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“Piracy” in the Twentieth Century

“Piracy” by Analogy

R*ebels and War Criminals.* It was observed above¹ that Dr. Stephen Lushington interpreted the British Bounty Acts of 1825 and 1850 to incorporate into British legislation an intention of the Parliament to label any acts of robbery or murder upon the high seas, as “piratical acts” for the purposes of the bounty and further applied the 1850 act to “murder” not on the high seas but in the territory of Chile. It has been seen at some length that this particularly British confusion between “piracy” as a vague pejorative and a “piracy” as a technical word applicable to criminal offenses within the historical jurisdiction of British Admiralty tribunals, underlay many political decisions. The word was applied to acts outside of any British jurisdiction under the normal distribution of legal powers in the international legal order; it came to be used routinely by British policy-makers and naval officers with regard to nearly any acts of foreigners against whom some forcible political action was directed. Although the implied reference to criminal law seemed to confuse only the British users of the word “piracy,” who frequently found themselves in the political difficulties their use of a word drawn from the criminal law had been intended to avoid, the word appears to have re-entered the vocabulary of international lawyers by the end of the nineteenth century with meanings varying from the technical one relating to the criminal law applied in Admiralty tribunals to the most vague and general. It is not the object of this study to re-examine the definitions of “piracy” proposed, or simply asserted, by learned publicists in order to criticize their knowledge of history or their legal scholarship, but the reader must be warned that the word was used increasingly towards the end of the nineteenth century in ways totally unsupported by scholarly analysis. Lushington’s usage gradually became the common usage of statesmen and publicists, while in fact never applied in any known cases when the issue of definition as a matter of international law was squarely presented. Indeed, even the usage of statesmen in contexts in which a negotiation among European states was involved was evasive and not the usage approved so offhandedly by Lushington and the less contemplative men of action.

The use of the word “piracy” with regard to foreign officials remained as it existed in the nearly nineteenth century and supported by the *Magellan Pirates* decision’s dicta, a pejorative applied to non-European and unrecognized rebel military forces to which the statesmen wished to attach a sense of illegality under international law. The Barbary states came to be routinely considered “piratical” in late nineteenth century writings without analysis of the actual treatment given their governments by European statesmen or the legal writings of scholars of the seventeenth and eighteenth centuries distinguishing between the common pejorative usage and the position in the international legal order actually accorded in practice to the governments, title adjudications, privateering licenses and other official acts performed by the constitutional authorities of those “states” affecting foreign interests. The failures in practice to encourage non-European societies to conform their behavior to the needs of European commerce by calling their military arms, or even their governments, “piratical,” appears not to have been noticed by statesmen, who persisted in using the word “piracy” and its derivatives to refer generally to illegality under international law, but in the ultimate moment in every known case either to withdraw from that usage, withhold the legal results that they had argued should flow from it, or to apply the law of war to the conflicts that ensued.²

At the same time, the use of the word “piratical” to describe acts that would be “war crimes” were it conceded that the law of war applied, seemed to increase. Ironically, the first known usage clearly in that context was in the Lieber Code, General Orders No. 100 of the United States Federal Army promulgated by President Lincoln on 24 April 1863.³ The irony exists in the fact that the Lieber Code itself was regarded from the very first as a codification of the international law of war, although issued in a conflict in which the Federal Government of the United States did not consider the Confederate forces to be entitled to the status implied by the application of that body of law.⁴ The distinction drawn between enemy soldiers who fit the form of classical soldierdom and enemy irregulars, those who commit acts that would be within a soldier’s privilege but “without any commission, without being part and portion of the organized army, and without sharing continuously in the war,” seems strange in a code issued at a time the Federal authorities insisted that all Confederate soldiers had no privileges by right but were treated as if they had such privileges only as a matter of political concession by the Federal Government. But, assuming that the Federal Government had by implication accepted the law appropriate to true “belligerency” by 1863 as the legal regime best suited to the facts even without expressly saying so, it is interesting to note the reference to “pirates:”

Men, or squads of men, who commit hostilities, whether by fighting . . . or by raids of any kind, without commission, without being part and portion of the organized army, and without sharing continuously in the war, but who do so with intermittent return to

their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men, or squads of men, are not public enemies, and, therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.⁵

It is noteworthy that these “unprivileged belligerents” were not considered to be “highwaymen or pirates,” but only to be treated as if they were; their status was determined by analogy and the legal label was not given them directly.

It is tempting to see in this innovative usage a compromise between the excessive language of polemicists and the scholarship of Francis Lieber and his learned panel of revisers.⁶

The analogy is dropped without explanation in the succeeding partial codifications of the laws of war and there is no mention of “pirates” in the Brussels Rules of 1874, the Oxford Manual of 1880 or the great Hague Conventions of 1899 and 1907.⁷ Instead, those who act beyond the privileges of soldiers may legally be treated as war criminals under the laws of war as administered by the courts of the capturing power, and those who are determined not to have the privileges of soldiers at all are subject to the “normal” criminal laws of the state into whose hands they have fallen; the charges against them would not be “piracy” or “highway robbery” unless those laws so provided as a matter of municipal law, and no implication of international purview over the definition of their offenses would exist.

The word “piracy” pops up again in connection with the laws of war as a semi-learned response to the excesses felt by the British to flow from the invention of the submarine as a commerce-destroying weapon applied during the First World war. At the Washington Conference of 1922 on the Limitation of Armaments, the United States, Great Britain, France, Italy and Japan agreed that the general international law of war forbade the destruction of a merchant ship “unless the crew and passengers have been first placed in safety,” and specifically affirmed that this rule applied to belligerent submarines.⁸ Going further, the signatories declared that:

[A]ny 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 and may be brought to trial before the civil or military authorities of any Power within the jurisdiction of which he may be found.⁹

This language seems extremely confusing. “Piracy” is not a “war crime” historically or by any known definition applied in diplomatic practice or court case. Indeed, the term “piracy” was historically used to distinguish those who fought as privateers under the laws of war and those who had no valid commissions or sailed under the commissions of unrecognized powers and thus were subject not at all to the laws of war but to the normal criminal law of some state with the necessary legal interest to try them.¹⁰

It has been noted that the form of commission lost importance over time, and the essential question in the universal "natural" municipal laws of "piracy" became whether the accused "pirate" had an intention to rob for his own ends (*animo furandi*), failing which he was not a "pirate" regardless of defects in his commission.¹¹ It has also been noted that as a matter of public international law, attempts to draw the legal results of municipal law "piracy" with the added twist of universal jurisdiction failed both as to the expansion of jurisdiction beyond the case of stateless "pirates" and as to the extension of any protective jurisdiction on the high seas beyond ships of the flag and individuals who are nationals of the state seeking to exercise that jurisdiction.¹² Now, under the 1922 formula, the major victorious allies of the First World War seem to have tried by treaty among themselves alone to forbid states even to issue commissions or order the use of submarines against merchant ships, and to make those acting under the authority of those invalid commissions or illegal orders not only "war criminals," who would be subject to punishment only by a state with the requisite "standing" to apply the law of war to the individual concerned, but in other ways analogous to a "pirate." This presumed that as a matter of international law "piracy" and "war criminality" were somehow similar, which is not evident, and that one legal result of attaching the label "pirate" by analogy ("*as if* for an act of piracy") was universal jurisdiction in states with no legal interest in the matter beyond finding the accused within their territory.¹³ The language of the 1922 Conference has been variously construed, but in fact has never been applied to a submariner.¹⁴ In the Treaty for the Limitation and Reduction of Naval Armaments signed at London on 22 April 1930, Part IV, article 22 repeats the substance of article 1 of the 1922 Conference's Final Act, but does not repeat the analogy to "piracy."¹⁵ Nor does that analogy reappear in the Procès-Verbal of 6 November 1936 which continued the terms of the 1930 Treaty and vastly expanded the number of states parties to that statement of substantive law.¹⁶

The analogy of submarine warfare against merchant ships to "piracy" was revived to some extent by the Nyon Agreement of 1937. That Agreement among nine "Mediterranean" states, including Bulgaria, Rumania and the USSR, but excluding the United States, Germany and Italy, repeats the "piracy" analogy in its Preamble:

Whereas arising out of the Spanish conflict attacks have been repeatedly committed in the Mediterranean by submarines against merchant ships not belonging to either of the conflicting Spanish parties; and

Whereas these attacks are violations of the rules of international law referred to in Part IV of the Treaty of London of 22 April 1930 . . . and constitute acts contrary to the most elementary dictates of humanity, which should be justly treated as acts of piracy; and

Whereas . . . it is necessary in the first place to agree upon certain special collective measures against piratical acts by submarines . . .¹⁷

But in the operative text, there is no mention of “piracy” or “piratical acts.” Submarines believed to have attacked neutral merchant vessels in disregard of the 1930 and 1936 Rules, it is provided, “shall be counter-attacked and, if possible, destroyed,” but there is no provision for criminal trials of their officers or crew. Nor is there any assertion of universal jurisdiction, although special rights of operation are asserted by the British and French fleets on the high seas within the Mediterranean, and access to the Mediterranean ports of other states parties to the Agreement is provided. Whether those special rights went beyond the bounds of British and French rights under general international law seems doubtful, and, of course, the access provisions are a matter of agreement only. On the other hand, the assumption of a legal authority to clear the seas of commerce-destroying submarines that had not attacked the merchant ships of Great Britain or France or any of the other parties to the Nyon Agreement does seem to have assumed some special jurisdiction in Great Britain and France outside the scope of the Agreement itself. Unless Great Britain and France were willing to concede the same military jurisdiction to a non-party, like Italy, however, the jurisdiction would not seem properly to be considered an extension of “universal” jurisdiction to “piratical” submarines, but a continued British assertion, now shared with France, of a special authority to safeguard international commerce based on the special interest, military strength and moral assertiveness of the British alone.¹⁸ There is no known evidence of the British and French attitude towards Italian or other non-party assertions of the jurisdiction asserted by the British and French, but it may be noteworthy that the Nyon Agreement itself does not mention “universal jurisdiction” or give any legal basis for the British and French activities outside of the operative terms of the document. If an analogy is sought to prior state practice in the face of asserted belligerent rights against neutral merchant shipping, under which the affected neutrals banded together to police the seas, the closest historically might be the so-called “armed neutralities” of 1780 and 1800.¹⁹

Without excessive research in England it is impossible to discover the origin of the references to “piracy” and “piratical acts” in the Preamble to the Nyon Agreement, but the clauses in which they appear both look like late additions to the text and seem to reflect British positions trying to turn the political use of the word “piracy” into some legal rule. Since the words do not appear in the operative text, and the legal conception that might underlie them seems unnecessary to explain the conceptions that support the Agreement itself, the point seems not worth further discussion. It might be significant that three days after the conclusion of the Nyon Agreement, a Supplementary Agreement was concluded at Geneva by the same nine powers which again in the Preamble refers to “piratical acts by submarines in the Mediterranean,” but extends the terms of the Nyon Agreements, including its special policing authority for the British and French, to “similar

attacks” on neutral merchant ships in the Mediterranean by surface ships or aircraft.²⁰ No legal basis or legal result seems to exist to give meaning in law to the phrase “piratical acts” in this context. It looks more like the attempts seen in the United States and Great Britain throughout the nineteenth century to somehow involve “war criminals,” or unrecognized belligerents not acting *animo furandi* while interfering with peaceful commerce, in a legal category of common crime, with the enforcement left to British or American ships as a matter of immediate political and military action, to the exclusion of the courts. As such, rather than reflecting universal jurisdiction to apply municipal criminal law, it seems to reflect a conception of special military or political rights to impose order on the high seas in the interests of general commerce and to confine rebellion to national borders of a single state, to the profit of third country merchants. It seems clear from the silence of the operative texts concluded at Nyon that not all of the countries represented there agreed that the word “piratical” had any place in the legal rationale for their concurrences.

In the Western Hemisphere, there is direct evidence that states rejected the concept of “piracy” as appropriate to acts that did not involve the *animum furandi* without in any way limiting the legal power of a state to call its rebels “pirates” for the purposes of its own municipal law, as England had done in the 1690s and for some purposes under the Act of 1700,²¹ and the Federal Government of the United States had done in 1861-1864,²² and as Peru had *not* done in 1877.²³ On 20 February 1928, 20 states of Latin America plus the United States signed²⁴ the Havana Convention on Civil Strife.²⁵ Ratifications include 13 between 1929 and 1937, 2 in 1945, 2 in 1950 and 1 in 1957. Article 2 of that Convention says: “The declaration of piracy against vessels which have risen in arms, emanating from a Government, is not binding upon the other States.” On the one hand, this could be regarded as a mere statement of the self-evident positivist position that each state has an equal power with all other states to classify events in legal terms as suits each classifying state’s policy and perceptions; it does not prevent any state from labeling rebel ships as “piratical.” On the other hand, article 2 of the Convention continues:

The State that may be injured by depredations originating from insurgent vessels is entitled to adopt the following punitive measures against them: Should the authors of the damages be warships, it may capture and return them to the Government of the State to which they belong, for their trial; should the damage originate with merchantmen, the injured State may capture and subject them to the appropriate penal laws.

The insurgent vessel . . . which flies the flag of a foreign country . . . may also be captured and tried by the State of said flag.²⁶

This specification of the state receiving the injury and the state whose flag is flown as the states to apply their criminal laws to the insurgents strongly implies that third states have no business in the affair; that universal

jurisdiction does not exist and that the law to be applied is the municipal law of the capturing state.

This impression is confirmed by article 3 of the Convention, which provides that an insurgent vessel arriving in a foreign country (presumably any country not suffering depredations and not the flag state of the vessel) shall return the vessel and consider the crew "as political refugees."²⁷ There is no hint of criminality.

Aircraft Hijacking. Aside from polemical writings, there appears to be only one other situation in the twentieth century in which "piracy" has been spoken of seriously as a living legal conception applicable in circumstances analogous to what was presumed to be "classical" "piracy." That was the situation of aerial hijacking.

The notion that aircraft could be seized by people of unknown nationality or no nationality, or subordinate to no recognized licensing authority, and that such seized aircraft could interfere with air navigation over the high seas, Antarctica or other parts of the globe outside the territorial jurisdiction of any particular state, makes it possible to consider that the reasons supporting an international law of "piracy" might apply as well to aircraft as to ships. In the attempts to codify the supposed public international law of "piracy" culminating in articles 14-22 of the 1958 Geneva Convention on the High Seas²⁸ aircraft came to be included with ships as if equally susceptible to "piratical" seizure and uses. Thus, when in the 1960s several incidents arose involving the seizure of commercial aircraft by passengers seeking to divert them for their own purposes to some country other than the one which their operators had intended, and some commercial aircraft seizures were made with the apparent intention of making some political statement, or drawing public attention to the real or fancied grievances of some political movement or individual, the phrase "aircraft piracy" came into vogue in the United States and elsewhere.²⁹ Nonetheless, in the legal action taken by states in the international plane to control this interference with international commerce, the word "piracy" and its presumed legal results were not used.³⁰ Instead, in the Convention on Offenses and Certain Other Acts Committed on Board Aircraft signed at Tokyo on 14 September 1963³¹ municipal jurisdiction and municipal substantive law were taken as the basis for the control of unauthorized actions on board aircraft in flight or outside national territorial jurisdiction. As to jurisdiction, the state of registry of the aircraft was confirmed in its competence to exercise jurisdiction to enforce its municipal criminal law prescriptions over offenses and acts committed on board. In addition, "universal" jurisdiction to prescribe was impliedly rejected as contracting states which are not states of registry of the aircraft in which the reprehended act has occurred were forbidden to interfere with the aircraft in flight, even over their territory, thus within the enforcement jurisdiction of

the state, except for five situations: (a) the offense has effect on the territory of the interfering state; (b) the offense has been committed against a national or permanent resident of that state; (c) the offense is against the security of that state; (d) the offense consists of a breach of rules relating to the flight of the aircraft within that state; or (e) the exercise of jurisdiction is necessary to ensure the observation of a multilateral international agreement by that state.³² All of these categories seem vague enough, but all seem linked to traditional bases for municipal criminal law prescriptive jurisdiction³³ and require legal "standing," some special interest in the situation to warrant action other than the general interest of all states in the safety of international civil aviation.

The most far-reaching provisions of the Tokyo Convention do not really go to questions of criminal jurisdiction at all, but to the authority of an aircraft commander to discharge a passenger on foreign territory, and the obligation of the state in whose territory the person is disembarked to receive him and detain him until the normal criminal law of some state with jurisdiction to prescribe has been examined and extradition, if appropriate, or trial in the state of disembarkation, if appropriate, has been set in motion.³⁴

The offenses coming within this jurisdictional arrangement are any offenses against the penal law of any state which, under the Convention, has jurisdiction to prescribe, and "acts which, whether or not they are offenses, may or do jeopardize the safety of the aircraft or of persons or property therein . . ." ³⁵ The conceptual framework thus seems not to involve any abstract uniform definition of "piracy" unless acts which may jeopardize the safety of the aircraft or of persons or property in it are classified by some pertinent state's municipal law with that label. But since those acts might well include acts which are not criminal under any known conception of criminal law, such as the uncontrollable fit of a person incompetent to control his actions, or simply obstreperous drunkenness, it is very difficult to see in this language an attempt to define "piracy." The reference to offenses against the penal law of any state having jurisdiction under the Convention to prescribe offenses seems reminiscent of the most expansive position taken by Justice Story in the United States in 1812³⁶ and rejected by the Supreme Court including Story himself.³⁷

It would appear that the Tokyo Convention viewed this way is not addressed to any questions of substantive criminal law, but to questions of the safety of civil aviation. It resolves those questions by encouraging states to exercise their existing prescriptive jurisdictions based on linkages between the place of the act, the nationality of the actors and their victims, and the impact of the act on the territory of the state involved, but does not assert any "universal jurisdiction" that could involve states which are strangers to the incident in the enforcement processes of the law. It does not define any criminal acts at all, but encourages states to use their existing penal codes in

cases within their jurisdiction, and, in its one innovation, requires states to receive obstreperous passengers or crew members whose acts might endanger flight safety; but not for the purpose of criminal proceedings (unless otherwise based). The obstreperous passenger, if not otherwise to be tried or extradited for trial on the basis of existing national penal laws and extradition treaties, is to be released promptly.³⁸

A far more innovative approach was taken in the Hague Convention of 16 December 1970 for the Suppression of Unlawful Seizure of Aircraft.³⁹ That Convention does not use the word “piracy,” but instead defines in general terms “the offense”:

Any person who on board an aircraft in flight:

- (a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act, or
- (b) is an accomplice of a person who performs or attempts to perform any such act,
- (c) commits an offense (hereinafter referred to as “the offense”).⁴⁰

Each contracting party is bound to make “the offense” punishable “by severe penalties.”⁴¹ The United States has done so by directly referring to the Convention in a statute making the commission of “‘an offense,’ as defined in the Convention for the Suppression of Unlawful Seizure of Aircraft” punishable by “not less than 20 years” imprisonment.⁴² Oddly, the American statute goes on to repeat verbatim the definition of the offense as set out above.⁴³ Presumably the intention was merely to set out in American municipal law what the elements of the offense were to be, and the incorporation by reference to the Convention was to assure that the definition would be regarded as the discharge of American obligations under Article 2 of the Convention and to assure that the definition of the offense would be interpreted in the light of the international negotiation, not merely the American interpretation of it.⁴⁴

In fact, the interpretation of the Convention’s definitional article is not free from doubt. What, for example, does the word “unlawfully” refer to? If “unlawful” under the law of the flag state alone, the definition would seem to require states to cooperate in the suppression of revolution, where the rebels seize the aircraft as an act of what they regard as lawful war not subject to the flag state’s municipal law, and the defending government regards as an act of municipal law robbery or treason. Indeed, rebellion is not the only situation in which the question would arise; any enemy seizure in the claimed exercise of belligerent rights would be “unlawful” under the law of the state whose aircraft is seized. yet it is most unlikely that the parties to the Convention were attempting to insulate civil aviation entirely from the vicissitudes of military action.

If, on the other hand, “unlawful” is intended to refer to “international law,” then belligerents might have the authority to seize enemy flag civil aircraft (or even neutral flag civil aircraft in some circumstances, for

example, to prevent the flow of contraband to blockaded territory). But then the legitimacy of the seizure would seem to depend on whether the state interpreting the Convention in any particular case “recognized” the belligerent status of the organization authorizing the seizure. It seems unlikely that much additional security to international civil aviation would result as long as the group doing the seizing had influential political sympathizers in a potential state of landing. Moreover, questions such as the validity and extent of the “authorization” would become significant, and the same issues would arise that resulted in the eventual abandonment of the “lack of license” condition as an element of the classical British (and possibly international) law of “piracy.”⁴⁵ These doubts are in large part resolved as a result of dropping the *animo furandi* qualification of British municipal law as it had been applied in British assertions of international law, and then abandoned as the world “piracy” came increasingly to be used as a mere excuse for political action unjustifiable under any concept of legal tradition limiting the policing jurisdiction of states with no direct legal interest in a particular incident.⁴⁶ The legal effect of dropping “*animo furandi*” as an essential element of the “international crime” of civil aircraft hijacking is apparently to inject the international community into political matters that might have been confined to a single state or small group of states.

That is the Convention’s great innovation. Civil aviation by widely accepted treaty seems now to be, at least among the parties to the Convention not uttering reservations dealing with political motivation,⁴⁷ legally protected from interference on the basis of substantive law analogous to the legal rules asserted to underlie the protection maritime states claimed was owed to merchant shipping on the high seas in the seventeenth and eighteenth centuries. Civil aviation is, as it were, “neutral” with regard to political struggles among recognized belligerents and its liability to seizure determined by the laws and customs of war in that context. In the absence of “belligerency,” the “lawfulness” of the seizure by a group whose status in the international legal order is “unrecognized” by another state is, as far as that other state is concerned, non-existent for lack of an authority competent to issue a license either under any municipal law or under international law. In neither case is motive or intention, *animus furandi*, pertinent to triggering the legal obligations of the states parties to the Convention.

