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TOWARD A REVISION OF THE INTERNATIONAL LAW OF PIRACY

By Clyde H. Crockett*

The 1958 Geneva Convention altered the traditional laws of piracy. The Convention appears to have removed the acts of States and political groups from the deterrent effect of piracy sanctions. Professor Crockett traces the development of the laws of piracy and notes the existing ambiguities and problems. He suggests that in light of continuing acts of violence at sea and inadequacies of existing laws, revision is in order.

I. INTRODUCTION

Throughout its long history, the international law of the sea has undergone gradual modifications which have reflected an accommodation of changing sovereign, political and economic interests. Today, as the Third United Nations Conference on the Law of the Sea nears the end of its work, very significant and occasionally drastic amendments are being recommended in many areas of the law.¹ To date, the emphasis of the Conference has been on innovation.² However, the extensive work of the Conference also presents an excellent opportunity to resolve long-standing differences of opinion and to clear up ambiguities and errors contained in the 1958 Conventions on the Law of the Sea, the last major revision

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1. For example, the concept of the economic resource zone has the potential of placing under the jurisdiction of coastal states extensive maritime areas which have, since the 17th century, been regarded as high seas. The economic resource zone and other proposals reflect changes in values and interests as well as the emergence of new ones, particularly those shared by developing states. The proposals are contained in United Nations Third Conference on the Law of the Sea: Informal Single Negotiating Text, U.N. Doc. A/Conf. 62/WP. 8/Part I (1975), 14 INT'L LEG. MAT. 682 (1975).

2. This is attributable to the recognition of new interests and new technology which makes possible the exploration of deep sea resources. See Stevenson, *The Third United Nations Conference on the Law of Sea: the 1974 Caracas Session*, 69 AMER. J. INT. L. 1 (1975); Adede, *The System for Exploitation of the "Common Heritage of Mankind," at the Caracas Conference*, 69 AMER. J. INT. L. 31 (1975); INTERNATIONAL LAW OF THE SEA AND THE FUTURE OF DEEP SEA MINING (Joyner ed. 1975); THE LAW OF THE SEA: NEEDS AND INTERESTS OF DEVELOPING COUNTRIES—PROCEEDINGS OF THE SEVENTH ANNUAL CONFERENCE OF THE LAW OF THE SEA INSTITUTE, UNIVERSITY OF RHODE ISLAND, 1972 (Alexander ed. 1973).

in this area. The discussion which follows is devoted to one particular area, the law of piracy, where it is suggested revision should be considered.

Piracy, as defined by the 1958 Convention on the High Seas,³ has remained apparently untouched and unconsidered. However, as is obvious to any observer of the international scene, acts of violence committed on the high seas continue to be a problem, and could well become a major source of international friction and dispute. This Article will examine two related types of incidents. The first concerns the illegal use of force by a State directed against merchant vessels, as when a State authorizes the commission of an act of violence at sea on the basis of a mistaken view of its rights. The second concerns the use of force on the high seas by persons who are acting out of political motives. For instance, a group intent upon overthrowing its national government may seize an innocent merchant vessel in order to achieve success. It is evident that these types of cases differ from the popular conception of piratical acts, i.e., those committed by a band of sea outlaws who are concerned strictly with selfish gain. Under traditional views of piracy held before the 1958 Convention, authority was more or less equally divided on the question of whether acts of violence by States or political groups were piracy.

In an effort to settle this issue, the 1958 Geneva Convention on the High Seas adopted a test which makes the actor's liability for piracy turn upon whether the act is for "private ends." The private ends test does not have a precise definition, but generally an act will be deemed to have a private end if it is without lawful authority and is committed for personal gain or revenge. Acts of violence by governments or organizations acting for political ends usually are not considered to be for private ends, and thus do not meet the definition of piracy. The Geneva formulation, albeit vague, probably intended to exclude from piracy the above exam-

3. Convention on the High Seas, *opened for signature* April 29, 1958, [1962] U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 [hereinafter cited as GENEVA]. Articles 13 through 21 deal with specific aspects of piracy. The provisions, as well as this Article, deal only with the international law of piracy, not municipal laws which provide for punishing certain acts as piracy. For a discussion of the differences between municipal law piracy and piracy *jure gentium*, see Dickinson, *Is the Crime of Piracy Obsolete?*, 38 HARV. L. REV. 334 (1925).

ples, and excludes many variations of acts associated with a State or with a non-selfish motive.

International law, however, does not exist in a vacuum. There will continue to be violent acts on the high seas and reactions by States to those acts. Such reactions must be considered in order to interpret the meaning of the Geneva test and to evaluate its effectiveness. Two recent incidents provide illustrations of these areas of concern and a backdrop for the discussion that follows. The first is the May 1975 seizure of a United States merchant vessel, *Mayaguez*, by the crew of a Cambodian patrol boat in the Gulf of Siam, sixty miles off the coast of Cambodia.⁴ The President of the United States officially declared the act to be piratical and ordered remedial action, which resulted in the rescue of the vessel and its crew.⁵ The second incident involved the seizure of a Japanese freighter, *Sheiro Maru*, in a Philippines port in September 1975, by members of a group seeking to overthrow the government of the Philippines. The government denounced the seizure and described it as piracy, intervened and recaptured the vessel.⁶

In these circumstances, piracy is a frequently encountered description. Yet, it is difficult to determine whether the term is used only to accentuate the heinousness of the act in question in order to engender public support, or is reflective of a decision that the acts qualify legally as piracy so as to justify remedial acts. Such official government characterizations may well be evidence of State practice leading to the development of a customary norm. Even though the *Mayaguez* and *Sheiro Maru* incidents may not have involved piracy, a major power's denouncement certainly has a substantial effect on customary international law. Such declarations by major powers could set a dangerous precedent leading to the development of a permissive norm allowing the commission of retaliatory acts which tend to cause further breaches in international peace and security. The present ambig-

4. New York Times, May 13, 1975, at 1, col. 8.

5. It was reported that members of the Legal Adviser's Office of the State Department did not agree with the description of the seizure as piracy. New York Times, May 13, 1975, at 19, col. 6. The recapture of the *Mayaguez* by the use of force was denounced as an act of piracy by the People's Republic of China, New York Times, May 17, 1975, at 17, col. 2.

