

## ESSAYS ON PIRACY

### AN INTRODUCTION TO THE INTERNATIONAL LAW OF PIRACY

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The substantive meaning of “piracy” in contemporary international law is unsettled. Publicists, drawing on treaty provisions and evidence of state practice, generally acknowledge the existence of an international law of piracy that covers acts of depredation on the high seas. They disagree about much, however, debating, among other issues, whether piracy includes attacks by insurgents or terrorists. The debates remain unresolved, in part because no international legislature exists to codify the crime and because no international court sits to settle disputes over how to interpret the concept of “piracy.” Despite the indefinite content of the international law of piracy, however, most commentators believe that piracy does have meaning today in international law, at least in a core, “classical” sense encompassing acts of depredation committed by a private ship against another ship on the high seas for private, commercial gain. For those commentators, the international law of piracy illustrates that international law’s proscriptions traditionally could and did apply to the acts of individuals, and not just to the acts of states.

Those concerned with piracy cannot consider the content of the international law rules of piracy in isolation from the processes by which such rules come to be interpreted and applied. In large measure, the task of applying the international law of piracy is left to municipal legal systems. The bases nations in fact use to exercise jurisdiction over pirates, as well as how municipal courts interpret rules of international law outlawing piracy and how they distinguish international and municipal law approaches to the issue, are factors relevant to anyone concerned with the functional application

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of legal standards to those accused of piracy.

The first section of this introductory essay highlights some of the reasons why the international law of piracy is hard to define, examining the nature of treaty provisions proscribing piracy and the nature of customary international law. The first section also notes that the existence of different jurisprudential approaches to international law affects conclusions about the nature of piracy as an international legal concept. The second section of this essay explores the interface between international law and municipal law and process, and examines some of the jurisdictional and process issues that U.S. courts face in piracy cases. The other articles in this symposium, all by experts in the field, examine some of the doctrinal and theoretical dimensions of the national and international law of piracy. This essay concludes by suggesting that the academic contributors to this symposium—Alfred Rubin, Barry Dubner and Samuel Menefee—in fact share some common ground in their observations concerning how best to remedy the contemporary incidents of violence at sea that Eric Ellen notes in his Article.

## I. INDEFINITE RULES

Treaty provisions governing the law of piracy have not been particularly clear. Articles 14-21 of the 1958 Geneva Convention on the High Seas,<sup>1</sup> which concern piracy primarily in the “classical” sense of acts of depredation against another ship for private ends on the high seas, contain some confusing language. Consider, for example, Article 15 of the Convention. Article 15 states that piracy consists, *inter alia*, of “any illegal acts of violence, detention, or any act of depredation, committed for private ends . . . .”<sup>2</sup> As Profes-

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1. Done Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 (entered into force Sept. 30, 1962) [hereinafter 1958 High Seas Convention]. As of December 31, 1989 the Convention on the High Seas had been ratified by 58 states.

2. *Id.* art. 15. This language is repeated, almost verbatim, in Article 101 of the United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/CONF.62/122 reprinted in UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 206, 248 (M. Nordquist ed. 1985) [hereinafter 1982 U.N. Convention]. The 1982 U.N. Convention has not yet entered into force. The text of Article 15 of the 1958 Convention reads:

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;

sor Rubin has noted, the word "illegal" is ambiguous.<sup>3</sup> Does the word "illegal" imply that some acts of violence or detention committed for private ends might be legal, thus suggesting a revival of the long-discredited concept of privateering, under which people cruised the seas to commit hostile acts under the color of a commission received from a government? Does the term "illegal" contemplate the concept of "legal" violence by insurgents, who historically have not been recognized as having governmental status? Or was the word intended cryptically to incorporate national, rather than international, standards of illegality into the Convention? The *travaux préparatoires* of the First United Nations Conference on the Law of the Sea and the records of the International Law Commission's 1956 draft articles on the law of the sea, from which the piracy articles of the 1958 Convention were derived, do not provide clear answers. Nor is the word "illegal" the only example of ambiguous drafting in the piracy articles of the 1958 Convention.<sup>4</sup>

Nations' approaches to treaty-making conferences provide at least a partial explanation of why the particularly ambiguous and elliptical provisions of the 1958 Geneva Convention on the High Seas have not been clarified.<sup>5</sup> States may consider instances of violence at sea, in the "classical" sense of depredations for private, commercial gain and perhaps even in the modern sense of terrorist actions, insufficiently numerous or important to justify efforts to clarify and update the language of the 1958 Convention. Or states may fear that impermissible invasions of their sovereignty might

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

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

3. See A. RUBIN, *THE LAW OF PIRACY* 333 (1988); Rubin, *Is Piracy Illegal?*, 70 AM. J. INT'L L. 92 (1976); Rubin, *Revising the Law of "Piracy,"* 21 CAL. W. INT'L L.J. 129, 136 (1990). At the First United Nations Conference on the Law of the Sea, Greece unsuccessfully proposed deleting the word "illegal," noting the "legal confusion that would arise" by interpreting "illegality" under various national law standards. Summary record, Second Comm., 29th mtg. (1958), para. 3, UNCLOS I, IV Off. Rec. 83, A/CONF.13/40.