The jurisdictional provisions, article 4, of the Convention approach “universality” in a way that only Justice Joseph Story and other extreme “naturalists” would have found congenial:

1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offense or any other act of violence against passengers or crew committed by the alleged offender in connection with the offense, in the following cases:

(a) when the offense is committed on board an aircraft registered in that State;

(b) when the aircraft on board which the offense is committed lands in its territory with the alleged offender still on board;

(c) when the offense is committed on board an aircraft leased without crew to a lessee who has his principal place of business . . . in that State.

2. Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offense in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article . . .⁴⁸

Article 8, in pertinent part, says:

1. The offense shall be deemed to be included as an extraditable offense in any extradition treaty existing between Contracting States . . .

But the full impact of Article 4.2 cannot be understood unless read in conjunction with yet another provision of the Convention, article 7:

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offense was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offense of a serious nature under the law of the State.⁴⁹

The intention seems clear to make the state in which the offender is found legally competent to try him even in the absence of other contacts between the offender or the offense and that state. This is the jurisdiction asserted historically in the case of piracy only by “naturalist” jurists, and applied as far as can be told from the present research, only very few times.⁵⁰

Since the “universal” jurisdiction provided in the case of aerial hijacking is provided by treaty, and is not necessarily a reflection of any underlying conviction of law, the precise legal situation is less clear than might at first appear. If, for example, the “asylum” state refuses to extradite the accused, perhaps for lack of an extradition treaty which article 8 can be considered to amend, there is no obligation in article 7 to try him in the exercise of “universal” jurisdiction, but only to submit the case to the “asylum” state’s competent authorities for prosecution. They can still find prosecution undesirable or impossible for lack of evidence or even for lack of jurisdiction over the offense regardless of article 4.2. For example, in the American legislation to implement the Convention in the United States, it is provided:

The subsection shall only be applicable if the place of takeoff or the place of actual landing of the aircraft on board which the offense, as defined . . . [above], is committed is situated outside the territory of the State of registration of that aircraft.⁵¹

Taken together with other provisions that define the “special aircraft jurisdiction of the United States,”⁵² this seems to mean that if a civil aircraft registered outside the United States, and flying between one third state and another, not actually landing in the United States, and not leased to a lessee with a principal place of business or permanent residence in the United States, is hijacked, the United States will still lack a court competent to try the

accused for his offense. It is not known how the United States can argue persuasively that this restrictive view of American jurisdiction in the case of aircraft hijacking discharges American obligations under article 4.2 of the Convention, but if the American legislation is consistent and complete and does discharge American obligations under the Convention, the United States can legally still be a haven state for hijackers who have managed to flee there after the initial landing elsewhere. And if the American legislation is regarded as consistent and complete to discharge American obligations under the Convention, the same haven possibilities must legally exist for other states parties to the Convention. Thus, it appears that the United States, and other states interpreting the Convention as the United States seems to, still reject "universal jurisdiction" in principle, but apply their legal prescriptions in criminal cases only to alleged criminals and acts that have some territorial connection with the "asylum" state.

Two ironies must be pointed out. The establishment of an international consensus requiring states to enact municipal "criminal" laws to forbid acts analogous to the interference with shipping that formed the basis of the British municipal law of "piracy" and the British view of the purported international law of "piracy," reintroduced the conception that to be a "crime" under international law, the taking had to be unauthorized by some sovereign's license, and abandoned the British municipal criminal law requirement that the taking to be "piracy" had to be "*animo furandi*." This is the reverse of the evolution of the municipal law definition, which had, for reasons and in ways amply discussed above, abandoned the notion of passing on the validity of a foreign license and emphasized instead the motive of private profit as an essential element of the municipal law offense. It remains to be seen whether the word "unlawful" in the Convention and the American implementing legislation will eviscerate the definition, or turn it into a political or international law matter in which the existence of a "license" from a party legally empowered to give it will depend on "recognition" of the "belligerent" status of the hijackers' organization by political officers of the government with custody of the hijackers.

More striking, the rejection in practice by the United States of the "universal jurisdiction" not only permitted, but apparently required, by the Convention, highlights the underlying power of the Westphalian legal order and its implied limits on the prescriptive jurisdiction of states. Story and Wheaton maintained the theoretical possibility that American jurisdiction under the Constitution might extend to the acts of foreigners abroad despite the uneasiness of Marshall, Johnson and others who in practice limited the assertions of jurisdiction to cases in which some American interest could be shown to support that jurisdictional assertion. The limits that the international legal order places upon the reach of any single state's constitution were not bluntly acknowledged by the American courts, although hinted at

often enough. Now, with every reason, including the positive commitments of the United States, to extend American legislative competence to the acts of international pariahs, and no apparent reason not to exercise that prescriptive jurisdiction, the Congress withheld its legislative hand, restricting its grant of jurisdiction to American courts to cases in which that jurisdiction could be supported by reference to ancient and deep traditions of the limits to prescriptive authority. It remains to be seen whether this self-denying approach to prescriptive jurisdiction will be applied in other areas in which the American “naturalist,” “universal law” courts have taken a less restrained position.⁵³ Foreign sovereigns have already begun to make known their unhappiness with the unrestrained American assertions of the legal power to make rules for the conduct of foreigners abroad on the basis of some territorial effects which might or might not pass the threshold of legal interest necessary to support the jurisdictional assertion.⁵⁴

A third recent international Convention dealing with acts done outside of a belligerency context which endanger international civil aviation is the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, concluded in Montreal on 23 September 1971.⁵⁵ The substantive offenses covered by the Convention are listed:

1. Any person commits an offense if he unlawfully and intentionally:
 - (a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or
 - (b) destroys an aircraft in service . . . ; or
 - (c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft . . . ; or
 - (d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or
 - (e) communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight . . .⁵⁶

The jurisdictional provisions of the 1971 Montreal Convention are, with minor changes not relevant to the subject of “piracy” or “universal jurisdiction,” identical with the jurisdictional provisions at the Hague Convention of 1970 analyzed above. To the extent the offenses listed in the 1971 Convention cannot be construed to be included already in the 1970 Convention’s terms, they are not within the definition of “aircraft piracy” in the municipal law of the United States.⁵⁷ There is no special statute bringing the substantive or jurisdictional terms of the 1971 Convention into the municipal law of the United States; its substantive terms are apparently regarded as included already in American legislation making it a crime under the municipal law of the United States for “Whoever,” other than a law enforcement officer:

. . . while aboard, or while attempting to board, any aircraft in, or intended for operation in, air transportation or intrastate air transportation, [to have] on or about his person or his property a concealed deadly or dangerous weapon, which is, or would be,

accessible to such person in flight, . . . [or to have] placed . . . or attempted to have placed aboard such aircraft any bomb or similar explosive or incendiary device . . . ⁵⁸

There is no reflection in the American municipal legislation that this language was intended to discharge any international commitment or bring into American municipal law the conceptions of a treaty whose meaning would have to include a study of the intentions of its other parties and drafters.⁵⁹

Although there have been other attempts by individual scholars and some statesmen speaking in non-legal contexts to analogize various actions of unrecognized belligerents or "criminals" to "piracy," apparently for the purpose of encouraging concerted international action to suppress those activities, none has succeeded in actually bringing the concept of "piracy" or the word into the international legal arena with meaningful consequences.⁶⁰

Attempts to Codify the International Law of Piracy

Introduction. Throughout the preceding pages little reference is made to the writings of learned publicists dealing with their conceptions of the international law of "piracy" except for those publicists who, by virtue of their eminence and their influence on later writers and state practice, have participated in the law-making process more or less directly. Some, such as Grotius and Gentili, established or applied patterns of legal thought that have been influential regardless of the superficiality (in the case of Grotius) or frankly adversary twist (in the case of Gentili) of their conclusions. Others, such as Molloy, Jenkins, Blackstone and Wooddeson, have been so influential on the course of Anglo-American jurisprudence and practice that some detailed analysis of both their patterns of thought and their substantive summaries of the law of "piracy" have been necessary. Still others, such as Wheaton and Dana, were so directly involved in the legal evaluation of events and so prestigious within the narrow intellectual world of their place and time that it may be taken that their views represented major trends of official thought. Of course, many publicists of lesser influence or lesser direct involvement in affairs addressed the definition of the law of "piracy" and its legal consequences in monographs of more or less cogency. Fortunately for the length and coherence of this study, expert analyses of those lesser writings were made as part of a codification movement during the first third of the 20th century and it is unnecessary to repeat those analyses here. It is necessary to look at the results of those analyses.

The League of Nations Effort. On 22 September 1924 the Assembly of the League of Nations formally requested the Council of the League to convene a committee of experts to prepare a provisional list of the subjects of international law the regulation of which by international agreement would seem to be most desirable and realizable, to circulate that list to the

international community, and to report to the Council on the results.⁶¹ "Piracy" was among the subjects chosen by the "Committee of Experts for the Progressive Codification of International Law" set up under this arrangement. A Sub-Committee consisting of M. Matsuda of Japan as Rapporteur and M. Wang Chung-Hui of China delivered its Report to the Committee in January 1926, and the Report, amended by M. Matsuda on 26 January 1926 as a result of the Committee's deliberations,⁶² was circulated to Governments for their comments on 29 January 1926.

The Report contains no citations to learned texts or specific state practice or cases, thus there is no distinction between those elements that might be considered to codify well-based existing international law and those that might be new. It is acknowledged in the Report that there is considerable "confusion of opinion" among scholars on the subject of "piracy," but that confusion is not traced to doctrinal differences or the changing perceptions of states over time or any other of the sources of differing opinion analyzed above. It is attributed instead "to failure to draw a clear distinction between piracy in the strict sense of the word, as defined by international law, and piracy coming under the private laws and treaties of individual states."⁶³ Thus, the eight articles of the "Draft Provisions for the Suppression of Piracy" proposed by the Committee and drafted in final form by M. Matsuda on 26 January 1926 reflect 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.

The key provisions of this purported codification for purposes of this study are the following:

Article 1: Piracy occurs only on the high seas and consists of the commission for private ends of depredations upon property or acts of violence against persons.

⁶⁴ It is not involved in the notion of piracy that the above-mentioned acts should be committed for the purpose of gain, but acts committed with a purely political object will not be regarded as constituting piracy.

Article 2: It is not involved in the notion of piracy that the ship should not have the right to fly a recognized flag, but in committing an act of piracy the pirate loses the protection of the State whose flag the ship flies.

Article 3: Only private ships can commit acts of piracy. Where a warship, after mutiny, cruises on its own account and commits acts of the kind mentioned in Article 1, it thereby loses its public character.

Article 4: Where, during a civil war, warships of insurgents who are not recognized as belligerents are regarded by the regular Government as pirates, third powers are not thereby obliged to treat them as such.

Insurgents committing acts of the kind mentioned in Article 1 must be considered as pirates, unless such acts are inspired by purely political motives.

Article 5: If the crew of a ship has committed an act of piracy, every warship has the right to stop and capture the ship on the high sea.

On the condition that the affair shall be remitted for judgment to the competent authorities of the littoral State, a pursuit commenced on the high sea may be continued even within territorial waters unless the littoral state is in a position to continue such pursuit itself.

Article 6: Where suspicions of piracy exist, every warship, on the responsibility of its commander, has authority to ascertain the real character of the ship in question. If after the examination the suspicions are proved to be unfounded, the captain of the suspected ship will be entitled to reparation or to an indemnity, as the case may be. If, on the contrary, the suspicions of piracy are confirmed, the commander of the warship may either proceed to try the pirates, if the arrest took place on the high sea, or deliver the accused to the competent authorities.

Article 7: Jurisdiction in piracy belongs to the State of the ship making the capture, except: (a) in the case of pursuit mentioned in Article 5, paragraph 2; (b) in the case where the domestic legislation or an international convention otherwise decides.

Article 8: The consequences of capture, such as the validity of the prize, the right of recovery of the lawful owners, the reward of the captors, are governed by the law of the State to which jurisdiction belongs.⁶⁴

The replies of Governments to which the Report was sent are very lengthy and serious questions were raised with regard to each of the draft articles.⁶⁵ Only one country, Portugal, commented on the definition in the light of historical usages of the word "piracy." The Portuguese response noted that "the Norman [Viking?] pirates acted on the western coasts of Europe, and later the Barbary pirates in the Mediterranean" attacked shore points; did not confine their piratical activities to the "high seas."⁶⁶ But aside from the implication that the Committee of Experts/Matsuda definition was not a codification of the entire body of pre-existing international law relating to "piracy," no deeper analysis was offered. Nor was there any significant discussion of the universality principle of Article 7. There is no explanation available as to whether the second paragraphs of Articles 4 and 5 were added with the *Huascar* incident in mind;⁶⁷ it looks as if somebody was trying to present as if a rule of established law some assertions of principle that would cover the British action without unduly upsetting the Government of Peru or those scholars, including eminent British scholars, who found the actual British position as presented publicly to be argumentative and unconvincing.

The way around the questions of historical and juristic analysis that the Committee and its Rapporteur seemed unwilling to try to resolve, or unable to resolve in the light of the strong jurisprudential assertions and policy positions of many states, was to present the draft without historical or jurisprudential analysis, as a draft treaty *de lege ferenda*; i.e., as a proposal for new law regardless of history and theory. This was permissible as "progressive" codification within the terms of reference of the Committee, and some alteration in the previous conceptions of law is inevitable in any

codification exercise. Thus, the focus being forward, the consistency of the new proposal with history and theory became unimportant.⁶⁸

But this orientation raised questions with regard to the utility of the Committee's work on "piracy." Despite the continued use of the word in some political and municipal law contexts, it was felt that "piracy" under that name was no longer a pressing issue to the international community. In the words of the Polish Representative (M. Zaleski) approved by the League Council on 13 June 1927:

It is perhaps doubtful whether the question of Piracy is of sufficient real interest in the present state of the world to justify its inclusion in the programme of the conference, if the scope of the conference ought to be cut down. The subject is in any case not one of vital interest for every State, or one the treatment of which can be regarded as in any way urgent, and the replies of certain Governments with regard to it indicate that there are difficulties in the way of concluding a universal agreement.⁶⁹

This view was adopted by Nicholas Politis as Rapporteur for a Sub-Committee of the First Committee of the Assembly of the League of Nations, who wrote with regard to "piracy," that this question "on which the conclusion of a universal agreement seems somewhat difficult at the present time, is [not] important enough to warrant . . . insertion in the agenda of the proposed Conference."⁷⁰ Accordingly, the Assembly of the League of Nations, in its Resolution of 27 September 1927 requesting the Council to arrange with the Netherlands for the Codification Conference, did not include "piracy" in the proposed agenda⁷¹ and nothing more came of M. Matsuda's Report or the documentation it provoked.

The Harvard Research in International Law

Introduction. The initiative of the League of Nations in proposing activities preparatory to what was expected to be a major codification effort prompted the faculty of the Harvard Law School to organize its own research effort to contribute to the Codification Conference. A Committee was set up by the Harvard Research program to consider the international law of "Piracy" independently of the efforts of Matsuda and the League. The Reporter was Professor Joseph W. Bingham of Stanford University, who chose as his advisers a learned body composed almost exclusively of residents of California.⁷²

The result of the new effort was a full draft Convention of 19 articles, the last one, obviously irrelevant to "piracy" and *de lege ferenda*, being a commitment to peaceful settlement of disputes arising out of the interpretation or application of the Convention and referring to arbitration or adjudication by the Permanent Court of International Justice set up in 1920 or the arbitration procedures provided in the Hague Convention of 18 October 1907 for the Pacific Settlement of International Disputes.⁷³ It is thus obvious that the drafters of the Convention regarded it as not merely codifying, but

also as blending the international law of "piracy" in to the system of legal relationships that they believed applied in the world of their time. The draft could thus reflect formulations *de lege ferenda* without violating the fundamental conception of its function, as an aid to the attempts of the time to "codify" the rules of international law as they ought to exist rather than as they could be shown to exist by an examination of theory and past practice.

The Theory Behind the Harvard Draft. The Harvard Researchers recognized immediately that the public international law relating to "piracy," if any such existed, had to be analyzed separately from the municipal law said in various countries to apply to "piracy": "[P]iracy under the law of nations and piracy under municipal law are entirely different subject matters and . . . there is no necessary coincidence of fact-categories covered by the term in any two systems of law."⁷⁴ One aspect of the jurisprudential split between "naturalists" and "positivists" analyzed at such length above, is summarized as "a decided difference of fundamental theories" between those jurists (whom I have denominated "naturalists") who view the "law of nations" as a legal order directly applicable to individuals, merely lacking enforcement mechanisms outside of the state system, and those jurists (whom I have denominated "positivists") who adopt "the modern orthodox theory" that the law of nations is a law between states only.⁷⁵

The view that international law is a legal order that applies directly to individuals, that states serve only to enforce that law, is considered "naturalist" because in the absence of practices indicating that states actually adopt that view, and in the absence of legislative machinery in the legal order other than treaty and practice to create or exemplify legal rules, the formulation of the "rules" is left to scholars without the interposition of the kinds of policy considerations that differentiate legislation from moralization. The logic is that of Molloy.⁷⁶ It is part of the "rule of reason" in English Common Law.⁷⁷ The notion traces back ultimately to Cicero and, in a rather more strained way, to Aristotle or even Plato. But an analysis of the roots of "natural law" theory and the evolution of the concept through all its ramifications is far beyond the scope of this study and, when pursued deeply enough, trenches on philosophical postulates regarding the nature of ideas and the relationship between abstractions and reality.⁷⁸

The view that international law can be conceived as a "legal" order only if restricted to relations among states and other group actors on a stage that disregards the notions of individuals who are not members of the cast with whom the actors choose to deal, is "positivist" because of the interposition of policy judgments in the process by which certain perceived moral rules or policy preferences become binding as if "law."

A rule of thumb for distinguishing between the assertions of "law" on the basis of "reason" and assertions of "law" on the basis of the implications of

policy-based consent, lies in the pattern of legal argument. Arguments based on “reason” assume moral underpinnings and aim at defining the “issues” (or moral principles) touched by a proposed “rule,” finding the highest virtue or social function in the formulation favored by the arguer. Arguments based on “positive law” disregard “principles” which are viewed as part of the law-creating legislative process, not part of the process of finding and applying established law. “Positivist” jurists look instead for express or implied consent in diplomatic correspondence (in the case of international law) and behavior implying the acceptance of rules as an exercise of policy judgment regardless of morality. Little weight is given to behavior in the obvious interest of the acting state; much to behavior that seems against the immediate interest of the state but which the state performs out of an apparent sense of obligation, or of a desire to conform to some rules regardless of immediate interest. From this point of view, the attitudes of states and their courts towards individuals called “pirates” by that state or its judges, are impressive most where the acting state has no basis for jurisdiction, no direct legal interest, in the activities complained of. From this point of view, British assertions of jurisdiction over foreigners on the high seas or in non-European or American territory are of doubtful legal value, because the British self-interest in those assertions is so obviously great. But British deference to the better-based jurisdiction of others, as in the handing over to the United States in 1834 of the “piratical” Captain and crew of a Spanish ship whose depredations had Americans as victims and not English people,⁷⁹ and the equivalent relinquishment by the Americans to France in 1822 of the accused slave traders of the *Jeune Eugenie*⁸⁰ are far more persuasive as to rules of law restricting the legal powers of states precisely because the self-denials were so clearly performed against the inclinations of the naturalist jurists involved.

All this jurisprudential thought implied a division between, on the one hand, publicists classifying the international law of “piracy” as a valid set of rules established by universal reason and immediately applicable to individuals but enforced only through the intermediacy of states, implying universal jurisdiction and only technical procedural problems of “standing;” and, on the other hand, publicists classifying the facts and precedents to deny the very existence of an international law of “piracy,” but asserting the existence of merely a subset of the municipal maritime laws of many states by which jurisdiction over foreigners could be asserted on the basis of the nationality of the victim of a depredation that did not occur solely within a single vessel or other specific jurisdiction that could be claimed to be exclusive.

