteristic of previous international efforts against terrorism applied in the context of safety of air navigation, internationally protected persons, and hostage taking.183 Rather than attempting to develop an all encompassing instrument which would be generally acceptable to all parties yet effective in achieving its intended objectives, the sectorial approach identifies particular offenses which belong to the activities of terrorists, and works out specific international instruments for their suppression. Therefore by targeting specific offenses, ideological and political aspects of international terrorism can be minimized, and a network of international obligations addressing the most alarming manifestations of international terrorism can be constructed.184

Interestingly, while the term "Suppression" figures prominently in the title of the Convention, the operative provisions of the instrument are concerned more with the apprehension, conviction, and punishment of the offenders, rather than measures for suppression, which are stated in Article 13 as:

(a) taking all practicable measures to prevent preparations in their respective territories for the commission of those offenses within or outside their territories;

(b) exchanging information in accordance with their national law, and coordinating administrative and other measures taken as appropriate to prevent the commission of offenses set forth in article 3.
THE FOCUS OF THE ROME CONVENTION: PROSECUTE OR EXTRADITE

The 1988 Rome Convention did not attempt to modify the definition of "piracy" found in the 1982 Law of the Sea Convention by eliminating the private/public acts conundrum, which as a result might have presumably imputed a universal jurisdiction for any state to engage maritime terrorists irrespective of its connection with the crime. The Rome Convention instead adopted the model found in air terrorism conventions: the principle of aut dedere aut iudicare, or "prosecute or extradite." Here the obligation of each state party to the Convention in which an offender is found is either to extradite the offender to one of the states which has jurisdiction under the Convention, or submit the case to its own authorities for prosecution. Additional provisions regarding measures for cooperation between states parties to the Convention in preventing the offenses identified in the Convention, as well as in connection with the criminal proceedings resulting therefrom, complement the prosecute or extradite rules.

THE SPECIFIC OFFENSES DEFINED

The specific offenses covered by the Convention are detailed in Article 3 and substantially reproduce mutatis mutandis the offenses provided for in the Hague and Montreal aviation related Conventions, vis:

1. Any person commits an offense if that person unlawfully and intentionally:
   (a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
   (b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or
   (c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or
   (d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or
is likely to endanger the safe navigation of that ship; or
(e) destroys or seriously damages maritime navigational
facilities or seriously interferes with their operation, if any
such act is likely to endanger the safe navigation of a ship; or
(f) communicates information which he knows to be false, thereby
endangering the safe navigation of a ship; or
(g) injures or kills any person, in connection with the commission
or the attempted commission of any of the offenses set forth in
subparagraphs (a) to (f).

2. Any person also commits an offense if that person:
(a) attempts to commit any of the offenses set forth in paragraph
1; or
(b) abets the commission of any of the offenses set forth in
paragraph 1 perpetrated by any person or is otherwise an
accomplice of a person who commits such an offense; or
(c) threatens, with or without a condition, as is provided for
under national law, aimed at compelling a physical or juridical
person to do or refrain from doing any act, to commit any of the
offenses set forth in paragraph 1, subparagraphs (b), (c), and
(e), if that threat is likely to endanger the safe navigation of
the ship in question.

Unlike the Hague and Montreal Conventions which do not make it an offense to
injure or kill a person, the Rome Convention specifically denominates
this as one of the principal offenses. This provision was inserted largely at
the insistence of the United States, and was no doubt directly linked to the
killing of Leon Klinghoffer during the Achille Lauro affair. The degree
to which there must be a connection between the killing or injury and the
commission or attempted commission of the other specified acts is subject to
interpretation, but it has been suggested that no clearer wording could be
found. Nevertheless, as Professor Halberstam, the head of the US
delegation has pointed out, it was important to include this provision in the
Convention because otherwise it would make it difficult to prosecute the
offenders for such a killing. She notes that while it presumably would be an
offense under the law of the flag state even if not included as a separate
offense under this Convention,
"...the flag state would not be entitled to extradition of the offender for murder under the Convention. The extradite or prosecute provision of the Convention applies to "offenses" under the Convention. The inclusion of murder as an aggravating circumstance, rather than as an "offense," would therefore not provide a basis for extradition for murder. Furthermore, if the offender were extradited to the flag state for other offenses under the Convention, that state would not have jurisdiction to try him for the murder, since under the laws of extradition a state may generally not try a person for any offenses other than those for which he was extradited." [citation omitted]188

THE IMPROVED GEOGRAPHIC SCOPE OF THE ROME CONVENTION

As recalled from the discussion at the beginning of this paper, the introduction of the EEZ in the 1982 Law of the Sea Convention has had a profound effect upon littoral states' sovereign rights. Piracy enforcement has been complicated by this development. As Professor Birnie has suggested, "coastal states may consider that as the [EEZ's] purpose is to secure their exclusive right to its economic uses and as its legal status is arguably left sui generis by the wording of [the 1982 Law of the Sea Convention] since it is not clearly stated to be part of the high seas, it is their responsibility to protect navigation from piratical assaults."189

As a practical matter, because the areal extent of the "high seas" has diminished under the impact of the EEZ, only about 15 percent of recent incidents of violence at sea were within the geographic scope of piracy jure gentium.190

The geographic scope provision of the Rome Convention, Article 4, incorporates a "positive approach", i.e., it lists the circumstances in which the Convention applies, rather than where it does not apply. By providing jurisdictional authority to states whose vessels have come under piratic attack in virtually any waters, the Rome Convention greatly improves upon the geographic coverage provided in previous conventional piracy provisions which
rely on the now increasingly inappropriate "high seas" concept. Thus:

1. This Convention applies if the ship is navigating or is scheduled to navigate into, through or from waters beyond the outer limits of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States.