4. See 2 D. O'CONNELL, *THE INTERNATIONAL LAW OF THE SEA* 970 (1984) ("Because of its elliptical nature, Article 15 is one of the least successful essays in codification of the Law of the Sea . . ."); A. RUBIN, *supra* note 3, at 319-37; Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AM. J. INT'L L. 269, 291 ("*travaux préparatoires* are not unequivocal").

5. This essay does not address either the 1956 International Law Commission draft articles on the Law of the Sea, A/3159, 2 Y.B. INT'L L. COMM'N 253 (1956), or the 1932 Harvard Research Project, 26 AM. J. INT'L L. SUPP. 739 (1932). An examination of those sources is essential to an understanding of the 1958 Convention's piracy articles, which derived directly from the ILC work and the Harvard research. See generally A. RUBIN, *supra* note 3, at 314-17, 319-37.

result from a treaty that recognizes the right of nations to act against putative terrorists characterized as pirates. Delegates to the Third United Nations Conference of the Law of the Sea (“UNCLOS III”) left the piracy articles of the 1958 Convention essentially unchanged. The Second Committee at UNCLOS III, devoting most of its attention to such controversial issues as the exclusive economic zone (“EEZ”), straits passage, archipelagoes and land-locked states, did not undertake the sensitive task of attempting to broaden the scope of the piracy articles to include terrorist actions or takeovers of ships for political purposes. Nor did the Second Committee try to clarify such ambiguous language as the reference to “illegal” in Article 15 of the 1958 Geneva Convention on the High Seas.<sup>6</sup> Indeed, it is arguable that the lack of attention to the piracy articles at UNCLOS III resulted in some new confusion related to the geographical scope of piracy under the provisions of the not-yet-in-force 1982 United Nations Convention on the Law of the Sea. Article 101(a)(i) of the 1982 Convention, like Article 15(a)(i) of the 1958 Convention, refers to acts on the high seas, but the recognition in the 1982 Convention of 200-mile coastal state EEZs makes it somewhat uncertain whether acts of depredation committed against another ship outside a state’s territorial waters but inside its EEZ would qualify as piracy under the 1982 Convention.<sup>7</sup> The treaty-making process at UNCLOS III, in short, did not lead states to alter the content of treaty law governing the contemporary international law of piracy.

It requires a large step, however, to conclude that because the piracy articles of the 1958 Geneva Convention on the High Seas and the 1982 United Nations Convention on the Law of the Sea contain ambiguous language, they are therefore devoid of meaning. Professor Rubin in fact has argued that the 1958 Convention piracy rules, “when read carefully, are incomprehensible and therefore codify nothing.”<sup>8</sup> But even if the piracy articles are interpreted

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6. Articles 102 and 105 of the 1982 U.N. Convention, *supra* note 2, did incorporate a few new references to aircraft, and a few other minor wording changes appeared in the text of Articles 101 and 107. Virtually all changes in the piracy articles of the 1958 Convention derived from recommendations of the Drafting Committee at UNCLOS III.

7. Whether Articles 100-107 of the 1982 U.N. Convention on the Law of the Sea—the piracy articles—do apply in the exclusive economic zone depends on the construction given Article 58 and other articles in Part V of the 1982 Convention, which govern the EEZ. Article 58(2) states that Articles 88-115 of the Convention “apply to the exclusive economic zone in so far as they are not incompatible with” Part V. *See also* 1982 U.N. Convention, *supra* note 2, art. 86.

8. A. RUBIN, *supra* note 3, at 344.

very strictly, it seems quite likely that decision makers would agree that the text captures some core meaning. For example, individuals on one private ship who attack another ship on the high seas, solely for private, commercial gain, and who could not be considered privateers or insurgents, might well be considered pirates under the Convention's language.