The Harvard Researchers adopted the latter, “positivist” view:

Since, then, pirates are not criminals by the laws of nations, since there is no international agency to capture them and no international tribunal to punish them and no provision in the laws of many states for punishing foreigners whose piratical offense was committed outside the state’s ordinary jurisdiction, it cannot truly be said that piracy is a crime or an offense by the law of nations.⁸¹

The Harvard Researchers adopted this view not only for purposes of discussion, but as the jurisprudential basis for their draft Convention:

The theory of this draft convention, then, is that piracy is not a crime by the law of nations. It is 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 offenses which are committed outside the territorial and other ordinary jurisdiction of the prosecuting state and which do not involve attacks on its peculiar interests.⁸²

As to the key jurisdictional point, the Harvard Researchers do not seem to have undertaken the research that forms the body of this work. Instead, resting on argumentative secondary analyses, much of it by scholars who do not seem to have done much primary research either, the Harvard Researchers said:

Indeed it is difficult to find cases of exercise of jurisdiction over piracy which would not be supported on one or more of the ordinary grounds. They are very rare.⁸³

Recourse is had to writers then who support "universal jurisdiction" not on the basis of state practice, real incidents, diplomatic correspondence and municipal court cases referring to what was asserted to be international law by a municipal judge, but on the basis only of the writers' conceptions of the structure of the international legal order and filtered interpretations of state practice asserted to exist but difficult to demonstrate in particulars. These "naturalist" scholars, like Story, are quoted extensively, but their conclusions and jurisprudential viewpoint are not adopted. Instead, the most influential single publicist whose views are cited at length and for many points of approach is a German "positivist," Paul Stiel.⁸⁴ Stiel regarded the jurisprudential split between "naturalists" and "positivists" as a split between Anglo-American jurists, whom he regarded as "naturalist" despite the cases and the writings of John Marshall, Dana and the others,⁸⁵ and the "*Kontinentalen*" as "positivists" despite the writings of Grotius, Pufendorf and the others.⁸⁶ From this point of view, and without the detailed analysis attempted above, he concluded that a definition is possible: "Piracy is a non-political professional course of forcible robbery against nearly all countries undertaken at sea."⁸⁷ From this he isolated the elements of the legal concept, including location (high sea), physical means (force), intention (to take property), against whom (anybody), purpose (private enrichment), etc. Since this framework excludes privateering or the regular course of raiding attributed (falsely) by many European publicists to the Barbary states before 1830 and to others, and yet such activities had routinely been called "piracy" by many scholars and some courts, Stiel had some difficulty. He resolved this not by reconsidering his definition, or breaking the concept into two parts, as we have done above in the light of the historical evolution of the word "piracy" and its usage in different legal and political contexts, but by simply asserting the old state-authorized "piracy" to be obsolete, even though there seemed to him to be some similarities between the acts for which a "piracy"

conviction was obtained by English officials in Singapore in 1858 and the Roman practice against Illyrian raiders. His analysis is not deep and his assertion about the Malayan case of 1858 is unattributed and not evidenced in any other known source; his citation to Roman practice is not to any original source, but to the great nineteenth century German historian of Rome, Theodore Mommsen.⁸⁸ This leads Stiel into some difficulties when he finally comes to consider the doctrinal impact of Sir Stephen Lushington's opinion in the *Serhassan (Pirates)* case,⁸⁹ and those difficulties are avoided rather than solved by relegating the discussion to the section on political ends, denying that the legal concept of "piracy" applies to political actors, but finding some states to be "capable of being classified "piratical" because they lack political goals for their takings.⁹⁰ It is not at all clear that the desire of the Serhassan communities to be free of British visits and other influences, which prompted the attack on British warships that led to the punitive raid held by Lushington to entitle the victors to the bounty paid to those who engage "pirates," was non-political, and Stiel does not explain why he classifies it as such.

Similarly, the British position in the *Huascar* correspondence⁹¹ is not analyzed; instead the British suggestion that unrecognized "rebels" can be properly considered "pirates" as a matter of international law is dismissed as questionable because as long as the rebels' victims are only government vessels of their own state nobody would consider them "pirates," and an *ad hoc* denomination as "pirates" solely because of the nationality of the victim vessel seems more than any criminal law conception should bear.⁹²

Now, none of this analysis of Stiel diminishes the utility of Stiel's proposal as useful *de lege ferenda* for the law of "piracy" as it might have been acceptable to states in the early years of the 20th century, and the use of Stiel's suggestions regardless of the doubtful soundness of the historical and legal evidence on which they rest is justified for that purpose. Indeed, there is much in Stiel's work that could as well have been based on a more thorough analysis, and, regardless of soundness, seems consistent with the conclusions possible to reach from the cases and jurisprudential discussions above. In taking the general orientation proposed by Stiel as the basis for their own draft, the Harvard Researchers thus did not necessarily diminish the value of their proposal as an exercise *de lege ferenda*.

In their use of earlier scholarship in general, however, the Harvard Researchers themselves seemed somewhat confused. Long quotations from Stiel⁹³ are preceded or followed with what appear to be supporting quotations from a variety of sources addressing different problems from different jurisprudential perspectives and at different times. Article 3, the definition of "piracy" for purposes of the draft Convention, quotes at some length from what seem to be 54 different sources in addition to Stiel, mostly European publicists of the 19th century, who were supposed to support in one way or another various parts of the proposed definition. There is no apparent attempt

to evaluate those writings by jurisprudential view or any other clue as to relative persuasiveness; there is no chronological consistency or indication that perhaps the rules found persuasive in Italy or other states deriving their experience from Roman or Mediterranean interactions were rejected by world-stage actors, like England in the 17th century and later, because of possible differences in the political structure of the overall society whose trade was to be protected from interference, or the self-image of the state accepting or denying the role of world policeman against "piracy."⁹⁴ Thus, the Harvard draft must be evaluated on its own merits as a legislative proposal, and cannot be supported as a reflection of a scholarly analysis of precedent and theory. Indeed, the Researchers themselves seem to throw up their hands in dismay with regard to the definition of "piracy":

An investigation finds that instead of a single relatively simple problem, there are a series of difficult problems which have occasioned a great diversity of professional opinion. In studying the content of the [definition] article, it is useful to bear in mind the chaos of expert opinion as to what the law of nations includes, or should include, in piracy. There is no authoritative definition. Of the many definitions which have been proposed, most are inaccurate, both as to what they literally include and as to what they omit. Some are impromptu, rough descriptions of a typical piracy.⁹⁵

In these circumstances, the legal analysis implicit in the Harvard draft is of minimal interest to this study; indeed it is almost wholly lacking in the Report itself.

The Text of the Harvard Research Draft Convention. As an exercise in proposing legal formulations taking due account of the confusions of the period regarding the concept of "piracy" and the persistence of the concept as a factor in justifying some legal results, the Harvard draft has had a major impact on the development of legal thought. For the sake of completeness, the entire text is reproduced in Appendix III.A below. But for present purposes only the definitional article and the articles dealing with jurisdiction are important. They follow:

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 of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, for private ends without a 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.

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 sea, 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 . . .

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 be made there, unless prohibited by the other state . . .

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 reparation.

Article 13:

1. A state, in accordance with its law, may dispose of ships and other property lawfully seized because of piracy.

2. The law of the state must conform to the following principles:

. . . (b) Claimants of any interest in the property are entitled to a reasonable opportunity to prove their claims. . . .

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 . . .

3. A state may intercede diplomatically to assure [fair and humane treatment] to one of its nationals who is accused in another state.

Weaknesses in the draft are immediately apparent. As to the substance of the offense, why are “rape,” “wound,” “enslave” and “imprison” there? There seem to be no cases supporting any such inclusions; the English Common Law of “robbery” had become the bedrock of the municipal law maritime offense that had come to be called “piracy” in England and America since the jurisdictional statute of 1536 was adopted; and “kill” could be conceived to have entered the definition in practice. Participation in the slave trade had been expressly ruled out of European (including British) definitions when that trade was a serious matter in international commerce.⁹⁶ And if “rape,” “wound” and “imprison” should be included merely because they are serious and violent offenses, why not “torture” or even generally “assault?”

Why is there a distinction drawn between acts “committed in a place not within the territorial jurisdiction of any state” for the purpose of defining the offense, and an act otherwise within the definition (indeed, more broadly stated in article four also to include “any similar act”) “within the territory of a state by descent from the high sea” for the purpose of defining a “pirate ship?” The definition of *what* is “piracy” in article three includes an implied definition of *who* is a “pirate” (whoever commits an act of defined “piracy,” as well as any of the fringe connections specified in paragraphs 2 and 3 of that article). Article four defines a “pirate ship” more broadly. It would seem that there could be conceivably a “pirate ship” with no “pirates” on board and that had never been involved in the commission of an act of “piracy,” if all its assaults were raids ashore. Presumably, to make some sense of this, it was to establish a category for ships *not* wholly lacking nationality from which an act of piracy within the definition of article three could be committed. But why, if the attacking vessel had national character, should the law of “piracy” come into play at all? At least, it is not clear why a ship which had been involved in shore raids should be considered a base for piratical acts when it acted at sea, and the identical vessel that had not previously committed shore raids would not be considered a base for piratical acts on the high sea unless it had first lost its national character. And if any vessel had first lost its national character, it would seem to be within the definition of a base for “piratical” acts at sea whether or not it had first been involved in shore raids. Article four seems senseless.

As to jurisdiction, clearly territorial jurisdiction is dominant and, contrary to the position of the Disraeli government in support of the actions of Admiral de Horsey in the *Huascar* incident,⁹⁷ pursuit into the territorial waters of any state can be forbidden under article seven. The language shifts the burden to the territorial sovereign to prohibit the chase, rather than limiting the authority of the policing state to pursue the “pirate,” but that seems to be as far as the Harvard Researchers were willing to go to meet the British position in principle.⁹⁸ And Article nine seems to take even that concession back by providing not only for a turning over to the territorial sovereign of the persons and property seized, but even the paying of reparations.

Finally, as to “universal” jurisdiction, article 13 refers back to the lawfulness of the seizure to determine if the seizing state can apply its own law to property seized. If the seizure was “lawful,” then it can apply its own law, apparently even if there is no identifiable national interest in the incident beyond the fact of the seizure by its officials. Article six appears to make lawful (although the word is not used) the seizure of “a pirate ship” or a ship “taken by piracy and possessed by pirates,” and the property connected with it; but the same seizure of the same ship and property would appear to be unlawful if the ship had been used for depredations only “against ships or territory subject to the jurisdiction of the state to which the ship belongs”

(article four). In that latter case, the ship would not be classifiable as a “pirate ship,” and whether the ship’s company were “pirates” could not be determined until after the seizure; the seizure itself could not be regarded as “lawful” when done. And if the ship was not in the first instance “taken by piracy,” but had been lawfully acquired, or even taken by robbery under the law of some territorial state while not on the high sea and not by descent from the high sea, then it is not clear that any taking by a second country’s officials would be “lawful” in the sense of article six. And if article six did not make the seizure “lawful,” then article 13 would apparently not apply. This construction opens up complications of a magnitude that cannot repay further analysis in this place since the Convention has never been adopted. But it is clear that the provisions as drafted do not represent a simple assertion of universal jurisdiction over ships and property involved in “piracy,” or of universal jurisdiction with a simple exception. This gingerly handling of ships and property involved in alleged “piracy” is particularly interesting as showing a complete denial of the concepts of a universal law of nations in the sense used by Blackstone and the framers of the American Constitution; concepts which included all maritime law within the law of nations and denied the legal significance of the place, or sovereign authority, of the tribunal erected to apply that universal law. The implication is not only that there is a cloud on the notion of universal jurisdiction over the goods involved in suspected “piracy,” but that the same rules of “standing” applied to determine which sovereigns’ courts could even hear the case; that standing *ratione materiae* and standing *ratione personae* must both be present in any piracy adjudication.

Article 14 seems to attempt to change that situation with regard to criminal trials, but again the universality of the jurisdiction is made to rest on the “lawfulness” of the “custody;” and that “lawfulness” seems to depend on the interpretation of article six. In the Researchers’ commentary to article six no clue is given as to the complications involved; they seem to have thought that article six merely codified an ancient “right of any state to capture on the high sea a foreign ship which has committed piracy or is the booty of pirates.”⁹⁹ But there is no citation to any case or writer to support this grand assertion, and, as has been amply demonstrated above, it seems wrong both historically and legally to the degree it ignores the general international law of “standing.” It seems to reflect the misconceptions of the time growing out of British assertions of a world-wide policing jurisdiction taken as a matter of policy and applied to foreign military vessels of non-European subordination in the absence of *animus furandi*, and not applied by any state to “pirates” in the context of the Harvard Research, *i.e.*, “persons” acting *animo furandi* within article three as “criminals” under the laws of all states.

There are many other peculiarities and questions raised by the Harvard Research draft Convention on Piracy, but since it was presented as an

exercise *de lege ferenda* and was not in fact adopted as such, it seems unnecessary to analyze it further in this place.

The Anglo-American Position. In 1931, while the Harvard Research was still underway, there was an incident in the Far East that resulted in the third known instance after 1705¹⁰⁰ of jurisdiction over accused “pirates” being exercised in the absence of a link to some traditional basis for jurisdiction to prescribe. The incident occurred between Chinese vessels on the high seas, and a capture of the accused “pirates” was effected by a British naval vessel, H.M.S. *Somme*, apparently (the report is not entirely clear) also on the high sea. The accused were taken in to the British tribunal in Hong Kong and there convicted of “piracy” subject only to the technical legal question of whether a mere attempt without an actual robbery was sufficient to constitute “piracy” for purposes of a British criminal conviction. The question was referred all the way to the highest British tribunal with jurisdiction over colonial courts, the Judicial Committee of the Privy Council. The opinion was unanimous among the five judges, and delivered by Viscount Sankey, the Lord Chancellor. It does not mention any jurisdictional doubts.¹⁰¹ As to the point of substance, the opinion seems to treat British precedents and writings, including those of Coke, Molloy, Jenkins, and the charge of Sir Charles Hedges in *R. v. Joseph Dawson*¹⁰² as if evidentiary of the evolving public international law regarding “piracy,” and not merely evidence of an evolving British municipal law. The *Huascar* correspondence is referred to with a single sentence reciting the facts followed by another single sentence saying merely: “The British Admiral justly considered the *Huascar* was a pirate, and attacked her.”¹⁰³ Dr. Lushington’s opinions in both the *Serhassan (Pirates)* and the *Magellan Pirates* cases, and the American case *The Ambrose Light*¹⁰⁴ are cited for the proposition that an actual robbery is not required for the crime of “piracy” to be completed. There is no notice of the fact that in all three cases there was no *animus furandi* at all, and that this lack might indicate that something other than the English crime of “piracy” might have been involved; the assumption is unstated that the legal word “piracy” covers both the acts descended from the English notion of robbery within the jurisdiction of English Admiralty tribunals and acts of interference with ocean shipping whatever the motive, and some assumption of British legal rights to police the sea. The confusion of concepts seems to have been complete.

It is noteworthy that the case is a British case and adopts the British view of natural law and British jurisdiction as an incident of an assumed universal jurisdiction. Although both the Harvard Research draft Convention and the League of Nations draft are cited with approval, there is no analysis of either except on the most superficial level. Other European publicists are cited; it appears all the citations to sources other than the usual English sources were taken from the Harvard Research, at least all those cited seem on cursory

inspection to appear also in the Harvard Research and the comprehensiveness of the Harvard Research is praised by Viscount Sankey.¹⁰⁵

The Privy Council's conclusion was:

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 juriconsults were expressing their opinions. . . . [T]heir Lordships . . . having examined all the various cases, all the various statutes and all the opinions of the various juriconsults cited to them, they have come to the conclusion that the better view and the proper answer to give to the question addressed to them is . . . that actual robbery is not an essential element in the crime of piracy *jure gentium*.¹⁰⁶

One other case was rescued from oblivion in 1932 and should be mentioned as evidentiary of the tendency of Anglo-Americans at the time to assert universal jurisdiction even where unnecessary to support the particular adjudication, and to cover all "piracy" cases with verbiage of a generality unnecessary and inappropriate to criminal proceedings. In 1922 an American court in the Philippine Islands affirmed a conviction for "piracy" against "certain Moros from the Philippines" who boarded a Dutch boat in the territorial waters of an island in the Dutch East Indies, raped the women and sank the boat with the men on board (who escaped to shore). An appeal on the basis of lack of jurisdiction was disallowed and the prison term was changed to a death penalty for the one of the two defendants who had committed the rape.¹⁰⁷ As reported, the decision says: "Nor does it matter that the crime was committed within the jurisdictional 3-mile limit of a foreign state," because "The jurisdiction of piracy unlike all other crimes has no territorial limits." Since the actual conviction of Lol-Lo was for rape, and it was for the rape and not the piracy that he was sentenced to death, this is very difficult to understand. Why was a rape within the territorial jurisdiction of the Dutch authorities within the jurisdiction of the American authorities also? It is especially difficult to understand when the definition given by the tribunal for the "crime of piracy" was: "Piracy is robbery or forcible depredation on the high seas, without lawful authority and done *animo furandi*, and in the spirit of universal hostility." Even if "rape" fits within the concept of "forcible depredation" (which seems doubtful not only as a matter of definition, but because the sentence for "piracy" was life imprisonment and the sentence for rape was death; it is hard to see a crime with a greater penalty as a lesser included offense of a crime with a lighter penalty), it is incomprehensible that "on the high seas" means also "within the territorial waters of a foreign state."

In fact, if the Spanish-rooted law of the Philippines, which is reported to have been the law applied, could have been construed to apply to Philippine defendants acting abroad, and jurisdiction could have been based on the personal power of a sovereign to prescribe rules binding on his subjects

wherever they are, the jurisdiction was easily supportable on the basis of the nationality of the actors, not universality. As reported, no mention is made of the established Constitutional limits to American prescriptive jurisdiction as pronounced by the United States Supreme Court in 1820,¹⁰⁸ or the long course of American practice that by 1922 for a hundred years had followed that result despite the constant reiteration of the theoretical possibility of universal jurisdiction which was in fact never asserted to lie within the territorial jurisdiction of a foreign sovereign, but only on the high sea. It must be concluded that the case is a unique, or nearly unique, example of a colonial court, this time an American one, making up a convenient law for itself regardless of precedent, logic or the political need to accommodate to the legal powers of neighboring sovereigns. It is probably not accidental that the incident occurred and was decided on the far fringes of two empires where the legal and political problems would not be likely to be significant.

Nonetheless, it is odd and significant for the trend of thinking in the United States that the "Piracy" section in the major compilation of American (and some foreign) legally significant practice published in 1941,¹⁰⁹ normally a source of balanced reportage and minimal comment,¹¹⁰ quotes the passages set out about from both *In re Piracy jure gentium* and *People v. Lol-Lo and Saraw* without any counterbalancing comment.¹¹¹ Universal jurisdiction seems to have been adopted at the official American position by 1941, and the contrary cases and logic forgotten.

The Law of Sea Codification of 1958

The International Law Commission Draft. As part of a more or less complete review of the law of the sea, with an eye to eventual codification, the United Nations General Assembly asked the International Law Commission to prepare a text that could form the basis for international agreement on the law of the sea.¹¹² The text originally prepared in French by J.P.A. François, the Commission's Special Reporter, titled *Regime of the High Seas*, was published on 1 March 1954¹¹³ and contains six articles dealing directly with "piracy." Article 23 is the definition. It is François's French translation of article three of the Harvard Research draft Convention.¹¹⁴ The other five articles are French translations of articles 4(1), 5, 6, 10 and 12 of the Harvard Research draft.¹¹⁵ The provisions set out above dealing with jurisdiction and the disposition of goods and persons seized as "piratical" simply do not appear in the François draft. In his commentary, the Reporter acknowledges that his draft is incomplete, saying that only those provisions necessary for protection against "piracy" seemed appropriate for the purpose of his assignment from the International Law Commission, but that if a more elaborate section on "piracy" were desired, the Harvard Research draft Convention with its 19 articles would be the best starting point.¹¹⁶

The International Law Commission began its discussion of “piracy” at its 289th meeting on 11 May 1955. At that session, the Commission adopted a proposal to include “piracy” in the article drafted by François in connection with the slave trade, requiring as a matter of abstract principle the cooperation of all states in suppressing both activities.¹¹⁷

The Commission began its discussion of the substantive “piracy” provisions of the François text, i.e., the Harvard Research draft Convention articles defining “piracy” and authorizing foreign state vessels to apprehend “pirates,” at its 290th meeting the next day.

It was apparent from the very beginning that the word “piracy” had such an overlay of emotion and conflicting meaning that many political compromises would have to be made. On 6 May 1955 the Government of Poland had submitted formal “observations” on the draft and accused the Republic of China of “piracy” in language reminiscent of the translators’ interpretation of Grotius’s charges against Portugal in the early 17th century:¹¹⁸

Foreign men-of-war assisted by airplanes forced to stop Polish ships maintaining peaceful commercial communication with the Chinese People’s Republic. . . . The[se] acts committed in the China seas constitute a most serious crime—namely, piracy. . . . The formulation of article 23 of the draft is in conflict with established views on piracy. It should be clear that the words “*bona fide* purpose of asserting a claim of right” cannot be used in connexion with such actions as robbery, rape, wounding, enslavement and killing. 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.¹¹⁹

After an acrimonious exchange among the Chinese, Czech and Soviet members of the Commission, it was decided that the Polish note was actually a complaint against the Republic of China lying outside the competence of the Commission.¹²⁰ The subject of nationalist Chinese naval vessels intercepting Soviet, Polish and other countries’ vessels heading for mainland Chinese ports after the Communist victories had resulted in the establishment of a Communist government in China in 1949, had already been raised in the United Nations, and attempts there to call the Republic of China’s actions “piratical” had been rejected in December 1954 by the Ad Hoc Political Committee (composed of all the members of the General Assembly).¹²¹ Nonetheless, in introducing the substantive definition of his article 23, the Reporter reintroduced the subject. He set out the debate between those jurists who regard *animus furandi* as an essential element of the international (as distinct from the municipal) law “offense,” and those who do not. François rejected the argument of the Polish memorandum on the ground that the Chinese vessels interfering with Polish shipping were public vessels.¹²² He sided with those who regard the *animus furandi* as an essential element of the international law offense. Other essential elements in his view were a location on the high seas, and that the offense be committed by one ship

against another. Since his own draft, copied from the Harvard Research draft, includes some land activity within the definition, it is hard to understand the rigidity of François's presentation on the second point. All three of his "essential elements" seem to be derived from the opinions of others with no analysis of their consistency with actual state practice, cases and the deeper levels of theory. There seems to be no reflection of the possibility that the requirement of *animo furandi* is historically derived from municipal law concepts and in practice not applied to limit the activities of the British in their attempts in the late 19th and early 20th centuries to keep open the sea lanes for peaceful traffic. Most disturbing, there seems to be no reflection in the presentation of M. François that the Harvard Research which he was presenting as the basis for discussion was drafted by its authors *de lege ferenda* and that those authors themselves regarded their disordered compilation of quotations as evidence not of any clear underlying concept of "piracy" in the international legal order, but just the opposite, as evidence that no clear conception could be derived directly from the writings of publicists or an examination of historical correspondence and cases. And while the research set out in some detail above seems to indicate that the Harvard Researchers were wrong, that there is indeed a complex order in the many uses of the word "piracy," equivalent research and jurisprudential analysis are not found in the Harvard Research nor were they supplied by François.

