

PIRACY IN CONTEMPORARY NATIONAL AND INTERNATIONAL LAW

DR. BARRY HART DUBNER*

INTRODUCTION

In preparation for the April 25-26, 1990 meeting of the American Bar Association Section of International Law and Practice, I began to think about two recent meetings involving the issue of piracy. In December of 1988, I was asked by Professor Kolodkin, President of the Soviet Maritime Law Association, to participate in the first United States/U.S.S.R. Workshop on Law of the Sea to be held in Moscow. Primarily, that workshop focused on problems regarding ratification of the 1982 Law of the Sea Treaty. I was rather startled to hear a talk at that workshop by Dr. Pyotr D. Barabolya, Major-General of Justice, retired, regarding the subject of sea piracy. He spent over an hour at one time or another talking about the necessity of ravaging pirates whom he thought were marauding the seas once again. I think that everyone who heard his talk could not understand why there was such an adamant need for finding the means of ridding ourselves of what he called "pirates." Again, in July 1989, I was invited by Professor Kolodkin to submit a paper at the Law of the Sea Institute Conference that was being held by the host government, the Soviet Union. At this conference, however, General Barabolya did not have much to say about piracy, but did bring up the topic once again. I raise these two instances that have occurred within the last year to remind you of the fact that there may be a vast difference in perception about what exactly should be considered "piracy" and how to go about eradicating "piracy" after we have defined the subject.

I. CLASSICAL AND MODERN DAY PIRACY

I believe that there are two types of piracy. The first type I would call "classical piracy." Classical piracy is really a catch-all way of including domestic crimes of murder, plunder, robbery and kidnapping, that have been elevated to the international level and

* Professor, Thomas M. Cooley Law School.

have questionably become a crime against mankind. Classical piracy has been reduced to treaty form both in 1958 and 1982. I will get to the definition of this type of piracy later. The second type of piracy may be called "modern-day piracy." Modern-day piracy is really a crime that falls under the catch-all word "piracy" that can include air piracy, hijacking (both air and sea), and possibly the destruction of oil rigs and nuclear facilities. Most of these types of modern-day piracy are reduced to crimes by domestic legislation. For example, one can utilize the United States statutes concerning these types of crimes later as an example of modern-day piracy. The real issues are: is there piracy today? If so, where? Should the definition of "classical piracy" be expanded to cover "political" problems? Is there any justification for expanding the definition of "classical piracy" to include terrorism, hijacking, air piracy, or other crimes not yet thought of under international law? Is "modern-day piracy" a crime against mankind? Is it necessary that it be a crime against mankind? Is "classical piracy" a crime against mankind? The ultimate question is: what subject are we really talking about?

Developed countries are naturally desirous of being able to "try" persons who have killed their nationals. Indeed, domestic legislation may supplement these wishes. Is it necessary to expand the classical definition of piracy to a modern-day international treaty? Should we permit countries to avoid "extradition" (assuming their laws permit them to do so) if available to them in order to accomplish this result?

We know that the classical form of piracy (ship-to-ship) does occur today. There have been many reported incidents off the coasts of various African nations, in the Far East and in the Caribbean. *Outlaws of the Ocean*¹ gives many examples. But can a country go into another country's water in "hot pursuit" without permission, capture these pirates, and either (1) turn them over to the country, or (2) try them under the international crime of piracy as a crime against mankind or, under their own domestic laws? Are we not really asking whether the doctrine of "hot-pursuit" should be expanded to allow capture of persons alleged to have committed domestic crimes?

At this point, I wish to point out what I think is apparent but needs to be restated. First, the classical form of piracy has included

1. See generally G. MUELLER & F. ADLER, *OUTLAWS OF THE OCEAN* (1985).

various crimes such as murder, kidnapping and robbery. I see various incidents happening today that have aroused public concern. These incidents have led people to believe that the classical form of piracy should either be stricken altogether or left to die in its original state to apply, if at all, to very few situations. Alternatively, others believe that the classical form of piracy should be expanded to include other particular occurrences happening in the modern world. We must ask whether or not these occurrences justify the attempt to expand the classical form of piracy into a modern day form. The question is whether or not nations will accept this expansive definition and will agree to be bound by their reduced jurisdiction in these particular arenas. Obviously, if the crime itself is expanded to incorporate new crimes (or occurrences that we consider crimes), then individual states will have to accept limitations on their jurisdictional powers and give way to permitting other states to exercise enforcement procedures against the expanded crime. Frankly, I do not believe that the world community is ready for this broader expansion of jurisdictional power, because individual states may not be willing to limit their respective jurisdictional powers to achieve a more comprehensive international deterrent.