Does a customary international law of piracy exist that is different from or broader than the conventional law embodied in the 1958 Geneva Convention on the High Seas? The answer to this question is uncertain, according to modern commentators. Professor Dubner, in his article in this symposium, believes that "there is definitely no custom regarding a modern definition of piracy."<sup>9</sup> By contrast, Samuel Menefee argues that the piracy articles of the 1958 Convention and the 1982 United Nations Convention on the Law of the Sea represent only a partial codification of the international law of piracy, and that a customary international law argument may be made that the international law of piracy is broad enough to include ship takeovers by insurgents or terrorists, as in the *Achille Lauro* incident.<sup>10</sup> Others agree, stressing "the policy advantages and law-enforcement benefits" of such a position.<sup>11</sup> Professor O'Connell considers open the question whether the 1958 Convention's definition of piracy is comprehensive enough to preclude reliance on customary international law.<sup>12</sup>

The indefinite meaning of piracy in customary international law is explained at least in part by what one commentator has termed the "inelegance" of customary international law.<sup>13</sup> A large amount of indefiniteness is built into the concept of custom. Arguments are likely over whether a sufficient body of state practice exists, whether such practice has been sufficiently consistent, whether an asserted norm has enough "inherent authority" so that the norm may be said to exist despite a significant amount of contrary practice, whether and when the contours of an established norm have changed, and how treaties affect assertions of custom. The inquiry into *opinio juris vel necessitatis*, i.e., the requirement that states

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9. Dubner, *Piracy in Contemporary National and International Law*, 21 CAL. W. INT'L L.J. 139, 143 (1990).

10. Menefee, "Yo Heave Ho!": *Updating America's Piracy Laws*, 21 CAL. W. INT'L L.J. 151, 161 n.49, 162 n.56 (1990).

11. Goldie, *Terrorism, Piracy and the Nyon Agreements*, in INTERNATIONAL LAW AT A TIME OF PERPLEXITY 225, 248 (Y. Dinstein ed. 1988). Accord Halberstam, *supra* note 4, at 289.

12. 2 D. O'CONNELL, *supra* note 4, at 970.

13. M. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 45 (1988).

follow a pattern of behavior because they believe it to be legally obligatory, is particularly amorphous. Fully informed decision makers will differ in their conclusions as to whether a particular customary international legal rule exists.

Although different commentators may reach different conclusions about the outer limits of a rule of customary international law proscribing piracy, might we at least agree that certain acts constituting “classical” piracy—including attacks by those on a private ship against another vessel on the high seas for purely private, commercial gain—violate international law? Even this conclusion is resisted by a few. For example, Professor Rubin has concluded, in his comprehensive study of piracy from Greek and Roman times to the present, that historical uses of the concept of piracy reveal no consistent practice. Instead, he has stated:

that both in current practice and in current theory built upon ancient roots and the evolution of the international political and legal orders, there is no public international law defining “piracy;” that the only legal definitions of “piracy” exist in municipal law and are applicable only in municipal tribunals bound to apply that law; that these examples of municipal law do not represent any universal “law of nations” based on moral principle and right reason exemplified through identical laws of different countries, but rather rest on national policies made law by the constitutional processes of the different countries; and that such other uses of the word “piracy” as exist in international communication reflect vernacular usages, pejoratives, and perhaps memories of Imperial Rome and Imperial Britain inconsistent with the current legal order and of doubtful legal effect even when used most emphatically in the heyday of both empires.<sup>14</sup>

Yet many accept that, if “vernacular” and “pejorative” references to piracy in international communication are discounted, some core meaning of the concept exists in contemporary international law. The appropriate frame of reference need not include ancient Greece and Rome, but might focus on relatively recent years, in which a significant intercontinental oceangoing trade exists and in which conceptions of freedom of navigation on the high seas are widely shared. Many modern publicists, it is true, resist a definition of piracy that is limited to acts of depredation for private gain on the high seas, for they do not regard such acts as pressing problems

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14. A. RUBIN, *supra* note 3, at 344. See also *id.* at 1-2 (summarizing six different meanings of “piracy” found in the literature).

today. They prefer that the “constantly evolving”<sup>15</sup> customary international law of piracy reach the acts of terrorists who indiscriminately attack vessels and nationals of several states. Nevertheless, even publicists who argue in favor of some terrorist acts being included within the customary international law definition of piracy accept the notion that acts of depredation on the high seas for private, commercial gain still constitute piracy. Much of the “fuzziness” associated with contemporary conceptions of the international law of piracy results from the disputes over whether customary international law norms proscribing piracy cover political acts.