The Commissioners themselves quickly made it clear that each had his own special conception of "piracy," and his own notion of the historical and theoretical bases for that conception, excluding other conceptions as incorrect. For example, M. Georges Scelle (France) argued that "piracy" must include land-based activity, because otherwise the Barbary corsairs "would not have been pirates." On this basis he accused M. François of "a methodological error."¹²³ Mr. Zourek asserted that *animus furandi* was not an essential element on the ground that in his view the Nyon Treaty¹²⁴ included within the notion of "piracy" actions by submarines as state-owned vessels acting for what they conceived to be a public purpose.¹²⁵ These and other arguments were made and the 290th meeting broke up in some polite confusion. The next day, M. François presented a redraft, and a new draft based on the previous day's discussion was also presented by one of the Commissioners, Mr. Douglas L. Edmonds (United States of America). The Commission then decided to postpone the discussion of the definition of "piracy" while the two new drafts were examined.¹²⁶

At its 292nd meeting, on 16 May 1955, the International Law Commission finally began to discuss substantive questions on the basis of a working draft. The draft prepared by M. François was immediately challenged by Mr. A. E. F. Sandström (Sweden), who presented yet another counter-draft. The first point at issue was whether it would be proper to call "pirates" those who descended from the sea to perform their raids on land; François said not, on

the basis of "the Harvard report, together with the whole weight of jurisprudence."¹²⁷ Sandström did not challenge this patently erroneous interpretation of both the Harvard Research draft¹²⁸ and such precedents as the treatment of the Barbary states and such cases as the *Serhassan* (*Pirates*) (which François seems to have simply ignored), but defended his view as within the Commission's responsibility "to promote the progressive development of international law rather than its codification," arguing as a matter of policy that it was "inadmissible" that a warship should have to refrain from seizing "a pirate vessel" on the high sea because the act of piracy had been committed in territorial waters or on land.¹²⁹ The Commission then voted by 6 to 4 with 1 abstention to reject the Sandström draft and work from the François redraft.¹³⁰ But although the implication of this might seem to be that the Commissioners felt they were codifying a more or less clear legal conception, in fact the entire discussion that followed was based on policy considerations; there are no citations to cases or accepted rules of law that might apply by analogy. The International Law Commission seems in silence to have construed itself into a legislative session, while on the surface accepting François's view that codification was its function. Nobody noted that François's view was itself inconsistent with his basing his "codifying" text on another text, prepared by the Harvard Researchers, which was frankly non-codifying but *de lege ferenda*.

Acting thus as a legislative session, the International Law Commission agreed that territory not subject to the jurisdiction of any particular state, such as guano islands, should be assimilated to the high sea for the purpose of defining the location in which the law regarding "piracy" should apply.¹³¹ A proposal that ships which were suspected of being "pirate ships" within the sense of the draft should be subject to seizure only on the high sea and there only by properly authorized warships, but not police boats, was adopted 9 to 1 with 2 abstentions on the stated ground that a different rule "might encourage abuse,"¹³² although why police vessels should abuse their authority more than warships seems difficult to grasp and was not addressed. A short discussion of the differences between "piracy" and "mutiny" occurred, François taking the position that an attack on a second vessel should be necessary and Sandström that if the entire vessel were seized on the high sea by passengers or crew, not merely property within it, then acts of "piracy" would have occurred and should be treated as such in the draft.¹³³ Sir Gerald Fitzmaurice (United Kingdom) referred to the primacy of the law of the flag state in cases of mutiny, concluding that until the seized vessel acted against some other, committed a different and later "act of piracy," it would be premature to classify its seizure as "piracy" even if the whole vessel were taken. Although no vote was reported, there seems to have been a consensus that the approach taken by Fitzmaurice was persuasive.¹³⁴ Fitzmaurice's precise language, as recorded, seems excessively cautious: "[I]t would be preferable to make it

clear that piracy was not confined to acts committed on the ship itself, but that it essentially consisted in acts committed against another ship or persons not on the pirate vessel itself."¹³⁵ Indeed, read carefully, this seems to mean the opposite of what was apparently intended; that acts within a single vessel might well be denominated "piracy"—the first clause seems to say that that was the normal case, which is wholly inconsistent with the context; the second that the normal case involved a second ship or persons, but not necessarily so.¹³⁶ The point was not raised again, and the two-ships approach was taken in all the later drafts.

At the 293rd meeting on 17 May 1955, three minor points were resolved first. An attack by one aircraft against another was excluded from the definition of "piracy" by a vote of 8 to 3 with 1 abstention. Immediately afterwards, it was decided by consensus that an attack by an aircraft against a vessel should be denominated "piracy," and that provision should be included in the draft allowing military aircraft to take steps against ships committing "acts of piracy."¹³⁷

The longest discussion was reserved for a renewed consideration of the Chinese seizure of Polish merchant vessels and the question of "state piracy." S. B. Krylov (Soviet Union) pressed hard to have his view of the Nyon Agreement adopted as containing the "seeds of a new principle" regardless of the precedent of the Barbary corsairs. Jaroslav Zourek (Czechoslovakia) concurred on the basis of the inadmissibility of "superior orders" to exculpate a war criminal, although why he thought that "pirate" was an appropriate synonym for "war criminal" was not made clear. Fitzmaurice objected on the ground that the Nyon Agreement was based on the assumption that the parties had agreed not to authorize the kind of submarine warfare that was involved, and that therefore the acts could only be classified as for "private ends;" that the Nyon Agreement was therefore irrelevant to the argument made by Krylov. He also pointed out that acts of aggression or acts of war were not "piracy" in any known sense. Several members then questioned the impact of the concept of "public ends" on revolutions, denying that revolutionaries should properly be classified as "pirates" for any purpose and that in any case it was beyond the Commission's charge to attempt at this time to codify rules appropriate to the conduct of civil wars. After active discussion, Krylov's proposal was defeated by 10 votes to 2 with 1 abstention, and the words "for private ends" were specifically approved by 11 votes to 2. At this point, the entire text was referred to the Commission's drafting committee as non-controversial.¹³⁸

The Product of the drafting committee was reported at the close of the 7th session.¹³⁹ The changes from the Harvard Research draft are substantial, and seem to reach far beyond the normal scope of a drafting committee's authority, but there is no record of the reasons for those changes beyond what has been related above.

Article 13 begins the section on “piracy:”

Article 13: All States shall co-operate to the fullest possible extent in the repression of piracy on the high seas.

Obviously, the general provision drafted to apply only to the slave trade, then expanded to include “piracy,” had been shrunk back to its original size by dropping its original inspiration and leaving it applicable only to the afterthought, “piracy.” In the commentary, the debt to the Harvard Research is repeated but no support is given for this article except the assertion that it “lays down a sound principle.”

The most important changes are, of course, in the definition:

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 [*sic*: presumably *crew*] or the passengers of a private vessel or a private aircraft:

(a) Against a vessel on the high seas other than that on which the act was committed, or

(b) Against vessels, persons or property in territory outside the jurisdiction of any states . . .¹⁴⁰

Six points of substance were specifically noted by the Commission in its formal commentary:

First, that “the intention to rob (*animo furandi*) is not required.” Hatred or revenge are cited as motives equally appropriate for “piracy.” Of course, *animo furandi* has always meant something a bit more complex than the intention to rob,¹⁴¹ but the drafting committee cannot be faulted for petty overgenerality in a mere comment. Presumably the reference to hatred and revenge reflected some knowledge of the views of Joseph Story in 1844¹⁴² but precisely what knowledge is unclear.

Second, the Commission simply stated without discussion: “The acts must be committed for private ends,” thus crystalizing the rejection of Poland’s complaint against the Republic of China.

Third, the Commission reported, “Save in the case provided for in article 15 [mutiny by the crew] piracy can be committed only by merchant vessels, not by warships.” This assertion split the Commission, some of whose members cited the “Nyon Arrangement” of 1937¹⁴³ as evidence of a development of general international law giving all states a new right, or even an obligation, to suppress certain violations of the laws of war by one party during a civil war in order to safeguard freedom of navigation by neutrals on the high seas. The Commission as a whole rejected that view solely on policy grounds:

In view of the immunity from interference by other ships which warships are entitled to claim, the seizure of such vessels [warships] on suspicion of piracy might involve the gravest 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.¹⁴⁴

This judgment, that the enforcement of the laws and customs of war at sea in situations of belligerency, whether or not recognized, is less important to the world community than freedom of third party navigation on the high seas, does not seem to rest on any expressed legal analysis. As an unreasoned perception of the priority of two different values protected by the international legal order it seems entitled to some respect but not much. The same conclusion could have been reached along more traditional legal lines by noting that no states not parties to the Nyon Agreement appear to have modified their behavior in reliance on its formulation¹⁴⁵ and that its formulation itself does not make the unlawful acts "piracy" as such, but only attributes to them the legal results of "piracy" as a matter of analogy. But the penchant of international lawyers, even arbitral tribunals and persons acting officially within the authority of the International Law Commission, to pretend to the authority of legislators despite restrictions on their actual authority and their place in the legal order has been frequently documented and needs no further comment here.¹⁴⁶ There is no hint from the records of the International Law Commission that the concept of warships as "piratical" might have ancient roots implying imperial authority to suppress the activities of "states" or purporting to defend a world order analogous to the Roman *hegemonias* or the British vision of free seas in the nineteenth century, and it seems safe to speculate that the split among the Commissioners reflected instead a Soviet position aimed at the rump Government of China in Taiwan without much thought to possible legal implications beyond the immediate horizon. It is, of course, possible that some Soviet or Polish or other jurists were driving toward a world order model in which the legal power to go to war would be restricted by community consensus, or by some natural law perception making legal some changes of government in a "progressive" direction and making resistance to those changes somehow illegal. But this begins to carry speculation too far. There is no hint of such logic in the records of the Commission or its references to Nyon.

Fourth, the Commission rejected the late eighteenth and early nineteenth century American and later British notion that "piracy" could be a proper label for depredations on land even if by bands based on ships:

Piracy can be committed only on the high seas or in a place situated outside the territorial jurisdiction of any State, and cannot be committed within the territory of a State or in its territorial sea.

In commenting on its own conclusion, the Commission recorded the fact of some dissent, did not attempt to justify the extension of the definition from the "high seas" to "a place situated outside the territorial jurisdiction of any State," and simply referred acts within the territorial jurisdiction of a state, including its territorial waters, to "the State affected."¹⁴⁷ For legal support the Commission mentioned only "the line taken by most writers on the subject." There was no attempt to explain away the *Serhassan (Pirates)* case¹⁴⁸

and the many writings flowing from it, and British practice using the word “piracy” to justify Imperial adventures. Nor was any nod made in the direction of *People v. Lol-Lo and Saraw*¹⁴⁹ in which an American tribunal had rejected Dutch territorial jurisdiction as possibly removing the case from the “piracy” jurisdiction of the United States.

The Commission addressed its extension of the definition of “Piracy” to include acts by aircraft against vessels on the high seas also by mere assertion:

Acts of piracy can be committed not only by vessels on the high seas, but also by aircraft, if such acts are committed against vessels on the high seas.¹⁵⁰

In what purports to be an explanation, there is merely a denial that air-to-air acts anywhere can be regarded as acts of piracy, and an affirmation that air to sea depredations “might, in the Commission’s view, be assimilated to acts committed by a pirate vessel.” The only hint of an explanation or logic is the purely technical one that air to air acts “are outside the scope of these draft articles” which are presumably confined to the law of the sea. But why acts in airspace over the high seas are not regarded as part of the law of the sea for the purpose of defining “piracy” while Antarctica and guano islands are part of that law for that purpose, and why, if all aspects of air law are regarded as beyond the limits of investigation, the “effects” doctrine is thought sufficient to bring some airborne action into the law of the sea but not other airborne action, are questions not asked or answered in the Commission’s report. *Quaere*, an airborne attack on an Antarctic base? There is an obvious inconsistency between this section and the preceding one unaddressed by the Commission.

Finally, the Commission excluded mutiny from its definition:

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 cannot be regarded as acts of piracy.¹⁵¹

This is explained as tallying “with the opinions of most writers.”

Article 15 is a mere technical article assimilating “acts of piracy” committed by a warship or military aircraft whose crew has mutinied to acts committed by private vessels. The official comment explains that this is necessary legally in order that a state aircraft or vessel can be treated as one engaging in “acts of piracy,” implying that without such a provision the acts might be classifiable as acts of war.

Article 16 is another technical article defining “pirate ship” for purposes of the codification as a ship “devoted by the persons in dominant control to the purpose of committing an act described” in the part of article 14 analyzed above.

Article 17 reverses the American naturalist approach that Justice Story had been most successful with, the one that gave to American courts jurisdiction over foreign vessels that in the opinion of the Supreme Court had lost national character as a result of their piratical depredations;¹⁵² it also made clear the

rejection by the Commission of whatever persuasiveness the logic of the British Government had in the *Huascar* correspondence:¹⁵³

Article 17. A ship or aircraft may retain its national character although it has become a pirate ship or aircraft. The retention or loss of national character is determined by the law of the State from which it was originally derived.¹⁵⁴

But while reserving to the flag state the legal power to apply its prescriptive and enforcement jurisdiction to the vessel, the classification as a “pirate ship or aircraft” gives to a third state all that it would need in the way of legal authority to arrest the vessel and, subject to other terms of the purported codification, try the crew for “piracy” and distribute the seized property. Since the law of Prize would not seem to apply outside of a “war,” and the entire approach negates any implication that the struggle against “pirates” is to be regarded as involvement in “war” in any sense—indeed, at least in England and America in the nineteenth century the word “piracy” was deliberately used to avoid the application of the law of war to foreign vessels interfering with seaborne commerce,¹⁵⁵—it would seem that this preservation of flag state jurisdiction would be inconsistent with any provisions allowing a capturing state to apply its law to the persons of property on board the vessel. This inconsistency is created for the draft by article 18, and does not seem to have been noticed by the Commission.

Article 18 is the one containing the legal results of all the labeling that was the subject of the previous articles:

Article 18. On the high seas or in any other place not within the territorial jurisdiction of another State, any State may seize a pirate ship or aircraft or a ship taken by piracy and under the control of pirates, and property or persons on board. The courts of that state [lower case *sic*] may decide upon the penalties to be imposed, and determine the action to be taken with regard to the property, subject to rights of third parties acting in good faith.¹⁵⁶

The Commission’s commentary on this draft article says merely that it “gives any State the right to seize pirate ships (and ships seized by pirates) and to have them tried by its courts,” going on to emphasize that a ship flying a flag to which it is not entitled is not thereby a pirate ship; it must commit acts of piracy first. Except for the obscure reference to rights of third parties acting in good faith, there seems to be no notice that the substantive law of the seizing states might be inappropriate as the law to measure property rights in the pirate ship or goods taken in it; that the preservation of flag state jurisdiction in the previous article makes its law the proper governing law in cases in which that state maintains its national interest in the character of the vessel or aircraft. There is no explanation of the reference to “third parties acting in good faith;” whether that relates to states or individuals, prior owners or later transferees of property taken by “pirates,” or anything else. No guidance is given either as to a conflict of laws rule to determine which law a court should apply to a determination of substantive property rights in

property possessed by “pirates,” or as to whatever substantive law might be found in the international legal order regarding such goods.¹⁵⁷ The “penalties to be imposed” in the second sentence seem to relate to the formal action to be taken by the courts of the capturing state against “pirates.” Taken in context, it illustrates the way in which the Commission resolved the conflict between “naturalist” jurists who view “piracy” as a crime against international law seeking only a tribunal with jurisdiction to apply that law and punish the criminal, and “positivist” jurists who view “piracy” as solely a municipal law crime, the only question of international law being the extent of a state’s jurisdiction to apply its criminal law to an accused foreigner acting outside the territorial jurisdiction of the prescribing state. This conflict was noted at the beginning of the Harvard Research which was the basis for the International Law Commission’s work.¹⁵⁸ The resolution was to leave unexpressed the frankly “positivist” conclusion of the Harvard Research¹⁵⁹ and to treat “piracy” as if a “crime” whose elements were defined by international law (set out in article 14 of the Commission’s draft) but whose enforcement was left to municipal law: the “naturalist” model. Presumably, the failure of a state to conform its municipal law definition of “piracy” to that proposed by the Commission as if a codification of existing international law in the absence of prior legislative acts except such as might be considered to flow in the international legal order from the municipal criminal law practices of states, would be considered itself a violation by the state of its obligations under general international law. This approach avoids all considerations of “standing,” the legal link between the incident or the accused or his victim on the one side, and the state seeking to extend its jurisdiction on the other. It adopts the *locus deprehendatis* rule of *R. v. Green*,¹⁶⁰ merely restricting the legal power of a state to seize “pirates” to the high seas and other places “not within the territorial jurisdiction of another state,” which seems to coincide with the maximum reach of enforcement jurisdiction anyhow, since no state has the legal power to make an arrest in the territory of another state without that other state’s permission. What would happen if a state operating under the law as purportedly codified by the Commission made an arrest in foreign territory *with* the consent of the territorial sovereign is left unmentioned. It is therefore unclear whether the Commission envisaged that sort of cooperation and would regard it as proper but outside the framework it felt required codification, or intended to restrict extraterritorial jurisdiction by requiring each sovereign to enforce the general international law of “piracy” without help in its own territory, or simply did not consider the lacunae in its conceptual framework for a draft codification of the law. There is no explanation as to why this “natural law” approach was taken by the Commission, and no attempt to grapple with the conceptual difficulties that persuaded the Harvard Research drafters to take a different approach.

Article 19 provides that a state seizing as if for "piracy" a vessel or aircraft whose behavior had not provided adequate grounds for such an interference with rights of navigation on the high seas, is liable to the flag state for any damage caused by that seizure. And article 20 restricts the right of seizure because of "piracy" to "warships and military aircraft." The reason for this latter provision is explained on the basis that "other state-owned vessels do not provide the same safeguards against abuse."¹⁶¹ No consideration is given to police or coast guard arrests or to the possible survival of the "natural right" asserted by Molloy for private vessels to make the equivalent of a "citizen's arrest,"¹⁶² and no explanation is offered for that "codification."

The final article of this section of the International Law Commission's draft Convention on the Law of the Sea, Article 21, deals with the right of visit on the high sea, limiting that right to warships (without mention of military aircraft, a possibility specifically included in Article 20) and restricting it to three circumstances, of which one is that there is "reasonable ground for suspecting . . . that the vessel is engaged in piracy."¹⁶³

The draft and commentary were distributed by the International Law Commission to Governments with replies requested before 1 January 1956¹⁶⁴ and six Governments addressed the articles dealing with "piracy."¹⁶⁵ Those replies were summarized by the Special Rapporteur (J. P. A. François) with his own comments on them and distributed on 1 May 1956 to the members of the Commission.¹⁶⁶ These new documents were further considered by the Commission on 9 May 1956.¹⁶⁷

Regarding the introductory general article, article 13, The Netherlands suggested that "piracy on the high seas" seems inconsistent with article 14's definition of "piracy," which allows for the legal word to apply to some activities not on the high seas. The Rapporteur suggested deleting the reference to "the high seas" in article 13, pointing out that "piracy" is fully defined for purposes of the draft in article 14; thus the Rapporteur agreed with The Netherlands' position.¹⁶⁸ But the Commission adopted the suggestion of Mr. Jean Spiropoulos (Greece) to add: "or in any other place not within territorial jurisdiction of another State."¹⁶⁹ The reason for choosing this rather prolix and not entirely grammatical solution to the problem raised by the comment of The Netherlands is clear from the report of the International Law Commission. Sir Gerald Fitzmaurice (United Kingdom) had pointed out that the intention of article 14(1)(b) in referring to acts "outside the jurisdiction of any State" had been to allow the definition to cover the case of "piracy committed on desert islands," and that from this point of view the proposal of The Netherlands merely to delete the restrictive language of the draft article 13 was logical. The counter-argument apparently was that posed by Mr. Radhabinod Pal (India), who pointed out that the phrase "on the high seas" refers not to the definition of "piracy" but to the place in which measures of cooperation among states would be

required. In order to carry this affirmative duty, he suggested that that phrase should be retained and supported Spiropoulos's proposal to add language referring to other places in which that cooperation would be required.¹⁷⁰ A drafting committee eventually cleaned up the grammar, and the following language was incorporated in the final draft submitted by the International Law Commission to the United Nations General Assembly and ultimately adopted without change as article 14 of the 1958 Geneva Convention on the High Seas:

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.¹⁷¹

It is repeated with a minor stylistic change ("possible extent" changed to "extent possible") as article 100 of the 1982 United Nations Convention on the Law of the Sea.¹⁷²

The definition article, article 14, received substantive comments from China, the Union of South Africa and The Netherlands. China suggested expanding the definition to include all shipboard violence and threats of violence when coupled with taking over command of the vessel, thus making "mutiny" a subspecies of "piracy." The Chinese argument to support this position was not based on history or legal precedent or the needs of the international order, but solely on the existence of two definitions of "piracy" in the Chinese Criminal Code¹⁷³ and uncited, unquoted, asserted "opinions" of unnamed authorities. These provisions seem to assume universal standing unless, as with the American definition of about 115 years earlier,¹⁷⁴ some basis for restricting the reach of Chinese law is assumed to exist in the international legal order. If not, every mutiny in any foreign vessel anywhere in the world involving persons of solely non-Chinese (even solely ascertained foreign nationality in their own flag vessel) would come within the scope of the Chinese criminal law system. Since the offense we call "mutiny" is, in the Chinese Criminal Code, merely "deemed" to be piracy, it is very difficult to attribute this possible reading of the Code to some notion of piracy *jure gentium*. Thus, in the absence of any precedents for Chinese exercise of jurisdiction over the acts of foreign mutineers in foreign vessels outside Chinese waters, it must be supposed that the expansive interpretation given to the reach of Chinese legislation by the Government of the Republic of China reflected similar expansive British assertion during the heyday of colonial enterprise, and not the intentions of the Chinese legislators of the Code (who used the word "deemed") or the experience of the United States and other powers who found such broad assertions to be unworkable in practice in the absence of complete dominance of the seas because inconsistent with international legal principle.