6. New York Times, Sept. 30, 1975, at 3, col. 1.

uous status of the law of piracy provides an excellent field for the development of such norms.

II. THE CONCEPT AND SIGNIFICANCE OF PIRACY

Piracy is admittedly difficult to define. In order fully to appreciate the difficulty that commentators and drafters have had with defining piracy, one must be aware of the unique consequence of characterizing an act of piracy. The jurisdiction of all States may be asserted to pursue, capture and punish the perpetrator of such an act, and to seize and condemn the pirate ship. Jurisdiction is not confined to the State or States whose interests have been directly injured. The reason for this extraordinary jurisdiction lies in the danger, either actual or potential, that the acts pose to commonly held interests, particularly the necessity that the seas be safe for economic intercourse, passage, and for military and scientific purposes. If there is a threat to these universally shared interests, then the act would generally qualify as an act of piracy.⁷ Thus, given the wide array of acts which could upset these interests, specific and detailed definitions have proved difficult and unsuccessful.

While recognizing the slippery nature of the concept, some jurists occasionally have hazarded short-hand definitions of traditional piracy. The type of acts which qualify as piracy have been defined generally as "acts of violence"⁸ or "armed violence at sea

7. Admittedly, this general characterization is somewhat circular. But it is clear that not all robberies or murders committed on the high seas would be piracy, *i.e.*, that they would authorize the assertion by any state of its jurisdiction. For example, if a cabin boy stole goods from a passenger, the act would not be piracy, for the threat to the freedom of the sea is not sufficiently serious.

8. See, *e.g.*, 1 L. OPPENHEIM, *INTERNATIONAL LAW* 558 (7th Lauterpacht ed. 1948). See also W. HALL, *INTERNATIONAL LAW* 271 (7th Higgins ed. 1917). An attempt was made to specify which acts are or are alleged to be piracy, as follows:

1. Robbery or attempt at robbery of a vessel, by force or intimidation, either by way of attack from without, or by way of revolt of the crew and conversion of the vessel and cargo to their own use.
2. Depredation upon two belligerents at war with one another under commissions granted by each of them.
3. Depredations committed at sea upon the public or private vessels of a state, or descents upon its territory from the sea by persons not acting under the authority of any politically organised community, notwithstanding that the objects of the persons so acting may be professedly political. Strictly all acts which can be thus described must be regarded as in a sense piratical.

which is not a lawful act of war."⁹ More restrictively, piracy has been defined as theft at sea.¹⁰ General descriptions of the nature of the act must be considered the correct approach, as there are many acts which are of universal concern and thus subject to the jurisdiction of all States. Attempts to define piracy by enumerating specific acts which qualify as piracy have proven to be unsuccessful since circumstances continue to change.

The great majority of definitions have included a qualification that the acts of violence must be to some degree dissociated from a lawful authority. The words "unauthorized" and "illegal" have been used as descriptions of this feature.¹¹ The difficulty is that no further effort is made to explain what is "illegal" or "unauthorized." In many cases connected with a State, the legality of an act will be clear by reference to international law. Thus, an act in self-defense, although it may be violent, would not be illegal. On the other hand, a seizure of an innocent merchant vessel on the high seas when there is no basis for a claim of self-defense clearly is illegal under traditional law.¹² The Geneva Convention makes seizure of merchant vessels illegal when the vessel is not a pirate ship or engaged in slave traffic.¹³ Between the extremes of

9. See, e.g., *In re Piracy Jure Gentium*, [1934] A.C. 586.

10. See, e.g., 2 D. O'CONNELL, *INTERNATIONAL LAW* 657 (2d ed. 1970).

11. See, e.g., Art. 15 (1) of the Geneva Convention on the High Seas, note 18 *infra*.

12. See 1 D. O'CONNELL, *INTERNATIONAL LAW* 315-20 (2d ed. 1970); van Zwanenberg, *Interference with Ships on the High Seas*, 10 *INT'L & COMPARATIVE L.Q.* 785 (1961).

13. Article 22 GENEVA, *supra* note 3, of the Convention on the High Seas provides a guide for determining when interference with merchant vessels on the high seas is legally authorized:

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting:
 - (a) That the ship is engaged in piracy; or
 - (b) That the ship is engaged in the slave trade; or
 - (c) That, though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.
2. In the cases provided for in sub-paragraphs (a), (b) and (c) above, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.
3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

a valid claim of self-defense and the total lack of such a claim, there are gray areas. For example, if a State acts on the basis of necessity, is the act nevertheless illegal?¹⁴ Another area of uncertainty, which will be discussed later, involves the legality of acts by groups which do not qualify as States.¹⁵

In addition to illegality, another element common to many definitions of piracy is the objective of the actor.¹⁶ The determination of objective is the cornerstone of the two most elaborate formulations—the Draft Convention on Piracy, prepared by the Harvard Research in International Law, and the 1958 Convention on the High Seas, both of which provided that in order for the act to qualify as piracy it had to be for “private ends.”