2. In cases where the Convention does not apply pursuant to paragraph 1, it nevertheless applies when the offender or the alleged offender is found in the territory of a State party other than the State referred to in paragraph 1.

The delegates' intent here was to ensure that the concept of internationality was maintained irrespective of the physical location of the vessel. To do this, the geographical elements in the Convention are described in terms of the actual or scheduled location of the ship, as opposed to the geographic location of the offense. Thus the international elements triggering the Convention are: the actual navigation of a ship, whether voluntary or not; in internal waters; the territorial sea; or beyond the territorial sea so long as the ship is coming from or is headed towards (or is scheduled to head towards) a point outside the territorial sea of a single State. In the event these criteria are not met, the Convention still applies if the offender is found abroad.

Several debates were held regarding the desired applicability of this Convention to the cabotage trade, with the decision being made to exclude from the Convention coasting occurring entirely within the internal waters of a state by a ship flying the flag of a different state, though the provisions of paragraph 2 would still be applicable. The words "into, through, or from" were carefully crafted to ensure that ships such as oil tankers, which may only visit offshore terminals and therefore do not cross the outer limits of the territorial sea, were included in the jurisdictional scope of this
A number of Arab delegations, led by Saudi Arabia, insisted on including a provision which dealt specifically with international straits, though the wording in the Convention imputed application in all instances of straits navigation which had an international element.  

However, Spain, in particular, was concerned that the Convention could result in a diminution of coastal state sovereignty in situations where navigation occurred in an international strait, though the ship never crossed (nor was scheduled to cross) the outer limit of the territorial sea. Navigation between the Spanish ports of Algeciras, west of the Strait of Gibraltar, and Malaga, on the east of the Strait, was provided as an example. To secure general agreement to Article 4, the United Kingdom proposed not mentioning international straits in the Convention itself, but instead included in the Final Act the following explanatory paragraph:

23. In relation to Article 4 of the [Convention], some delegations were in favour of the inclusion in Article 4, paragraph 1, of straits used for international navigation. Other delegations pointed out that it was unnecessary to include them since navigation in straits was one of the situations envisaged in Article 4, paragraph 1. Therefore, the Convention will apply in straits used for international navigation, without prejudice to the legal status of the waters forming such straits in accordance with relevant conventions and other rules of international law.

Since this paragraph merely confirms what was obvious from the beginning, i.e. that navigation in international straits is covered by the Convention if an international element is included, the utility of the paragraph, if any at all, may rest with its use as an interpretive aid in accordance with Article
32 of the Vienna Convention on the Law of Treaties.193

ESTABLISHING JURISDICTION

The jurisdictional provision, Article 6, is the other aspect relevant to this study. Article 6 establishes two types of jurisdiction, obligatory and discretionary, viz:

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offenses set forth in Article 3 when the offense is committed:
   (a) against or aboard a ship flying the flag of the State at the time the offense is committed; or
   (b) in the territory of that State, including its territorial sea; or
   (c) by a national of that State.

2. A State Party may also establish its jurisdiction over any such offense when:
   (a) it is committed by a stateless person whose habitual residence is in that State; or
   (b) during its commission a national of that State is seized, threatened, injured, or killed; or
   (c) it is committed in an attempt to compel that State to do or abstain from doing any act...

4. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offenses set forth in article 3 in cases where the alleged offender is present in its territory and it does not extradite him to any of the State Parties which have established their jurisdiction in accordance with paragraphs 1 and 2 of this article...

While based closely on Article 5 of the International Convention Against the Taking of Hostages, the Rome Convention provides more grounds for establishing jurisdiction, especially with respect to its discretionary provisions. The Rome Convention recognizes that the most widely accepted bases of jurisdiction under international law, nationality and territoriality (and as for ships, the flag state), can be inadequate to establish effective standing in the context of maritime terrorism on the high seas. For example, in terrorist cases, the offender’s national state may be reluctant to prosecute, and indeed could even
approve of the act. Further, in this era of open registry shipping, the flag state may not have the political or economic wherewithal to undertake an effective prosecution. Thus the Convention, in its discretionary provisions, adopts the protective principle and passive personality principle.

**THE PROTECTIVE PRINCIPLE AND PASSIVE PERSONALITY PRINCIPLE**

Briefly, the protective principle provides that a state has a right to prosecute those persons who threaten its governmental functions (counterfeiting is frequently cited as an example) regardless of the nationality of the offender or the geographic location of the offense.\(^{194}\)

The rationale behind the protective principle can easily be applied to situations involving threats to a state's nationals or property when such threats are based on a third party's attempts to coerce the target government to do, or refrain from doing some act. The passive personality principle accords extraterritorial jurisdiction to a State when its nationals are victims of crimes committed abroad.\(^{195}\)

The adoption in this Convention of the passive personality and protective principles, i.e. jurisdiction for the State of nationality of the victim, and by the targeted State, are particularly significant for the United States. As Professor Halberstam observed, "the United States is unlikely to be the state of nationality of the offender and not very likely to be the flag state, but has already been and will unfortunately probably continue to be the state of nationality of the victim and one of the states whose conduct terrorists seek to affect by their attacks."\(^{196}\)
THE ROME CONVENTION EVALUATED

Because of its essentially public and political character, maritime terrorism is distinguished from "traditional" piracy, which is committed for private purposes. Developed in the wake of the Achille Lauro affair, the Rome Convention has eliminated the two ship and private ends tests which heretofore rendered the previous conventional international piracy law inapplicable in the context of maritime terrorism. At the same time the Convention maintains a near "universal jurisdiction" evocative of that customarily ascribed to piracy through the application of the passive personality and protective principles, as well as the more customary jurisdictional bases of nationality and territoriality. As a result, the Rome Convention provides a substantial improvement to the international community's legal arsenal against maritime terrorism.
Incidents such as the Achille Lauro affair and the July 1988 attack upon the tourist ferry City of Poros in the Gulf of Aegina represent only the most recent manifestations of maritime violence. The maritime menace which most closely conforms to the general public's commonly held notions of piracy, i.e. violent robbery at sea, continues to flourish in selected geographic regions of the globe. Perhaps the most insidious example is in the Straits of Malacca and Singapore, which have been the site of some 200 instances of pirate attacks last year.