The Netherlands comment on article 14 also referred to "mutiny" (although not with that word) as a subspecies of "piracy," referring to Higgins-Colombos,¹⁷⁵ Ortolan,¹⁷⁶ Oppenheim-Lauterpacht,¹⁷⁷ Gidel¹⁷⁸ and

the British case of the *Attorney General of Hong Kong v. Kwok-a-Sing*.¹⁷⁹ But The Netherlands did not press the point, concluding that the prior language of the Commission was correct as a matter of policy growing out of the distribution of jurisdiction under the international legal order. "The community of States need not interfere with a change of authority on board the ship so long as the acts of the mutineers are not directed outwards."¹⁸⁰

The Rapporteur's comment dated 1 May 1956 says merely that "The Commission did not wish to adopt the broad definition of piracy advocated by the Chinese Government,"¹⁸¹ and does not mention the position of The Netherlands. In the Commission's discussion of 9 May 1956 there is only passing mention of the point, and the provision of article 14 that to be "piracy" the act must be committed by the personnel of one vessel (or aircraft) against another, was retained without substantive modification.

Other matters were discussed by the Commission in connection with article 14 on 9 May 1956. The Union of South Africa had raised the question: would the definition affect state vessels operated for commercial purposes? In addition, Mr. Yuen-li Liang, Director of the Codification Division of the United Nations Secretariat Office of Legal Affairs, acting as Secretary of the International Law Commission, raised again the question of whether the definition should include acts done any place other than the high seas.¹⁸³ The Netherlands had also noted the point made by South Africa about state-owned vessels suggesting that article 14 be reworded to make it clear that it does not apply to "State-owned vessels having a public function."¹⁸⁴ In his report of 1 May 1956 the Rapporteur had agreed with both the South African and Netherlands points in substance. He suggested a redrafted article 14 eliminating "persons or property" as objects of "piratical" attack from the draft; supplementing the original reference to "private vessel or . . . aircraft" with a reference to any "vessel or aircraft in commercial service" (thus including some state-owned vessels or aircraft)¹⁸⁵ and inserting the words "persons or property" as possible objects of piratical attack in subparagraph (a) to parallel the language of subparagraph (b).¹⁸⁶

In the discussions of the Commission on 9 May 1956, Mr. S. B. Krylov (U.S.S.R.) and Mr. Jaroslav Zourek (Czechoslovakia) repeated their objections previously stated.¹⁸⁷ Mr. Zourek in particular made an elaborate argument for revising the definition to include as an "act of piracy" all peace-time depredations even when committed for political ends, by warships or military aircraft, when committed from the high seas even if against ships, persons or goods located in territorial waters, internal waters or on land, unless those acts were denominated acts of aggression.¹⁸⁸ This suggestion seems to have provoked no response in the Commission despite its being consistent with a traditional use of the word "piracy" prior to and even during the nineteenth century; probably, the earlier Czech-Soviet political attempt to embarrass the Republic of China dominated the thinking of the

non-Communist members of the Commission, and the basic criminal law definition of “piracy” seemed incompatible with a world order model in which there was no imperial legislator. Much more could, of course be said about the possible attractiveness of this definition when the consequences of universal criminality are sought to be imposed on foreign “terrorists” acting abroad but this seems not the place to elaborate further on the theme.¹⁸⁹

The bulk of the Commission’s energy was spent discussing the desirability of including aircraft within the definition. As to that, an interjection by Sir Gerald Fitzmaurice proved the most influential. He pointed out that the main legal result of the definition was to determine which vessels (and aircraft) a warship of any nation would have the legal right to visit and seize. For that reason, it was necessary that the definition be precise as to its physical locus: high sea and territory not subject to the jurisdiction of any state. As to aircraft, the problem of depredations by aircraft was both novel and potentially real, and enforcement of the law by aircraft was also feasible. There seemed to be consensus that these arguments for progressive development of the law in the Commission’s draft were persuasive, although Messrs. Krylov and Zourek preserved their opposition to the entire conception. With two dissents, therefore, the article was adopted subject to “drafting changes in the light of the discussion.”

The changes wrought by the drafting committee were major but seem not to have been discussed in published documents. The redrafted article, article 39 of the Commission’s final draft, appears as Article 15 in the 1958 Geneva Convention of the High Seas and, with stylistic changes, as article 101 of the 1982 United Nations Convention:¹⁹⁰

Piracy consists in 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 [a] 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 incitement or of international facilitation of an act described in subparagraph 1 or subparagraph 2 of this article.

In the final version adopted into the Geneva Convention the only changes are the addition of the italicized words and the deletion of the bracketed “a.” The stylistic changes in the 1982 Convention were to change the period at the end of paragraph 1(b) to a semicolon, and to change the passive “incitement” and “intentional facilitation” in paragraph 3 to the active “inciting” and “intentionally facilitating.”

This final version appears to be at least as much the product of exhaustion and the dynamics of a group drafting committee as of logic or a knowledge of jurisprudence and history. Read carefully, it seems to revive the law of privateering by its reference to “illegal” acts, implying that some depredations for private ends might be “legal,”¹⁹¹ and leaving no explanation of how sense is to be made of a purported definition of a “crime” that rests on an undefined and unreferenced concept of prior “illegality”: Illegal under what law? By whose determination?¹⁹² An attempt by the United Kingdom to rectify its own oversight in not raising the question earlier as to whether an “attempt” should not have been included with “voluntary participation” as part of the “crime” of “piracy”¹⁹³ was defeated during the Geneva negotiating session, indicating surely that by then nobody was willing to focus seriously on the formulation. Further comment seems unnecessary regarding the irony that the International Law Commission failed throughout its deliberations concerning article 14 to focus on the evolving patterns of jurisprudential thought and political and economic activity that lay behind the writings some of the Commissioners seem to have found persuasive; that instead primary reliance for background information was placed on the Harvard Research, which had enough jurisprudential analysis to take a positivist position and deny the consistency of contending schools of thought, but too little analysis of deeper jurisprudential currents and historical movement to make it possible to organize the mass of material in a form fit for codification except *de lege ferenda*; and that, even after some discussion by the Commission of one of the very few substantive points discussed with any depth at all, relating to the inclusion *de lege ferenda* of aircraft within the definition of vehicles that might be called “piratical” for the purpose of allowing official search and seizure on the high seas, the point was relegated to a drafting committee that then ignored it while engaging in major redrafting that it had not been supposed to undertake.

Article 15 in draft assimilated acts against third country vessels or warships and aircraft whose crews had mutinied to acts of “pirate” ships and aircraft. Some minor drafting changes were proposed by the Governments of Belgium, The Netherlands and Yugoslavia. In addition, The Netherlands proposed language to harmonize the article with their proposal for a specific reference to state-owned vessels in non-commercial service in article 14, and Yugoslavia made a similar proposal. The Rapporteur accepted this notion and redrafted the article.¹⁹⁴ At the meeting of the International Law Commission on 9 May 1956 Krylov rejected the new wording, saying that The Netherlands’ proposal was “quite unrealistic,” presumably in light of the Soviet position making all government vessels legally identical, whether engaged in commercial, military or other service.¹⁹⁵ Fitzmaurice noted that the problem would be the same whether or not the government vessel taken over by mutineers and committing acts of “piracy” were in commercial or

non-commercial service prior to the mutiny. He suggested the question "be ventilated in the Subcommittee" for drafting, and that suggestion was adopted.¹⁹⁶ There are no records available of the drafting committee's reasoning, but apparently The Netherlands' suggestion supported by Fitzmaurice but modified to eliminate the distinction between warships and other government vessels, won out. The distinction between a "warship" and other government vessel was reinserted at the diplomatic conference in Geneva, but with no apparent legal reason, since both military and non-military government vessels are put in the same category and no distinction between military and commercial aircraft was similarly inserted. The final version appears as article 16 of the 1958 Convention and article 102 of the 1982 Convention:

The acts of piracy, as defined in article 101 [15] [39],¹⁹⁷ committed by a *warship*, government ship or [a] government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private [vessel] *ship*.¹⁹⁸

Article 16 of the draft was believed to be superfluous by the Government of The Netherlands, which argued that if retained it should refer to all acts of "piracy," not only those referred to in the first part of the definition. The Government of Belgium in its written comments proposed new wording whose result was to delete the time limit on the denomination of a vessel or aircraft as a "pirate ship or aircraft," thus subject to search and seizure on the high seas. The Belgian suggestion replaced "when it is devoted by the persons in dominant control to the purpose of committing" a piratical act, with "if it has committed . . . or is intended to be used" by those persons for that purpose. The Rapporteur proposed to accept both the Belgian and Netherlands' suggestions,¹⁹⁹ and when Mr. A. E. F. Sandström (Sweden) pointed out the substantive effect of the Belgian proposal, the article was referred to the drafting committee.²⁰⁰ The result of the unrecorded deliberations of the drafting committee was to adopt the Belgian form but retain the original meaning:

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 102 [15] [39]. 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 version appears unaltered as article 17 of the 1958 Convention and article 103 of the 1982 Convention.²⁰¹

Article 17, codifying in part the Peruvian view of the *Huascar* incident, received no comment from governments and was adopted by the Commission on 9 May 1956 without further discussion. It appears as article 42 of the Commission's final draft with petty drafting changes, and as article 18 of the 1958 Convention and article 104 of the 1982 Convention:

A ship or aircraft may retain its [national character] *nationality* although it has become a pirate ship or aircraft. The retention or loss of [national character] *nationality* is determined by the law of the State from which [the national character] *such nationality* was [originally] derived.²⁰²

Article 18 was the article authorizing universal jurisdiction to seize “a pirate ship or aircraft” and dispose of the persons and property on board. The Government of Belgium made its approval conditional on approval of the Belgian revision of article 16. The United Kingdom suggested a minor amendment to make clear that capturing states had complete discretion as to the legal disposal of the “pirate ship” after seizure. The Rapporteur preferred not to raise that issue which he seemed to feel would involve complications.²⁰³ At the meeting of the International Law Commission on 9 May 1956, Fitzmaurice repeated the British position, pointing out that there might be particular difficulties arising out of the specification in the draft that the capturing state could dispose of the seized property while not mentioning the “pirate” vessel or aircraft itself. As so interpreted, the British objection appeared to be a minor drafting point, and Mr. L. Padilla-Nervo (Mexico) suggested it be solved by inserting the words “ships, aircraft or” before the word “property” in the part of the article dealing with disposal. The amendment was adopted.²⁰⁴ In the drafting committee some further minor changes were made, and the final version of the article reported as article 43 by the Commission, was adopted without amendment by the Geneva Conference as article 19 of the 1958 High Seas Convention and now appears as article 105 of the 1982 Convention:

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy 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 the ships, aircraft or property, subject to the rights of third parties acting in good faith.²⁰⁵

The difficulties with this language noted above in connection with the International Law Commission’s first drafting session²⁰⁶ appear to have been overlooked, and all the criticisms mentioned there seem still to apply.

Article 19 specifying the legal result (international liability) for a seizure on suspicion of “piracy” without adequate grounds, drew comments from The Netherlands and Norway concerning an apparent minor inconsistency in language with a non-piracy article (article 21 of the draft) concerning claims resulting from any unjustified official boarding on the high seas.²⁰⁷ The Rapporteur and the members of the Commission all agreed.²⁰⁸ The minor drafting change was referred to the drafting committee. The result was article 44 of the Commission’s final draft and, without any further modification, article 20 of the 1958 Geneva Convention and article 106 of the 1982 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.²⁰⁹

The final article dealing directly with “piracy” was article 20, limiting the right of seizure to warships and military aircraft. The Government of the Union of South Africa in its comment on the draft pointed out that to withhold from private vessels the legal right to arrest a “pirate” on the high sea would favor “pirate vessels *vis-à-vis* States with small fleets and a long coastline.” Nevertheless, South Africa was prepared to accept the draft on the grounds that it was “justified by necessity,” presumably meaning that the alternative, allowing all vessels to seize suspected “pirates” as Molloy had believed was justified by natural law,²¹⁰ would open the way to incidents it would be better to avoid; on the basis of an interpretation of another article of the draft,²¹¹ which seems of doubtful applicability; and on the ground that nothing in the draft limits the right of self-defense, under which “the master of the vessel against which the act of piracy was committed would presumably be entitled to seize the vessel and its crew pending the arrival of a warship or military aircraft.”²¹² The Rapporteur, noting that he agreed with this interpretation of the law of self-defense, recommended no change in the draft article 20.²¹³ At its meeting on 9 May 1956, M. Georges Scelle (France) disagreed that the municipal law concerning self-defense permitted such an arrest, implying that the international law of self-defense unamplified could go no further, but he concurred in the final position taken by the Rapporteur on the ground that he believed the law allowed the functions of public authorities to be discharged by others when those authorities were absent.²¹⁴ Mr. F. V. Garcia Amador (Cuba), the Chairman of the International Law Commission, suggested that some language be added to the Commission’s commentary on its draft to be forwarded to the U.N. General Assembly to make clear that private vessels would be authorized to effect a provisional seizure of an attacking “pirate” vessel in the exercise of rights of self-defense, but not generally to police the sea. It was agreed that an appropriate statement would be put in the commentary, and article 20 was passed without change.²¹⁵ The official commentary was then adjusted by adding the following paragraph:

Clearly this article does not apply in the case of a merchant ship which has repulsed an attack by a pirate ship and, in exercising its right of self-defence, overpowers the pirate ship and subsequently hands it over to a warship or to the authorities of a coastal State. This is not a “seizure” within the meaning of this article.²¹⁶

This language presumably the product of the drafting committee, does not mention aircraft and seems much more narrow than appropriate to respond to the problem raised by the Government of the Union of South Africa. It may be supposed that the members of the Commission were simply too tired by this time.

The final version of article 20, numbered article 45 in the Report to the General Assembly, is slightly different from the draft that is reported to have been approved on 9 May 1956, and it is possible to suppose that the drafting

committee had broadly construed its authority again; the changes seem nonsubstantive. At the 1958 Geneva Conference a new clause was added at the end of that article to take care more directly of the South African point by adding other authorized ships or aircraft to the class "warships or military aircraft" authorized to seize "pirates." It was adopted as article 21 of the 1958 Convention (107 of 1982):

*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.*²¹⁷

The articles adopted in Geneva in 1958 as set out above were inserted with unexplained minor changes in the United Nations Convention on the Law of the Sea concluded at Montego Bay, 10 December 1982²¹⁸ and appear in that Convention as articles 100-107. None of the changes addresses any of the substantive points discussed above; only one seems significant. In the last quoted article the additional language patched in to the text by the 1958 Conference was further amended, apparently to narrow the scope for possible abuse, as follows:

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.

The complete text of the 1982 version is reproduced below at Appendix III.B.

"Piracy" Today

Having decided to reanalyze primary sources in order to discover why it seems so difficult to codify a concept as frequently mentioned as "piracy," analysis of the secondary sources, the writings of learned publicists, has seemed out of place. Indeed, fitted in to historical and jurisprudential context, it early became clear that the voluminous writings contributed little to an understanding of the behavior of statesmen and courts, but illustrated instead the mental agility and theoretical bent of writers who, with varying degrees of subtlety, had sharp axes to grind; wanted to make a debating point or fit practice into some preconceived pattern of legal theory rather than examine with open eyes the concepts actually motivating statesmen and jurists when they used the word "piracy." Indeed, it has never been far from my own mind that this work itself, if it is ever read by anybody, will be sharply criticized for what must appear to be departures from orthodoxy to some, and biased preconceived argument based on false models of the nature of the international legal order by others. My assurances are sure to be dismissed as irrelevant or even misleading that I began work with no notion of where it would lead, and that my primary sources are quoted at inordinate length to make clear the evidence for my rather complex view of the evolution of at

least two major streams of meaning and a half-dozen lesser technical meanings to the word "pirate" and its derivatives in commonly cited literature.

Nonetheless, I am loath to dissect the most commonly cited secondary and tertiary sources. Partly, this is because such a dissection would necessarily lead to a wider analysis of the jurisprudential thought of complex minds, like that of Sir Hersch Lauterpacht, with whom I find myself in profound disagreement. I should have thought that such an analysis were better done by a disciple than by one whose deepest respect is not uncritical. Nor do I imagine that the world will be much improved by a critical study of Lauterpacht's thought approached through the narrow path of a study of "piracy," which was peripheral to Lauterpacht's own main stream of ideas. Thus, Lauterpacht's complex but logical structure built upon the *Huascar* and other cases,²¹⁹ while defensible, seems shallow; more a manipulation of received ideas and immense reading of current literature than an analysis of roots, and somehow finds British practice always correct and consistent. But consistency among statesmen of different times, with different aims, and under different historical and cultural conditions cannot be expected, while the research set out in chapters I, II and IV above should respond amply to notions that England has been so lucky in its leaders that principled action was always taken.

The deepest commentary on the place of "piracy" in the web of the law is probably that of Professor Georg Schwarzenberger, predating the discussions of the International Law Commission, but ignored by the Commission.²²⁰ Perhaps it is only because he and I have come to similar conclusions independently that his work seems to make such sense, but to those who find the current study interesting, Schwarzenberger's analysis should be more so.

He finds six quite different meanings to the phrase "international criminal law": (a) Municipal criminal law applied to persons abroad, mitigated by limits in the international legal order on the power to arrest and try the accused; (b) international law requiring states to prescribe municipal criminal law consequences to various acts, such as treaty or custom forbidding the slave trade or exceeding fishery limits; (c) "piracy" *jure gentium* and war crimes, as acts which international law requires states to punish by their municipal criminal law in all cases within their enforcement jurisdiction; (d) municipal criminal laws common to all states, possibly the residue of Coke's natural law theory that would withhold immunities even from foreign ambassadors when they commit *mala in se*;^{221, 222} (e) matters of customary cooperation such as extradition, in all cases based on treaty; and (f) international crimes strictly speaking, acts punishable by the international community more or less directly such as the "crime" of waging aggressive war punished by an international tribunal at Nuremberg. "Piracy," to Schwarzenberger, fits only category (c), and if there is a question about the

classification, it is only that the authorization international law gives to municipal authorities to prescribe and punish "piracy" and "war crimes" is not clear as to precisely what "piracy" is. Neither "piracy" nor "war crimes" in the normal sense fit category (f), because their definition and punishment is left to municipal law entirely; there has never been an international tribunal set up to define and punish "piracy" as such, and the novelty of Nuremberg was its new definition of crimes not included in the traditional notion of violations of the laws and customs of war; it was because of the new crimes and the fact that no national tribunal was competent to apply them to German officials except a German tribunal, and none existed in Germany with the requisite authority in 1945, that made the Nuremberg tribunal necessary and created a new class of international "crimes."²²³

With this in mind, it is interesting to ponder for a moment the uses of the word "piracy" in recent years.

The first notorious incident after 1958 in which "piracy" was an issue was the seizure of the Portuguese passenger ship *Santa Maria* by a Portuguese political figure, Dr. Enrique Galvão. Portugal appealed for some foreign naval help, calling the politically-motivated captors of the vessel "pirates." That label, or, at least, its legal results, was uniformly denied by all states whose assistance might have been involved. Very little attention was paid to the definition in article 15 of the 1958 Geneva Convention on the High Seas, at least in the United States.²²⁴ Brazil gave political asylum to Dr. Galvão and his band to end the incident; no criminal proceedings followed.

On 12 May 1975 the American container ship *Mayagüez* was captured by government forces of Kampuchea off Tang (Wei) a small island whose sovereignty was in dispute but which was at the time occupied by Kampuchea. President Ford immediately called the capture an "act of piracy" and ordered military measures. His use of the word "piracy" was reminiscent of the British late nineteenth century practice of using the word "piratical" as an adjective to describe foreign government action, then turning the adjective into a noun for the purpose of asserting an enforcement jurisdiction in themselves, thus calling foreign military forces "pirates" by implication, and themselves policemen enforcing substantive public international law rather than British Imperial law or British military policy. But the American State Department came very quickly to the rescue and on 13 May 1975 an unnamed "State Department lawyer" was quoted as denying that the Kampuchean act was "piracy" in the sense of the 1958 Convention, implying as far as a loyal civil servant could that the legal rationale chosen by the Chief Executive officer of government was not correct.²²⁵ The issue was quickly permitted to drop as a military action by the United States was condemned widely an excessive, dangerous and unnecessary to procure the release of the crew.²²⁶ In fact, in tort actions against the vessel's owner before American courts in the years that followed, it became clear that the ship had in fact been

within three miles of land legally claimed and in fact occupied by Kampuchea at the time of the incident, and that among its cargo were sealed containers consigned to the U.S. military.²²⁷ It is, of course, possible that President Ford's use of the word "piracy" reflected a vernacular usage that had never been wholly dropped since the 16th century, or a conception of "state piracy" as the word was used in Roman times and revived for use against the Barbary states from time to time. But the *Mayagüez* was within any definition of Kampuchean territorial waters except one that would deny legal effect to the Kampuchean legal claim and physical occupation of Tang Island, and she was carrying cargo consigned to the American military in time of military activity and great stress in the area, with the United States ranged against the revolutionary government of Pol Pot in Kampuchea. It thus seems much more likely that President Ford was simply overreacting in words as in military deeds, and he used the word "piracy" as a mere pejorative without any thought to meaning at all.