Article 3 of the Harvard Draft provides:

Piracy is any one 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 or 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.¹⁷

The comments to Article 3 note the difficulty and importance of the definition and indicate further the great variety of views of writers on such a definition. Article 3, and the Harvard Draft Convention as a whole, represent more than a codification of

14. See E. BROWN, *THE LEGAL REGIME OF HYDOSPACE* 143-45 (1971) for a discussion of cases involving necessity.

15. See text accompanying notes 40-50 *infra*.

16. See, e.g., OPPENHEIM, *supra* note 8, at 558.

17. Harvard Law School, *Research in International Law, Codification of International Law* (pt. 4 Piracy) [hereinafter cited as HARVARD RESEARCH], 26 AM. J. INT'L L. 740, 743 (Supp. 1932). The draft convention contains 19 articles and is, along with the comments, a valuable collection of sources for any research in the international law of piracy. Although the convention *per se* has never been adopted, its impact upon the development of the law of piracy is unquestioned.

customary international law. Both have had a significant and continuing effect on the development of the law of piracy. The piracy articles of the Geneva Convention on the High Seas (Arts. 13-21), which represent present law on this subject, were based, to a great extent, on the Harvard Draft provisions. Article 15 of the Geneva Convention¹⁸ and Article 3 of the Harvard Draft are nearly identical in substance and use similar language.

III. "THE PRIVATE ENDS" AND "PRIVATE VESSEL" EXCEPTION

The Geneva Convention is the most prominent statement on the law of piracy today. The Convention has entered into force, having been ratified by the great majority of sea powers.¹⁹ However, many interpretational problems and ambiguities are posed by its provisions. The *Mayaguez* case illustrates the complexities of piracy and the broader problem of attempts to codify a controversial subject matter. It is assumed that the Cambodian act was an "illegal act of violence." The *Mayaguez* was not engaged in illegal surveillance of Cambodia nor in any other type of activity which arguably would have justified or excused the seizure under the doctrines of self-defense or necessity. However, Article 15 requires that the pirate ship be "private" and in pursuit of "private ends." In an objective sense the Cambodian naval vessel was a public, i.e., non-private vessel. The United States, however, had not recognized the *Khmer Rouge* regime, under whose authority the seizure was made. The Convention does not address the problem of recognition, or lack of it, in making this determi-

18. Article 15, GENEVA, *supra* note 3, provides:

Piracy consists of any of the following acts:

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

- a. On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
- b. Against a ship, aircraft, persons or property in a place outside the jurisdiction of any state;

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

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

19. Over 50 States are parties to the convention, including the United States, the United Kingdom and the Soviet Union.

nation. Although some support may be found for the proposition that lack of recognition of a government may justify treating that government's vessels as "private,"²⁰ the weight of authority calls for a more objective assessment.²¹

Even if there were no doubt that a vessel was a government ship, it is possible that the vessel could be considered a pirate. For example, Article 16²² provides that acts of piracy committed by a government ship on which the crew has mutinied are "assimilated to acts committed by a pirate ship." In other words, a government ship can be considered a pirate ship if a mutinous crew uses the ship for private ends. However, other than Article 16, there is no provision which provides for an assimilation of a non-private vessel to a private one. This may indicate that in any situation other than mutiny, a public ship remains public and, consequently, cannot be considered a pirate ship under Article 15. Arguably, it would have been reasonable to impose a rule that public ships, such as naval vessels and other government-owned vessels, can never be pirates, although the crew may be guilty of piracy. This would provide, in effect, that the crew would fall within the common jurisdiction, but the ship itself would remain within the exclusive jurisdiction of the flag State.²³ Such a rule

20. See, e.g., OPPENHEIM, *supra* note 8, at 559. C. COLOMBOS, *INTERNATIONAL LAW OF THE SEA* 444 (6th ed. 1967). Cf. *The Ambrose Light*, 25 Fed. 408 (S.D. N.Y. 1885), where recognition of a state of war or of belligerent rights with regard to insurgents was viewed as being necessary to prevent their ships and acts from being held piratical. For a further discussion of the recognition problem, see Johnson, *Piracy in Modern International Law*, 43 *GROTIUS SOCIETY TRANS.* 63, 79-80 (1957).

21. 1 D. O'CONNELL, *INTERNATIONAL LAW* 148-51 (2d ed. 1970).

22. The acts of piracy, as defined in Article 15, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship.

Article 16, GENEVA, *supra* note 3.

23. Article 8, GENEVA, *supra* note 3, does provide that "warships" have complete immunity from the jurisdiction of any State other than the flag state. A warship is defined as a "ship belonging to the naval forces of a state . . . under the command of an officer duly commissioned by the government . . . and manned by a crew who are under regular naval discipline." If these conditions are not met, the vessel would not qualify as a warship and would then not be entitled to the immunity afforded by Article 8.

Article 9 further provides that other government ships, e.g., ships owned or operated by a State and used only for government non-commercial service, such as for scientific purposes, shall also enjoy complete immunity.

A ship owned by a State and used on commercial service or a ship so owned by a State

would eliminate the danger to international peace which would result from an uninvolved State asserting universal jurisdiction under piracy law and attempting to punish a pirate vessel belonging to another government.

