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On the Definition of the Crime of Sea Piracy Revisited: Customary vs. Treaty Law and the Jurisdictional Implications Thereof

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PREFACE

Your author was in the middle of preparing an outline for an article on the definition of sea piracy ("piracy") because he thought the definition to be rather ambiguous, when a decision, handed down by Judge Jackson in the U.S. District Court for the Eastern District of Virginia,[1] stated that "the definition of piracy in the international community is unclear" and that the "court's reliance on these international sources as authoritative would not meet constitutional muster and must therefore be rejected."[2] Since I was cited by the judge as authority[3] (for a different reason), I thought it best to continue what I was originally writing about, the definition of sea piracy.

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[1]See United States v. Mohamed Ali Said, 2010 U.S. Dist. LEXIS 106050 (E.D. Va. 2010). (Please note that during the editing process of this article Judge Mark S. Davis, in the Eastern District of Virginia, came to a dramatically different conclusion in defining the crime of "piracy under the law of nations" pursuant to 18 U.S.C. §1651. See United States v. Hasan, 2010 U.S. Dist. LEXIS 115746 (E.D. Va. 2010). Where Judge Jackson applied an 1820 Supreme Court holding that piracy means "robbery at sea", Judge Davis applied the definition of piracy as set out in Article 101 of the United Nations Law of the Sea Convention. H. Allen Black, III, *Pirates Win 1, Lose 1 in Virginia Split Double Header*, BILGE & BARRATRY, Nov. 10, 2010, at 6.)

[2]Id. at 32; See also Richard Serrano, *U.S. Judge Dismisses Piracy Charges Against Somali Attackers*, ORLANDO SENT., Aug. 18, 2010, at A3. (Judge Raymond Jackson stating "[T]he government's assertions would subject defendants to an enormously broad standard under a novel construction of the statute that has never been applied under United States law, and would in fact be contrary to Supreme Court case law."); John Schwartz, *Virginia: Somali Pleads Guilty in Ship Attack*, N.Y. TIMES, Aug. 17, 2010, at A9. ("A Somali man pleads guilty Friday to attacking a Navy ship in the Gulf of Aden in April 2010. Earlier this month, a federal judge in Norfolk threw out piracy charges against the man, . . . , accused in the attack on the U.S.S. Ashland, saying the government had not shown that the men's actions violated American piracy law. . . . The dropped piracy charge carried an automatic life sentence; . . .").

[3]Said, 2010 U.S. Dist. LEXIS 106050 at 16.

Thereafter, the reader will better identify the problem with the reasoning of the court.

I
INTRODUCTION

The first question is: can a definition that is so all-inclusive be too vague to base a prosecution on at the same time?

The second question, raised by my spouse in conjunction with defining piracy, is can pirates on land be considered pirates only if they were first considered pirates on the high seas? These questions sparked my interest because of the diversity of opinion by scholars prior to the development of the articles on sea piracy, which first appeared in the 1958 Geneva Convention on the High Seas (Geneva Convention)[4] and the 1982 United Nations Convention on the Law of the Sea (UNCLOS).[5]

With all that has been written about the subject of Somalia piracy, one would think that there is a prevailing definition of the word "piracy". There seems to be a lack of enthusiasm for calling "piracy" by its real name (i.e., "piracy") when the crime occurs in internal or territorial waters. Rather, piracy is being called "armed robbery" in those locations.[6] Since "armed robbery" is only one possible ingredient of many in the definition of "piracy", the question presented is why we have one definition of "piracy" in international law;[7] and why it is called "armed robbery" in areas other than high seas; and, "piracy" in municipal statutes. Your author believes that the

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[4]Convention on the High Seas, April 29, 1958, 13 U.S.T. 2312 (1962), 450 U.N.T.S. 82 [hereinafter Geneva Convention], available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_high_seas.pdf.

[5]United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, S. Treaty Doc. No. 39, 103d Cong., 2d Sess. (1992) [hereinafter 1982 Convention], available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

[6]See INTERNATIONAL MARITIME ORGANIZATION, CODE OF PRACTICE FOR THE INVESTIGATION OF CRIMES OF PIRACY AND ARMED ROBBERY AGAINST SHIPS, IMO Res. A.1025 (Adopted on Dec. 2, 2009), available at http://www.imo.org/OurWork/Security/docs/Pages/Piracy.aspx

> 2.2 "Armed robbery against ships" means any of the following acts:
> .1 any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, *within a State's internal waters, archipelagic waters and territorial sea;*[Emphasis mine]. Id.

[7]According to UNCLOS, "[p]iracy consists of any of the following acts: (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State . . ." 1982 Convention, Art. 101, supra note 6. The 1958 Geneva Convention includes identical language. See Geneva Convention, Art. 15, supra note 5.

confusion can be traced to the fact that at least one scholar has stated that the Geneva Convention and UNCLOS definitions of piracy adopted customary law; and, thereby, took the place of all customary law.[8] However, a closer reading of the material cited by the Harvard Draft[9] demonstrates that there was a split of authority on that subject.

The purpose of this work is to set forth the different views of what constituted a crime of piracy, historically, and how it evolved into its current usages. What was the "custom(s)" regarding the definition(s) of piracy and were these "custom(s)" *absorbed, totally*, within the treaty definitions found in the 1958 Geneva Convention and later in UNCLOS (1982)?[10] How does the international law definition in the Geneva Convention and UNCLOS impact any discussion regarding the type of court (and the possible creation of a new and/or state judicial system) necessary to prosecute pirates?[11] When reading any material on piracy it is important to understand that the main purpose of having piracy as a crime (other than the fact that pirates sometimes commit murder and/or other heinous acts), is to keep commercial lanes of navigation open to shipping.[12] But, before discussing any other relationships between the customary and treaty laws regarding sea piracy, it is important to set forth the definition of piracy.

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[8]See Dr. DOUGLAS GUILFOYLE, TREATY JURISDICTION OVER PIRATES: A COMPILATION OF LEGAL TEXTS WITH INTRODUCTORY NOTES (2009), available at http://ucl.academia.edu/DouglasGuilfoyle/Papers/116803/Treaty-Jurisdiction-over-Pirates—A-Compilation-of-Legal-Texts-with-Introductory-Notes. (Report prepared by Dr. Guilfoyle for the 3rd Meeting of Working Group 2 on Legal Issues "The Contact Group on Piracy off the Coast of Somalia." Dr. Guilfoyle was contacted by the Danish Ministry of Foreign Affairs to produce a compilation of relevant international legal texts providing jurisdictional bases for the prosecution of suspected pirates.)

[9]Harvard Research in International Law, *Draft Convention on Piracy, with Comment*, 26 AM. J. INT'L L. SUPP. 739 (1932) [hereinafter "Harvard Draft"].

[10]See, e.g., supra note 8.

[11]The Secretary-General, *Report of the Secretary General on the Question of Prosecuting Sea Piracy, delivered to the Security Council and the General Assembly,* U.N. Doc. S/2010/394 (July 26, 2010).

> Report of the Secretary-General on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia, including, in particular, options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements, taking into account the work of the Contact Group on Piracy off the Coast of Somalia, the existing practice in establishing international and mixed tribunals, and the time and resources necessary to achieve and sustain substantive results[.] Id.

[12]Barry Hart Dubner, *Human Rights and Environmental Disaster–Two Problems that Defy the "Norms" of the International Law of Sea Piracy*, 23 SYRACUSE J. INT'L L. & COM. 1, 11-12 (1997); See also Harvard Draft, infra note 24.