This region is especially pertinent for examination because the once relevant concept of universal jurisdiction over piracy on the high seas has become increasingly inappropriate to the actual piratic circumstances occurring in these waters today. While the methodology and appearance of the criminals plying these waters may well harken back to the eighteenth century freebooter image of piracy, today's enforcement strategies must contend with maritime geopolitical developments, e.g. expanded territorial seas, archipelagic waters concepts, EEZs, and increased coastal state sensitivity to intrusions on their sovereignty by former colonial powers, which were totally alien in the era of Blackbeard and Captain Kidd. And as will be discussed, failure to develop an effective response to the piracy menace in this region may have consequences of a severity equally unimaginable in a previous era.

HISTORICAL BACKGROUND OF THE MALACCA AND SINGAPORE STRAITS

Piratic activity has long been associated with the Strait of Malacca (map 1). The region first attained its historical prominence in the fifth century
by providing Arab traders with a marine corridor between the Indian Ocean and
the southeast coast of Sumatra. The significance of the Singapore Strait as a
link between the Bay of Bengal and China was to come centuries later.
European influence arrived first with the Dutch and Portuguese in the late
sixteenth and early seventeenth centuries, with the British achieving
political and economic primacy in the region following the Treaty of London of
1824, which, *inter alia*, confirmed the British acquisition of Singapore. By
the late 1950s these Straits had become a particularly important route in the
world petroleum market, as ever increasing amounts of crude oil from the
Persian Gulf (and by the late 1970s, liquefied natural gas, [LNG] from
Sumatra) were carried by tankers to Japan. The strategic importance of this
waterway to the Japanese can not be underestimated since by the end of the
1970s more than 80 percent of Japan’s crude oil originated in the Persian
Gulf.198 As the economies of the so called "Four Tigers": Singapore,
Taiwan, Hong Kong, and Thailand, have grown in the eighties, there has been a
corresponding increase in the region’s container traffic. Resultantly, in 1991
the Port of Singapore became the world’s busiest container port.199

**THE STRAITS TODAY: TRAFFIC DENSITY AND GEOGRAPHY**

Today the Strait of Malacca and the Singapore Strait are arguably the most
important commercial waterways in the world. Connecting the Indian Ocean on
the west to the South China Sea on the east, the area attracts the heaviest
concentration of merchant shipping in the world. Nearly 200 vessels over 1000
gross tons (excluding fishing vessels and military ships) transit these
Straits on a daily basis.200 In addition to the moving traffic, at any
given time, hundreds of vessels are laying by in the two major anchorage areas
off of Singapore, awaiting berths, receiving supplies, bunkering, or making repairs.

The abundance and density of maritime traffic in the region are not the only factors in the piracy equation; geography and economics also play vital roles. The western end of the Malacca Strait is quite spacious as the coasts of Indonesia to the southwest and Malaysia to the northeast are separated by some 200 miles (map 2). The Straits narrow appreciably as one moves in a southeasterly direction towards Singapore. At approximate latitude 3 degrees N, just below One Fathom Bank, the territorial waters of Indonesia and Malaysia begin to overlap (map 3). At the southwestern tip of the Malay Peninsula the Straits of Malacca are at their narrowest, 8.4 nautical miles, though the actual navigable channel for deep draft vessels is very much less (map 4). It is about this point that the Malacca Strait merges with the Singapore Strait, which proceeds for a length of about seventy miles eastward to the South China Sea. The Singapore Strait is bounded on the north by the Malay Peninsula and Singapore Island and to the south by the Indonesian islands of Batam and Bintan, the largest islands in the Riau Group (map 5). The navigable channel at the western end of the Singapore Strait is about 7.5 miles in width, though on its eastward course the navigable channel narrows to a minimum of 1.5 miles, with the narrowest land width being 3.2 miles. At its western extremity, the Singapore Strait is joined by the Durian Strait, which is the route to and from the Sunda Strait, and the Phillip Channel, the latter joining the Singapore Strait south of Raffles light. The Phillip Channel, located entirely within Indonesian territorial waters, is, pursuant to an IMCO (now IMO) approved traffic separation scheme implemented in 1977, the
required passage for large deep draft vessels proceeding eastward.