If one accepts the premise that in some cases State-owned ships may lose their immunity, does this necessarily mean that such ships may become "private" vessels for the purposes of Article 15? By applying the rule of Article 16 to Article 15, it appears that a government ship can become a private vessel and pirate ship if it is controlled by a mutinous crew. The conversion of government ships to private ships in other contexts, however, is less clear. For example, if a government ship is stolen or taken over by nationals of another country, the foreign nationals may perpetrate acts of violence which would be considered piratical under traditional views. But the Convention articles do not specify whether this situation would result in conversion of the government ship to private status. Considering the potential danger to international peace, such a take-over should convert the vessel to private status, especially if the foreign nationals attack ships of innocent countries.

If a conclusion is drawn that a once public ship may be assimilated in diverse contexts to a private vessel or that the public characteristics of a vessel do not necessarily preclude that vessel from being a factor in piracy, the most complex interpretational problem of the Geneva formulation remains the "private ends" test.²⁴

The Harvard commentary on Article 3 indicates that the major problem facing the drafters was how to treat the acts of groups who are attempting to achieve a political objective rather than

and partially engaged in commercial activities and partially on non-commercial service would not fall within the immunity afforded by Article 9.

24. The test may be traced directly to the HARVARD RESEARCH which included the test in Article 3 of its draft convention. Article 3 is reproduced in the text accompanying note 17 *supra*. The Reporter's comments in the International Law Commission's Report to the U. N. General Assembly on the piracy articles, state as follows:

In its work on the articles concerning piracy, the Commission was greatly assisted by the research carried out at the Harvard Law School, which culminated in a draft convention of nineteen articles with commentary In general, the Commission was able to endorse the findings of that research.

Comment to Article 13, Report of the International Law Commission (1956), 2 *T.B.K. INT'L L. COMM'N* 25, U.N. Doc. A/CN. 4/Ser. A/1955/Add. 1.

selfish gain.²⁵ Both the Harvard Draft and the Geneva Convention adopted the "private ends" test which excluded from the definition of piracy all acts committed for "political or other public ends,"²⁶ thus excluding the acts of political groups and States.²⁷ The drafters did not differentiate between political groups who were acting against a single government versus groups who directly affected the interests of more than one State. Nor was there a differentiation between acts of political groups and acts of States. The "private ends" test was a sledgehammer solution to a very complex problem. It ignored the fact that there can be differences in the degree of State involvement and in the nature of political groups and their acts.

The "private ends" qualification could operate as an escape device for almost any act of a State or revolutionary political organization. This exception can hardly be considered wise. The underlying reasons which support any rule of State immunity are generally distinct from those which are urged as supporting exclusion of acts of insurgents from the domain of piracy. The next section will deal with the rationale and desirability of State immunity from the law of piracy. The discussion will then turn to the treatment of insurgents and other organizations of a political complexion.

IV. STATE PIRACY

That a State may not be guilty of piracy is a treatise proposition founded in the early days of international law²⁸ and revived after the Geneva Convention. Several reasons may be suggested for the rule. It is said that piratical acts "are done under conditions which render it impossible or unfair to hold any state re-

25. 26 AM. J. INT'L L. 786 (Supp. 1932).

26. HARVARD RESEARCH, *supra* note 17, 26 AM. J. INT'L L. 740, 798 (Supp. 1932).

27. The preamble to the Convention on the High Seas indicates that it represents a codification of the rules of international law. It would appear, however, that several articles are more accurately described as modifications or amendments of customary law. See, e.g., Article 11 which, in effect, is a modification of the law reflected in the celebrated *Lotus* case, [1927] P.C.I.J., ser. A, No. 10, at 4.

28. See van Bynkershoek, *QUAESTIONES JURIS PUBLICI*, Lib. 1, ch. XVII (1737), translated by Duponceau, 3 AM. L. J. 1, 258 (1810). See also A. HALL, *INTERNATIONAL LAW* 661-62 (2d ed. 1970) where the question of whether a state may be guilty of piracy is described as a "very nice (unsettled) point."

sponsible for their commission."²⁹ Theoretically, if Cambodia had been guilty of an illegal act of violence *vis-a-vis* the United States, then Cambodia would have become liable to the United States under international law for the injury inflicted. The probability that the wrong will go unredressed is, in the present state of international law, hardly a valid basis for denigrating the theoretical quality of this rationale.³⁰ In addition, if the common jurisdiction could be asserted *vis-a-vis* a State, potentially undesirable consequences are evident. The threat to international peace and stability could be of grave significance if a State whose interests have not been directly infringed sought to punish a State which authorized an act of piracy. Finally, it may be suggested that the legality of an act of violence authorized by a State may be impossible or impracticable to assess for purposes of piracy. For example, in the *Mayaguez* context, the State may have pursued the course it did in an effort to protect what it thought was a legitimate claim of right, *e.g.*, preventing non-innocent passage or protecting its economic resource zone.

On the other hand, the purpose of the law of piracy is to provide an effective means of maintaining the security of the high seas so that it will be open for trade, commerce and navigation. If the acts of private individuals acting for purely private ends may interfere seriously with this shared interest, then *a fortiori* acts of violence supported by the State and its resources pose an even greater threat to commercial and military uses of the high seas. However, after balancing the threat of State violence against the danger to international peace from allowing universal jurisdiction against the offending States, it is reasonable to opt for the rule that State acts will not be within the definition of piracy. An additional problem of allowing State acts to be classified as piracy would be defining which acts of a State would be piracy and which would not. The Geneva Convention has not responded to this problem. It is not clear whether all acts somehow associated with a State or authorized by it are excluded.