II. TOWARDS A MODERN DEFINITION OF PIRACY

To help us arrive at a meaningful definition of "piracy" today, I wish to point out that there are two diametrically opposed views to the subject of piracy. One view is represented in an article written by Professor Malvina Halberstam entitled *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*.² In addition, George Constantinople authored a Note entitled *Towards a New Definition of Piracy: The Achille Lauro Incident*.³ In contrast to these two articles, there is a book written by Professor Alfred P. Rubin of the Fletcher School of Law and Diplomacy of Tufts University which is entitled *The Law of Piracy*.⁴

Professor Halberstam points out that the textbooks on international law usually list five bases of jurisdiction: nationality, territoriality, passive personality, the protective principle and universal-

2. Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AM. J. INT'L L. 269 (1988).

3. Note, *Towards a New Definition of Piracy: The Achille Lauro Incident*, 26 VA. J. INT'L L. 723 (1986).

4. A. RUBIN, *THE LAW OF PIRACY* (1988).

ity.⁵ The nationality principle determines jurisdiction by reference to the nationality or national character of the person committing the offense. The territorial principle determines jurisdiction by reference to the place where the offense was committed. The passive personality principle determines jurisdiction by reference to the nationality or national character of the person injured by the offense. The protective principle determines jurisdiction by reference to the national interest injured by the offense. The universality principle determines jurisdiction by reference to the custody of the person committing the offense.⁶ I doubt that an international agreement, be it in the form of convention, treaty, protocol, or exchange of notes, could be agreed upon regarding a modern definition of piracy. I believe that the views are just too divergent on the subject.

As we all know, there are at least two elements required for the creation of a rule of customary international law: (1) a constant and uniform practice (*diuturnitas*); and (2) a conviction that some existing law renders the practice obligatory (*opinio juris sive necessitatis*). These two elements were set forth in *North Sea Continental Shelf Cases*.⁷

One may also find evidence of custom, for example, in the actions of states in international relations, governmental correspondence, official instructions to diplomatic agents and state officers, statements of state representatives to international conferences or international organizations, acts of domestic legislation, and decisions of municipal courts. We also know that international agreements can, sometimes, become the starting point for the creation of new customary rules. While the period of time for establishing custom may be shorter or longer depending on the necessity for the creation of the new rule, it must also be established that states have formed an opinion that the behavior is obligatory under international law. To demonstrate how apparent and elementary this knowledge is, I acquired it from a bench memorandum that was passed around to all Jessup International Moot Court Competition Judges of which I recently served.⁸

5. Halberstam, *supra* note 2, at 296.

6. Halberstam, *supra* note 2, at 296 n.111 (quoting Draft Convention on Jurisdiction with Respect to Crime, 29 AM. J. INT'L L. SUPP. 439, 445 (1935)).

7. *North Sea Continental Shelf Cases*, (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 4, 45 (Judgment of Feb. 20, 1969); *see also* *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, (Nicar. v. U.S.), 1986 I.C.J. 14, 108-09 (Judgment of June 27, 1986).

8. L. Vulpinia, *Case Concerning International Environmental Law and Antarctica*, Memorandum of Law and Authorities for Judges, Philip C. Jessup International Law Moot

I do not believe that there is enough of an international concern to form an international agreement. In addition, there is definitely no custom regarding a modern definition of piracy. If the United States enforces its various domestic legislation with regard to air piracy and other forms of terrorism today, and nations acquiesce in the enforcement of such legislation, perhaps over a period of time other nations will do the same and we will see a custom established. However, there have been suggestions for defining a modern form of piracy. In Constantinople's Note, he sets forth what is suggested to be a modern definition of piracy:

Piracy consists of any of the following acts:

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

- (i) on the high seas, against a ship or aircraft, or against persons or property on board such ship or aircraft;
- (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any acts done for public ends if they (1) otherwise satisfy the definition of paragraph (a) and (2) are directed towards ships, property, or nationals of third States neutral to the conflict;

(c) 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;

(d) any act of inciting or of intentionally facilitating an act described in subparagraph (a), (b), or (c).⁹

Constantinople points out, in support of his desire to revise the piracy definition as we know it, that the Harvard Research Draft admonished us to continually update the definition of piracy so that it meets the needs of the current period.¹⁰ Consequently, Constantinople points out the elements in Article 3 of the Harvard Research Draft of 1932 are present today in the definition of piracy contained in Article 101 of the Montego Bay Convention signed in 1982.¹¹ But he is quick to point out that the drafters of this convention failed to draft a definition of piracy which would meet the political and social needs of the late twentieth century. He states:

[t]he drafters gave no attention to acts of violence committed on

Court Competition (1990).

9. Note, *supra* note 3, at 750 (emphasis & footnotes omitted).

10. *Id.* at 737.

11. *Id.*

the high seas for public ends and thus they ignored the growing threat that organized insurgents, national liberation organizations and their splinter groups, informal groups and isolated individuals would attack and seize ships on the high seas. In modern times, terrorist groups carry out seemingly random acts of violence against innocent civilians to instill fear in the larger community. When such acts occur on the high seas, beyond the jurisdiction of any State and far from the reach of police or military forces, there is a compelling need to invoke the effective basis of piracy, its "special jurisdiction." In this way, the forces of all States can police the high seas to minimize terrorism.¹²

Constantinople ends his Note by stating that his definition of piracy focuses on "action rather than status," thereby avoiding "the definitional problems inherent in the word terrorism as well as the value judgments which attach to such a definition."¹³ He claims that the definition which he proposes would not end the debate captured in the phrase, as he quotes it, "'one man's terrorist is another man's hero,' but it does label as pirates those who perpetrate acts of political terrorism."¹⁴ He then concludes by stating that "the modern definition of piracy states that in the civilized community of nations, terrorists must forever be *hostis humani generis*."¹⁵

Professor Halberstam's well-thought out article also points out the necessity that the

[c]ontinued vitality of any legal system depends on its ability to deal with current problems. For international law, perhaps even more than for municipal law, its ability to adapt existing law and to create new law to deal with current problems may well determine whether its rules are accepted and applied or viewed as irrelevant and ignored. It remains to be seen to what extent States are ready to adapt, and if necessary to extend, existing principles of international law, such as the law on piracy or the universality principle, to deal with terrorism, and/or to adopt and ratify conventions that are meaningful in scope, as regards both substance and jurisdiction.¹⁶

On the other side of the coin we have Professor Rubin's brilliant book on piracy which states:

[t]hus the international law relating to "piracy" comes down to

12. *Id.* at 752 (footnotes omitted).

13. *Id.* at 753.

14. *Id.*

15. *Id.*

16. Halberstam, *supra* note 2, at 310.

the adoption of principles of "passive personality" to activities in which the prescribing state's only connection with the act to which it attaches legal consequences is the nationality of the victim or the property effected by the act. Since the international law regarding the extent of national jurisdiction subordinates passive personality jurisdiction to jurisdiction based on the nationality of the actors and the legal subordination of the territory or vehicle in which the act occurs, what is left is a small residue of legal power which, if exercised beyond the bounds of legal "standing" to apply national prescriptions, embroils the prescribing state in legal complications that easily slip into attempts to extend general prescriptive jurisdiction beyond the bounds the legal order accepts. That is the path to imperial adventures that states embark on at their peril.¹⁷

Professor Rubin then cites Professor Georg Schwarzenberger regarding the "place of 'piracy' in the web of the law"¹⁸ as follows:

[Schwarzenberger] finds six quite different meanings to the phrase "international criminal law": (a) municipal criminal law applied to persons abroad, mitigated by limits in the international legal order on the power to arrest and try the accused; (b) international law requiring states to prescribe municipal criminal law consequences to various acts, such as treaty or custom forbidding the slave trade or exceeding fishery limits; (c) "piracy" *jure gentium* and war crimes, as acts which international law requires states to punish by their municipal criminal law in all cases within their enforcement jurisdiction; (d) municipal criminal laws common to all states, possibly the residue of Coke's natural law theory that would withhold immunities even from foreign ambassadors when they commit *mala in se*; (e) matters of customary cooperation such as extradition, in all cases based on treaty; and (f) international crimes strictly speaking, acts punishable by the international community more or less directly such as the "crime" of waging aggressive war punished by an international tribunal at Nuremberg. "Piracy," to Schwarzenberger, fits category (c), and if there is a question about the classification, it is only that the authorization international law gives to municipal authorities to prescribe and punish "piracy" and "war crimes" is not clear as to precisely what "piracy" is. Neither "piracy" nor "war crimes" in the normal sense fit category (f), because their definition and punishment is left to municipal law entirely; there has never been an international tribunal set up to define and punish "piracy" as

17. A. RUBIN, *supra* note 4, at 345.

18. *Id.* at 338.

such, and the novelty of Nuremberg was its new definition of crimes not included in the traditional notion of violations of the laws and customs of war; it was because of the new crimes and the fact that no national tribunal was competent to apply them to German officials except a German tribunal, and none existed in Germany the requisite authority in 1945, that the Nuremberg tribunal necessary and created a new class of international "crimes."¹⁹

Professor Rubin, in his concluding notes entitled "'Piracy' Today," states that codifying the crime of piracy was difficult because the

voluminous writings contributed little to an understanding of the behavior of statesman and courts, but illustrated instead the mental agility and theoretical bent of writers who, with varying degrees of subtlety, had sharp axes to grind; wanted to make a debating point or fit practice into some preconceived pattern of legal theory rather than examine with open eyes the concepts actually motivating statesmen and jurists when they use the word "piracy." Indeed, it has never been far from my own mind that this work itself, if it is ever read by anybody, will be sharply criticized for what must appear to be departures from orthodoxy to some, and biased preconceived argument based on false models of the nature of the international legal order by others. My assurances are sure to be dismissed as irrelevant or even misleading that I began work with no notion of where it would lead, and that my primary sources are quoted at inordinate length to make clear the evidence for my rather complex view of the evolution of at least two major streams of meaning and a half-dozen lesser technical meanings to the word "pirate" and its derivatives in commonly cited literature.²⁰

Professor Rubin concludes that the crime of piracy really does not exist because the antecedents were false in nature and, therefore, even though we have an international treaty regarding the classical form of piracy, the word "piracy" is, at best, a misnomer.

Thus far, we have seen that the publicists have determined that there is a classical form of piracy, that there is not a classical form of piracy in the international sense, that we should take the classical form of piracy and expand it to include political piracy, or that we should simply draft new treaties covering problems of today, such as terrorism.

Another approach is mentioned in a book called *Outlaws of the*

19. *Id.* at 338-39 (footnotes omitted).

20. *Id.* at 337-38.

Ocean—the Complete Book of Contemporary Crime on the High Seas. My personal view is that this book was extremely enjoyable to read and it really broke down the current problems occurring today. The authors call for the establishment of an international maritime law enforcement and peacekeeping force. They discuss subjects such as “The Drug War at Sea,” “Pirates, Rovers, and Assailing Thieves,” “Smugglers, Spies and Spoilers”—the list goes on.²¹ They state that “political” piracy is a contradiction in terms. In the classical mode of piracy, the crime had to be committed for private gain whereas today, “piracy” has been applied to politically motivated acts condoned or supported by governments.²² In their discussion of terrorism, they even set forth the systems used to guard against acts of sabotage and terrorism that heavy ships employ as routine protective measures including watches and patrols continuously throughout the ship, checks on classified material storage, and alertness for any signs of sabotage.²³

Of interest to our discussion today is that the authors believe that there are two types of solutions to the problem of assuring *pacem in maribus*: national and international. They point out that national solutions are easier to achieve although their outreach is limited by jurisdictional bounds: “Students of maritime terrorism tell us that today’s maritime terrorism is more likely to strike ships at port, whether through bombings with limpet mines, hijackings, or other attacks.”²⁴