II
DEFINITION OF PIRACY

A. Definitions

"Piracy" as defined in both the Geneva Convention on the High Seas and UNCLOS was the same crime committed on high seas, as follows:

> Article 101 Definition of piracy
>
> Piracy consists of any of the following acts:
>
> (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
>
> (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
>
> (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
>
> (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate-ship or aircraft;
>
> (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).[13]
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> Article 102 Piracy by warship, government ship or government aircraft whose crew has mutinied[.][14]

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

> Article 103 definition of a pirate ship or aircraft
>
> A ship or aircraft 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 101. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the person guilty of that act.[15]

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[13] 1982 Convention, supra note 6, at 57.

[14] Id. at 58.

[15] Id.

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

A ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the State from which such nationality was derived.[16]

Article 105 Seizure of a pirate ship or aircraft

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy 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.[17]

Article 106 Liability for seizure without adequate grounds

Where 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.[18]

Prior thereto, the 1958 Geneva Convention on the High Seas defined "piracy" as follows:

Article 15

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

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

(*b*) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

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

(3) Any act of inciting or of intentionally facilitating an act described in subparagraph 1 or subparagraph 2 of this article.[19]

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[16]Id.

[17]Id.

[18]Id.

[19]1982 Conventions, supra note 5, at 5.

There was no change in the conventional definitions of "piracy" from 1958 through 1982. Before explaining why there was no change and why the crime of piracy was defined in international law as taking place on high seas rather than in territorial waters, it is first necessary to look at another definition.

The ICC International Maritime Bureau (IMB) is a specialized division of the International Chamber of Commerce (ICC.) The IMB is a non-profit organization which was established in 1981 to gather material and act as a focal point in the fight against all types of maritime crimes and malpractice.[20] For statistical purposes, their definition of piracy is "An act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in the furtherance of that act."[21] This definition thus covers actual or attempted attacks whether the ship is berthed, at anchor, or at sea. Petty thefts are excluded unless the thieves are armed.[22]

The above definition has been adopted by the IMB as the majority of attacks against ships take place within the jurisdictions of States and piracy, as defined under the Geneva Convention and UNCLOS, only applies to piratical acts that occur on the high seas.

The IMB noted that the International Maritime Organization (IMO) at its 74th meeting of Maritime Safety Committee (MSC) addressed this definitional matter in the Draft Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships.[23]

The Code of Practice defines "Piracy" and "Armed Robbery against Ships" as follows:

> Piracy means unlawful acts as defined in article 101 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS):
>
> ARTICLE 101

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[20]See INTERNATIONAL CHAMBER OF COMMERCE, INTERNATIONAL MARITIME BUREAU, available at http://www.icc-ccs.org (The International Maritime Bureau is a specialized division of the International Chamber of Commerce that was established in 1981 to act as a focal point in the fight against all types of maritime crime and malpractice. Since 1992, the IMB has operated its Piracy Reporting Centre (PRC), the "main objective" of which "is to be the first point of contact for the shipmaster to report an actual or attempted attack or even suspicious movements thus initiating the process of response." The PRC's "main aim" is to "raise awareness within the shipping industry, which includes the shipmaster, ship-owner, insurance companies, traders, etc., of the areas of high risk associated with piratical attacks or specific ports and anchorages associated with armed robberies on board ships.").

[21]Id.

[22]Id.

[23]ICC, INTERNATIONAL MARITIME BUREAU, MARITIME SAFETY COMMITTEE, 74th Session, June 8, 2001, available at http://www5.imo.org/SharePoint/mainframe.asp?topic_id=110&doc_id=1151.

Definition of Piracy consists of any of the following acts:

a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed
  (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
  (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).
"Armed Robbery against Ships means any unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of "piracy," directed against a ship or against persons or property on board such ship, *within a State's jurisdiction* over such offences.[24] [Emphasis mine.]

The above definitions now cover actual or attempted attacks whether the ship is berthed, at anchor, or at sea.

The reader will see, immediately, that the IMB's definition is given "for statistical purposes" and defines Piracy and Armed Robbery in such a way that the definition covers actual or attempted attacks in any water, be it internal, territorial or high seas. Again, this is only for statistical purposes. This is not a treaty signed onto by a consensus of the international community. However, the statistics are very important to any discussion of maritime violence and are so noted.

B. The Harvard Draft

In order to understand why certain States are having difficulty understanding jurisdictional concepts concerning the crime of piracy, it is necessary to look back to see why the articles at the 1958 Convention were originally drafted. Both the 1958 and 1982 definitions of piracy (again, both are identical) are based on the Harvard Research Draft (Harvard Draft),[25] which was prepared in 1932 for the purpose of "expediency."[26] The study itself was extremely comprehensive and has been used and cited in different texts. In 1932, the drafters of the study were presented with a main question: "What initial significance does piracy have in the law of nations?"[27] The Harvard

[24]1982 Convention, supra note 6.

[25]Harvard Research in International Law, *Draft Convention on Piracy, with Comment*, 26 AM. J. INT'L L. SUPP. 739 (1932) [hereinafter "Harvard Draft"].

[26]Dubner, supra note 13.

[27]Id. at 16; Harvard Draft, supra note 24, at 749.

Draft pointed out there was a great diversity of opinion regarding fundamental matters, one of which was the definition of piracy as understood by the international community; i.e., the law of nations.[28] In the Harvard Draft Article 3, piracy is considered to be any of the following acts committed at a place not within the territorial jurisdiction of any State:

> 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 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.[29]

The Commentators to the Harvard Draft are quick to point out that " . . . there is no authoritative definition" of the crime of piracy.[30] In fact, many definitions were proposed, most of which they deemed to be inaccurate.[31] The divergence in opinion can be seen by looking at scholars. All pirates are persons who depredate by sea or land without authority from the sovereign.[32] The Harvard Draft points out that the definition "is at once too wide and too narrow to correspond exactly with the acts which are now held to be piratical, but it may serve as a starting-point by directing attention to the external characteristics by which, next to the violent nature, they are chiefly marked . . . ."[33] The Commentators disclosed that the writings on the subject of piracy include arguments for inclusion and among piratical acts the following:

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[28]Harvard Draft, supra note 24, at 749. ("Naturally he will ask: What significance has piracy in the law of nations? In seeking an answer, he will meet at once a diversity of opinion which runs throughout the subject. This diversity is especially remarkable with respect to the following fundamental matters: (1) The *definition* of piracy in the sense of law of nations.) [emphases mine] Id.

[29]Id. at 768-69.

[30]Id. at 769.

[31]Id.

[32]Id. at 771. (citing HALL, INTERNATIONAL LAW 310-11 (8th ed. 1924) "Pirates, according to Bynkershoek, are persons who depredate by sea or land without authority from a sovereign.").

[33]Id.

I. Acts on the high sea:

(1) Robbery committed by using a private ship (a pirate ship) to attack another ship. (This is the typical piracy of history and fiction.)

(2) Intentional, unjustifiable homicide, similarly committed for private ends.

(3) Unjustifiable imprisonment of a person similarly accomplished for private ends.

(4) Any unjustifiable violent attack on persons similarly committed for private ends

(5) Any unjustifiable depredation or malicious destruction of property similarly committed for private ends.

(6) Attempts to commit the foregoing offences.

(7) Cruising (in a pirate ship) for the purpose of committing any of the foregoing offences.

(8) Cruising as professional robbers in a ship devoted to the commission of such offences as the foregoing.

(9) Participation in selling a ship (on the high sea) devoted to the purpose of making attack in territorial waters or on land by descent from the sea. (*This is another phase of familiar traditional piracy.*)[34] [Emphasis mine.]