There was considerable doubt in the pre-1958 period as to

29. A. HALL, *INTERNATIONAL LAW* 267 (7th Higgins ed. 1917).

30. Nevertheless, the practical impossibility of obtaining reparation for State authorized wrongs is a factor to be considered in any revision of the law which deals with the consequence of that wrong.

whether any act of State could be termed piracy.³¹ In an article published in 1958, the distinguished British authority on this subject, Professor D. H. N. Johnson, explored the precedents in response to the question: "Must piracy be committed for private ends, or can it also be committed by persons acting either on behalf of a State or at least on behalf of a politically organized group for a purpose which can reasonably be described as a public purpose as opposed to a private purpose?"³²

In regard to a State, Johnson explored the prominent judicial precedents, the most famous of which is the case of *The Magellan Pirates*, in which Dr. Lushington announced the following view in dictum:

Even an independent State may, in my opinion, be guilty of piratical acts. What were the Barbary pirates of older times? What are many of the African tribes at this moment? It is, I believe, notorious, that tribes now inhabiting the African coast of the Mediterranean will send out their boats and capture any ships becalmed upon their coasts. Are they not pirates, because, perhaps, their whole livelihood may not depend on piratical acts? I am well aware that it has been said that a state cannot be piratical; but I am not disposed to assent to such *dictum* as a universal proposition.³³

In an earlier case, *The Serhassan Pirates*,³⁴ the same judge held that attacks by armed vessels under the control of island natives, directed against British vessels were piratical, even though, in a sense, the natives were acting on behalf of a "State."

Professor Johnson questioned whether the cases decided by Dr. Lushington have much relevance today, noting that while the Barbary pirates "were acting for a sort of public purpose as well

31. In the commentary to Article 3 of the Harvard Draft, this doubt is acknowledged. See HARVARD RESEARCH, *supra* note 17, 26 AM. J. INT'L L. 740, 769 (Supp. 1932). In the same work see p. 798 ff for a collection of authorities. See OPPENHEIM, *supra* note 8, at 562-63 for a view that States may be guilty of piracy:

There is substance in the view that, by continuous usage, the notion of piracy has been extended from its original meaning of predatory acts committed on the high seas by private persons and that it now covers generally ruthless acts of lawlessness on the high seas by whomsoever committed.

32. Johnson, *Piracy in Modern International Law*, 43 GROTIIUS SOCIETY TRANS. 63 (1957).

33. *The Megellan Pirates*, 164 Eng. Rep. 47, 48 (1853).

34. 166 Eng. Rep. 788 (1845).

as for private gain, they can hardly be compared with modern States."³⁵ The article then considered two other precedents for treating State-authorized acts as piratical, the Washington Naval Treaty of 1922, which dealt with excesses of submarines in World War I and the Nyon Agreement of 1937, occasioned by the naval atrocities committed against innocent merchant shipping by parties involved in the Spanish Civil War. For many reasons,³⁶ Johnson was able to de-emphasize the precedential value of these attempted conventional solutions to acts of violence committed against merchant vessels. Nevertheless, they are indicative of a continuing dissatisfaction with the traditional view of State immunity from piracy and evidence the desire to achieve a satisfactory conventional settlement. It is doubtful that the Geneva Convention has achieved, or its perpetuation will achieve, this end.

It might be said that given the variety of acts with which a State may be associated, it is unwise to foreclose forever the possibility that a State, or those acting in behalf of a State, may come within the ambit of piracy.³⁷ Although it is highly unlikely

35. JOHNSON, *supra* note 32, at 78-79.

36. It was not until the advent of German submarine activity in the period of the First World War that the question of State piracy received any serious consideration. The Treaty of Washington of 1922 represents a response to the German activity. Under that treaty, persons responsible for the sinking of innocent merchant vessels were subject to punishment "as if for an act of piracy." The treaty was never ratified by the signatories and consequently never came into force. S. Doc. No. 348, 67th Cong., 4th Sess. 3118 (1923). The next attempt at conventional treatment of State authorized acts was occasioned by the naval activities of the Spanish Civil War. The Nyon Agreement of 1937 described the attacks of submarines upon merchant vessels as "piratical," "contrary to the most elementary dictates of humanity which should be justly treated as acts of piracy" The agreement signed by nine States did not apply to merchant vessels in control of the belligerents in the war. 181 L.N.T.S. 135.

These precedents and authorities were discussed in some detail by Johnson. The precedential value of the Washington Treaty was questioned by Johnson because of the attempt to extend piracy to war crimes; it was signed by only five States; the London Naval Limitation Treaty of 1930 in effect overruled its provisions on piracy; and subsequent events showed that illegal submarine activities could be treated as war crimes without involving the complexities of the law of piracy. The Nyon Agreement was signed by only nine States; Spanish merchant vessels were not subject to the protection of the Agreement; and such agreement amounted to an *ad hoc* collective self-defense measure.

37. The *Mayaguez* incident is an example of the clearest type of State authorized act. Obviously, there are many possible variations involving a State in some way. Foreign mercenaries provide an interesting and complex case falling within the gray areas. At the present time, there is doubt as to what acts may be, in international law, treated as acts

that Barbary-type States³⁸ will arise in the modern world, there is the possibility that States may indulge in such excesses that the security of the high seas will become so threatened that to invoke the universal jurisdiction would be a reasonable course. On the other hand, even though the "private vessel-private ends" qualifications do not absolutely foreclose State piracy, it is submitted that a less vague, although necessarily general, approach to the solution of this problem must be possible. It is unlikely that any State today would act affirmatively on the basis of the Geneva Convention, even though such assertion of its jurisdiction, based upon the traditional law of piracy, would be reasonable.