Finally, the indefinite meaning of piracy in international law is also explained, in part, by the fact that a variety of meanings can be attached to “international law.” The concept of international law in general, and the concept of the international law of piracy in particular, may mean different things to adherents of different jurisprudential schools. Positivists, for whom the consent of separate states—manifested either through unambiguous treaty language or through clear evidence of consistent state practice and *opinio juris*—is a prerequisite for any rule of international law, may be skeptical that piracy has any substantive content in international law. By contrast, some decision makers, comfortable with natural law formulations, have given content to an absolutely binding international law of piracy to protect property rights and prohibit unlicensed acts of violence at sea.<sup>16</sup> The existence of schools that compete with a positivist, statist view of international law at once helps to explain why the content of the international law of piracy appears indefinite and why some can, in the strongest terms, condemn as illegal acts of violence on the high seas.

Some twentieth-century observers have even concluded that international norms outlawing piracy—at least in a core sense of depredations on the high seas interrupting commerce—rise to the level of *jus cogens*.<sup>17</sup> Under this conception, any agreement among states to aid or tolerate piracy would be invalid because it would violate a fundamental or peremptory norm of general international law outlawing such depredations. The jurisprudential underpinnings of *jus cogens* are disputed, but the concept historically appears to relate

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15. Halberstam, *supra* note 4, at 289.

16. See, e.g., *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820).

17. See, e.g., Report of the International Law Commission on the Work of its Eighteenth Session, U.N. Doc. A/6309/Rev.1/Part II, in 2 Y.B. INT'L L. COMM'N 172, 248 (1966), U.N. Doc. A/CN.4/SER.A/1966/Add.1; Whiteman, *Jus Cogens in International Law, With a Projected List*, 7 GA. J. INT'L & COMP. L. 609, 625 (1977).

to the natural law tradition.<sup>18</sup> Although strict positivists may dispute whether the concept of *jus cogens* should be recognized at all, most contemporary observers admit some role for fundamental principles in international law. The content of the norms that fall within the *jus cogens* category also is disputed. However, for those who consider the protection of people and their property from depredations in areas outside the territorial jurisdiction of any state to be a matter of fundamental importance to the international order, a proscription against piracy arguably falls within the category of *jus cogens*.

Followers of the Lasswell/McDougal world public order approach, who view international law in terms of a value-oriented jurisprudence, also do not question the reality of an international law proscribing piracy. International law in this area fulfills the "fundamental policy" of "secur[ing] and maintain[ing] the safety and order of activities on the high seas from deprivations imposed by persons acting without the authorization and responsibility of a state."<sup>19</sup>

This introductory essay, of course, cannot begin to explore the richness of the world public order approach or other visions of the nature of international law. But the fact that, at this point in history, several different approaches toward the nature of international law compete for our devotion helps to explain why there are questions about whether an international law of piracy exists and, if it does, what its content is. To the extent that one maintains a strict positivist, statist view of the nature of international law, the very existence of an international law rule proscribing piracy, even in the classical sense of acts of depredation on the high seas for private, commercial gain, may appear in doubt. From the perspective of other jurisprudential schools, however, the international legal proscription against at least "classical" acts of piracy appears well-established.

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18. See, e.g., Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AM. J. INT'L L. 55, 56 (1966). Other writers, pointing to the language of Article 53 of the Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF./39/27, stress that "acceptance" by the international community of states characterizes a rule rising to the level of *jus cogens* and analogize the concept to notions of overriding public policy accepted within municipal legal systems. See, e.g., Turpel & Sands, *Peremptory International Law and Sovereignty: Some Questions*, 3 CONN. J. INT'L L. 364 (1988).

19. M. McDUGAL & W. BURKE, *THE PUBLIC ORDER OF THE OCEANS* 808 (1962).

## II. UNIVERSAL JURISDICTION AND MUNICIPAL PROCESS

International law interacts with municipal law and process in many ways relevant to an understanding of the meaning and treatment of "piracy." For example, enforcement actions against pirates and criminal prosecutions of pirates are left to individual states. Not only does no international maritime peacekeeping force exist, no international tribunal has jurisdiction to try or punish pirates. Should the 1982 United Nations Convention on the Law of the Sea enter into force, states theoretically might invoke its provisions on the compulsory settlement of disputes<sup>20</sup> to bring interstate disputes over the interpretation of the 1982 Convention's piracy articles to a tribunal. The 1982 Convention does not, however, authorize any tribunal to hear piracy cases brought against individuals.<sup>21</sup>

This section notes only two aspects of the relationship between municipal and international law. The first involves the international law rules of jurisdiction that authorize nations to prescribe and apply laws governing piracy. The second concerns whether a municipal statute that directly incorporates the international law of piracy is sufficiently definite to support a conviction. There are of course many other issues related to the judicial function in an actual criminal case brought in a municipal court against an individual accused of piracy. Such issues include the availability of other national laws (including municipal piracy laws<sup>22</sup>) that might provide a basis for prosecution and the relationship of such laws to international law. Still other process issues related to the international character of piracy actions might include extradition requirements, methods of obtaining evidence abroad, and assessments of the propriety of seizing vessels.