At this point, the Harvard Draft cites Hall who states that: ". . . a pirate does not so lose his piratical character by landing within state territory that piratical acts done on shore cease to be piratical."[35] [Emphasis mine.] Hall further elaborates that:

> Usually piracy is spoken of as occurring only upon the high seas. If however a body of pirates land upon an island unappropriated by a civilized power, and rob and murder a trader who may be carrying on commerce there with the savage inhabitants, they are guilty of a crime possessing all the marks of common place professional piracy. In so far as any definitions of piracy exclude such acts, and other done by pirates elsewhere than on the ocean but of the kind which would be called piratical if done there, the omission may be assumed to be accidental. *Piracy no doubt cannot take place independently of the sea, under the conditions at least of modern civilization; but a pirate does not so lose his piratical character by landing within state territory that piratical acts done on shore cease to be piratical.*[36] [Emphasis mine.]

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[34]Id. at 773-75.

[35]HALL, INTERNATIONAL LAW 313 (8TH ED. 1924).

[36]Id.

(10) Sailing a ship not authorized by any State or recognized belligerent government while disclaiming allegiance to any State.

(11) Appropriation of a ship for unlawful private end by mutiny of its crew or passengers.

(12) Using a ship to attack another for some political purpose provided the attack is not made under the authority or protection of any state or recognized belligerent government.

(13) Attacks on commerce by illegitimate privateers during a war or revolution.

(14) Participation in privateering attacks of a foreign belligerent on commerce of a nation with which the offender's State of nationality is at peace.

(15) Causing a wreck of another's ship for private ends.

(16) Any unjustifiable act of violence or depredation committed for private ends on board a pirate ship or a ship which is not under the peculiar jurisdiction or protection of some State (its flag State or State of national character).[37]

As the reader will note, this is part of the language finally adopted in the Geneva Convention of 1958 and UNCLOS, 1982.[38]

The next category of acts are those committed outside all territorial jurisdiction but not on the high sea.[39] These include acts of several types but committed in or from the air and involving aircraft instead of only a water craft.[40]

(2) Robbery on land.
  (a) by professional robbers.
  (b) by others than professionals.
(3) Other unjustifiable acts of violence or depredation committed for private ends on land.
  (a) by professional robbers.
  (b) by others than professional robbers.[41]

This is where the history of the definition of piracy gets interesting. The reply of Romania to a questionnaire on piracy of League of Nations' Committee of experts stated that " . . . it is quite untrue that a special legal notion of piracy is due to its maritime character . . . Besides the high seas, there are also **unowned** territories, and until some state acquires exclusive sovereignty over them, every state in virtue of the principles described

[37]Harvard Draft, supra note 23, at 776-80.

[38]See Geneva Convention, supra note 5; See also 1982 Convention, supra note 6.

[39]Harvard Draft, supra note 23, at 780.

[40]Id.

[41]Id. at 781. (Please note: The actual text of the Harvard Draft does not have a (1) in the list).

above, will naturally have a theoretical right of punitive jurisdiction over them.[42] [Emphasis not mine.] The reply from Romania draws a distinction of the following:

> Supposing, for example, that a band of brigands in some unowned territory attacks and plunders a convoy or caravan and escapes capture by its victims, what is the difference from the legal point of view between piracy on the high seas and pillage in unowned territory? . . . If the act was committed in unowned territory, it is universally punishable *in virtue of the same principles* as those which make piracy on the high seas universally punishable. It would therefore be most desirable to substitute for the term 'high sea' the words 'place not subject to sovereignty of any State.'[43]

Another well-known scholar, stated that: "If the foregoing remarks are well founded, piracy may be said to consist in acts of violence done upon the ocean or unappropriated lands, or within the territory of the state through descent from the sea, by a body of men acting independently of any politically organized society."[44]

The persons who prepared the 1932 Harvard Draft believed that the type of piracy seen in Errol Flynn's movies had died years before the preparation of the 1932 draft.[45] An illustration of such European piracy is described in a book about William Dampier, a noted author and naturalist as well as a pirate during the late 1600s to the early 1700s.[46] He described his companions as "privateers;"[47] they were not. Privateers at the time were "legalized" maritime raiders given official letters of marque in war times by governments to attack enemy shipping, usually in return for the cut of the proceeds, which also had to be shared with the ship's owners.[48] The men to whom Dampier referred were actually "buccaneers"— adventurers whose activities often had no legal sanction and crossed the boundary into out-and-out piracy, when all ships were fair game and the loot had to be shared with no one.[49]

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[42]Id.

[43]Id.

[44]Id. at 789. (citing Hall, supra note 23, at 314).

[45]Although there is some dispute about the exact dates, the "Golden Age" of piracy extended from approximately 1650 to 1730. MARCUS REDIKER, VILLIANS OF ALL NATIONS: ATLANTIC PIRACY IN THE GOLDEN AGE 8 (Beacon Press 2004). Estimates of the number pirates operating during the Golden Age range from 1,000 to 2,000 per year. PETER T. LEESON, THE INVISIBLE HOOK: THE HIDDEN ECONOMICS OF PIRATES 23 (Princeton University Press 2009). Crew sizes generally ranged from 80 to perhaps 200, although Blackbeard's crew aboard *The Queen Anne's Revenge* consisted of as many as 300. Id. at 24. Some of the larger pirate crews formed squadrons, with multiple ships under the command of a single captain. Id.

[46]DIANA PRESTON & MICHAEL PRESTON, A PIRATE OF EXQUISITE MIND: EXPLORER, NATURALIST, AND BUCCANEER: THE LIFE OF WILLIAM DAMPIER (Walker & Company 2004).

[47]Id. at 44.

[48]Id. at 44-45.

[49]Id. at 45.

The Harvard Draft continued to point out that among other elements in the variety of definitions (frequent but not unanimous among states) is one or more of the following qualities that is essential:

> (1) An intention to acquire wealth.
>
> (2) An intention to attack indiscriminately the nationals and ships of all states (except insofar as motives of personal interest – e.g. safety - lead to discrimination).
>
> (3) An intention to disclaim all state allegiance and state authority.
>
> (4) A menace to the commerce or other interests of all states (or of all seafaring peoples).[50]

The confusion in defining customary sea piracy was due to the "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. In our view, therefore, it would be preferable for the committee to adopt a clear definition of piracy applicable to all states in virtue of international law in general."[51] That is, there was a traditional concession to a common jurisdiction by all States over piracy, if the offense occurred on the high seas only.

The Draft pointed out that it was part of the *customary law* that some states:

> . . . [P]unish as a pirate a person whose offense was committed within territorial jurisdiction or was not robbery or any of its frequent concomitants. Of course, this may be done without violation of international law, for the asserted jurisdiction over such offences may be justified on the ground that they occurred in a territory or on board a ship of the prosecuting state or that the offenders were its nationals or otherwise subject to its jurisdiction at the time of the offence, or that the offence was an attack on a ship or other interest of the prosecuting state.[52]

All of these elements or some of them were the ordinary traditional bases of jurisdiction.[53]

The Harvard Draft goes on to point out that piracy is important as a topic for international agreement mainly because " . . . it furnishes an extraordinary basis for *common* jurisdiction – a special basis consisting of the nature and locality of the offence – which cannot be enlarged by the separate action of a

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[50]Harvard Draft, supra note 26, at 781.

[51]Id. at 782.

[52]Id.