Several examples may indicate the breadth of the private ends exception as applied to cases involving acts associated with a State:

Case I: The naval forces of State A attack a merchant vessel of State B in order to prevent non-innocent passage³⁹ through A's territorial sea. The attack, however, due to a mistake, is made on the high seas, and there is no justification for the act. Under these circumstances, the act of State A would not be piracy under traditional pre-1958 law or the Geneva Convention.

Case II: State A, in order to lay claim to off-shore mineral deposits, regularly attacks merchant vessels on the high seas which stray within a three mile radius of the site of the deposits.

Case III: The President of State A issues orders to vessels under State control to seize on the high seas any vessels flying the flag of State B, C, or D. The objective may be revenge or gain.

In Cases II and III, it would be difficult to conclude that the attacks and seizures were for private ends. Yet, the threat to the

of the State. Perhaps this problem as it related to piracy, cannot be solved until the more general aspects of the issue are settled along conventional lines. See the efforts of the International Law Commission in [1974] 1 Y.B. Int'l L. Comm'n 5-61, U.N. Doc. A/CN.4/246 and Add. 1-3; A/CN.4/264 and Add. 1; A/9010/Rev. 1; A/9334.

38. For a sketch of the Barbary States and their status as pirates, see deMontmorency, *The Barbary States in International Law*, 4 GROTIIUS SOCIETY TRANS. 87 (1918).

39. Article 14(4) of the Geneva Convention on the Territorial Sea and the Contiguous Zone, 1958, 516 U.N.T.S. 205 provides in part: "Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State." Article 16(1) provides: "The coastal state may take the necessary steps in its territorial sea to prevent passage which is not innocent."

freedom of the high seas is sufficiently severe in these cases to justify the exercise of the common jurisdiction. Thus, under the traditional theory of piracy, Cases II and III would be piracy.

The Harvard Draft provision and the Geneva test were recognized as expedient measures. To be sure, expediency may dictate a rule that the common jurisdiction cannot be a ground for action even when in theory it would be an appropriate basis. Thus, Case II might well be excluded on the basis of expediency. Yet, there is very little reason to exclude Case III from the designation of piracy. It is not the purpose here to suggest specific draft provisions, but it is suggested that appropriate provisions could be drawn to distinguish various cases which contain an element of State involvement.

V. POLITICAL GROUPS

In the case of groups organized for the purpose of achieving some political objective, such as overthrowing an established government in order to gain governmental control of a State, the dominant view is that such groups can never be guilty of piracy.⁴⁰ To be sure, there are views to the contrary, particularly regarding acts committed in fringe areas.⁴¹ For example, if the acts were directed against innocent, non-involved third nation vessels or persons, the acts then could qualify as piracy.

Thus, insurgents and a State were treated differently in some respects and for good reason. While the quality and degree of the acts were relevant to determine as to each subject whether its acts were piratical, the same considerations that support State exemptions do not always or necessarily apply to insurgent exclusion. Hobbesian notions of sovereignty have led to the view that a people must not be subject to punishment for acts taken to displace a despotic government. Arguably, denying these groups the advantages of acting at sea would foreclose their goals.⁴² Thus,

40. For a collection of these views, see the commentary of the HARVARD RESEARCH, *supra* note 17, at 798 *et seq.*

41. *Id.* See also OPPENHEIM, *supra* note 8, at 562 for the view that vessels of insurgents and States may be treated as piratical.

42. This view has engendered provisions commonly found in extradition treaties, excepting persons who are sought to be extradited for "political" crimes. The interpretation of the phrase, left as it is to municipal organs, has proved to be quite troublesome. It is

other States should not intervene in what is a strictly internal matter. Where interests of third nations are injured, practical considerations of potential liability also support this view.⁴³

The Harvard Research departed significantly from traditional views by adopting the private ends qualification. Such qualification was formulated primarily because of the problem presented by insurgents. The main concern which faced the drafters in 1932, as well as the International Law Commission in the 1950's, and the approach to this concern is illustrated by the following commentary on Article 3:

While the scope of the draft convention is controlled by the international law of piracy, it is expedient to modify in part the traditional jurisdiction because of modern conditions [T]he draft convention excludes from its definition of piracy all cases of wrongful attacks on persons or property for political ends, whether they are made on behalf of states, or of recognized belligerent organizations, or of unrecognized revolutionary bands. Under present conditions there seems no good reason why jurisdiction over genuine cases of this type should not be confined to the injured state, the state or recognized government on whose behalf the forces were acting, and the states of nationality and domicile of the offender. Most of these cases would not fall indisputably under the common jurisdiction by traditional law, and this is an additional reason for disposing of them as the draft convention does.⁴⁴

There is a division of authority on the status of acts of insurgents and subtle distinctions have been urged on this point. Although there is authority for subjecting States and insurgent groups to the law of piracy, to the Harvard drafters it seemed best to confine the common jurisdiction to offenders acting for private ends only. The intended effect of this qualification is quite signifi-

noteworthy that two closely related legal systems, that of the United States and England, interpret the term differently. See generally SHEARER, *EXTRADITION IN INTERNATIONAL LAW* (1971).

43. For example, it is arguable that if insurgents in the course of an insurrection commit an act of violence on the high seas, injuring the interests of a non-involved State, no claim would lie against the government of the State against which the group is in revolt, if the group were pirates. Also, if the group is successful in gaining control of the government, it may well prove to be an embarrassment to a State which has denounced the group's acts as piratical. See JOHNSON, *supra* note 32, at 80.