### A. *Universal Jurisdiction*

Standard formulations of international law principles of jurisdiction support the view that each state has jurisdiction to prescribe punishment for offenses such as piracy that are recognized as of universal concern, even if they are offenses committed by non-citizens against noncitizens on board foreign vessels on the high seas. That is, even absent normal jurisdictional connections of na-

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20. 1982 U.N. Convention, *supra* note 2, arts. 286-299.

21. See generally B. DUBNER, *THE LAW OF INTERNATIONAL SEA PIRACY* 20-22, 161-62 (1980); Noyes, *Compulsory Third-Party Adjudication and the 1982 United Nations Convention on the Law of the Sea*, 4 *CONN. J. INT'L L.* 675 (1989).

22. See, e.g., 18 U.S.C. §§ 1652-1661 (1988).

tionality or territoriality, a nation may exercise “universal jurisdiction” over pirates.<sup>23</sup> Furthermore, according to the international law governing jurisdiction to adjudicate and enforce, a state generally will be entitled to punish noncompliance with its piracy laws by means of court cases and to take other enforcement measures reasonably related to those laws.<sup>24</sup> One classic formulation of the idea that all nations might take actions against pirates was John Bassett Moore’s statement in *The Lotus*:

[A]s the scene of the pirate’s operations is the high seas, which it is not the right or duty of any nation to police, he is denied the protection of the flag which he may carry, and is treated as an outlaw, as the enemy of mankind—*hostis humani generis*—whom any nation may in the interest of all capture and punish.<sup>25</sup>

Article 19 of the 1958 Geneva Convention on the High Seas and Article 105 of the 1982 United Nations Convention on the Law of the Sea also indicate that a pirate ship on the high seas will not be subject to the exclusive authority of its flag state. According to these articles, “every State” may seize a pirate ship and decide on the penalties to be imposed against pirates and the actions to be taken against their ships.<sup>26</sup>

For some positivists, the only international law relevant to piracy issues concerns jurisdiction. The 1932 Harvard Law School research project, for example, proposed a draft convention premised on the theory “that piracy is not a crime by the law of nations.” Instead, “[i]t is the basis of an extraordinary jurisdiction in every state to seize and to prosecute and punish persons, and to seize and dispose of property, for factual offenses which are committed outside the . . . ordinary jurisdiction of the prosecuting state and which do not involve attacks on its peculiar interests.”<sup>27</sup> Professor Rubin, who rejects the view that a substantive international law of piracy exists,<sup>28</sup> believes that municipal courts do in practice apply a rule of universal jurisdiction concerning piracy, at least in a qualified sense. He concludes, after a review of many piracy cases, “that a true rule of universality exists, but is conditioned on a legal inter-

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23. See 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987).

24. See *id.* §§ 423, 431.

25. *The S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 65, 70 (Sept. 7) (Moore, J., dissenting).

26. 1982 U.N. Convention, *supra* note 2, art. 105; 1958 High Seas Convention, *supra* note 1, art. 19.

27. Harvard Research Project, *supra* note 5, at 760.

28. See *supra* text accompanying note 14.

est existing in the capturing state: standing.”<sup>29</sup> This standing:

could be based on many connections insufficient as a basis for jurisdiction in the normal context, e.g., the nationality of the victim, the flag of a victim’s ship, and perhaps even the nationality of some members of the crew of “pirates” up for trial, in order to dispose in a single case of all defendants involved.<sup>30</sup>

Most, however, agree that today, “the preoccupation with piracy merely as a basis for jurisdiction seems substantially to have disappeared.”<sup>31</sup> For those who accept the existence of a substantive international law of piracy, universal jurisdiction provides a complementary doctrine. It generally supports the view that action by states is important to help combat piracy. The conceptual case for universal jurisdiction concerning pirates emphasizes that pirates are not subject to the authority of any state and are a threat to all states.<sup>32</sup> Because no state is responsible for the actions of pirates, state responsibility doctrine provides no recourse for damage done by pirates. Municipal law and process, in short, may complement the international community’s recognition that piracy is illegal. Perhaps there are, in fact, few occasions today in which a state would seek to try pirates whose nationality, vessel and victims are totally unconnected to it. Perhaps states with more traditional jurisdictional connections to pirates’ acts will most often capture, prosecute and punish the pirates. To the extent that states do accept the concept of universal jurisdiction to prescribe and punish in this area, however, they signify their recognition of piracy as unusual and significant, for international law has not recognized similarly expansive jurisdiction over most criminal activity.<sup>33</sup>