[53]Id.

state on its own behalf."[54] The universal adoption of the draft convention, which the Harvard Draft Commentators were working on, would not obliterate directly the varying definitions of crimes called piracy in the municipal law of the signatory State. States could continue to punish their nationals as pirates for offenses which did not fall under any of the specifications of the draft convention.[55] The Commentators pointed out that the " . . . [a]doption of the draft convention would require the signatory states to bring their laws in accordance with its provisions, and this would naturally tend to produce a measure of uniformity in international law; but to produce *such uniformity is not the purpose of this draft convention*."[56] [Emphasis mine]

The reader can observe that while the scope of the draft convention was controlled by the customary international law of piracy, the drafters were *modifying*, in part, the traditional customary jurisdiction, for the sake of expediency, to what they saw were "modern conditions."[57] This modification could work in both directions.[58] So it was not the purpose of the Commentators to include in its definition of piracy all cases of wrongful attacks on persons or property for *political* ends whether they were made on behalf of States, or recognized belligerent organizations, or unrecognized revolutionary bands.[59] Whatever motive or intent that inspires the act of piracy, the important fact to remember is that it is a menace to travel and commerce beyond territorial jurisdiction.[60]

The main theme throughout the draft convention was to the fact that " . . . expediency . . . should be the chief guide in the formulation of a convention . . . ."[61] So, based on the aforementioned "elements" the Commentators set forth a definition of "acts" of piracy.

There was not just one definition of the customary law. As will be seen, all of the acts discussed by the Harvard Draft Commentators were each, in their own right, part of the customary law of sea piracy. Later, just because the Geneva Convention (ratified by the United States)[62] and UNCLOS (not

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[54]Id.

[55]Id. at 785.

[56]Id.

[57]Id. at 786.

[58]Id.

[59]Id.

[60]Id.

[61]Id. at 787; See also Dubner, supra note 24.

[62]The United States ratified the 1958 Geneva Convention on Apr. 12, 1961; However, the following "objections" were noted:

ratified by the United States)[63] adopted certain parts of the customary law when drafting, for the sake of expediency, the international definition of piracy, did not mean that there was no customary law still available.

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19 September 1962:
The United States does not find the following reservations acceptable:
1. The reservations to article 9 made by the Governments of Bulgaria, the Byelorussian SSR, Czechoslovakia, Hungary, Poland, Romania, the Ukrainian SSR and the Union of Soviet Socialist Republics.
2. The reservations made by the Iranian Government to articles 2, 3, and 4 and article 26, paragraphs 1 and 2.
3. The reservation made by the Government of Indonesia.

19 August 1965:
The reservation to article 9 made by the Government of Albania in its instrument of accession.

28 September 1966:
The reservation made by the Government of Mexico in its instrument of accession.

11 July 1974:
The Government of the United States does not find acceptable the reservations made by the German Democratic Republic to article 20 of the Convention on
the Territorial Sea and the Contiguous Zone and to article 9 of the Convention on the High Seas. The Government of the United States, however, considers those Conventions as continuing in force between it and the German Democratic Republic except that provisions to which the above-mentioned reservations are addressed shall apply only to the extent that they are not affected by those reservations.

On 27 October 1967, the Government of the United States of America transmitted to the Secretary-General the following communication with reference to its previous communications regarding ratifications and accessions to the Law of the Sea Conventions with reservations which were unacceptable to the United States of America:

> "The Government of the United States of America has received an inquiry regarding the applicability of several of the Geneva Law of the Sea Conventions of 1958 between the United States and States which ratified or acceded to those Conventions with reservations which the United States found to be unacceptable. The Government of the United States wishes to state that it has considered and will continue to consider all the Geneva Law of the Sea Conventions of 1958 as being in force between it and all other States that have ratified or acceded thereto, including States that have ratified or acceded with reservations unacceptable to the United States. With respect to States which ratified or acceded with reservations unacceptable to the United States, the Conventions are considered by the United States to be in force between it and each of those States except that provisions to which such reservations are addressed shall apply only to the extent that they are not affected by those reservations. The United States considers that such application of the Convention does not in any manner constitute any concurrence by the United States in the substance of any of the reservations involved."

CONVENTION ON THE HIGH SEAS, Geneva, 29 April 1958, http://treaties.un.org/doc/publication/mtdsg/volume%20ii/chapter%20xxi/xxi-2.en.pdf

[63]The United States objected to the provisions of Part XI of the Convention on several grounds, arguing that the treaty was unfavorable to American economic and security interests. Due to Part XI, the United States refused to ratify the UNCLOS, although it expressed agreement with the remaining provisions of the Convention. See The United Nations Convention on the Law of the Sea: A historical perspective, United Nations Division for Ocean Affairs and the Law of the Sea, available at http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm.

Likewise, if the IMO, Resolution A.1025 (26)[64] adopted a Code of Practice for Investigating Piracy and Armed Robbery Against Ships, it did not mean to limit the definition of piracy and customary law or municipal statutes.[65] In fact, your author wonders why it was even necessary to use the term "robbery at sea" when it is quite obvious that "robbery at sea" is one possible element or act that could constitute a crime of piracy.[66] Perhaps it was because the IMO wanted to distinguish between the acts of piracy on the high seas compared to the territorial waters and internal waters of each State. However, when piracy was defined by the Harvard Draft Commentators, it included " . . . ***any*** of the following acts, committed in a place not within the territorial jurisdiction of any state . . . ."[67][Emphasis mine] It was obvious to the Commentators that the crime of piracy, historically, was committed against commerce on the high seas. In fact, they stated: " . . . the same acts committed in the territorial waters of a State do not come within the scope of international law but fall within the competence of the local sovereign power."[68]

The aforementioned statements by the Commentators reflected a decision to adopt Oppenheim's view of piracy rather than that of Hall.[69] Hall stated, "If the foregoing remarks are well founded, piracy may be said to consist in acts of violence done upon the ocean or unappropriated lands, or within the territory of the state through descent from the sea, by a body of men acting independently or through any politically organized society."[70] Whereas Oppenheim stated: "Piracy as an 'international crime' can be committed on the open sea only. Piracy in territorial coast waters has little to do with international law as other robberies within the territory of a State. Some writers maintain that piracy need not necessarily be committed on the open sea, but that it suffices that the respective acts of violence are committed by descent from the open sea."[71] To this thought, Oppenheim disagreed saying that ". . . piracy is and always has been a crime affecting the safety of traffic on the open sea and therefore cannot be committed anywhere else than on the open sea."[72]

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[64]See IMO, supra note 7.
[65]Id.
[66]Id. at 4.
[67]Harvard Draft, supra note 23, at 768.
[68]Id. at 788.
[69]Id.
[70]Id. at 789.
[71]Id.
[72]Id.

As stated in the Report of the Sub-Committee of the League of Nations Committee of Experts for the Progressive Codification of International Law (set forth below) it shows:

> The confusion of opinion on the subject of piracy is due 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. In our view, therefore, it would be preferable for the Committee to adopt a clear definition of piracy applicable to all States in virtue of international law in general. Accordingly, we have the honour to submit to the Committee the following draft.[73]

The Commentators were also in disagreement on the motives of piratical acts. Some expressed that force and depredation have always painted the mental pictures of piratical enterprises. The typical pirate has been a robber, and some writers have insisted that a purpose of private gain is essential. Others have argued that the motive may vary and that even vengeance or bare malice may be the inspiration of piratical attacks. Thus, the intent when defining piracy was to be broad:

> 1. Any unjustifiable 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.[74]

This is also expressed by Oppenheim, as he pointed out that even if the

> . . . pirate wants to make booty; it is the cargo of the attacked vessel which is the centre of his interest, and he might free the vessel and the crew after having appropriated the cargo. But he remains a pirate, whether he does so or whether he kills the crew and appropriates the ship, or sinks it. *On the other hand, the cargo need not be the object of his act of violence. If he stops a vessel and takes a rich passenger off with the intention of keeping him for the purpose of a high ransom, his act is piracy; it is likewise piracy if he stops a vessel merely to kill a certain person on board, although he may afterwards free vessel, crew, and cargo.*[75] [Emphasis mine.]