THE PHILLIP CHANNEL: OPPORTUNITY, MOTIVES, AND METHODOLOGY

It is in the reef and island strewn Phillip Channel that the majority of pirate attacks have occurred. As Captain Henry Keppel, the famed pirate hunter of the Serhassan case observed nearly 150 years ago: "As surely as spiders abound where there are nooks and crannies, so have pirates sprung up wherever there is a nest of islands offering creeks and shallows, headlands, rock and reefs—facilities in short for lurking, for surprise, for attack, for escape." The islands of the Riau Group are densely vegetated with many narrow passages and reefs which provide excellent hiding places, and the indigenous population of fishermen affords a desirable measure of anonymity to the pirates, who can thus operate in an environment of relative safety. Laden oil tankers, their freeboards low and their speed reduced to the minimum revolutions necessary to maintain adequate steerage in this densely trafficked narrow channel, present the most inviting targets of opportunity. The pirates usually approach under cover of darkness in speed boats or in ubiquitous native fishing craft, and easily ascend the vessel by a grappling hook tossed over the stern railing. Once aboard, the pirates, typically operating in groups of two to five men, armed with axes, knives, and with disturbing frequency now, small arms and automatic weapons, seize the vessel’s master, and force him to open the ship’s safe which usually contains substantial amounts of cash. Cash and valuables have been the principal booty in attacks that are completed usually in fifteen minutes or so by boarders who have been described by the victims as "quiet, swift, serious, and professional."
Inasmuch as traffic density and geography provide the opportunity for prospective pirates, the economic conditions of the area provide ample motive. Singapore, a tiny nation of some 240 square miles with population of 2.6 million, enjoys the highest standard of living among ASEAN nations. It has highly trained and efficient defense and police forces which have done a creditable job in curbing piracy in its own territorial waters. In contrast, its southern neighbor Indonesia is an archipelagic nation of some 13,677 islands which stretch nearly 3200 miles from the Indian Ocean to the Arafura Sea. It is the world’s fifth most populous nation, but enjoys an annual per capita income of only US$430. Most of the Indonesians in the Riau region exist at a subsistence level. Given the sparse military and law enforcement capability in the region (the Indonesian naval base at Tanjung Pinang on Bintan Island reportedly had only two patrol craft policing the area), there is every incentive for enterprising young Indonesians to take advantage of the profitable opportunities provided by an endless supply of vulnerable steel cash cows navigating slowly through their waters.

THE PHILLIP CHANNEL: THE JURISDICTIONAL ISSUE

The most problematic aspect of piracy in this area is of course the jurisdictional issue. Indiscriminant attacks are being made on the world’s commercial vessels exercising their rights of transit passage through an international strait which lies wholly within the territorial waters of a single nation. The conventional definitions of piracy mandate its locus "on the high seas", and, it will be recalled, a state’s duty to cooperate in piracy repression is limited to those acts occurring on the high seas or in any other place outside the jurisdiction of any state. What options
are available to the international community to remedy a situation which poses an international maritime menace, when the littoral state in whose waters the menace is located can not or will not take action?

THE CORFU CHANNEL CASE: OBLIGATIONS OF THE LITTORAL STATE

The 1949 Corfu Channel Case\(^{212}\) points to some principles which may be relevant to the instant situation. Shortly after the conclusion of the Second World War, the British were engaged in mine clearing operations in the Strait of Corfu, located between the Greek island of Corfu and the mainland shores of Greece and Albania. British vessels initially cleared the strait of mines, but on a later transit, two British vessels were damaged by mines located in Albanian territorial waters. Britain alleged that either the mines had been laid by Albania following the initial sweep, or at the minimum, Albania had been aware of the presence of the mines and had failed to warn the foreign shipping transiting the straits, thereby violating the right of innocent passage through an international waterway. In diplomatic correspondence between Great Britain and Albania, the British government described the incidents in the Corfu Channel as "deliberate and outrageous" breaches of international law and maritime custom.\(^{213}\) The British viewed the matter not just as an incident between the two nations but rather as a matter of general safety of life at sea, and as such regarded Albania’s action as a "criminal disregard for the safety of innocent seamen of any nationality lawfully using an international highway."\(^{214}\) Britain took the matter to the International Court of Justice (ICJ) and in its Memorial to the Court, classified Albania’s action as an "international delinquency" and in the special circumstances of the case, as "an offense against humanity which most
seriously aggravates the breach of international law and the international delinquency committed by that State." Britain claimed compensation from Albania for the damages to its vessels, and the loss of life which ensued.

The Court found that Albania had sufficient knowledge of the presence of the mines in its waters and thus ruled that it had been a duty of the Albanian government to notify the world in general of the existence of the minefield, and to specifically warn the British vessels when they were in imminent danger. Citing elementary considerations of humanity and the obligation of every state not to allow its territory to be used for acts contrary to the rights of other states, the Court affirmed Albanian responsibility under international law for the mining of the British ships and the subsequent damage and loss of life involved. Britain was awarded compensation, however the award was ignored by Albania.

The ruling of the ICJ may have some relevance to the activities occurring now in the Phillip Channel. The degree to which the ICJ accepted an international freedom of maritime communication in straits, and thus condemned a littoral state for allowing its territory to be used for acts contrary to the rights of other states, suggests some precedential value for applying Article 44 of the 1982 Law of the Sea Convention (insofar as it may now be regarded as declarative on the matter) to the situation in the Phillip Channel. Article 44 denominates the duties of States bordering international straits, among which are the obligations not to hamper transit passage and to publicize those dangers to navigation in the straits about which they have knowledge. Potential piratic attacks may reasonably constitute a legitimate
navigational hazard for which publicity is appropriate. Of course, the duty to advise the maritime community about the potential for piratic attack does not in itself impute a duty to repress piratic activity. However, frequent and potentially dangerous piratic attacks could arguably be construed as conditions hampering transit passage. Further, an interpretation of the "shall not hamper" clause made in light of the ICJ’s implicit condemnation of "criminal" activity which adversely impacted upon the maritime traffic in an international waterway, suggests that a failure by the cognizant littoral state to implement reasonable municipal measures to eliminate piratic activity could result in the state being held negligent in its international obligations. Such a state could then be subject to international sanction.

SANCTIONS AND REPARATIONS

International sanctions are of debatable utility, and indeed may be totally inapplicable to the Singapore Strait situation, given the paucity of economically suitable alternative navigation routes. Further, Singapore, the nation which has been the region’s most vigorous proponent of the internationalization of the Straits, and is in the best economic and technological position to mount an effective anti-piracy program, stands to lose the most should the international maritime community shy away from the region.

In an analysis of the possible liability arising from a state’s failure to act against piracy, D.H.N. Johnson interpreted this as, "the payment of reparation to other states whose shipping was molested by the pirates in question." Unfortunately this provides little practical relief to the
maritime community. Nations lacking the economic capacity to mount an effective law enforcement program in their own waters are unlikely to have the resources to pay reparations, assuming first that they even acknowledge such an assessment by a cognizant international forum.