### *B. Municipal Process*

Let us turn from jurisdiction to another issue involving the relationship between municipal and international law: whether judges would consider municipal criminal law that incorporates by reference the substantive international law of piracy to be sufficiently definite to support a conviction. In the United States today, crimi-

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29. Rubin, *Revising the Law of “Piracy,”* *supra* note 3, at 133. Accord A. RUBIN, *supra* note 3, at 343, 345.

30. Rubin, *Revising the Law of “Piracy,”* *supra* note 3, at 133-34.

31. M. McDUGAL & W. BURKE, *supra* note 19, at 877.

32. See, e.g., Halberstam, *supra* note 4, at 284-85, 288.

33. See, e.g., 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987) (listing the slave trade, aircraft hijacking, genocide, war crimes, “and perhaps certain acts of terrorism” as additional international law violations to which universal jurisdiction extends).

nal actions may be brought in federal courts only pursuant to a statute enacted by Congress that defines and punishes the offense.<sup>34</sup> One U.S. criminal statute refers directly to the international law of piracy. Section 1651 of title 18 of the United States Code ("section 1651") authorizes criminal punishment of any person who, "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."<sup>35</sup> In *United States v. Smith*,<sup>36</sup> Justice Story found this reference to international law sufficiently definite to support the trial, conviction and execution of several men, including non-Americans, accused of piracy for seizing a foreign vessel off the coast of Argentina.

With regard to prosecutions that might be brought today under section 1651, can we have any assurance that a conviction could be obtained? How would the words "piracy as defined by the law of nations" be interpreted? We may fairly start with the proposition that the preconceptions and policy preferences of the U.S. judge asked to apply a rule of international law proscribing piracy will be relevant in answering such questions. Professor Maier has written:

Insofar as international law is concerned, the United States decision maker may very well treat customary international law as the substantial source of the rule that the decision maker applies, but the act of selecting the rule, interpreting it and applying it is the authoritative act in that domestic forum, not the acts of the international community that create the custom. . . .

Domestic decision makers in international cases are not automatons, making decisions mechanically by applying international legal rules, any more than they are automatons when they decide purely domestic issues. The content of customary international law is even more amorphous and, therefore, even more subject to interpretations reflecting the policy preferences of the decision makers who use it as a guide to authoritative decision than is domestic law. . . . [C]ustomary international law is [n]either easily determined [n]or may [it] be mechanically applied without reference to the policy preferences of the decision maker.<sup>37</sup>

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34. See *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415 (1816) (no federal common law crimes); *United States v. Hudson and Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812).

35. 18 U.S.C. § 1651 (1988). Other sections of title 18 of the United States Code also concern piracy, but do not specifically refer to substantive international law standards. See 18 U.S.C. §§ 1652-1661 (1988).

36. *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820).

37. Maier, *The Authoritative Sources of Customary International Law in the United States*, 10 MICH. J. INT'L L. 450, 459-60 (1989).

A judge interpreting section 1651's reference to "piracy as defined by the law of nations" can draw on sources other than treaty law, and may well use "policy preferences" in his interpretation of the statute.

It is uncertain whether section 1651 would support a conviction today, even of a defendant who has committed acts of depredation on the high seas for private, commercial gain. One widely shared judicial preconception is that a criminal statute under which a conviction is sought must appear to provide the defendant with fair notice about wrongful conduct. If a federal statute provides no such notice, a judge may conclude there has been a violation of the due process clause of the fifth amendment of the U.S. Constitution. Judges may also be concerned that loosely worded statutes might invite discriminatory or arbitrary enforcement, and they might well prefer, in the criminal law area, that judicial discretion be limited or constrained by legislative intent. Criminal statutes that are uncertain or ambiguous in their terms may be declared unconstitutionally vague on their face.<sup>38</sup> In light of the indefiniteness of the contemporary international law rules governing piracy outlined in the first section of this essay, and perhaps in light of a general preconception that international law is by its nature amorphous, a U.S. judge arguably might conclude that the language of section 1651 is unconstitutionally vague.<sup>39</sup>

Cutting in favor of a conviction under section 1651 of a defendant who has committed acts of depredation on the high seas for private gain, however, is the claim that there is a core meaning of piracy that encompasses just such acts. The Congress that enacted the Act of March 3, 1819,<sup>40</sup> from which section 1651 directly descended, likely intended that at least robbery on the high seas committed by those on board one ship against those on board another be punished.<sup>41</sup> U.S. courts also have some Supreme Court precedent that construes section 1651 as providing standards sufficiently

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38. See, e.g., W. LAFAVE & A. SCOTT, CRIMINAL LAW § 2.3 (1986).