The authors demonstrate the drastic decline in airplane hijackings and connect that reduction in incidents as attributable to the more or less tacit agreement by Cuba to prosecute hijackers of aircrafts abducted to Cuba. They ask the question “[m]ight it therefore not be possible to guarantee the safety of the oceans against terrorists and saboteurs by international collaboration, conventions, or treaties?”²⁵ They point out that the time is now for maritime lawyers to join hands with maritime crime preventers in order to produce some type of anti-terrorist convention because the draft conventions (specifically the Law of the Sea Treaty, 1982) are still waiting for such an anti-terrorist convention. Using the 1982 Law of the Sea Treaty (which has not yet been entered into force), the

21. See Part Headings, G. MUELLER & F. ADLER, *supra* note 1, at 59, 129, 233.

22. *Id.* at 156.

23. *Id.* at 173.

24. *Id.* at 176.

25. *Id.* at 177.

authors review various articles therein and believe that the “truly international law of the sea has arrived with the potential of controlling all criminality on the high seas.”²⁶ However, the United States has to take “the final step possible—the establishment of the international maritime law-enforcement and peacekeeping force.”²⁷

III. ASSESSING THE DEFINITION OF PIRACY

What do I think about the subject? The real issue is whether the catch-all word “piracy” can be expanded to include other crimes as well as the traditional crimes of robbery, etc. But will states accept this expansion of the word? I do not know the answer to this question. My guess is that there will never be enough nations who want to expand the definition of classical piracy. Therefore, I think it is imperative that the few nations who are interested in this subject agree to handle the situation by utilizing their intelligence and military services in such a way as to thwart crimes committed against their nationals.

Publicists usually deem it necessary to define what crimes they wish to cover. I think that there is no doubt that they include terrorism, aerial hijacking, and terrorism in connection with port facilities which affect port access, oil rigs, and nuclear installations. Once we list and define the types of problems we have, we can then narrow down the nations who are affected by these problems to a list that will probably include no more than the developed nations of the world. At that point, we can see if there is a consensus on how to deal with the various problems.

One approach, that I believe would be useful, would be to forget about defining crimes such as terrorism or other political crimes and to focus on the installation or the ship or the airplane that is being attacked. In other words, the nations involved should discuss what legislation, if any, is needed to rectify an attack on a nuclear plant, a port, etc. Naturally, the security involved to prevent and to protect against such attacks will first be ironed out. Thereafter, assuming an attack occurs, the nations will have to address how they wish to pursue the attackers. They will first have to examine what laws are available in their own country. Then, they will review the constitutional limitations, if any, that are currently enforced as far as extradition is concerned. If we do create a consensus among the

26. *Id.* at 312.

27. *Id.* (footnote omitted).

nations for a multinational arrangement for a delta-type force, this force would first have to apply uniform criminal standards (a prospect that is highly unlikely) or react to an attack in a similar manner (a prospect that probably is workable). I do not know if this is possible because I am certain that the Soviet Union has different laws than we do and the various countries may not be able to agree on this.

Therefore, the two main problems that I see with this subject are the definitional problems on the one hand, and the enforcement problems on the other hand. The definitional problems include, by their very nature, politically motivated attacks. The enforcement problems include gaining jurisdiction in areas which have until now been precluded under international law. For example, can the United States go in and suppress "piratical" attacks in another country's territorial waters without gaining that other country's consent? Traditionally, the answer of course is "no," you cannot do such a thing. However, I believe that unless we are willing to limit incursions into other territorial waters by delimiting the "attack" situations that would permit entry into these areas, we will run into the problem of having each nation who wishes to do so make any excuse for the entry. Naturally, this is tantamount to a breakdown in international law and is more of a concern to me than the actual isolated acts of terrorism.

In conclusion, I suggest that we first decide whether there is a necessity for doing anything at this time with regard to the various isolated incidents that may occur in the future. If nations decide that something has to be done in order to prevent catastrophe, then we must decide what geographical areas we wish to protect from "attacks" and then determine how we should go about creating and enforcing measures to counter these attacks. We should concentrate on *preventive* measures as well as *enforcement* reprisals against these isolated incidents. Again, I would point out that the utilization of intelligence services may be the key to solving the problem of politically motivated attacks.