Hyde stated that the piratical acts may assume a variety of forms including homicide, robbery or burning.[76] "They may be directed against the ship on which the actors are lodged, or against its officers, or against another vessel and its occupants."[77] While the Commentators recognized that they had

[73]Id. at 782.
[74]Id. at 790.
[75]Id. at 792.
[76]Id.
[77]Id.

to justify " . . . so wide a definition by reference to the past the following questions may be raised":[78]

> Suppose that a band of lawless men set sail with the purpose of committing such violence or depredations on the high sea as chance and their views of advantage might determine. If, on occurrence of an opportunity,
>
> (a) they attacked a foreign merchant ship to kill a man who had incurred their vengeance,
>
> (b) they attacked a foreign merchant ship to wound a man who had incurred their vengeance,
>
> (c) they attacked a foreign merchant ship to rape,
>
> (d) they attacked a foreign merchant ship to capture and enslave the persons on board (compare the acts of Moorish pirates in former centuries),
>
> (e) they attacked a foreign merchant ship to capture and hold for ransom the persons on board (compare again the acts of Morrish pirates),
>
> (f) they attacked only to maliciously destroy property, or found property unprotected on the high seas and maliciously destroyed it. Would the law of nations in any of these cases prohibit any state from treating the perpetrators as pirates (quite without regard to any purpose of robbery)? Certainly such a band would be as much a menace to international commerce as a band of sea-robbers of like force and readiness for mischief.[79]

The Commentators further stated that:

> If these questions all receive answers in favor of the common jurisdiction, then as far as the motivation of the act of violence or depredation is concerned, the draft convention has met the test except as to the case of "intent to steal." In view of the frequent occurrence of thefts from vessels in eastern waters by professionals who escape to their own craft lying near, it is inexpedient to exclude the case of theft without violence or the case of violence with intent to commit theft.
>
> Of course it should be remembered that the common jurisdiction does not attach unless other elements also are present in the case: if the attack or attempt takes place from on shipboard there must be involved a pirate ship or one without national character, and in any event the act must be done beyond territorial jurisdiction.[80]

[78]Id. at 793.
[79]Id. at 794.
[80]Id.

Another view, which was totally rejected, was the traditional conception of a typical pirate relating back to the days of large outlaw communities and the conception of an offense against all the world as an essential theoretical basis for common jurisdiction. The Commentators felt that this doctrine ran contrary to the dictates of expediency and to practical operation of municipal law. In other words, there were those, like Stiel, and some other writers who thought that "piracy does not consist of single acts of violence or depredation, but a manner of life or sort of enterprise."[81] Others used the Serhassan Pirates as an example and stated that it did not make any difference "whether they were inhabitants of any island, nor can it be imagined that the title of pirate attaches solely to persons following an avowed piratical occupation upon the high seas."[82] This view was largely rejected as well. Yet, it is part of the customary law.

There were those who thought that the definition drafted in the draft articles by the Commentators was at once too wide and too narrow to correspond exactly with the acts, which were held to be piratical but it did serve as far as Hall is concerned as a starting-point by directing attention to the external characteristic by which, next to the violent nature, they are chiefly marked.[83]

In addition, it was not necessary for pirates to prey on all mankind in order to be within the various definitions of piracy at common law.[84] The statement "*hostis humani generis*" has been called properly an "epithet and not a definition."[85] The Latin phrase "is an ancient verbal condemnation of the conduct of a pirate and a figurative epitome of the common war against them."[86] Hyde states: "Piratical acts may assume a variety of forms. They may include, for example, homicide or robbery or burning . . . ."[87]

In connection with Article 2 in the Harvard Draft "Any act of voluntary participation in the operation of a ship with knowledge of facts which makes it a pirate ship,"[88] Hall stated that piracy is usually spoken of as occurring only on the high seas:

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[81]Id. at 794.

[82]Id. at 796.

[83]Id. at 799. ("Pirates according to Bynkershoek, are persons who depredate by sea or land without authority from a sovereign. The definition, like most other definitions of piracy, is at once too wide and too narrow . . .) Id.

[84]Id. at 803.

[85]Id.

[86]Id. ("Furthermore, although it is true that the typical pirate of fiction and tradition was an indiscriminative plunderer, expediency and not traditional epithets or the fancy of traditional concepts should direct the definition of the common jurisdiction over piracy, . . .) Id.

[87]Id. at 806.

[88]Id. at 820. (Article 2 has striking similarities to the case of Said, the Virginia case in which your author was cited as authority. Article 2 states:

> . . . If however a body of pirates land upon an island unappropriated by a civilized power, and rob and murder a trader who may be carrying on commerce there with the savage inhabitants, they are guilty of a crime possessing all the marks of commonplace professional piracy. In so far as any definitions of piracy exclude such acts, and others done by pirates elsewhere than on the ocean but of the kind which would be called piratical if done there, the omission may be assumed to be accidental. Piracy no doubt cannot take place independently of the sea, under the conditions at least of modern civilisation; but a pirate does not so lose his piratical character by landing within state territory that piratical acts done on shore cease to be piratical.[89]

Oppenheim, on the other hand, states:

> Piracy as an 'international crime' can be committed on the open sea only. Piracy in territorial coast waters has as little to do with International Law as other robberies within the territory of a State. Some writers maintain that piracy need not necessarily be committed on the open sea, but that it suffices that the respective acts of violence are committed by descent from the open sea. With this opinion I cannot agree. Piracy is, and always has been, a crime against the safety of traffic on the open sea, and therefore, it cannot be committed anywhere else than on the open sea.[90]

In looking at the divergent opinions of Hall and Oppenheim, it is rather obvious that Oppenheim did not believe piracy occurred anywhere other than outside the territorial waters of a State. Your author has no idea why he believed this other than the fact that the overriding concern in all of piracy context was (and still is) to block pirates from interfering with commerce on the high seas. Certainly, Oppenheim was aware of the fact that pirates raided territory but I believe he was looking for an international law definition. The Commentators seemed to agree with Oppenheim's view which leads the Commentators to state that "in 1932 at least the change in international relations induced a final discrimination in a wider range in the modern legal conception of piratical acts."[91] Today, however, the international law of pira-

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> It covers piratical roving before any attack has been committed. In this phase it will be useful both as a basis for international police prevention of attackers and as a ground of jurisdiction to prosecute when the evidence of a certain person's participation in particular outrages is not sufficient. . . . [I]n foreign territorial waters or on a foreign coast as would be piracy if committed beyond territorial jurisdiction. Thus are included such ravaging expeditions as the Moorish pirates used to make against the sea-coast of England, as the buccaneers used to make against the American settlements, and as are made today against the coast of the Philippines and other far eastern countries. . . . [A]uthority given the injured or threatened state (and all other states) to seize an offending ship on the high sea either before the attack is made, or after the attack when there has been no hot pursuit.) Id.

[89]Id. at 821-22.

[90]Id. at 822.