39. Congress presumably could be more specific. The "offenses clause" of the U.S. Constitution authorizes Congress to "define and punish piracies and felonies committed on the high seas, and offenses against the law of nations." U.S. CONST. art. I, § 10 (emphasis added).

40. Ch. 77, 3 Stat. 510 (1819).

41. The 1819 Act was apparently passed in reaction to an 1818 U.S. Supreme Court decision, *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818), in which the Court found insufficient statutory authority to label as piracy "the crime of robbery, committed by a person on the high seas, on board of any ship or vessel belonging exclusively to subjects of a foreign state, on persons within a vessel belonging also exclusively to the subjects of a foreign state." *Id.* at 643. See A. RUBIN, *supra* note 3, at 141-42.

certain to support a conviction. Justice Story found in *Smith* that writers on the law of nations, to whom Story looked for evidence of the content of the law of nations, "allude to piracy, as a crime of a settled and determinate nature" and "concur in holding, that robbery, or forcible depredations upon the sea, *animo furandi*, is piracy."<sup>42</sup> A U.S. judge thus need not be left entirely to unfamiliar international sources in seeking to give specific content to section 1651's proscription of "piracy as defined by the law of nations."<sup>43</sup> A U.S. judge concerned with applying section 1651 in a case involving piracy for private gain will also note that some modern U.S. Supreme Court decisions have found some very general statutory language not to be void for vagueness.<sup>44</sup> Criminal statutes which "by their terms or as authoritatively construed apply without question to certain activities, but whose application to other behavior is uncertain"<sup>45</sup> may satisfy due process requirements.

If a defendant accused of some act of modern "political" piracy were prosecuted under section 1651, however, it seems highly unlikely that a conviction could be obtained. In such a case, concerns about lack of fair notice to defendants and possibilities of arbitrary enforcement appear particularly strong. The lack of previous convictions under section 1651 for acts of political piracy means that U.S. precedent supporting a conviction under the statute would be weak. Furthermore, acts of political piracy do not fall within any clearly accepted core meaning of piracy in international law. A judge might be particularly reluctant to convict under section 1651 in a case in which no U.S. interests appear to be directly involved.

Many actors and observers may care about the current state of the relationship between international law and U.S. municipal law and process in the piracy area. Prosecutors and others concerned about suppressing instances of violence at sea may doubt whether they can obtain convictions, unless they can use statutes setting

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42. *Smith*, 18 U.S. (5 Wheat.) at 161. *But see id.* at 164, 169-83 (Livingston, J., dissenting). Note that the 1956 International Law Commission's draft articles on piracy did not limit piracy to cases in which an intent to rob (*animo furandi*) could be demonstrated. See A/3159, 2 Y.B. INT'L L. COMM'N 282 (1956).

43. Some recent U.S. decisions, albeit in the civil law context, also have accepted the existence of customary international law human rights norms of much more recent vintage than piracy. See, e.g., *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

44. See *Parker v. Levy*, 417 U.S. 733 (1974) (upholding conviction for violations of Article 133 of the Uniform Code of Military Justice, 10 U.S.C. § 933, for "conduct unbecoming an officer and a gentleman" and of Article 134 of the Code, 10 U.S.C. § 934, for "all disorders and neglects to the prejudice of good order and discipline in the armed forces").

45. *Smith v. Goguen*, 415 U.S. 566, 578 (1974).

forth standards allowing relatively more certain prosecutorial success than would section 1651. Those concerned about the integrity of the domestic criminal law process may fear the invocation of a statute such as section 1651 in situations in which it does not clearly apply. And those concerned with the legitimate use of force in the world should be watchful that the "international law of piracy" not be broadly used by nations to uphold repressive national police actions against "pirates" who may have insignificant connections with the prosecuting state and close connections with another state. Professor Rubin's observation that, historically, some international law of "piracy" has existed "in the autointerpretive projections of some states from time to time seeking to expand their jurisdiction to safeguard their own trade or establish imperial interests"<sup>46</sup> serves as an appropriate caution against overbroad national assertions of "piracy" today.