There have been many incidents in the South China Sea and elsewhere of what many have called "piracy" since the end of the war in Vietnam on terms favorable to the Communist Government there. About a million refugees, particularly but not exclusively ethnic Chinese, have left Vietnam, Kampuchea and Laos, about half of them by ship, in a flow that reached flood proportions in 1978 and 1979. In their struggle to reach haven in Malaysia by sea, many were beset by "pirates" based in Thailand, and many others by other attackers at sea.²²⁸ There are other reported incidents in West African waters, Indonesian waters, Philippine waters (particularly among the Muslim inhabitants of the southern islands of the Philippines), the Straits of Singapore and elsewhere.²²⁹ The word "piracy" appears frequently in the reports. From the point of view of this study, the important point is not the vernacular use of the word, or even its occasional use by naval or other governmental personnel arguing for international cooperation or even unilateral action to suppress this dreadful feature of our time. It is the refusal of states in fact to cooperate or even to acknowledge that there is any international obligation to cooperate in suppressing the acts called "piracy." Indeed, there has been a notable refusal even to discuss the possibility of international cooperation in this context. For example, at a Conference on the problems of the Association of South East Asian Nations (ASEAN) held at the Fletcher School of Law & Diplomacy on 12 November 1981, a very high Malaysian official acknowledged that "piracy" existed in the area, but in response to a question about whether ASEAN could protect "boat people" on the high seas at least from predators putting out from the ASEAN countries themselves or flying the flags of ASEAN countries, he replied carefully that American traders need not fear "pirates" or lack of police in the "territorial waters" of his country, and the Chairman of the session quickly shifted the subject in what seemed an attempt to avoid embarrassing the distinguished speaker any further.

The Malaysian position requires a deeper analysis. The problem of controlling these depredations appears not to be one of definition alone, although it might help if either the 1958 Geneva Convention on the High Seas or the 1982 United Nations Convention on the Law of the Sea had a comprehensible definition of "piracy." But discussions do not get even that far. The problem instead relates to the strength of the international legal order and its emphasis on "standing," the legal link between an act and the state within the order trying to apply its view of the law to that act. In theory, there is no way to avoid the question of "standing;" all states would deny the legal authority of any to govern the acts of foreigners outside the prescribing state's territory if the denying state itself had "standing" to object, were itself affected by the exercise of the prescribing state's jurisdiction. This was discussed above²³⁰ in connection with the United States Supreme Court rejecting universality as the proper extent of American criminal law jurisdiction with regard to "piracy." In practice, aside from British actions of doubtful legal significance analyzed in such detail above,²³¹ and a handful of oft-cited judicial decisions that seem badly reasoned and internally inconsistent or inconsistent with known facts,²³² the evidence is simply not there. The reason is clear. The international law of "standing" reflects general theory forbidding intermeddling in the quarrels of others. The sovereign equality of states, the lack of a superior to judge the facts, the law or the relative importance of conflicting national interests, and the overall system's interest in limiting disputes to the narrowest possible compass involving the fewest possible people, are summarized in the Latin maxim "*res inter alios acta* [a thing involving (only) others]." Such intermeddling would thus be indignantly rejected by the states involved in the absence of agreement to arbitration, an agreement establishing some international organization's purview, or some other legal basis for the intervention. As a matter of customary law and practice, very few states in very few circumstances have engaged, or would even have considered engaging, the lives of their mariners, the money of their taxpayers, or the prestige of their rulers in policing activities with regard to acts that have no clear impact on the material interests of influential constituencies.

British expanding and aggressive mercantile interest, overwhelming naval dominance, and self-perception as a law-abiding race bringing justice to benighted parts of the globe from the time of the end of the Napoleonic Wars to the World War of 1914-1918, brought together a combination of factors making universal "standing" under the law, with Great Britain the only country likely to be able to exercise it, seem a compelling legal rationale for police actions. An added benefit was that those actions so rationalized would give the British discretion to keep order or not as the British chose. The supposed "obligation" to "cooperate" in suppressing "piracy" implied that somebody else was shouldering the primary burden in cases actually far from

British trade routes or ambitions; and in cases in which the British wanted to be the prime actors, they could call on the help of others under this supposed "obligation," amounting to an obligation of others to help support British military actions in British interest. To those for whom security of life, property and international trade was a higher value than national self-rule and the equality of legal persons under the law, the British rationale combined morality with interest and must have been very compelling indeed, while still not saddling British governments with any obligation to risk blood, treasure or prestige on police actions beyond their constituencies' interest.

But in many parts of the world today, particularly parts that had at one time in the not too distant past been parts of the British Empire, the value of national self-rule and the equality of legal persons under the law, *i.e.*, of states under international law, now seem higher in cases of conflict than the value of life and property, particularly the life and property of foreigners. The Malaysian, indeed ASEAN, refusal to exercise jurisdiction over the acts of even their own nationals to protect "boat people" in the South China Sea area, thus seems to rest on a denial of American and presumably British and other third countries' legal basis for complaint; it is a reservation of discretion comparable to that of the British during the heyday of Empire, but without the world-wide commercial interest and pride that led to British assertions of universal jurisdiction when it suited British interest. To make matters worse for the victims of "piracy" today, as long as the social, economic and political orders of the ASEAN states are not affected by the attacks on the "boat people," the same factors that lead third countries to abstain from action must also lead the leaders of the ASEAN nations to abstain from direct action. While their own jurisdiction over their own nationals committing these depredations on the high seas is not denied, neither is it exercised. Since the states which have undeniable "standing," Vietnam and China, apparently make no complaints about atrocities committed against those whom the international legal order allows them to protect on the high seas, and take no police action of their own to raise the issues with the ASEAN countries, the ASEAN countries feel neither internal nor external pressures to act themselves.

An added factor in the policy question of whether the United States should try to assume the former British position, arguing universality of jurisdiction and a right under international law to apply national criminal prescriptions to the acts of foreigners against other foreigners on the high seas when no clear American legally protected interest is affected, is the basic rule of the sovereign equality of states in the international legal order. What the United States can legally do, the Soviet Union can legally do; and the Soviet base in Cam Ranh Bay is closer to the scene of the action than American bases in the Philippines. There seems to be no convincing legal rationale that would permit American action and forbid Soviet action in the South China Sea, so

the better course might be to forbid the action of both as long as the legally protected interests of both are not threatened. Thus, the policy reasons that give rise to statements and acts evidencing positive international law dictate abstention.

It can be concluded that "universal jurisdiction" was at best a rule of international law only for a limited period of time and under political circumstances that no longer apply; at worst it was merely a British attribution to the international legal order of substantive rules forbidding "piracy" and authorizing all nations to apply their laws against it on the high seas, based on a model of imperial Rome, and British racial and commercial ambitions that never did reflect deeper realities, as part of the rationalization of imperialism never really persuasive outside of England alone.

If either view is correct, or any view between the two extremes, then even Schwarzenberger seems to overstate the role of public international law regarding "piracy." The legal order is better reflected by the unsuccessful initiative of Peru at a late meeting of the Third United Nations Law of the Sea Conference, proposing to delete the words "or in any other place outside the jurisdiction of any State" from the two articles in the United Nations draft in which they appear, articles 100 and 105.²³³ It may be remembered that the person most forcefully and successfully arguing for the inclusion of those words in the International Law Commission's draft had been Sir Gerald Fitzmaurice, whose perceptions of the needs of the international legal order as they relate to the high seas derived more directly from British experience than from the experience of smaller states seeking to establish and maintain their own authority and limit legal justifications for the incursions of others. It may be no accident that the state making the new proposal was the state most aggrieved by the British position in the *Huascar* incident. From this point of view, it is possible to assert with some confidence that there is no international law of "piracy" at all, and it is possible that there never has been any such law except in the autointerpretive projections of some states from time to time seeking either to expand their jurisdiction to safeguard their own trade or establish imperial interests, or in the theories of those who prefer to call their personal moral insights "law" as if universally applicable and not requiring a legislative decision by a "legislator" empowered within a legal order.

There are many other reasons in theory for denying the present day existence of an international law of "piracy," such as the general acknowledgment today that all criminal acts must be so defined by statute before they can be punished, *nulla crimen sine lege; nulla poena sine lege*.²³⁴ Thus, the very notion of there being an "international crime" in the absence of a statute binding on the tribunal before which the accused is brought, is inconsistent with basic theory for those accepting the validity of the platitudinous rule.²³⁵ Indeed, it is possible to argue further that the roots of the

confusion lie in the attempt by "natural law" jurists, reversing the original meanings of the Latin words, to turn the moral imperatives, the "*jus*" (as in "*justice*"), into legal imperatives, "*legis*" (as in "*legislation*"). In the case of "piracy," this seems to have been attempted through denominating judges as legislators for more than the case before them; by construing every precedent into a legislative act regardless of political reasons that might dissuade the community from accepting that form of legislation; reasons from the particular, such as the quality of trial advocacy and the impossibility of presenting general, community interests before a court in a single case, to the general, resting on the selection process of "judges" and their function under the constitution that empowers them to resolve cases. But these questions take us far beyond the bounds of a study of the law of "piracy" and into areas of jurisprudence better left for another occasion.

It may be concluded that both in current practice and in current theory built upon ancient roots and the evolution of the international political and legal orders, there is no public international law defining "piracy;" that the only legal definitions of "piracy" exist in municipal law and are applicable only in municipal tribunals bound to apply that law; that these examples of municipal law do not represent any universal "law of nations" based on moral principle and right reason exemplified through identical laws of different countries, but rather rest on national policies made law by the constitutional processes of the different countries; and that such other uses of the word "piracy" as exist in international communication reflect vernacular usages, pejoratives, and perhaps memories of Imperial Rome and Imperial Britain inconsistent with the current legal order and of doubtful legal effect even when used most emphatically in the heyday of both empires.

It is possible to argue, of course, that regardless of the weakness of the precedents taken in full context the conference process both in 1958 and 1982 produced widely acceptable formulations that must reflect some consensus. There might be some substance to this argument as it applies to rules actually discussed at the conferences, such as rules relating to passage through international straits and innocent passage through territorial waters. But as has been shown at great length above, the formulations relating to "piracy" reflect no such process and no such discussion. And if the 1958 formulation in its current version were in fact regarded as codifying acceptable rules regarding "piracy," it should now be apparent that the rules so codified, when read carefully, are incomprehensible and therefore codify nothing.

It is also possible to argue that the persistence over two millenia of some concept of "piracy," universal jurisdiction and a common criminal law applicable to persons outside the state system who interrupt commerce, creates a presumption that there is some "law" forbidding "piracy" and authorizing states to do something about it. But, as has been shown, the basic premise is wrong. The "piracy" of ancient Rome was a form of belligerency,

not criminal behavior; the “piracy” of Admiralty tribunals reflected municipal law and was restricted by underlying rules of the international legal order limiting national jurisdiction. The rhetoric seems always overdrawn or political; the cases seem narrow and, where used as a vehicle for expressing great generalities, a forerunner to political action that in practice proved disastrous to those who tried to use their view of the law to justify political movement. The actual practice of states, resting on the state system as it has existed more or less since the time of Gentili and Grotius, evidences unwritten “constitutional” rules in the international order that are disregarded only at the cost of futility or failure.

On the other hand, it is possible that there are small cracks in that order that permit something like the concept of “piracy” and universal jurisdiction in some very narrow circumstances. For example, where there is a *lacuna*, a gap, in the rules of national jurisdiction so that no state has the legal power to apply its law to an incident, the universal interest in international commerce might authorize any state to apply its law. But the pattern is not one of overlapping jurisdictions then, it is the hunt for “standing,” some basis in the legal order for action. From this point of view, there is no substantive international law defining “piracy” to be enforced by states directly; there is an international law distributing the legal power to apply municipal law to the acts of foreigners. It would seem that if there is any international law relating to “piracy” it is the legal power given to all states to apply their municipal laws to foreigners, even acting in foreign vessels or aircraft, in those cases in which the acts of those foreigners can be considered to injure the prescribing state more or less directly under the general international law restricting “standing.” Thus the international law relating to “piracy” comes down to the adoption of principles of “passive personality” to activities in which the prescribing state’s only connection with the act to which it attaches legal consequences is the nationality of the victim or the property affected by the act. Since the international law regarding the extent of national jurisdiction subordinates passive personality jurisdiction to jurisdiction based on the nationality of the actors and the legal subordination of the territory or vehicle in which the act occurs, what is left is a small residue of legal power which, if exercised beyond the bounds of legal “standing” to apply national prescriptions, embroils the prescribing state in legal complications that easily slip into attempts to extend general prescriptive jurisdiction beyond the bounds the legal order accepts. That is the path to imperial adventures that states embark on at their peril.

It bears repeating that both words “*peril*” and “*empire*” have the same Greek root as the word “*pirate*.” From the point of view of this study, all three words have evolved in meaning over time, and “*empire*” and “*pirate*” now relate more to a disregard of the legal powers of others than to the Greek

word relating to *experiments* and *experience*. It is the disregard of the legal powers of others to determine property and personal rights that is common to both "piracy" and "imperialism." The use of the word by Roman and British empire-builders to classify the equally disdainful depredations of those whose political organizations lay outside the imperial jurisdiction, and then, in the latter case, the assumption of an authority to apply English municipal criminal law to those persons called "pirates" without nationality, territorial, or passive personality victims as links to the prescriptive order, was the result of a logical confusion and in practice ironical. It did not increase respect for British "justice" or for international law, and embroiled the British in the expense and bloodshed of colonial wars while rationalized as a police action to enforce the law without recourse to war. It was an assumption of legal authority by those whose conception of law made it indistinguishable from a mere policy to use physical force. From this point of view, the fatal sin of the "pirates" and empire-builders was the same. It was not avarice, but "*hybris*"—the overweening pride of Greek myth that leads ultimately to destruction via the path of power.

Notes

1. Text at notes IV-171 sq. above.
2. The American Civil War experience and the British attempts to label the non-European or rebel obstructors of their commerce or political ambition as "pirates" have been amply cited and analyzed above. Only one instance has been found in which the political officers of a government not able to dominate the military and diplomatic situation actually used the word "pirate" and a court upheld that usage. That case involved the temporary imprisonment in Penang in 1815 of a claimant to the sultanate of Achin in Sumatra who had let his ambitions bring him into difficulties with the British authorities at a moment when his own fortunes were at an ebb, and when his enemies were in control of the "recognized" government in Achin and certainly had no interest in intervening diplomatically on his behalf with the British. The situation is doubtful as a matter of legal precedent, and was not even considered by the court in the influential Mohamed Saad case analyzed in the text at notes IV-133 sq. above. The incident is summarized and analyzed briefly in the text at notes IV-102 sq. above and in Rubin, *International Personality of the Malay Peninsula* (1974) 161-167.
3. Instructions for the Government of the Armies of the United States in the Field, Schindler & Toman, *The Laws of Armed Conflicts* (2nd rev'd ed. 1981) 3.
4. See text at notes III-230 sq., esp. Dana's summary at note III-280 above.
5. Article 82, in Schindler & Toman, *op. cit.* 3 at 14.
6. In form, Lieber, then a Professor at Columbia College (now Columbia University) in New York, submitted his draft for revision and approval to a board of Army officers headed by the Army Chief of Staff, General H. W. Halleck, himself a considerable scholar of international law. E. Root, Francis Lieber, 7 *AJIL* 453 (1913).
7. Project of an International Declaration Concerning the Laws and Customs of War, 27 August 1874, Schindler & Toman, *op. cit.* 25 sq.; Institute of International Law, *The Laws of War on Land* (The Oxford Manual), 1880, in *id.* 35 sq.; Convention (II) with Respect to the Laws and Customs of War on Land, The Hague, 29 July 1899, and Convention (IV) on the same subject, 18 October 1907, both in *id.* 57 sq.
8. Treaty Relating to the Use of Submarines and Noxious Gases in Wartime, Washington, 6 February 1922, in *id.* 789, article 1. The quoted language is from paragraph 1 on p. 790, the affirmation regarding belligerent submarines is in paragraph 2 on the same page.
9. *Id.*, article 3.
10. See *passim*, esp. text at notes II-4 sq., II-91 sq., III-160 sq. and III-230 sq. above.
11. See above text at notes II-48 sq.
12. See above *passim*, esp. text at notes II-80 sq., III-64 sq., III-85 sq. and III-122 sq.
13. The only known case prior to 1922 in which true "universal" standing was applied was the 1705 Scots case *R. v. Green* analyzed in pertinent part in the text at notes II-87 sq. above; a case notorious for its

prejudiced result implying the reasons why such "universal" jurisdiction is not conducive to justice. In other cases in which the point was made, like the British cases, *In re Tivnan* 5 Best & Smith's Q.B. Rep. 645 (1864), and Attorney-General of Hong Kong and Kwok-A-Sing (1873), L.R. 5 P.C., 3 BILC 812, analyzed in the text at notes III-259 sq. and IV-211 sq. above, other factors seem to have dominated the thinking of the court, and "universal" jurisdiction was mentioned as mere dicta by "naturalist" judges speaking beyond the confines of the case as a basis for not discharging an extradition obligation in circumstances when the "universal" jurisdiction asserted to rest in the responding state was not to be exercised either, or was a mere assertion of jurisdiction not supported by argument.

14. For some analyses, see G.G. Wilson, *International Law Situations* (NWC Blue Book 1930-1931) 25-36; W.T. Mallison, (NWC Blue Book 1968) 41-43. An extraordinarily vehement article supporting the characterization of submariners as "pirates" before the convening of the 1922 Conference on the basis of an analogy to the supposed "piratical" character of the Barbary states is de Montmorency, *Piracy and the Barbary Corsairs*, 35 *Law Quarterly Review* 133 (1919). An incisive criticism of the analogy to "piracy" in the 1922 Conference appeared immediately afterwards. Roxburgh, *Submarines at the Washington Conference*, 3 *BYIL* (1922-23) 179, reports how the chief American delegate, Elihu Root, blocked a referral of the "piracy" analogy to legal experts. Root apparently took the position that the word was useful for its pejorative overtones, and the analogy was political not legal; that the legal results that should flow from the use of the word were only those agreed in the Conference Final Act (i.e., the Treaty Relating to the Use of Submarines and Noxious Gases in Warfare of 6 February 1922), set out in the text at note 9 above. Of course, under this view, the Final Act is in no way a codification of pre-existing general international law, but only a contract among the parties to the Final Act of the Washington Conference. France refused to ratify that Final Act, and none of the defeated Central Powers was a party. See the list of signatures, ratifications and accessions in Schindler & Toman, *op. cit.* 791.

15. Treaty for the Limitation and Reduction of Naval Armaments, London, 22 April 1930, in Schindler & Toman, *op. cit.* 793-794.

16. Procès-Verbal Relating to the Rules of Submarine Warfare set forth in Part IV of the Treaty of London of 22 April 1930, London, 6 November 1936, in Schindler & Toman, *op. cit.* 795-796. By the end of 1938 there were 48 parties, including all the major powers of the world and the major belligerents of the impending Second World War. See the list in *id.*, 796-797.

17. The Nyon Agreement, Nyon, 14 September 1937, in Schindler & Toman, *op. cit.* 799.

18. There are several rationales for the British and French position that seem more persuasive in full context than the universal jurisdiction rationale. For some suggestions with regard to the analogous British assertions in the early nineteenth century, see text at the start of ch. IV above.

19. The more or less standard collection of documents and analyses compiled when the United States was a neutral commercial power before entering the First World War in 1917, is Scott, *The Armed Neutralities of 1780 and 1800* (1918).

20. Agreement Supplementary to the Nyon Agreement, Geneva, 17 September 1937, in Schindler & Toman, *op. cit.* 801-802.

21. See text at notes II-4 sq. above. The statute of 1700 is set out in Appendix I.B below.

22. See text at notes III-230 sq. above.

23. See text at notes IV-302 and IV-307 above.

24. Three of the signing states ultimately failed to ratify: Chile, Guatemala and Venezuela. See list in Schindler & Toman, *op. cit.* 807.

25. Convention on Duties and Rights of States in the Event of Civil Strife, Havana, 20 February 1928, in Schindler & Toman, *op. cit.* 805.

26. *Id.*, 806.

27. *Id.*

28. Convention on the High Seas, Geneva, 29 April 1958, T.I.A.S. 5200, 13 U.S.T. 2312, 450 U.N.T.S. 82. On the codification attempt, see text at notes 61 sq. below.

29. According to the statistical table in Evans & Murphy, *Legal Aspects of International Terrorism* (1978) 5, there were nine non-United States registered civil aircraft "hijacked" in 1960, no American aircraft; a total of 11 in 1961 (five American, six non-American); then seven or fewer total through 1967. In 1968 the total jumped to 35 (21 American); in 1969, 89 (40 American); then it declined slowly as pre-flight inspection procedures and other pressures made civil aviation less inviting as a target to people and groups with private or political grievances.

30. The phrase "aircraft piracy" was defined and used in American municipal legislation enacted on 5 September 1961; P.L. 87-197, 75 Stat. 466. That legislation will be discussed below.

31. Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Tokyo, 14 September 1963, T.I.A.S. 6768; 20 U.S.T. 2941; 704 U.N.T.S. 219. At this writing there are over 100 parties to the Convention.

32. *Id.*, arts. 3 and 4.