NON-JUDICIAL INTERNATIONAL EFFORTS

Leaving aside the international judicial remedies, there have been in the past decade a variety of other international efforts to address the piracy problem. The IMO, pursuant to Resolution A545(13) adopted on 17 November 1983, urged governments to take, as a matter of highest priority, all measures necessary to prevent and suppress acts of piracy and armed robbery against ships in or adjacent to their waters, including strengthening of security measures. The resolution also called on governments to report to the IMO all acts of piracy against ships flying their flag and to inform the Organization of action taken to implement the resolution. The United Nations Conference on Trade and Development (UNCTAD) became involved in the issue in 1982, whereby it decided to establish an Ad Hoc Intergovernmental Group to consider means of combating all aspects of maritime fraud, including piracy. The UNCTAD Committee on Shipping adopted Resolution 60(XII) in November 1986 which, inter alia, asked the Secretariat to monitor work on the development of a training program to combat maritime fraud.217

The United States' Defense Mapping Agency (DMA) provides a worldwide service, under the auspices of its Navigation Information Network (NAVINFONET), known as the Antishipping Activities Messages Subsystem (ASAM). The product of the U.S. Maritime Administration (MARAD) sponsored Interagency
Working Group on Piracy and Maritime Terrorism held in March 1985, the ASAM system is a centralized data base for filing reports of attacks against shipping worldwide and can be accessed by the maritime community at large. The system provides for a central location to file the reports of attacks against shipping, and it also provides warnings within the Automated Notice to Mariners system to the maritime community of the risks in certain geographical areas by advising them that they should avoid or approach these areas with due caution. Similar incident reporting and advisory schemes have been implemented by the International Chamber of Commerce’s International Maritime Bureau (IMB), the Baltic and International Maritime Council (BIMCO), and the International Shipping Federation (ISF).

The primary result of these international measures has been the generation of reliable statistics concerning the scope of piratic and maritime terrorist activity occurring throughout the world, and the promulgation of various shipboard security guidelines and anti-piracy safety measures intended for ship operators themselves. As such they have been primarily reactive type measures, rather than proactive enforcement solutions. In the case of the Singapore Strait, effective enforcement measures have been frustrated by jurisdictional complications based upon long standing political differences between the region’s littoral states. Since its independence in the months following the Second World War, Indonesia has been especially sensitive to intrusions on its territorial sovereignty, and as such was the principal architect of the archipelagic waters concept embodied in the 1982 Law of the Sea Convention. Malaysia too, joined Indonesia in opposing the internationalization of the Straits during the Convention’s negotiations,
though it perceived Indonesia’s archipelagic waters scheme as a potential threat to its own freedom of access between its peninsular West and its states of Sarawak and Sabah on Borneo. Singapore, in contrast, wished to maintain full freedom for maritime traffic in the Straits, which in large measure is its economic lifeblood. Despite these differences however there is an encouraging precedent for the implementation of an effective regional anti-piracy program: the 1977 IMCO Resolution on Navigation Through the Straits of Malacca and Singapore.

THE 1977 IMCO RESOLUTION

The 1977 IMCO Resolution was based on the Straits states’ recognition of the potentially disastrous environmental consequences which could result from the uncontrolled navigation of Very Large Crude Carriers (VLCCs) through this narrow and increasingly congested waterway. Indeed, in November 1971, the three Straits states, Indonesia, Singapore, and Malaysia, issued a joint statement whereby they agreed to adopt a common position on matters relating to the Straits of Malacca and Singapore. They concluded that the safety of navigation in the Straits is the responsibility of the coastal states concerned, and that a body composed of these three states be established to coordinate efforts for safety of navigation. The 6 January 1975 grounding of the 244,000 deadweight ton Japanese VLCC Showa Maru in the vicinity of Buffalo Rock, three miles south of Singapore in Indonesian waters, resulted in a spill of some 844,000 gallons of crude oil. The incident set the stage for tripartite action, in concert with IMCO, on the development of a traffic control scheme for the Straits. The IMCO provided both the technical expertise, and an effective political buffer between the affected
states, to ensure a workable traffic separation scheme was developed and implemented. As Professor Leifer has summarized the situation:

"The passage of the traffic separation scheme resolved a major issue of maritime contention. IMCO's deference to the priorities and to the authority of the coastal states satisfied the special concern of Indonesia and Malaysia that their rights would not be overridden because of international usage of the straits. At the same time, their evident willingness to accept external (Japanese) funding for the establishment of aids to navigation in addition to the expert advice of IMCO provided a measure of assurance to those maritime states that had an initial sense of apprehension at the possible consequences of the declaration of November 1971."220

The ability of the IMO to remain above the political fray has long been an attribute which has contributed to the organization's successes, as evidenced in the development of the Rome Convention previously discussed. It is suggested that the IMO could provide an equally important role in the development of an effective regional anti-piracy program, once the Straits states recognize the economic and environmental consequences that can result from their failure to mount an effective regional law enforcement effort against piracy.

AN ENVIRONMENTAL CALL TO ACTION

While the Straits states may have heretofore been able to dismiss the piracy problem as an economic nuisance not significantly affecting their national flag shipping or coastal zone interests, such naivete' is fast disappearing. Recent reports indicate that the latest technique being employed by the pirates is to divert the crew's attention by starting a fire aboard the target vessel and then plundering it while the crew's attention is focused upon fighting the fire.221 The potential for an environmental catastrophe is readily and frighteningly apparent in this scenario, especially given the
amount of hazardous cargo being transported through the narrow and heavily trafficked Phillip Channel. Insofar as environmental concerns provided the impetus for the development of a traffic separation scheme in 1977, so may they spur coastal state action to eliminate piracy in the region today. In this regard it is interesting to note that the Indonesian Minister of State for Population and Environment recently raised concerns over the impending shipment of plutonium from France to Japan through the Straits on the Japanese ship *Akatsuki Maru*, urging Indonesia, Malaysia, Singapore, and the Philippines to take a united stand against the presence of the vessel in the region.²²² Perhaps the best hope for an effective anti-piracy program will be one developed out of an environmental nexus.