### III. A COMMON APPROACH TO THE LAW GOVERNING CONTEMPORARY PIRACY?

The academic contributors to this symposium—Alfred Rubin, Barry Dubner and Samuel Menefee—broadly agree about the appropriate legal responses to the practical problems of "piracy" highlighted by Eric Ellen. All three experts suggest that one appropriate step is some revision of municipal laws governing piracy. Indeed, they suggest some specific statutory reforms. Professor Dubner, although he also focuses on the possibilities for cooperative international action against instances of violence at sea, proposes national legislation addressing attacks on specific types of targets, such as ports, ships or oil rigs.<sup>47</sup> Professor Rubin concludes that "the most productive approach" is now to define at the national level the precise problems of interference with navigation on the high seas and with property rights in vessels, use normal principles of jurisdiction, "and draft *de lege ferenda* the criminal statute necessary to implement American public policy within the bounds that public international law permits American municipal law to operate."<sup>48</sup> Samuel Menefee attempts just such a redrafting of U.S. piracy statutes, noting section 1651 but emphasizing the statutes that define a U.S. municipal law of piracy. He highlights existing

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46. A. RUBIN, *supra* note 3, at 343.

47. Dubner, *supra* note 9, at 148.

48. Rubin, *Revising the Law of "Piracy," supra* note 3, at 137.

statutory provisions that are ambiguous and antiquated, and suggests detailed and comprehensive revisions that would address contemporary problems.<sup>49</sup>

We ought, concurrently with attempts to rewrite U.S. piracy laws, be attentive to possibilities for international actions to define piracy and to establish cooperative programs, perhaps on a regional basis, to deal with problems of violence at sea.<sup>50</sup> There is nothing controversial about this assertion. But as yet the nations of the world have not found a way either to formulate a clear modern definition of piracy or to implement the very general requirement of Article 14 of the 1958 Geneva Convention on the High Seas and Article 100 of the 1982 United Nations Convention on the Law of the Sea that states must “co-operate to the fullest possible extent in the repression of piracy.”<sup>51</sup> For this reason, national legislative action to define and address instances of piracy that significantly affect national interests seems appropriate.

The authors in this symposium also share an awareness of the need to be sensitive to the protected interests of other states affected by the application of U.S. piracy law. Other states may have legitimate interests in determining personal and property rights that can be trampled by overbroad assertions of national jurisdiction to act against domestically defined “pirates.” Professor Dubner highlights the dangers of incursions or seizures in the territorial waters of other states. “[U]nless we are willing to limit” such incursions, he states, “we will run into the problem of having each nation who wishes to do so make any excuse for the entry.”<sup>52</sup> Samuel Menefee criticizes an existing provision of the U.S. municipal law of piracy—18 U.S.C. section 1661, dealing with robbery ashore—as “lacking restrictions as to places or persons involved,” “an extremely overbroad interpretation of piracy,” and “potentially disruptive” from a jurisdictional standpoint.<sup>53</sup> And Professor Rubin is fully cognizant, as noted above,<sup>54</sup> that any U.S. statutes must operate only within the limits that public international law imposes

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49. See Menefee, *supra* note 10.

50. Surveys of possible international actions may be found, *e.g.*, in Birnie, *Piracy Past, Present and Future*, in *PIRACY AT SEA* 131, 147-51 (E. Ellen ed. 1989), and in Green, *Piracy: Past, Present and Future*, 11 *MARINE POLICY* 163, 178-83 (1987).

51. 1982 U.N. Convention, *supra* note 2, art. 100; 1958 High Seas Convention, *supra* note 1, art. 14.

52. Dubner, *supra* note 9, at 149.

53. Menefee, *supra* note 10, at 169 (footnote omitted).

54. See *supra* text accompanying note 48.

on the scope of operation of U.S. municipal laws.<sup>55</sup>

Finally, the academic commentators in this symposium express a sensitivity to the historical dimensions of the law of piracy. Their sensitivity is practical. That is, the authors are aware that modern instances of violence at sea are often different in kind and purpose from the depredations and privateering of old, thus suggesting the need for reform of outmoded legal formulations. The authors' historical understanding of the law of piracy is also sophisticated, reflecting a deep understanding of the interplay between international law and process and municipal law and process. A historical perspective suggests that the problem of piracy is a multifaceted one, permitting no easy characterizations or solutions.

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55. See also A. RUBIN, *supra* note 3, at 341-42, 345-46 (summarizing the dangers of overbroad, imperialist assertions of national jurisdiction); *supra* text accompanying note 46.