33. This is not the place for a more elaborate re-examination of the public international law regarding the legal bases for extending municipal criminal law prescriptive jurisdiction. In *The Lotus Case*, P.C.I.J. Ser. A, No. 10 (1927), Part IV, the Permanent Court of International Justice at the Hague specifically reserved its position, refusing to either accept or reject a French contention that the nationality of the victim taken by itself was insufficient as a basis in law for a state to exercise jurisdiction to prescribe over a foreign individual acting outside the territory of the prescribing state. As has been amply documented above, whatever the limits of this so-called "passive personality" as a basis for asserting jurisdiction to prescribe municipal criminal consequences for the acts of a foreigner outside the territorial or Admiralty jurisdiction to enforce of the prescribing state, "passive personality," *i.e.*, injury to a national of the prescribing state, has been accepted from the earliest days as a basis for the assertion of jurisdiction to prescribe with regard to the acts of foreigners on foreign vessels sailing the high seas when two or more vessels of different flag or no flag were involved. It is possible to suggest that if "piracy" is a substantive "crime" under international law at all, one legal effect is to endow states with jurisdiction to enforce their municipal laws relating to it on the basis of "passive personality," *i.e.*, the nationality of the victim. Whether that extension of jurisdiction on the basis of "passive personality" is better regarded as the maximum extension of national jurisdiction, with or without the quite separate jurisdiction asserted over stateless "pirates" to fill a jurisdictional gap (see text at notes II-61 sq., II-80 sq., III-64 sq. and III-85 sq. above), or as merely the only type of "universal jurisdiction" that is undoubtedly exercised by states in view of the policy reasons why jurisdiction is declined in other cases involving the acts of foreigners abroad (see, *e.g.*, *U.S. v. Pedro Gilbert*, 2 Sumner 19 (1834), analyzed in text at notes III-69 sq. above; *In re Tivnan* in text at notes III-259 sq. above) seems to depend on whether the analyst takes fundamentally a "naturalist" or "positivist" stance as to the basis of the rules relating to "piracy" in public international law.

34. The basic articles of the 1963 Tokyo Convention are Article 9.1:

The aircraft commander may deliver to the competent authorities of any Contracting State in the territory of which the aircraft lands any person who he has reasonable grounds to believe has committed, or is about to commit, on board the aircraft an act contemplated in [the Convention].

and Article 13.1:

Any Contracting State shall take delivery of any person whom the aircraft commander delivers pursuant to Article 9, paragraph 1.

The custody assumed under this provision is stated in Article 13.2 to last only "for such time as is reasonably necessary to enable any criminal or extradition proceedings to be instituted."

35. *Id.*, art. 1.1.

36. *U.S. v. Tully and Dalton*, 1 Gallison 247 (1812), discussed immediately after note III-54 above.

37. *U.S. v. Wiltberger*, 18 U.S. (5 Wheaton) 76 (1820), discussed in text at notes III-73 sq. above; *U.S. v. Klintock*, 18 U.S. (5 Wheaton) 144 (1820), discussed in text at notes III-81 sq. above.

38. The release from custody provision is art. 13.2, quoted in part in note 34 above.

39. Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, 16 December 1970, T.I.A.S. 7192; 22 U.S.T. 1641; 860 U.N.T.S. 105. As of this writing there are well over 100 parties to this Convention, including Israel, Uganda, the United States and the USSR, Jordan, Libya, but not Algeria or Cuba.

40. Article 1.

41. Article 2.

42. 49 U.S. Code sec. 1472(n)(1), added by P.L. 93-366 sec. 103(b) on 5 August 1974, 88 Stat. 410 at 411.

43. Text at note 40 above.

44. This is not the place for a deeper analysis of the American legislative process or the technicalities surrounding the enactment of this particular Act.

45. See text at notes II-91 sq. and IV-292 sq. above for use "licensing" and "recognition" as the basis for the accusation of "piracy" at international law.

46. See text at notes IV-270 sq. above.

47. None of the states parties has uttered such a reservation.

48. *Op. cit.* note 39 above, article 4.

49. *Id.*, article 7.

50. See note 13 above. Two other cases, in 1922 and 1934, will be discussed at notes 101 sq. and 107 sq. below.

51. 49 U.S. Code sec. 1472(n)(3), cited at note 42 above.

52. The term "special aircraft jurisdiction of the United States" is defined in 49 U.S. Code sec. 1301(34) to include only:

(a) civil aircraft of [*i.e.*, registered in—*id.*, sec. 1301(15)] the United States; . . .

- (c) any other aircraft within the United States;
- (d) any other aircraft outside the United States—

(i) that has its next scheduled destination or last point of departure in the United States, if that aircraft next actually lands in the United States; or

(ii) having "an offense," as defined in the Convention . . . committed aboard, if that aircraft lands in the United States with the alleged offender still aboard; and

(e) other aircraft leased without crew to a lessee who has his principal place of business in the United States, or if none, who has his permanent residence in the United States . . .

53. For example, in enforcing American antitrust laws. See *United States v. Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945). The broad statement on p. 443 by Judge Learned Hand has become the stated basis for much later American assertion of prescriptive jurisdiction:

On the other hand, it is settled law—as [the defendant] itself agrees—that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize.

Cf. A.L.I., *Restatement, Second, Foreign Relations Law of the United States* Sec. 18 (1965); *Foreign Relations Law of the United States (Revised)* Sec. 402 (1980). This is not the place to analyze why many foreign commentators find this statement far too broad to be properly called "settled law" except in the narrowest American Constitutional law context as law for American courts only, and as law which can be denied legal effect abroad without impinging on any American legally protected interest. They would presumably argue that to the extent other states "ordinarily recognize" the liabilities Hand mentions, it is as a matter of political expediency, not of law.

More important for present purposes, Judge Hand's summary of what he regards as settled law is limited by his own statement to some vague "effects doctrine;" the conduct of foreigners abroad to be within Hand's notion of American prescriptive jurisdiction must have "consequences within" the United States. Precisely how severe those consequences must be, and of what kinds, are not specified. From the American aircraft hijacking legislation cited at note 42 above and quoted in pertinent part in the text at notes 48, 49 and 51 above, it can be supposed that the Congress did not think the "chilling effect" on international, including American, civil aviation from allowing the United States to be an asylum state for foreign hijackers confining their acts to foreign aircraft and climes was enough.

54. See, for example, House of Lords (U.K.) decision of 2 December 1977 in *Westinghouse Electric Corporation Uranium Contract Litigation*, 17(1) ILM 38 (1978). See also the (U.K.) Protection of Trading Interests Act, 1980, reproduced in 21(4) ILM 834 (1982). This again is not the place to attempt even a summary listing of the actions of foreign governments to maintain what they regard as their national prescriptive jurisdiction against the broader assertions of the United States to make rules for the conduct of foreign enterprises outside the United States.

55. T.I.A.S. 7570; 24 U.S.T. 564. There are 99 listed parties to the Convention as this is written. All but five of the parties to the Hague Convention of 1970 are also parties to the Montreal Convention of 1971; two states are parties to the Montreal Convention and not the Hague Convention. Lillich, *Transnational Terrorism: Conventions and Commentary* (1982) 38. The list of parties is at p. 48-50.

56. Article 1.

57. *U.S. v. Pliskow*, 354 F. Supp. 369 (D.C. Mich. 1973), aff'd 480 F.2d 927.

58. 49 U.S. Code sec. 1472 (1)(1). The language in this provision traces back to P.L. 85-726 of 1958, 72 Stat. 784, but reached its present (1986) form through P.L. 93-366 sec. 203 in 1974, which reorganized the earlier provisions, restricted their effect by adding the requirement that the weapon is, or would be, accessible in flight, and expanded their coverage to include the final provision about placing a bomb or similar explosive or incendiary device aboard the aircraft.

59. A useful study of the entire range of international and American aircraft hijacking reactions, although taking a view of "piracy" that seems to rest on Wheaton without much concern for the differences between Wheaton and other publicists' definitions of "piracy" and the reasons for those differences, is N. Joyner, *A Contemporary Concept of Piracy in International Law: The Status of Aerial Hijacking as an International Crime* (1973).

60. As to statesmen, see the reported Portuguese appeal in connection with the Santa Maria incident of 22 January 1961. Forman, *International Law of Piracy and the Santa Maria Incident*, 15(8) *The JAG Journal* 143 (1961). To the extent the Portuguese appeal reflected a considered legal opinion, it appears that no other country agreed, including the United States, which refused to treat the incident as one involving any criminal activity outside of Portuguese municipal law, and Brazil, which eventually gave haven free of criminal charges to the Portuguese political leaders who had participated in the seizure of the vessel.

As to scholars, aside from Joyner, *op. cit.* note 59 above, a proposal *de lege ferenda* apparently supporting a world-police role on the 19th century British model for unnamed naval powers today, but shallow in its analysis of law and skimpy in its history, is B.H. Dubner, *The Law of International Sea Piracy* (1980). Dubner

attributes by mere assertion greater clarity and force to a "natural law" concept of "piracy" than any research has ever demonstrated, and concludes: "Obviously, the ultimate goal would be the elimination of the competence of municipal law to prescribe and enforce penalties regarding the law of international sea piracy (and acts of terrorism)" [*sic*]. *Id.*, p. 162. Dubner's definition of "sea piracy" seems to derive wholly from the Harvard draft of 1932, 26 *AJIL Spec. Supp.* 739 (1932), and works quoted there. *Id.*, p. 45. See text at notes 72 sq. below. The approach is legislative despite some attempt to make it appear a modest extension of existing law: "The competing claims and interests will be, *inter alia*, the principle of state sovereignty versus the interest of the international community in preventing and controlling sea piracy and terrorism." Dubner, *op. cit.* 161.

A better researched presentation built on Dubner and proposing further elaboration of the concept of "piracy" as it might apply to modern "terrorism" (another undefined term) is J.W. Boulton, Modern International Law of Piracy: Content and Contemporary Relevance, 7(6) *International Relations* 2493 (November 1983), supplementing an even more historical article, J.W. Boulton, Maritime Order and the Development of the International Law of Piracy, 7(5) *International Relations* 2335 (May 1983). But the history in both seems to be a collection without critical analysis, like that of the Harvard Research, to be discussed below, which posits a simple, linear historical and jurisprudential movement, and contains huge gaps.

Another approach, frankly *de lege ferenda* and, sadly, quite wrong in its superficial historical analysis in the light of the research set forth above, is Rubin, Terrorism and Piracy: A Legal View, 3(1-2) *Terrorism: An International Journal* 117 (1979). There might be some merit to the draft treaty proposed to replace the patently defective articles relating to "piracy" in the 1958 Geneva Convention on the High Seas, cited note 28 above, arts. 14-22. See note 189 below.

Of the many other articles on the subject in recent years, perhaps the best researched, although resting largely on secondary sources, but with many references to European precedents and history that for reasons of space and organization have been neglected in the current work, is Sundberg, Piracy and Terrorism, 20 *De Paul L. Rev.* 337 (1971), reproduced in part in 1 Bassiouni and Nanda, *A Treatise on International Criminal Law* (1973) 455. Sundberg suggests a revival of the legal label "piracy" and its application to unrecognized "belligerents," but through an international criminal court rather than through the application of municipal law and "universal" jurisdiction.

Perhaps the most incisive analytical recent article precedes the current excitement about terrorism. It will be discussed at notes 220 sq. below: Schwarzenberger, The Problem of an International Criminal Law, 3 *Current Legal Problems* 263 (1950).

61. 20 *AJIL Spec. Supp.* 2-3 (1926).

62. M. Wang was not able to attend the Committee's meeting and the amendments were made in Committee by M. Matsuda without his concurrence. *Id.* 222 note 2.

63. *Id.* 228.

64. *Id.* 228-229. League of Nations pub. C.196.M.70.1927.V at p. 119.

65. The replies are set out in their entirety in League of Nations pub. cited note 64 above at pp. 136-260.

66. The Portuguese comment is conveniently reproduced verbatim in the Analysis of Replies submitted to the Committee of Experts by M. Matsuda and reprinted in 22 *AJIL Spec. Supp.* 25 at 29-31 (1928).

67. See text at notes IV-292 sq. above.

68. There is no direct evidence for this reconstruction of the logic of the Committee, but that has been the universal experience of "codification" committees and my own experience. Cf. H. Lauterpacht, Codification and Development of International Law, 49 *AJIL* 16 (1955). The Committee's probable logic is in fact dubious. Codification proposals that are not well-founded in history and theory tend quickly to become legislative sessions in which each participant seeks to maximize his benefits in disregard of "progressive development." Cf. R. Baxter, Treaties and Custom, 129 *Hague Recueil* 25 (1969).

69. League of Nations Doc. C.254.1927.V, reproduced in 22 *AJIL Spec. Supp.* 216 at 222 (1928). The Conference mentioned by M. Zaleski was held in 1930 at the Hague as the "First Conference for the Progressive Codification of International Law." It was regarded as a failure when it could not produce any treaties that states would ratify. See J.L. Brierly, *The Basis of Obligation in International Law* (1958) 341. In fact the 1930 Conference produced a Convention on Certain Questions Relating to the Conflict of Nationality Laws; a Protocol relating to Military Obligations in Certain Cases of Double Nationality; a Protocol relating to a Certain Case of Statelessness; and a Special Protocol concerning Statelessness, all dated 12 April 1930. It failed to produce agreement on the width of territorial waters. A Second Codification Conference was proposed but never held.

70. League of Nations pub. V.Legal.1927.V.28; reproduced in 22 *AJIL Spec. Supp.* 345 at 346 (1928).

71. League of Nations Official Journal, Spec. Supp. No. 53, Oct. 1927, p. 9; reproduced in 22 *AJIL Spec. Supp.* 231 (1928).

72. *Harvard Research*, 26 *AJIL Spec. Supp.* 5 (giving the background of the Harvard Research effort), 738 (the list of those concerned with the "Piracy" Report) (1932) (hereafter cited as *Harvard Research*). With no disrespect intended towards the Californians, who included such scholars as Max Radin of Berkeley, of 15

named Advisers only three were resident outside of California: Charles E. Martin of the University of Washington, W.E. Masterson of the University of Idaho, and Harold Sprout of Princeton University.

73. The Protocol of Signature to the Statute of the Permanent Court of International Justice and other relevant documents are conveniently reproduced in Hudson, *The World Court, 1922-1929* (rev'd ed. 1929) 103 sq. The Hague Convention of 1907 was Convention I of the Second Codification Conference (the first was 1899) that climaxed pre-League of Nations attempts to reduce general international law to treaty texts and commitments to the peaceful settlement of international disputes. 1 Bevans 577. The Permanent Court of Arbitration and the procedures established under the Convention of 1907 are still in effect for the United States and 48 other countries.

74. *Harvard Research* 749.

75. *Id.* 752, 754.

76. See text at notes II-61 to II-69 above.

77. F. Pollock, The History of the Law of Nature, 3 *J. of the Soc. of Comp. Leg.* (new ser.) 204 (1901).

78. See, for an ascerbic introduction and criticism of the Platonic view of reality, K. Popper, *The Open Society and Its Enemies* (rev'd ed. 1950) 58-85.

79. U.S. v. Pedro Gilbert & Others, cited in note 33 and discussed at notes III-69 sq. above.

80. U.S. v. La Jeune Eugenie, 26 Fed. Cas. 832, No. 15,551 (D. Mass.) (1822), discussed at note III-117 above.

81. *Harvard Research* 756.

82. *Id.* 760.

83. *Id.* 761.

84. Stiel, *Der Tatbestand der Piraterie nach Geltendem Völkerrecht . . .* (1905).

85. Stiel cites none of them, merely asserting about "englisch-amerikanischen" approaches: ". . . ihm ist die Piraterie ein Tatbestand des völkerrechtlichen international Strafrechts." *Id.*, p. 14.

86. "[D]ie Piraterie ist ihm ein seepolizeilicher Tatbestand." *Id.*

87. The translation (mine) is difficult and barely conveys the technical implications of the original German: "Piraterie ist ein unpolitisches auf die gewerbmässige Ausübung räuberischer Gewaltakte gegen prinzipiell alle Nationen gerichtetes Seeunternehmen." *Id.* 28.

88. *Id.* 30 note 1:

Nur ist die alte staatliche autorisierte Piraterie nunmehr verschwunden. Aber wenn noch im Jahre 1858 von den englischen Behörden in Singapore zum Tode verurteilte malayische Piraten erklärten, dass sie lediglich den Befehlen ihrer Herrscher gehorsam gewesen seien und nur getan hätten was in ihren Lande herkömmlich und erlaubt sei . . . , so besteht kein Unterschied der Anschauung gegen die des Illyrikerkönigs Agron, der 229 v. Chr. den römischen Gesandten erklärte, nach illyrischem Rechte sei der Seeraub ein erlaubtes Gewerbe.

I think I have read every reported case decided in Singapore during the 19th century, and the unattributed reference to something in 1858 baffles me. The reference to Roman precedent seems only marginally relevant and is wrong. The original source (not cited by Stiel) seems to be Polybius, *The Histories* (LCL 1954) ii, 8. The transaction involved Teuta, Agron's widow (Agron died in 231 B.C.), and relates to the concept of state responsibility for private injury, implying a justification for Roman hegemony in the default of Illyria accepting responsibility for controlling Illyrian raiders:

She [Teuta] had quickly put down the revolt of the Illyrians but was engaged in besieging Issa . . . when the Roman commissioners arrived by sea. . . . When they had finished speaking, she told them she would see to it that Rome suffered no public wrong at the hands of Illyrians, but that so far as private wrongs were concerned, it was not the custom of the Illyrian Kings to prevent their subjects from taking plunder at sea. The younger of the Roman ambassadors . . . said, "The Romans have an excellent tradition, which is that the state should concern itself with punishing those who commit private wrongs, and helping those who suffer them. With the gods' help we shall do our utmost, and that very soon, to make you reform the dealings of the Kings of Illyria with their subjects."

Polybius, *The Rise of the Roman Empire* (I. Scott-Kilvert transl., F.W. Walbank ed. Penguin Classics 1979), 118-119. Since Teuta had disclaimed responsibility apparently denying that she had licensed Illyrian raiders, and Roman action was threatened against Illyria, not against the raiders, it is hard to see how "piracy" in any sense pertinent to Stiel's point was involved.

89. The *Serhassan (Pirates)* [1845] 2 *W. Rob.* 354, 3 *BILC* 778. See text at notes IV-159 sq. above.

90. Stiel, *op. cit.* 80: "Ein Unternehmen, das politische Zwecke verfolgt . . . is nicht Piraterie." As to "Raubstaaten," "der politische Zweck fehlt ihnen" (p. 83).

91. See text at notes IV-292 sq. above.

92. Stiel, *op. cit.* 94-96.

93. Although not the material set out at note 88 above.

94. *Harvard Research* 769-822.

95. *Id.* 769.

96. See note III-110 above.

97. See text at notes IV-292 sq. above.

98. It remains a question of some academic interest why the British so staunchly maintained their weak position on this when, at least in unpublished opinions by their own law officers, they had abandoned that position as legally untenable as soon as the question squarely arose in calmness. See text at notes IV-220 sq. above.

99. *Harvard Research* 832.

100. See note 13 above; the first was *R. v. Green* cited there, and the second is discussed and cited at note 107 below.

101. *In re Piracy jure gentium* [1934] A.C. 586; 3 BILC 836.

102. Coke, see text at notes I-197, I-200 sq. above; Molloy and Jenkins, see text at notes II-61 sq. above; Hedges, see text at note II-60 above. All the quotations and analyses above are far more detailed than the selective and unanalyzed references and quotations retailed in the case report itself.

103. The sole citation in the case is to the Parliamentary Paper, Peru No. 1 1877, presumably Parliamentary Papers 1877 LXXXVIII 613, Peru No. 1 (C. 1833) discussed in text at notes IV-292 sq. above and cited at note IV-293.

104. Discussed in text at notes III-285 sq. and IV-156 sq. above.

105. *Op. cit.* note 101 above 599 (842).

106. *Id.* 600 (843).

107. *People v. Lol-Lo and Saraw*, 43 Philippine Islands 19 as reported in 1 *Annual Digest of Public International Law Cases* (1919-1922)(Williams and Lauterpacht, eds. 1932) 164-165, Case No. 112.

108. Wiltberger, cited note 37 above. See text at notes III-72 sq. above.

109. 2 Hackworth, *Digest of International Law* (1941) 681-695 (sec. 203).

110. For example, a statement that *U.S. v. Smith* is the leading American case supporting the notion that there is such a thing as an international law of "piracy" and that it is properly incorporated into American law by mere reference in the Act of 1819 (see text at notes III-91 sq. above) is immediately followed by a long excerpt from *Lenoir, Piracy Cases in the Supreme Court*, 25 *J. Crim. L. and Criminology* 532 (1934-35), including the passage: "It is doubtful whether the Court would hold this view today, nor is it considered a correct statement of the present international law on piracy," reasoning that Justice Livingston's dissent was more persuasive than the majority opinion and that in near universal practice "piracy" was not only punished, but, for sound jurisprudential reasons, defined only by municipal law. *Id.* 552-553.

111. Hackworth, *op. cit.* 686, 687.

112. A review of the procedure seems unnecessary here. See Briggs, *The International Law Commission* (1965) 298-301.

113. 2 YBILC, 6th Session, 1954 7. The Report is denominated Doc. A/CN.4/79 in the United Nations archives.

114. *Op. cit.* note 113 above at p. 15. The French text is not directly identified as a mere translation in the Report, but in the discussion at the International Law Commission's 290th meeting on 12 May 1955, the English text is set out. 1 YBILC, 7th Session, 1955 39 note 3. It is verbatim the text of the Harvard article quoted above except for changing the word "a" to "the" in the phrase "for private ends without a [the] bona fide purpose of asserting a claim of right." Oddly, in the unannotated text of the Harvard Research draft Convention, reproduced at Appendix III.A below, the text of art. three differs from the annotated text set out above with a third variation on that sentence; the unannotated text has neither "a" nor "the," but says merely "private ends without bona fide purpose." The confusion seems inconsequential.

115. The English version of M. François's draft, identical to the corresponding articles of the Harvard Research draft except for stylistic changes, is set out in 1 YBILC, 7th Session, 1955 31 at 51 note 1.

116. *Op. cit.* note 113 above 46.