[91]Id.

cy does not simply cover a field of public armed conflict distinct from that of war.[92] The current legal importance of piracy lies in the fact that it presents a special basis of State universal jurisdiction, constituting a qualification of the modern doctrine and law of the freedom of the seas.[93]

> [T]hus, the fundamental postulates and the scope of the modern international law of piracy are quite different from those of the ancient law and even from those of the law of a few centuries ago which knew no legal freedom of the seas in the modern sense and no such universal fine apportionment of jurisdiction among "states" on a territorial and nationality basis as if familiar today. This change in international relation has induced a finer discrimination and a wider range in the modern legal conception of piratical acts. [94]

According to Travers Twiss "The pirate has no *National* character, and to whatever country he may have originally belonged, he is ***justiciable*** everywhere, being reputed out of the protection of all laws and privileges whatever."[95]

We can then look at draft Article 6, together with the comments of the drafters, as follows: "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."[96]

COMMENT

> Perhaps the most important peculiarity of the law of piracy is the right of any state to capture on the high sea a foreign ship which has committed piracy or is the booty of pirates. Indeed the whole modern international law of piracy has developed from the ancient and persistent sea fighting of commercial nations against pirates who formerly were a principal menace to sea traffic.
>
> Article 6 authorizes a state to seize pirate ships and ships taken by pirates and held by pirates not only on the high sea, but in any place which is not subject to the territorial jurisdiction of another state – *e.g.* in the territorial waters of the seizing state.[97]

This clearly sets forth the "important peculiarity of the law on piracy" as a right of any State to capture, on the high seas, a foreign ship which has com-

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[92]Id. at 826

[93]See 1982 Convention, supra note 6, at Art. 87.

[94]Harvard Draft, supra note 26, at 826.

[95]Id. at 828.

[96]Id. at 832.

[97]Id.

mitted piracy or has received the "booty" of pirates.[98] The emphasis in the draft convention was always on the right of States (commercial nations) to attack pirates in order to protect against their interfering with commercial traffickers.[99]

What follows in the draft convention Article 7 is an extension of this right. The draft Article actually allows for hot pursuit of a ship into the territorial jurisdiction of another State even though it would impinge on the sovereignty of that State.[100] Draft Article 7, itself, puts the onus on the coastal (or littoral) State to object to this high pursuit.[101]

This Article was suggested, but not adopted at either international convention, even though there was no customary law permitting such hot pursuits, and certainly nothing uniform on the subject matter. The thought was that if the littoral State does not have the will or means to fight off pirates then the pursuing State could do so in order to protect the littoral State and others.[102] But the Commentators pointed out that there was no determining precedent on the matter. It was never adopted, and your author believes this was a big mistake.[103]

Thereafter, some of these draft articles were reworked and adopted into the 1958 Geneva Convention on the High Seas as well as UNCLOS 1982.[104] Again it should be remembered that the Commentators were interested in *expediting* the subject so we have the international law on sea piracy settled as part of the two aforementioned treaties. This, however, does not answer the question of whether there is still customary law of sea piracy or whether all customary law became a part of the treaty process. So, the reader can see

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[98]Id.

[99]Id.

[100]See Id. at 832.

ARTICLE 7

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

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

3. If the tender provided for in paragraph 2 of this article is not accepted, the state making the seizure may proceed as if the seizure had been made on the high sea.

[101]Id. at 832-33.

[102]Id. at 833.

[103]See, e.g., Barry Hart Dubner, *Human Rights and Environmental Disaster – Two Problems that Defy the "Norms" of the International Law of Sea Piracy*, 23 SYRACUSE J. INT'L L. & COM. 1 (1997); See also BARRY HART DUBNER, THE LAW OF INTERNATIONAL SEA PIRACY (1980).

[104]See UNCLOS, supra note 8.

that at customary law the problem was not the fact that there was no definition of piracy; rather, there were many acts that constituted sea piracy, some of which were later included in the 1958 Geneva Convention on the High Seas, which the United States Senate ratified, and in the UNCLOS (1982).[105] We have a situation, therefore, where a definition is very inclusive and yet, might appear to be vague due to a misreading of the history of piracy.

Just as the crime of homicide can be accomplished by committing any one of a number of acts, and using any number of weapons or other devices, the commission of the act of piracy can be accomplished by any number of means under customary law and international conventions.

III
DID THE INTERNATIONAL CONVENTION INCORPORATE ALL OF THE CUSTOMARY LAW OF SEA PIRACY?

One of the troubling factors of Judge Jackson's recent decision is that it states that customary international law is inappropriate to define piracy under our domestic statute.[106] There are writers who believe that customary law was adopted by the International Conventions (i.e. the Geneva Convention on the High Seas, 1958 and UNCLOS, 1982; the former was ratified by the Senate).[107] In writing for Danish Ministry of Foreign Affairs, Dr. Douglas Guilfoyle was requested to produce a compilation of relevant international legal texts providing jurisdictional bases for the prosecution of suspected pirates.[108] One of the items mentioned was the relationship between treaty law and customary international law, which seems to be a problem for Judge Jackson. Dr. Guilfoyle believes that there is no difference between the crime as defined in treaty law and in customary law.[109] Judge Jackson suggests that the customary international law is unsettled on the definition of piracy.[110] To make matters worse, the IMO and others referred to sea piracy and armed robbery as meaning different items by simply stating them separately in a sentence when describing sea piracy.

Now, looking back at what was shown in the first part of this paper regarding the history of how we arrived at the definition of various acts of sea piracy in the draft articles set forth in the Harvard Draft, most of which was later adopted in the Geneva Convention on the High Seas in 1958 and

[105]Supra notes 63-64.
[106]Said, 2010 U.S. Dist. LEXIS 106050 at 3-4.
[107]Id.
[108]Guilfoyle, supra note 9 at ii.
[109]Id. at 4.
[110]Said, 2010 U.S. Dist. LEXIS 106050 at 14.

UNCLOS, 1982, there is a lack of clarification of a definition on the subject. The view of your author is that there should be absolutely no doubt in one's mind that the crime of international law of sea piracy covers the international waters or waters outside the territorial high seas.

Turning to the report of Dr. Guilfoyle, he states that while it has been suggested that the customary international law of piracy extends to acts in territorial waters or to events occurring aboard one vessel, this idea is entirely without merit.[111] He states: "the suggestion usually relies on old national cases where the term "piracy" covers both national offences (occurring within the prosecuting States' waters) and the international crime. Few or none of these cases, on close inspection, assert jurisdiction of *foreign* territorial waters."[112] He further states that " . . . [a] State may of course enact a national crime called "piracy" applicable to its own territorial waters."[113]

Your author understands why Judge Jackson stated that there is no customary law on the subject, but the statement is incorrect as a proposition because all one has to do is to read all of the scholars set forth in the Harvard Draft in order to see divergent viewpoints on definitions of sea piracy in customary law– all of which were valid. (e.g., Hall's ideas are different from Oppenheim's.)[114]

Your author read the biography of Dampier, a well known pirate and naturalist/writer, and realized that the customary law of sea piracy existed centuries ago; pirates did attack in territorial waters, and pirates did attack on land.[115] The fact that the international conventions decided to adopt certain parts of customary law, in creating the international definition of sea piracy on the high seas, does not automatically mean that the crime of sea piracy no longer exists for geographical areas outside the high seas. In fact, since a State is entitled to define what it means by sea piracy, this, in and of itself, would seem to suggest that there is a customary law of sea piracy still surviving the two conventions. This customary law is the same as conventional definitions and is even more expansive. States can adopt international conventional definitions as their own. They can also expand on these definitions. However, once adopting an international convention, without any reservation thereto, the definition(s) therein become the law of the land. It is correct stating that nearly all States have adopted the treaty definitions as well as the various U.N. Security Council Resolutions, U.N. General Assembly Resolutions, and IMO Resolutions.[116] The international consensus

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[111]Guilfoyle, supra note 9, ¶13.