44. 26 AM. J. INT'L L. 786 (Supp. 1932).

cant as illustrated by further commentary to Article 16.⁴⁵ Several examples are provided which indicate the breadth of the qualifications. The following would not be piracy: a revolutionary organization uses an armed ship to establish a blockade against foreign commerce, or to stop and search foreign ships for contraband, or to seize necessary supplies from foreign ships. The commentary disputes the view held by some writers and judicial authorities that illegal attacks on foreign commerce by unrecognized revolutionaries are piracies in the international law sense. The commentary said: "It is the better view, however, that these are not cases falling under the common jurisdiction of all states as piracy by the traditional law, but are special cases of offences for which the perpetrators may be punished by an offended state as it sees fit."⁴⁶

Apparently, little thought was directed to the question of State piracy or variations on that theme, or the questions of acts committed by individuals for other than personal reasons. Under the Harvard Rule, however, it made no crucial difference whether the group interfered with innocent third nation shipping. The Geneva Convention followed the Harvard approach. Under Article 15, jurisdiction would lie only with States which were directly concerned, *e.g.*, States who were attacked by political groups and innocent third party States whose commercial vessels were the subject of interference.

The most prominent post-1958 incident spotlighting the difficulty in applying Article 15 has been the seizure, in 1961, of a Portuguese flagship, the *Santa Maria*, by the self-styled leader of a movement to overthrow the then government of Portugal. Other than the attainment of publicity and support for the movement, the other aims of the movement were obscure. Not unnaturally, the Portuguese government condemned the act as piracy. However, the United States and the United Kingdom did likewise.⁴⁷

45. Article 16 of the Draft Convention dealt with the problem of States that were injured directly by acts of violence authorized by States or insurgent groups, providing:

The provisions of this convention do not diminish a state's right under international law to take measures for the protection of its nationals, its ships and its commerce against interference on or over the high seas, when such measures are not based upon jurisdiction over piracy.

46. 26 AM. J. INT'L L. 857 (Supp. 1932).

47. See Green, *The Santa Maria: Rebels or Pirates?*, 37 BRIT. Y.B. INT'L L. 496 (1961).

Admittedly, British and American passengers were involved.

A modest scholarly debate ensued, which illustrated the complexity of the Geneva Convention, particularly the meaning and applicability of the "private ends" exception.⁴⁸ The incident itself, by virtue of the action of the United States and United Kingdom, further illustrates the very crux of the problem. Although a politically motivated group may not have the resources of an established government, such groups often can wreak severe havoc on innocent ships and persons. To be sure, the United States and the United Kingdom had direct interests at stake, but it may also be reasonable to view their characterization as based upon broader and less tangible interests. Both of these countries have extensive merchant fleets and obviously did not wish to create a precedent which could prove embarrassing if their ships were seized under similar circumstances. If the United States and the United Kingdom had not called the seizing of the *Santa Maria* piracy and if at a later time one of their own vessels was seized, other countries might fail to aid them, noting that the two countries had failed to consider such seizures piracy. Certainly, no definitive precedent was set one way or the other, and such hesitancy must be traceable to the ambiguity of Article 15.

Another aspect of the *Santa Maria* case, as well as the *Sheiro Maru* and *Mayaguez* incidents, deserves comment. In these cases, either the national States or third party States who were directly affected took remedial action. This normally will be the case when insurgents are operating close to home or the injury is done to a military power. However fortunate the results have been, there have been and will continue to be cases where the injured State is unable to take action. This is a particularly acute area of concern because of the substantial number of nations that possess large merchant fleets but little or no military or other forms of power. Assuming that negotiations fail in such cases, the acts of violence might go unredressed under Article 15. The common jurisdiction could not be asserted because of the wide-ranging exclusionary effect of Article 15.

Protection of organized political groups could have been ac-

48. See Fenwick, "Piracy" in the Caribbean, 55 AM. J. INT'L L. 426 (1961); Green, *The Santa Maria: Rebels or Pirates?*, 37 BRIT. Y.B. INT'L L. 496 (1961).

completed in a general, but less vague, manner.⁴⁹ The principal problem that should be addressed is whether and, if so, to what extent the displacement of established governments as an internal matter now outweighs the interest that all States have in the freedom of the seas. It is curious indeed that under the present formulation only those posing the least threat to the freedom of commerce can be pirates.

The seriousness of a restriction on the ability to achieve a just change of government must be confronted when evaluating the desirability of a revision of the law of piracy which would result in classifying a greater number of acts by insurgents as piracy. Insurgents still would have jurisdiction limited over their acts where they occur on the high seas against vessels of the State with which the group is in insurrection. Further, no act occurring within the land territory or territorial water of any State would be considered piratical. With the emergence of new types of maritime zones, the area of the high seas will shrink considerably, providing a quite expanded, relatively safe area for the acts of insurgents. It would appear that if such zones come into existence, rebels will be fairly accommodated.⁵⁰

VI. THE DUTY TO SUPPRESS PIRACY

Article 14 of the Geneva Convention on the High Seas provides as follows: "All states shall co-operate to the fullest extent in the repression of piracy on the high seas or in any other places outside the jurisdiction of any state." The Harvard Draft Convention

49. The *Santa Maria* episode is a perfect example of the difficulty of determining in this context whether an act is done for private ends. One might understandably turn to previous State practice or the theory of piracy in order to determine whether the act is piracy or not. By this means, one could justifiably conclude that the *Santa Maria* seizure was piracy.