117. 1 YBILC, 7th Session, 1955 31 at 36. No precedents or legal argument appear to have been presented in support of this amendment proposed by Mr. Jaroslav Zourek (Czechoslovakia — but all members of the International Law Commission serve in their private capacities, not as representatives of states); indeed, the suggestion seems to have been passed without any substantive discussion at all, 8-0 with 2 abstentions.

118. See notes I-126 and I-127 above.

119. Document A/CN.4/L.53 paras. 9, 11 and 17, in 1 YBILC, 7th Session, 1955 1 and 2.

120. 1 YBILC, 7th Session, 1955 39. It should be repeated here that membership in the International Law Commission is formally not by country but by individual merit. There is ample evidence in this colloquy that the members of the various nationalities in some cases shared the views of their respective governments as to the proper legal classifications to be attached to events. This is not improper; indeed, it would be odd if it were not so, considering that individual eminence in law is in fact achieved by success within a national legal and educational system in nearly all cases, and thinkers of too much originality are unlikely to be selected for prestigious public positions by the representatives of states.

121. I am indebted to LCDR John Petrie, USN, for bringing this incident to my attention and providing me with the handy summary of the United Nations procedures and the politics involved in Jessup, *Parliamentary Diplomacy*, 89 *Hague Recueil* 185 (1956) at 189-201. The legal situation was reminiscent of the American Civil War situation with the exception that the Chinese Civil War, if it can be called that, created an occasion for constructing a legal model based on labels that departed so far from reality that it is possible to doubt the sanity of those involved. The Republic of China, continuing to regard the Communist forces as bandits, exercised the legal powers of visit and search at sea that normally flow only to belligerents seeking to interdict contraband. The "neutral" countries were in the same position as the United Kingdom protesting the equivalent acts of the Federal Government of the United States in 1861 on the ground that without a state of war there could be no status of "neutrality" and no "belligerent rights" in the defending government's forces. To call the defending government's forces "pirates," however, implies not merely that they had breached international law rules regarding peaceful commerce, but that they had no legal privileges at all. That seems to imply that the Communist government in Beijing was the sole government in China and that the Republic of China government in Taiwan was an unrecognized group of rebels or, worse yet, "bandits" violating the law of China and international law. This is not the place to point out all the ironies and distortions involved on all sides, or to trace their roots in British Imperial practice and the contradictory positions taken by the Federal Government of the United States during our Civil War.

122. 1 YBILC, 7th Session, 1955 41.

123. *Id.* 43.

124. See text at and following note 17 above.

125. 1 YBILC, 7th Session, 1955 43. M. Zourek seems to have misread the Nyon Agreement.

126. *Id.* 44-45.

127. *Id.* 53.

128. Article 4 of the Harvard draft set out above and in Appendix III.A defines "pirate ship" to include a ship devoted by its company "to the purpose of committing any similar act within the territory of a state by descent from the high sea." This provision was repeated in the first François draft.

129. 1 YBILC, 7th Session, 1955 53.

130. *Id.*

131. *Id.* The proposal had come from Sir Gerald Fitzmaurice (United Kingdom).

132. *Id.* 54.

133. *Id.* 53.

134. No reference was made to the historical background or jurisprudential basis for this position. The evolution of the idea in English law began in 1680, as far as available records indicate. See text at and after note II-45 above. The Kwok-A-Sing case analyzed at notes IV-211 sq. above seems to hold directly the opposite of Fitzmaurice's views, but was not mentioned.

135. 1 YBILC, 7th Session, 1955 54.

136. In English, the word "essentially" in this sort of context does not necessarily relate to essences in a philosophical sense, but can relate to normal conditions. There is little logic to the English language.

137. 1 YBILC, 7th Session, 1955 55.

138. *Id.* 55-57.

139. U.N. Doc. A/2934, in 2 YBILC, 7th Session, 1955 19. The "Piracy" articles are articles 13-20 at pp. 25-26.

140. Two single-sentence paragraphs follow, identical except for minor polishing with paragraphs 2 and 3 of the Harvard Researchers' draft article 3. See Appendix III.A. With additional minor alterations in the drafting committee, thus with no known discussion of any possible intention to change substance, those two paragraphs form the text of paragraphs 2 and 3 of article 15 of the 1958 Geneva Convention on the High Seas cited at note 28 above, and paragraphs (b) and (c) of the UN Convention on the Law of the Sea, Montego Bay, 10 December 1982, article 102. See below and text reproduced at Appendix III.B.

141. See note II-49 above.

142. In *U.S. v. Brig Malek Adhel*, 43 U.S. (2 Howard) 209 (1844), 1 Deak 56. Hatred and revenge are specifically mentioned as "piratical" motives in the text of Story's opinion quoted at note III-218 above.

143. See text at note 17 above. It is not clear why the International Law Commission referred to the treaty as an "Arrangement."

144. *Op. cit.* note 139 at p. 25.

145. On the use of unrestricted submarine warfare during the Second World War, and the ignoring of the legal restrictions by both allied and German Admirals, see W.T. Mallison, Jr., *Submarines in General and Limited Wars*, (NWC Blue Book 1966, Vol. LVIII) (1968), esp. p. 47-51 and 192-195 (Interrogation of Fleet Admiral Chester W. Nimitz in connection with the prosecution of German Grand Admiral Doenitz at Nuremberg, 1946, reprinted from 40 *International Military Tribunal [Nuremberg]* 109-111).

146. See e.g., *Dissenting Opinion by Commissioner F.K. Nielsen in International Fisheries Co. Case (1931) (U.S. v. Mexico)* 4 *U.N. R.I.A.A.* 691 at 703 sq.; Rubin, *Pollution by Analogy: The Trail Smelter Arbitration*, 53 *Oregon Law Review* 259 (1971).

147. *Op. cit.* note 139 above 25.
148. Cited at note 89 above, discussed in text at notes IV-159 sq. above.
149. Cited at note 107 above.
150. *Op. cit.* note 139 above 25.
151. *Id.*
152. U.S. v. *Klintonck*, 18 U.S. (5 Wheaton) 144 (1820), 8 Deak 20. See Marshall's language, his furthest concession to the naturalist views of his friend and colleague, Story, in the text at note III-82 above.
153. See text at notes IV-292 sq. above.
154. *Op. cit.* note 139 above 26.
155. See text at notes III-230 sq. and IV-156 sq. above.
156. *Op. cit.* note 139 above 26.
157. For a brief analysis of the origins in English law of the use of the term "piracy" to justify changes in the title to property, see above ch. I *passim*, esp. text at notes I-153 and 173 sq. For a scholarly tracing of the use of the word "piracy" in English property law, see *Wortley Pirata Non Mutat Dominium*, 24 BYIL (1948) 258 at 260-272. Wortley does not address the jurisdictional questions, assuming *in rem* jurisdiction in an English Admiralty tribunal, and apparently assuming that the English cases either reflect universal law, in the Blackstone-naturalist tradition, or that it is irrelevant to English decisions what the law might be in other countries. Like the other secondary studies cited in this work, Wortley's asserts definitions of "piracy" that seem inconsistent with a deeper analysis of the international usages, practice and writings other than his own.
158. See text at notes 116-117 above.
159. See text at notes 81-82 above.
160. Cited at note 13 above. See generally text at notes II-85 sq. above.
161. *Op. cit.* note 139 above 26.
162. See text at note II-68. As to police and coast guard or equivalent vessels, the Commission eventually decided to solve the apparent inconsistency of authorizing warships to "police" the seas against "pirates" while not authorizing "police" vessels of a state to do the same, by making "police" vessels into "warships" for purpose of exercising public authority on the high sea. This was done in art. eight of the draft and involved discussion not pertinent to "piracy" as such. It is mentioned again in connection with the discussion of art. 20 at note 211 below.
163. *Op. cit.* note 139 above 26. The other two categories involve suspicion of violating treaties abolishing the slave trade, and suspicion that the vessel visited is actually of the nationality of the visiting warship although flying (falsely) other colors. They seem irrelevant to this study.
164. UN Doc. A/CN.4/97 reprinted with corrections in 2 YBILC, 8th Session, 1956 1.
165. *Id.* 37 sq., UN Doc. A/CN.4/99 and its addenda.
166. *Id.* 13 sq., UN Doc. A/CN.4/97/Add. 1, 1 May 1956.
167. 1 YBILC, 8th Session, 1956 45, 343rd Meeting.
168. 2 YBILC, 8th Session, 1956 18, 64.
169. 1 YBILC, 8th Session, 1956 46.
170. *Id.*
171. Report of the International Law Commission to the General Assembly, UN Doc. A/3159, in 2 YBILC, 8th Session, 1956 253. The article appears as article 38 of the draft. The 1958 Geneva Convention is cited at note 28 above. It entered into force for the United States on 30 September 1962. As this is written it has 46 parties.
172. Cited at note 140 above and reproduced in pertinent part at Appendix III.B below.
173. The provisions are articles 5(8) and 333(1) and (2), for which a translation supplied by the Legal Department of the Shanghai Municipal Council had been published in China in 1935. They are reprinted in 2 YBILC, 8th Session, 1956 44:

Article 5. This Code shall apply to any one of the following offences committed beyond the territorial limits of the Republic of China . . . :

8. Offences of piracy, as specified in articles 333 and 334.

Article 333. Whoever navigates any vessel not being commissioned by a belligerent State or not being part of the naval forces of any State, with intent to commit violence or employ threats against any other vessel or against any person or thing on board such other vessel, is said to commit piracy, and shall be punished with death, or imprisonment . . . for not less than 7 years.

Whoever being a ship's officer [ftn. 'A member of the crew' and 'another member of the crew' would be closer to the meaning of the original expressions—*id.*] or a passenger on board a ship, with intent to plunder or rob, commits violence or employs threats against any other officer [ftn. *id.*] or passenger and navigates or takes command of the ship shall be deemed to have committed piracy. . . .

Article 334 does not seem to have been reprinted. These provisions seem to be identical in intention, although not in translated English, to articles 1(14) and 352 of the Chinese Criminal Code of 10 March 1928 set out in Professor Stanley Morrison's compilation of national laws referring to "piracy" in the *Harvard Research*, 26 *AJIL Spec. Supp.* 887 (1932) at 952-954.

174. See text at notes III-64 sq., III-85 sq. and III-122 sq. above.

175. Presumably Higgins, *The International Law of the Sea* (Colombos, ed.) (3rd ed. 1954).

176. Presumably Ortolan, *Règles Internationales et Diplomatie de la Mer* (2 vols.) (3rd ed. 1856).

177. Presumably 1 Oppenheim, *International Law* (Lauterpacht ed.) (8th ed. 1954).

178. Presumably Gidel, *Le Droit International Public de la Mer* (3 vols.; only vol. 1 refers to the law of the high sea) (1932).

179. Cited note 13 above. See text at notes IV-211 sq. above.

180. 2 YBILC, 8th Session, 1956 64.

181. *Id.* 28.

182. *Id.* 79.

183. 1 YBILC, 8th Session, 1956 46-47.

184. 2 YBILC, 8th Session, 1956 64.

185. This seems to be a reverse formulation of the well-established exclusion from the benefits of the 1944 International Civil Aviation Convention of aircraft "used in military, customs and police services." 15 U.N.T.S. 295, T.I.A.S. 1591, 3 Bevans 944, article 3.

186. 2 YBILC, 8th Session, 1956 19.

187. See discussions following note 120 and preceding note 138 above.

188. 2 YBILC, 8th Session, 1956 47.

189. This is the proposal made on more but still inadequate, data in Rubin, *op cit.* note 60 above. A more or less thorough acquaintance with British 19th century practice in Malayan waters, coupled with a superficial knowledge of the jurisprudential issues and the leading cases and writings, lay in the background of a proposal to respond to increasing "terrorism" by application of the British Imperial law of "piracy." I propounded a complete treaty text.

Zourek repeated his objection to the approach taken by the Commission again at the Commission's final public review of the draft, its 376th meeting on 27 June 1956, reported in 1 YBILC, 8th Session, 1956 265, but again gave no reasons to add to his known policy preferences. A deeper awareness of the *lex lata* might have helped us both.

Works by Dubner and Boulton cited note 60 above have similar arguments based almost wholly on natural law speculation and unanalyzed precedents.

190. Cited respectively at notes 28 and 140 above.

191. This and other difficulties surely not intended by the drafters are pointed out in Rubin, *Is Piracy Illegal?*, 70(1) *AJIL* 92 (1976).

192. This anomaly was raised at the Geneva Conference in 1958 by the delegate of Greece, but the proposal to delete the word "illegal" was defeated, 4 votes in favor, 30 opposed, with 16 abstentions. UN Doc. A/CONF. 13/40 at 84. There was no reported discussion of the merits.

193. The British proposal was defeated by 13 for, 22 against, with 7 abstentions. The British argument rested primarily on the decision in *In re Piracy jure gentium* cited at note 101 above.

194. 2 YBILC, 8th Session, 1956 19, 38, 65, 97.

195. Of course, the Soviet position on this is not only shared by other countries with similar ties between government and economic enterprise, but were strongly asserted by the English themselves at one time. See text at and following note II-78 above.

196. 1 YBILC, 8th Session, 1956 48.

197. The numbering was changed twice.

198. 1958 and 1982 Conventions are cited notes 28 and 140 above.

199. 2 YBILC, 8th Session, 1956 19, 39, 65.

200. *Id.* 48. The anomaly of referring substantive questions to a drafting committee needs no further comment here. Some further drafting changes to this article were urged by A.E.F. Sandström (Sweden) at the Commission's 376th meeting on 27 June 1956, but relegated at that time to elaboration in the official "comment" to accompany the text. *Id.* 265.

201. 1958 and 1982 Conventions cited notes 28 and 140 above.

202. *Id.*

203. 2 YBILC, 8th Session, 1956 19, 39, 81.

204. 1 YBILC, 8th Session, 1956 48.

205. 1958 and 1982 Conventions cited notes 28 and 140 above.

206. See text following note 156 above.

207. 2 YBILC, 8th Session, 1956 65, 67. Article 21 included suspicion of "piracy" along with "slave trade" and suspicion that the vessel is actually of the same nationality as the interfering warship although flying a foreign flag or no flag, as grounds for boarding. The Netherlands and Norwegian governments were

obviously correct in seeing an overlap between that article and article 19 of the draft, and in trying to minimize the confusions that would arise from inconsistencies in language.

208. 1 YBILC, *8th Session, 1956* 48.

209. 1958 and 1982 Conventions cited notes 28 and 140 above.

210. See text at note II-68 above.

211. Article 8, which assimilated all state vessels to warships for the purpose of exercising public authority on the high sea. The evolution of art. eight seems to be beyond the scope of this study.

212. 2 YBILC, *8th Session, 1956* 79.

213. *Id.* 20.

214. 1 YBILC, *8th Session, 1956* 48. The legal position taken by M. Scelle seems sound in rejecting an expansion of the normal tight restrictions of international law on the authority of a state acting in self-defense. His notion that a third person should be regarded as legally empowered to act for public authority in cases of default seems overstated, but consistent with a line of precedent and argument adverted to at note IV-222 above. The international law regarding self-defense is very narrowly defined. See Bowett, *Self-Defence in International Law* (1958) for a start on the tremendous volume of learned writing in this area.

215. 1 YBILC, *8th Session, 1956* 48.

216. 2 YBILC, *8th Session, 1956* 283. This language was to some degree adjusted to make clear that a merchant ship need not have had it in mind to hand a "pirate ship" over to proper authorities in order to exercise its own rights of self-defense. The point was raised by Fitzmaurice at the 376th Meeting and the suggestion of an amendment to the official comment on the article was there approved, the text to be drafted later. 1 YBILC, *8th Session, 1956* 166.

217. 1958 Convention cited note 28 above.

218. 1982 Convention cited note 140 above.

219. Compare text at notes IV-292 sq. above with 1 Oppenheim, *International Law* (Lauterpacht, ed.) (8th ed. 1955) 608-617 (secs. 272-280).

220. Schwarzenberger, *op. cit.* note 60 above.

221. See Palachie's Case, 1 Rolle 175 (1615), reproduced in pertinent part at note I-197 above, holding a taking under a foreign king's commission not to be *malum in se* and thus upholding the Moroccan Ambassador's immunities in an English court. This rule is set out in Coke's usual direct simplicity in Coke, *Fourth Institute of the Laws of England* (1644) 153:

But if a foreign Ambassador being *Prorex* committeth here any crime which is *contra jus gentium* [i.e., against the reason-based law common to all nations], as Treason, Felony, Adultery, or any other crime which is against the Law of Nations, he loseth the privilege and dignity of an Ambassador, as unworthy of so high a place, and may be punished here as any other private Alien, and not to be remanded to his Sovereign but [as a matter] of curtesie.

222. Coke's views on this were interpreted to the reverse conclusion by 1710. See statute 7 Anne c. 12 (1708) and the argument based on Coke's writings by Attorney General Sir James Montague in the *Case of Andrew Artemonowitz Mattueoff, Ambassador of Muscovy*, Q.B., 8 Queen Anne (1710), 10 Mod. 4, reproduced in Scott, *Cases on International Law* (1922) 286.

223. I trust that Professor Schwarzenberger will forgive the misstatement that inevitably flows from an attempt to digest somebody else's thought. The interested reader is encouraged to view the original for himself.

224. I was the action officer within the Office of the Assistant General Counsel (International Affairs) in the Department of Defense at the time. The legal position that guided the Defense Department's reaction to the *Santa Maria* incident was an early version of the analysis set out in Forman, *op. cit.* note 60 above.

225. *New York Times*, 13 May 1975, p. 1 col. 8 (President Ford "considers this seizure an act of piracy"); p. 19, col. 7, (unnamed State Department lawyer).

226. *Id.*, 15 May 1975, p. 1., col. 5-6 (Thailand protests American troop movements related to the Mayagüez incident).

227. 6 *International Practitioner's Notebook* 3 (April 1979).

228. The facts have appeared in many newspaper stories from 1975 to the present. A useful retelling based on those reports is "Age," *The Boat People* (Bruce Grant, ed.) (Penguin Books 1979). Many stories are told orally by American naval personnel who witnessed atrocities in the area, and by refugees and relief workers with experience in Malaysian and Thai refugee camps.

229. For example, off the West coast of Africa. See 61 *African Business* 77 (September 1983). And, on the commercial importance of the problem and the inadequacy of current legal approaches, see UNCTAD Doc. TD (B) C.4/AC.4/2 of 21 September 1983, Report by the UNCTAD Secretariat, *Review and Analysis of Possible Measures to Minimize the Occurrence of Maritime Fraud and Piracy*, p. 12, 63-66. I am indebted to

Professor Martin Glassner of Southern Connecticut State College for bringing these items to my attention. Mr. Lawrence W. White has kindly sent me a copy of an article asserting with some likelihood of accuracy that the "piracy" in the southern Philippines is at least in part politically motivated, and that local authorities might be more upset at the use of firearms by foreign yachtsmen defending themselves than by the "pirates." Scott, *Pirate Attack in Paradise*, *Yachting* (May 1984) 25 at 28, and see the Note, *Some Afterthoughts on Piracy*, *id.*, at 31.

230. Ch. text at notes III-64 sq., III-85 sq. and III-122 sq. above.

231. See text at notes IV-230 sq. above.

232. Like *The Serhassan (Pirates)*, cited at note 89 above, and *People v. Lol-Lo and Saraw*, cited at note 107 above.

233. See Appendix III.B below. The articles are set out above at notes 171 and 205 in their earlier incarnation as articles 14 and 19 of the 1958 Convention. The Peruvian proposal is reported in UNCTLOS III Doc. C.2/Informal Meeting/64/Rev. 1 dated 13 August 1980. I am deeply indebted to Professor Martin Glassner of Southern Connecticut State College for bringing this document to my attention and making it available to me.

234. Literally, no crime exists without a statute creating it; no punishment can be imposed without a statute authorizing it. This modern translation equating "lege" to "statute" is not quite right, since the word "lege" (and "lex") were used by Cicero to include the natural or moral "vera lex [true law]" discoverable by "recta ratio [right reason]" and supreme even when inconsistent with positive law adopted by the senate or the people of Rome: "Huic legi nec obrogari fas est neque potest, nec vero aut per senatum aut per populum solvi hac lege possumus [We cannot be freed from its obligations by senate or people]." Cicero, *De Re Publica* III, xxii. On the other hand, the Fetial law under which war could be declared and which according to Livy was adopted as a matter of policy choice by the early King Ancus from the Aequicolae, was called by both Cicero and Livy "fetiali . . . iure." Cicero, *De Officiis* I, xi, 36 quoted in note I-46 above. But this is not the place to attempt even a summary of the very complex Roman distinction between "lex" and "jus," and the even more complex relationships between natural law, moral law, divine law and positive law purportedly resting on Greek and Roman writings and argued with vigor and inconsistency by 2500 years of jurists (and legists).

The English word "law" is not now generally believed to be cognate with the Latin "lex," although such words as "legislation" were imported into English later and are clearly Latin-rooted (from "legis," the nominative plural of "lex"). The *American Heritage Dictionary* traces the English words "law" and "legislate" to different Indogermanic roots, *leg-* and *legh-* (*American Heritage Dictionary*, p. 1525), meaning to collect and to lay flat respectively. But, as the editors of the *Oxford English Dictionary* (OED) point out, "As law is the usual English rendering of L[atin] lex, and to some extent of L[atin] jus . . . , its development of senses has been in some degree affected by the uses of these words." OED, Vol. "L" p. 113. A multivolume analysis would be necessary if the word "law" in English were to be given the same sort of etymological and jurisprudential investigation that I have attempted to give to the word "piracy" here.

235. For a modern example, see the attempts to create an international criminal law and an international criminal court by various lobbies within the United Nations, incisively analyzed in Gross, *Some Observations on the Draft Code of Offences Against the Peace and Security of Mankind*, 13 *Israel Yearbook on Human Rights* 9 (1983).