[112]Id.

[113]Id.

[114]See generally Harvard Draft, supra note 6.

[115]Preston, supra note 47.

[116]Guilfoyle, supra note 9, ¶14. (*see North Sea Continental Shelf Cases*, [1969] ICJ Rep., 3 at 41).

suggests that the accepted "expeditiously" agreed upon treaty definition has prevailed over any earlier inconsistent rules of customary law.[117] That does not mean that there is no customary law still available in addition to the treaty law that covers areas outside of the high seas. A State seizing pirates on the high seas can apply the international law, the treaty law or any law that it decides to utilize regarding piracy as long as their decision comes within community expectations.[118] The States may also decide on what penalties are to be imposed.[119]

The International Maritime Organization (Resolution A.1025(26) adopted on 2 December 2009) set forth a "Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery Against Ships."[120]

By "armed robbery against ships" the Annex defines the following acts:

> 1. any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, within a state's internal waters or archipelagic waters in territorial sea;[121]

The only reason your author can think that this was placed into the form of a "resolution" by the IMO is to distinguish between piracy on the high seas and elsewhere. However, usually "armed robbery against ships" means just that – a robbery. But in the definition it is any ". . . act of violence or detention . . ." or any act of depredation which is very similar to the treaty definitions of international law.[122] So the IMO distinction is made in order to distinguish internal waters and territorial seas from the high seas treaty definitions of sea piracy. Your author does not know whether this causes more confusion for a judge or less. However, it certainly seems to me that the IMO could simply state that piracy in internal waters and territorial waters is the same crime as piracy on the high seas adopted by treaty law. States could possibly add other acts as well, under each State's law. In other words, the crime does not change from piracy to armed robbery because of the location of the waters. What changes is the adoption by the States of the crime of piracy on the high seas and the difference between that and the various States' municipal laws. It would certainly be a lot clearer if that language was worked on or improved. So, Judge Jackson erred when he said that contemporary international law is unsettled on the definition of piracy:[123] it is definitely not unsettled in interna-

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[117]Id.
[118]Id. at 5.
[119]See *Id.* ¶20.
[120]IMO, supra note 7.
[121]Id. at 4.
[122]Id.
[123]Said, 2010 U.S. Dist. LEXIS 106050 at 14.

tional law.[124] And, if the United States and other countries ratify the treaty and adopt it as their own, as the United States did with 1958 Geneva Convention, we must follow it because the treaty becomes the law of our land. In fact, when the case of *United States vs. Smith* was decided in 1820 by the U.S. Supreme Court, armed robbery was not the only act that could constitute the crime of sea piracy.[125] That statement, in and of itself, is a mistake because that case only applies to the facts presented therein. The case is precedence for the fact that armed robbery can be considered a crime of piracy but it is not a limiting factor. The definitive definition of piracy being a crime on the high seas was adopted in the international conventions (mentioned above) one of which, we adopted. The definition of sea piracy becomes extremely important as the Security Council is considering various options (at the present time seven options) for the creation of an international court or some component thereof in order to try pirates.[126]

IV
DEFINING WHAT THE APPLICABLE LAW WOULD BE FOR AN INTERNATIONAL COURT OR ANY OTHER COURT TRYING SEA PIRACY

One cannot have an international court for trying sea pirates unless there is a definition of sea piracy that is agreed upon. Fortunately, there are two international conventions, both using the same basic definition of sea piracy. Various States are now using their own statutes to try sea piracy or creating them (i.e., Belgium).[127]

In a recent Report of the U.N. Secretary- General, various possibilities were discussed with respect to establishing or looking at options for creating special domestic chambers possibly with international components; original tribunals; or, international tribunals and corresponding imprisonment arrangements, which took into account the work of the Contact Group on Piracy off the Coast of Somalia.[128]

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[124]See Harvard Draft, supra note 26; 1958 Convention, supra note 6.

[125]See United States v. Smith, 18 U.S. 153 (1820).

[126]See The Secretary-General, *Report of the Secretary General on the Question of Prosecuting Sea Piracy, delivered to the Security Council and the General Assembly*, U.N. Doc. S/2010/394 (July 26, 2010).

[127]See, e.g., Barry Hart Dubner & Leticia M. Diaz, *On the Evolution of the International Sea Piracy: How Property Trumped Human Rights, the Environment and the Sovereign Rights of States in the Areas of the Creation and Enforcement of Jurisdiction*, 13 BARRY L. REV. 175 (2009).

[128]The Secretary-General, *Report of the Secretary General on the Question of Prosecuting Sea Piracy, delivered to the Security Council and the General Assembly*, U.N. Doc. S/2010/394 (July 26, 2010). (see Summary pages 1-5).

One of the first problems confronting such a project is to look at the applicable law available now and the Report of the Secretary-General under section III. Applicable Law.[129] In this provision, paragraph 10, the Report points out that the international regime applicable to piracy consists of the 1982 UNCLOS and other international and regional instruments, relevant Security Council and General Assembly resolutions as well as national implementing legislation.[130] The Report states as follows:

A. International and Regional Instruments

> 11. The international legal regime applicable to piracy set up primarily in the United Nations Convention on the Law of the Sea, which codifies customary law.[131]

Again, what it does create is a convention which adopts the Harvard Draft, Oppenheim view (and other scholars), that the customary international law definition is applicable to the high seas only. As you have already seen, it really does not codify customary international law, but adopts a definition based on parts of customary international law for the purpose of "expediency." It really does not matter for purposes of the treaty what customary acts it defines as long as it is followed by many States. The Secretary-General Report also states that " . . . Some of the acts of piracy may also constitute offences under international legal instruments, such as the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) . . . "[132] Although some scholars have stated that this act was really adopted to apply to terrorism, not piracy.[133]

The Secretary-General Report goes on to state that under the international law of piracy, as stated in the treaty law, States are entitled to exercise jurisdiction " . . . but are not obliged to do so. Acts, when committed within a territorial sea of a State, which would be piracy if committed on the high seas, are to be referred to as "armed robbery at sea" or "armed robbery against ships."[134] The Report goes on to state that "The United Nations Convention of the Law of the Sea does not contain any provisions on armed robbery at sea, and universal jurisdiction does not apply to these acts. The coastal State has jurisdiction over such acts committed in its territorial sea."[135]

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[129]Id. at 11.
[130]Id.
[131]Id. ¶11.
[132]Id.
[133]Id. at *11 n.10.
[134]Id. at 11-12.
[135]Id.

As you have seen earlier in this paper, this statement is clearly incorrect. First, "armed robbery at sea" is part of the international conventional definitions. The acts of piracy are akin to items on a menu. Any one of them could be a meal, in and of themselves. Or, they all are part of the definition. If the States are using "armed robbery at sea" or "armed robbery against ships" as a definition within their territorial waters, what is the point of having a conventional definition? This is what creates confusion. Piracy extends into territorial and internal waters. It is simply that the international law of piracy on the high seas, as contained in the treaty law, is a definition. It is up to the States to provide their own definitions of sea piracy but if they sign the treaties and ratify them, then the definition in the treaties should become the law of their land. It was "obvious" to Judge Jackson that contemporary international law is unsettled on the definition of piracy.[136] The problem is that it is not unsettled. In fact, as shown throughout this paper, the two international law of sea piracy treaties have adopted certain aspects of the customary law regarding sea piracy and incorporated them into a definition of sea piracy on the high seas. The fact that there was no authoritative definition of common law of sea piracy does not mean that there was no customary law. There was plenty of it as shown in the Harvard Draft that your author has cited throughout this paper. The international community adopted various acts and they were incorporated into a definition which has been followed since the 1958 Geneva Convention on the High Seas.[137] Although it is true that the contemporary writers have referred to the crime of sea piracy and armed robbery at sea, this does not mean that there is one act that constitutes sea piracy. Why Judge Jackson decided not to adopt the international law definition, such as the 1958 Geneva Conference on Law of the Sea, which the U.S. Senate ratified, is questionable.[138] States are free to adopt any or all parts of the piracy definition and incorporate it within their laws. To say that a case takes precedence as the sole authority over the definition of piracy is incorrect in this context.