There have been recent indications that the Straits states are beginning to come to grips with the piracy problem, following prompting from the Hong Kong Shipowners Association, the Federation of ASEAN Shipowners Association, and other commercial organizations.²²³ An anti-piracy agreement recently entered into between Singapore and Indonesia addressed the ticklish issue of hot pursuit by Singaporean forces into Indonesian territorial waters, and vice versa, and will lead to coordinated sea patrols in the Straits.²²⁴ Further, Indonesian and Malaysian customs officials planned to employ 56 patrol boats in a joint patrol operation in the Riau area beginning in September 1992.²²⁵ Regardless of the impetus behind the Straits states’ anti-piracy program, these measures may still fall short due to inadequate personnel training, or insufficient funding and resolve to mount a long term operation. Therefore, a degree of international participation beyond the immediate regional states is appropriate.
INTERNATIONAL PARTICIPATION: A ROLE FOR THE IMO

Safe, hazard free transit in these economically strategic Straits is of vital interest to the maritime community worldwide. As such, it should not be the sole responsibility for the Straits states to bear the entire cost and responsibility for policing pirates from these waterways themselves. Malaysian Prime Minister Mahathir Mohamad recently argued for a levy on all vessels transiting the Straits of Malacca. Such an extreme proposal would likely be unachieveable both in the mechanics of its application and for the inevitable international resistance to the undesirable precedent such a measure would establish. However, some degree of participation and cost sharing by all of the major maritime nations is warranted. This is where the IMO can play an important role.

The Organization is well suited to enlist international participation in the form of maritime law enforcement training by states with modern coast guards or marine police, the donation of surplus vessels and equipment suitable for an anti-piracy mission, or perhaps even to directly administer a multi-national maritime patrol force in these waters analogous to a U.N. peacekeeping force. As its record on the Straits traffic separation scheme, as well as a variety of other international maritime safety initiatives demonstrates, the IMO is a highly respected international organization. Thus it is especially well suited to the challenge of coordinating an anti-piracy enforcement program which would respect the territorial sovereignty concerns of the Straits states, yet ensure that a modern, efficient, enforcement program, which met the needs of the international maritime community as a whole, was carried out in the region.
CHAPTER VII. CONCLUSION

There is cause for guarded optimism in the fight against disruptions to the international maritime order. The 1 March 1992 entry into force of the Rome Convention\(^{228}\) (along with the Protocol for offshore platforms) brings to bear an important new weapon in the international community's legal arsenal against maritime terrorism. Admittedly, it is a weapon more effective in its reactive capacity to ensure the prosecution of modern "terrorist/pirates", rather than in its preventative character to eliminate piratic attack in the first place. Nonetheless, it marks an important step forward in international community's recognition of the reality of maritime terrorism and the necessity to provide an effective international legal mechanism with which to respond to problems when they do occur.

Cautious optimism also prevails in the Straits region. After more than a decade of denial, evasion, and inaction due to jurisdictional squabbling, it now appears that the Straits states have finally acknowledged the gravity of the piracy problem, and are at last willing to take some meaningful enforcement action to eliminate it.\(^{229}\) Unfortunately for the international maritime community at large, the Straits states continue to exude a strong regional parochialism which militates against what they perceive as "outside" interference. A proposal to establish a regional anti-piracy center in the Malaysian capital of Kuala Lumpur, financed by the international maritime community, initially met with resistance from the Indonesians during a regional anti-piracy conference held in Kuala Lumpur in July 1992.\(^{230}\) Indonesia later accepted the idea, and the center began operation in late September 1992.\(^{231}\) The center, set up by the London based International
Unified Maritime Bureau, functions as a 24 hour coordination center to answer distress calls from ships. It will also collate information that could be used by law enforcement personnel to locate and prosecute pirates.\(^{232}\)

While the nature and scope of piratic activity has evolved through the ages, one common aspect has remained: the international character of the crime. Whether it involves a cruise vessel of open registry with multinational crew and passengers held hostage by terrorists on the high seas, or an oil tanker registered under the flag of a traditional maritime nation, attacked by armed pirates while transiting an international strait wholly within the territorial waters of a single littoral state, compelling international interests are involved. While the maritime industry's self help measures, i.e., increased security awareness and preventative measures aboard ship, rerouting away from geographic trouble spots where economically practicable, etc., are an important part of an overall enforcement strategy, ultimately international problems require international solutions. In ages past it may well have been acceptable for the dominant maritime powers of the day to engage in repressive unilateral enforcement action against pirates. However, the contemporary state of international relations and the conventional notions of the law of the sea are very unlikely to permit a modern Pompey the Great or Captain Keppel to be unleashed against the maritime security threats facing the international maritime community today.

Fortunately today, a more acceptable approach to achieving global maritime security exists under the auspices of the IMO. The IMO has been looking into the creation of a multi-national task force to outline the problem of piracy
and armed robbery against ships in the Strait of Malacca.\textsuperscript{233} The task
force would be established to specify navigational techniques to be used in
waterways prone to piracy, and recommend safety precautions and enforcement
arrangements for crews, ship owners and operators, and flag, coastal, and port
states. The U.S. Coast Guard has also indicated support for IMO sponsored
involvement in an anti-piracy program in this region.\textsuperscript{234} Thus, should the
regional anti-piracy measures now being implemented by the Straits states fall
short of expectations, the IMO should not hesitate to bring to bear its
expertise to the situation.