It would still be necessary to go further to interpret the meaning of private ends in order to trace its conventional origin to the Harvard Draft. One would then be led to the *travaux préparatoires* which would strongly indicate that piracy was not involved. Although the International Law Commission was influenced by the Harvard Draft, the commentary of the Commission only indicated that its concern lay with the acts of disputants in a civil war. If this were the concern, it is curious why such a general and vague test was adopted, one which would exclude from its scope a single individual who, on the high seas, consistently fired upon innocent merchant vessels in protest, for example, of American wheat shipments to the Soviet Union.

50. Also, any land area would fall outside the universal jurisdiction.

contained a similar formulation in Article 18.⁵¹

Although there are some views to the contrary,⁵² under the traditional law of piracy a State has the right to assert its jurisdiction, but is not compelled to do so. If a State does not consider piracy a crime at all under its municipal laws, such a State may not have the machinery that is necessary to punish piracy, and it would be a serious interference with its sovereignty to impose such a duty.

Under the traditional rules of piracy, a State has the option not to take any action and may consider extra-legal factors in deciding whether it should act. Besides its general reluctance to treat piracy as a crime under its municipal laws, it could also take account of possible retaliation and the potential threat of international friction and discord.

If States are under a duty to act it is doubtful that they would agree to a return to traditional law or a broadening of jurisdiction over piracy. The duty imposed by Article 14 may explain why the definition of piracy was framed so vaguely.⁵³ Under a broad, traditional definition of piracy, States would have been reluctant to accept a rule which might create liability in numerous situations, because of failure to suppress piracy. States also may hesitate to suppress piracy for political, economic, or other non-legal reasons.⁵⁴

51. Article 18, GENEVA, *supra* note 3, states: "The parties to this convention agree to make every expedient use of their powers to prevent piracy, separately and in cooperation."

52. See, e.g., the commentary of the HARVARD RESEARCH and authorities collected there, 28 AM. J. INT'L L. 756 (1932).

53. The comments to the then Article 13, now Article 14, are illuminating in this regard:

The questions arising in connexion with acts committed by warships in the service of rival governments engaged in civil war are too complex to make it seem necessary for the safe-guarding of public order on the high seas that all States should have a general right, *let alone an obligation*, to repress as piracy acts perpetuated by the warships of the parties in question.

[1955] 2 Y.B. INT'L L. COMM. 25 (emphasis added).

54. An example is the situation of Thailand in the *Mayaguez* incident. There were Thai objections to the United States' use of Thailand territory as a base of its operations. Considering the location of Thailand and the uncomfortable situation of neutral Asian States during that period of the Vietnam conflict, the Thai reaction was not surprising.

Generally, where the intervention, on the basis of piracy, might well be viewed as an "unfriendly" act by a State whose interests are directly affected, intervention would be unlikely.

In any re-evaluation of the law of piracy, repeal of the duty should be given serious consideration. It would be unrealistic to expect States today to accept a duty to suppress piracy, no matter how general the provision is, if the definition of piracy is broadened. Of course, in exceptional cases, such as acts of clearly private individuals acting for clearly private ends, the imposition of a duty in connection with suppression of such acts probably would not be objectionable.

VII. CONCLUSION

The effect of the 1958 Geneva Convention has been to confuse the law of piracy. Perhaps it is not unreasonable to suggest that piracy has been rendered a dead letter. At any rate, it is doubtful that States will act except in rare situations on the basis of a right of jurisdiction based upon piracy.

Obversely, the danger is that the obsolescence of piracy will be marked by an increase in the commission of illegal acts of violence on the high seas. Piracy was traditionally an effective deterrent. Under the Geneva formulation, piracy can hardly be viewed as a deterrent at all in view of the fact that it is apparently directed only at offenders who resemble the classic pirate of children's books. First, it should be recognized that the Geneva Articles, having been borrowed from the Harvard Draft, are not generally codifications of the customary law of piracy and traditional doctrine. Under traditional laws of piracy, precedents may be found for treating some acts closely associated with States and, particularly, acts associated with groups organized along political lines as piratical. Second, there are too many acts associated with a State and acts which can be described as "political," which, upon serious reflection, should not be exempted from the common jurisdiction.

Negotiations should give some consideration to the following matters:

1. Should all acts of State be exempt from the universal jurisdiction? To analyze and answer this question properly, traditional notions of State sovereignty and the threat to international peace and stability should be weighed against present notions concerning the freedom of

the seas and the threat to such freedom that acts of violence pose. In perhaps limited situations, a consensus would emerge that such acts, although closely connected to the authority of a State, should fall within the definition of piracy. Many factors, including, for example, a State's refusal to reparate the injury or a clear showing that an act is not based upon a claim of right or necessity, may lead to rules for specific cases.

2. Should all acts of politically organized, or similar groups, and of all individuals who are not acting for personal gain, revenge, etc., be excluded from the common jurisdiction? In reaching this decision, it will be necessary to balance the need of political groups to have means available for changing governments against the need for freedom and security on the high seas. The shrinkage of the "high seas" area would by itself call for a re-evaluation of the Geneva treatment of insurgents.⁵⁵

The common jurisdiction associated with piracy is an illustration of an effective means of enforcing international law and is an excellent deterrent in that legal system. The issue is not one of semantics. In any new formulation, the term piracy could be discarded. Due to its epithetical connotation, however, the term probably should be retained for the deterrent capability it possesses. Unfortunately, if the present definition and qualifications persist, piracy *jure gentium* will be defunct. Revision of the law of piracy is in order.

55. The proposals being made at the present time would allow each coastal State to create an economic resource zone which could extend as far as 200 miles from the coast. This area would not be "high seas," to which the law of piracy is applicable. Obviously, cases of piracy, even if limited acts of State and acts of political organization are included, rarely will be encountered if a substantial number of such zones are created.

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