The court also concluded that the definition of piracy in the international community is unclear and not consistent with the precedence and Section 1651.[139] The "armed robbery" definition used throughout the domestic U.S. case is definitely clear.[140] It is not authoritative on the point because of the fact that the Senate ratified the definition used in the 1958 Geneva Convention. The "David and Goliath-argument" used by the court to denote

[136]Said, 2010 U.S. Dist. LEXIS 106050 at 14.
[137]See 1982 Convention, supra note 5.
[138]See supra note 2.
[139]Said, 2010 U.S. Dist. LEXIS 106050 at 19.
[140]See, e.g., United States v. Smith, 18 U.S. 153 (1820).

the failure of the definition of international sea piracy is disingenuous.[141] The Government apparently conceded that an act as minor as using a sling shot, a bow and arrow or the throwing of a rock at a vessel, could be considered an act of violence and subject a defendant to the penalty of life in prison for piracy under Section 1651.[142] The court said this is not a logical interpretation of congressional intent for an act falling within Section 1651, especially in light of the 10-year imprisonment that Congress promulgated for violation of Section 1659.[143] We need to look at the history of the draft articles and the Commentators' discussion of each one. Upon doing so, the reader will find that the words "any illegal acts of violence or detention, . . . " that are stated in the 1958 Geneva Convention/UNCLOS, would never apply to a situation where a sling shot or stone were thrown at a ship unless it fell within the definition found in the conventions. Normally such an act *would not interfere with commercial shipping on the high seas*. If it did interfere, the person could be tried as a pirate under U.S. domestic law as the U.S. ratified the Geneva Convention.[144] It is the disruption of commerce we should be concerned with, not how the act of violence, etc. was perpetrated!

In short, the problem today is while all States have the jurisdiction to try pirates, very few have adequate laws in place to prosecute them. Also, the term "armed robbery against ships" is being applied to piracy that takes place in internal waters. However, that definition of armed robbery against ships includes the international definition under each convention as well as municipal statutes. Therefore, limiting the term "armed robbery" to the 1820

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[141]Said, 2010 U.S. Dist. LEXIS 106050 at 13.

[142]Id.

[143] Id.; See also 18 U.S.C. §§1651, 1659 (2010)

HISTORICAL AND REVISION NOTES

In the light of far-reaching developments in the field of international law and foreign relations, the law of piracy is deemed to require a fundamental reconsideration and complete restatement, perhaps resulting in drastic changes by way of modification and expansion. Such a task may be regarded as beyond the scope of this project. The present revision is, therefore, confined to the making of some obvious and patent corrections. It is recommended, however, that at some opportune time in the near future, the subject of piracy be entirely reconsidered and the law bearing on it modified and restated in accordance with the needs of the times. Id.

(Sec. 1651. Piracy under law of nations: Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.) Id.

(Sec. 1659. Attack to plunder vessel: Whoever, upon the high seas or other waters within the admiralty and maritime jurisdiction of the United States, by surprise or open force, maliciously attacks or sets upon any vessel belonging to another, with an intent unlawfully to plunder the same, or to despoil any owner thereof of any moneys, goods, or merchandise laden on board thereof, shall be fined under this title or imprisoned not more than ten years, or both.) Id.

[144]See *Hasan*, 2010 U.S. Dist. LEXIS 115746.

case is simply not keeping up with current interpretation, treaty law, and U.S. constitutional law.

V
CONCLUSION

The author of this article has attempted to show that customary law of sea piracy, before the international treaties adopted by the international community, in the 1958 Geneva Convention and UNCLOS, lacked one clear definition of piracy in the sense that it was not defined as only one type of act. As is shown in this article, there were many types of acts; however, the international community adopted a definition that was developed in order to "expedite" (their words) adoption at the treaty level and at the same time try to protect international commerce from being disrupted by pirates. What is left is a definition that is all inclusive and was interpreted by one U.S. court as being too vague to prosecute as criminal conduct.[145] The reality is that the definition definitely covers "the different aspects of attacks on ships such as shooting, hijacking, attempted robbery, robbery, murder." The various acts can be done by knife, rifle, sling shot, or a rock *as long as it interferes with commerce*. It is up to the court to take into consideration what was used as a weapon and whether or not they want to find that an act of piracy was committed. But that was not the case presented in the United States recently. The commission of the act is but one element in determining how we define piracy.

It becomes very important to have an up-to-date definition because the international community is in the process of deciding whether they want to have a new international court (e.g., ad hoc or a chamber, etc.).[146] We definitely have certain aspects of customary law, adopted by the international community, in the Geneva Convention and UNCLOS. We still have customary law that has not been adopted, as well as States adopting municipal statutes to conform to their own laws (i.e. religious, or otherwise). If they are a "religious" State (e.g., in which they apply the Koran), there is nothing prohibiting that from being considered in municipal law.

There was a split of authority regarding the view as to what is custom in earlier days between Hall and Oppenheim and other scholars as well. Hall stated that piracy could occur anywhere whereas Oppenheim believed that the crime of piracy could only occur outside territorial waters, which seems

[145]But see Id. (Declaration of Legal Adviser Harold Hongju Koh).

[146]See The Secretary-General, *Report of the Secretary General on the Question of Prosecuting Sea Piracy, delivered to the Security Council and the General Assembly*, U.N. Doc. S/2010/394 (July 26, 2010).

to be the view that has been adopted by international community, for "expediency."

Your author again suggests, that the international waters and territorial seas should have another layer of jurisdiction in order to fight specific crimes of terrorism and/or piracy; namely, reaction zones.[147] This would entail the extension of the hot pursuit action for those crimes originating in reaction zones as well as for those occurring exclusively on the high seas. If our domestic courts are unwilling to adopt international treaty law whether we ratify the treaty, or not (in other words, there is a consensus among the international community) this becomes problematic. That presents more problems which are not the subject of this paper.

Clearly, our courts need to address its role in interpreting the law of international sea piracy.[148]

[147]Barry Hart Dubner & Leticia M. Diaz, *An Examination of Crimes at Sea and the Emergency of the Many Legal Regimes in Their Wake*, 34 N.C.J. INT'L L. & COM. REG. 522 (2009).

[148] *Hasan*, 2010 U.S. Dist. LEXIS 115746. ("Judge Davis holds that the court need not delve into an extensive analysis of the contours of the Decision in *U.S. v. Smith*, but rather must determine how the law of nations defines piracy today. The court surveyed current customary international law as set out in the High Seas Convention and UNCLOS, relevant judicial decisions from recent piracy trials in Asia and Africa, and scholarly writings. Judge Davis ultimately holds that the definition of 'piracy under the law of nations' is expressly defined in Article 101 of UNCLOS, as an expression of the overwhelming consensus of the international community. In response to the concern (as noted by Judge Jackson) that the United States has not ratified UNCLOS, Judge Davis notes that the United States did ratify the High Seas Convention – in which the definition of 'piracy' is virtually the same.") Black, supra note 2, at 9.