In addition to these anti-piracy initiatives, it is strongly encouraged that
more of the world's largest shipowning nations and port states ratify the 1988
Rome Convention in order to demonstrate a united front against maritime
terrorism.

The maritime community’s technological advances in response to nature’s
challenges have provided, at best, a tenuous accommodation between the
vagaries of the ocean, and the mariner’s desire for safety upon it. Thus the
seasoned mariner is quick to concede that nature always maintains the upper
hand. However, international cooperation in the development and
implementation of legal mechanisms against the challenges of piracy and
maritime terrorism will ensure that in the future, the mariner need not make
any such concession to the pirate.


9. Ibid.


26. Privateering was the legitimate practice of commissioning private vessels in time of war to capture enemy vessels as war prizes. Privateering was widespread in the early nineteenth century, and presented various problems to the international maritime community, not the least of which was the great number of commissioned privateers resulting from the various warring nation states. The principal distinction between the pirate and the privateer was that the latter had a commission issued by a legitimate recognized warring sovereign, whereas the pirate had no such authority. Privateering was outlawed at the end of the Crimean war by the 1856 Treaty of Paris. See, C.J. Colombos, The International Law of the Sea (London: Longmans Green & Co., 1968), pp.481-482.


30. Early conceptions of the scope of English Admiralty jurisdiction against pirates were broad indeed, as evidenced by this opinion of English Admiralty judge David Lewes in 1579: "...the first and principal part of the Lord Admirall's office by law is, and ever hath been, to clear the jurisdiction appertereyning to his office, being the sea, of pyrats and rovers haunting the same...". 1 Marsden, Documents: 224, cited in Rubin, A.P., The Law of Piracy, supra note 6, pp.43, 62.


34. see Rex v. Dawson supra note 28, p.92.


38. The Harvard Research Draft includes a comprehensive list of the applicable piracy laws of the various national states at the time; see 26 American Journal of International Law, Supp. IV (1932): 893.


54. Barratry is any fraudulent or criminal conduct against an owner of a ship or the ship's cargo or goods by the master or mariners in breach of the trust reposed in them, and to the injury of the owner. See Saunders, A., Maritime Law, Second Edition (London: Effingham Wilson, 1920), p.333.

55. Mutiny is any action by members of a ship's crew which solicits, incites, or stirs up any other of the crew to disobey or resist the lawful orders of the officers, or to refuse or neglect their proper duty on board. See Robinson, G.H., Handbook of Admiralty Law (St. Paul, MN: West Publishing Co., 1939), p.342.

56. Ibid.

57. e.g., see Rubin, A.P., The Law of Piracy, supra note 6, pp.220-232.


66. Id., pp.795-796

68. Id., pp.415-419.

69. Id., p.417.

70. 1st Cong. 2nd Session, 1 Stat 112, (30 April 1790).


72. Id., p.353.

73. Id., p.358.

74. Id.

75. Id., p.359.

76. Id., p.360.

77. Id., p.364.

78. Id., p.364.


80. Id., p.616.

81. Id., pp.617-618.

82. 15th Cong. 2nd Sess., ch.77, 3 Stat. 510 (1850 ed.).

83. Id.


85. Id., p.620.

86. Id., p.622.

87. Id., p.622.

88. Id., p.623.

89. Lenoir, J.J., "Supreme Court," supra note 37, pp.541-542.


92. The Court also ruled that the Piracy Act of 1819 did not repeal Section 8 of the Crimes Act of 1790; U.S. v. Griffen and Brailsford, 5 Wheat. 184 (1820).


94. Id., p.412.


98. Id., pp.16-17.


101. Id., p.232.

102. Id.


104. Id., p.412.

105. People v. Lol-Lo and Saraw, 43 Philippine Islands 19 (1922), as reported in 1 Annual Digest of Public International Law Cases (1919-1922): 164-165, Case No. 112.

106. Id., cf. US v. Wiltberger, 18 US 76 (1820), where Justice Marshall overturned a piracy conviction resulting from a murder which occurred on an American vessel in the territorial waters of China on the grounds that the legislative purpose of the statutory definition of piracy provided in Section 8 of the Act of 1790 was not to assert jurisdiction over everybody any place, but only in specific places, i.e., the high sea and rivers, havens, basins or bays outside the jurisdiction of any state; the offense thus committed within Chinese territorial waters was within the jurisdiction of China, thereby voiding application of Section 8.


108. e.g., see Rubin, A.P., The Law of Piracy, supra note 6, pp.295-298.


112. At least one jurist at the time saw the Draft as a precursor to the development of an international tribunal of justice before which private individuals might be prosecuted for crimes against the international community. M. Pella, a Roumanian, in reply to a questionnaire propounded by the League of Nations Committee of Experts observed:

"Absolute piracy [piracy jure gentium] is regarded today as an offense of special character, because it is punishable wherever encountered. We already see here in embryo the principle—which, in future social relations will become the practice—of penalizing throughout the world violations of laws which are common to every country...If we can evolve with reference to the suppression of piracy, a new combination of the principles of penal law with those of international law, we shall be able to bring to light hitherto unsuspected aspects of this question which render an international convention indispensable."


114. Ibid.


116. Ibid.


124. Ibid., p.757.

125. Ibid., p.760.


130. e.g., see Constantinople, G., "New Definition of Piracy," supra note 49; Halberstam, M., "Terrorism on the High Seas," supra note 18.


135. Ibid.

136. The subject of nationalist Chinese vessels intercepting other nations' merchantmen enroute to mainland China had previously been addressed by the UN, and attempts to label the Nationalists actions as piratical had been rejected in December 1954 by the Ad Hoc Political Committee. See Rubin, A.P., *The Law of Piracy*, supra note 6, p.320.


141. Ibid., p.25.
142. Ibid.


144. Ibid.

145. Ibid.

146. Ibid.

147. Ibid.


150. Ibid.


152. Ibid., pp.46-48.


154. see note 189, infra.


162. Green, L.C., "The Santa Maria: Rebels or Pirates?," 37 British Yearbook of International Law (1961): 496.

163. Ibid., p.503.


167. Pursuant to PL 99-399 of 26 August 1986, the US enacted "The Omnibus Diplomatic Security and Antiterrorism Act of 1986" (18 USCA 2332) which established extraterritorial jurisdiction over terrorist acts abroad against US nationals, and "The International Maritime and Port Security Act of 1986" which, inter alia, directed the Secretary of Transportation to develop and implement a plan to assess the effectiveness of the security measures maintained at those foreign ports which pose a high risk of terrorism against vessel passengers.


170. Ibid.


174. Consider the Explanatory note to the first draft of the Convention provided by Austria, Egypt and Italy:

"The acts that at any moment may be committed against the safety of maritime navigation are indeed only touched upon by the reference to "acts of piracy" under art. 15 of the 1958 Convention on the High Seas and the corresponding art. 101 of the 1982 UN Convention on the Law of the Sea. These provisions apply to illegal acts of violence or detention or any other act of depredation committed for private ends by the crew or the passengers of a private ship on the high seas against another ship or against persons on board of such a ship. Thus, these acts cover only a small part of the unlawful acts that deserve punishment as such acts are mostly not committed for private ends or from aboard a ship against persons on board of another ship." (IMO Doc. C/57/25 p.4)


It should also be noted that pursuant to IMO Assembly resolution A.584(14) of 20 November 1985, the IMO directed that internationally agreed measures should be developed, on a priority basis, by the Maritime Safety Committee to ensure the security of passengers and crews on board ships and authorized the Maritime Safety Committee to request the Secretary General to issue a circular containing information on the agreed measures to governments, organizations, concerned and interested parties for their consideration and adoption. At its fifty third session the Maritime Safety Committee approved the measures to prevent unlawful acts against passengers and crews on board ships, and published same as MSC/Circ.443 of 26 September 1986, entitled "Measures to Prevent Unlawful Acts Against Passengers and Crews on Board Ships."


178. The UNGA Resolution was dated December 1985, the Convention was opened for signature on 1 March 1988, and when France became the 15th country to deposit its instrument of ratification on 2 December 1991, the Convention entered into force on 1 March 1992.


184. Ibid., pp.71-72.


190. Ibid., p.140.

191. Though international straits are by conventional definition (1982 Law of the Sea Convention, Part III, Straits used for International Navigation, Articles 34-45) territorial waters of one or more states, a ship navigating in international straits, if its schedule included navigation beyond the outer or lateral limits of the territorial sea, would be covered by in the Rome Convention.


Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.

195. Ibid., p.303.


201. IMCO Assembly Resolution on Navigation through the Straits of Malacca and Singapore, 14 November 1977; for an excellent account of the history and politics behind the development of this traffic separation scheme, see Leifer, *International Straits*, supra note 198, pp.62-76.


204. Oil tankers have not been the only targets however. e.g. "Australian Boxships Raided Off of Singapore," *Journal of Commerce*, 10 October 1990.


208. Ibid., p.13.

210. Recent speculation by Malaysian and Singaporean shipowners suggests that much of the piratic activity is being committed by corrupt Indonesian Customs officials. "It is a well known fact in Singapore's shipping circles that the attacks were well organized and committed by a small group of poorly paid Indonesian customs officers trying to make ends meet," see Fairplay, (18 June 1992): 23, and also, "The Batam Connection," Far Eastern Economic Review (2 July 1992): 15.

211. Article 100, 1982 Law of the Sea Convention.


214. Ibid., p.278.

215. Ibid., p.279.


219. Ibid., p.65.

220. Ibid., pp.75-76.


227. There already exists precedent for international cost sharing. A consortium of Japanese shipping and petroleum interests established, with government support in July 1968, the Malacca Strait Council. The purpose of the Council was to promote the improvement of navigational aids in the Straits to enhance the safety of navigation. Between 1969 and 1974 the Council donated 8 lighted buoys, 3 lighthouses, and 6 lighted beacons to the government of Indonesia. The Indonesians were tasked with operating and maintaining them, but spare parts, facility repairs, and buoy repositioning have been financed by the Council. See Leifer, M., International Straits, supra note 198, pp.40,49,57,58.

228. Parties to the Convention include: Austria, China, France, The Gambia, Germany, Hungary, Italy, Oman, Norway, Poland, Seychelles, Spain, Sweden, Trinidad and Tobago, and the United Kingdom; all of these countries except The Gambia have accepted the Protocol.

At the present time (October 1992) the United States Senate has given its advice and consent to the Convention, however the necessary implementing legislation, proposed originally in the Senate Judiciary Committee's Omnibus Crime Bill, is now being held up in Conference Committee, and will not likely be enacted this term, author's telephone conversation with Mr. Mike Kraft, U.S. Department of State, Office of Counterterrorism, Washington, D.C., 2 October 1992.


232. Ibid.

234. ADM J.W. Kime, Commandant USCG, letter 16600 of 23 October 1992, to Mr. William O’Neil, Secretary General, IMO, re piracy in the Strait of Malacca.
THE MALACCA STRAITS AND SINGAPORE
(macro view)

Map 1: THE MALACCA STRAITS AND SINGAPORE (Macro-view)
SINGAPORE AND RIAU ARCHIPELAGO
(micro view)
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