

REVISING THE LAW OF "PIRACY"

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INTRODUCTION

There is a "Historical and Revision" note above the current codification of the American law regarding "piracy":

In the light of far-reaching developments in the field of international law and foreign relations, the law of piracy is deemed to require a fundamental reconsideration and complete restatement, perhaps resulting in drastic changes by way of modification and expansion. . . .¹

The statute itself says: "Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life."² This language comes directly from a statute of 1819³ which authorized the death penalty, and was held by the Supreme Court in *United States v. Smith*⁴ to be sufficiently clear that under it many accused "pirates" were hanged. The statute elides three major issues: (1) the relationship between municipal law and public international law implied by the phrase "law of nations"; (2) the relationship between national prescriptive jurisdiction and national enforcement jurisdiction assumed to be coextensive by legislators, but not by jurists; and (3) the relationship between the positivist insistence on official discretion as the key to legal categorization and the naturalist insistence on *mens rea* as underpinning for a criminal conviction, concealed in the distribution of authority among the three branches of government set up by the American Constitution and general European political theory of the 18th and 19th centuries.

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1. 18 U.S.C. ch. 81 (1988) (Historical and Revision Notes).
2. 18 U.S.C. § 1651 (1988).
3. 15th Cong., 2d Sess., ch. 77, 3 Stat. 510 (1819).
4. *United States v. Smith*, 18 U.S. (1 Wheat.) 76 (1820).

I. THE "LAW OF NATIONS"

As to the first issue regarding the relationship between municipal law and public international law implied by the phrase "law of nations," it is one of the ironies of legal history that Joseph Story, the naturalist justice who wrote the court's opinion in *United States v. Smith*, almost single-handedly destroyed the conception of "law of nations" on which the substantive law was based. When *Smith* was decided, the "law of nations" meant essentially the rules of many legal orders, the municipal laws of many states, supposed by analogy to apply to all legal orders, including public international law. The notion has been common since at least the 2nd century AD, when Gaius considered the "*jus gentium*" to be evidence of general principles of natural law that must be present in all legal orders based on reason in harmony with nature.⁵ The idea survives in Article 38(1)(c) of the Statute of the International Court of Justice.⁶ Under this conception there can be only technical and local distinctions between the substantive law in a municipal legal order and the substantive rules of public international law. All systems must reflect the same principles if the word "law" is to have a meaning related to "justice" and other notions related to value-morality. States, being "moral persons," were ruled by the same natural "laws" as corporations and individuals, and judges were best placed to determine what those rules were in particular cases. The conception had many inconsistencies, but was accepted as conventional wisdom at that time. The theory is part of what is usually called "naturalism": a basic framework that derives "law" from conceptions of "justice" and social values without the intermediacy of a discrete legislator; where judges and administrators "find" the law implicit in social relationships and moral values identified with virtue, and apply it regardless of the absence of a "command" by a political superior or legislator.

5. I THE INSTITUTES OF GAIVS § 1 (F. Zulueta ed. & transl. 1946).

quod uero naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur uocaturque ius gentium, quasi quo iure omnes gentes utuntur [the law that natural reason establishes among all mankind is followed by all peoples alike, and is called law of nations being the law observed by all mankind]. *Id.* Cicero seemed to have had the same notion about 43 BC, when he defined the "vera lex [true law]" as "recta ratio naturae congruens, diffusa in omnes, constans, sempiterna [right reason in harmony with nature, universal, unchanging, everlasting]." III CICERO, DE RE PUBLICA 210-11 (Loeb Classical Library ed. 1977).

6. 3 Bevans 1179, 59 Stat. 1055 (1945). Under Article 38(1)(c), "[t]he Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply . . . the general principles of law recognized by civilized nations."

In 1834, Story published his great work on Conflict of Laws.⁷ It destroyed at a stroke the entire underpinning of this natural law theory. It expressly rejected the notion of uniform natural law and "comity" as a reason for states to pay respect to the municipal laws of other states whose insight into eternal principles might not coincide with the views of the judge or legislator hearing a case. It replaced the "law of nations" as a municipal law concept with choice of law theory, under which each state could determine for itself what foreign law applied to what aspect of any case, and apply the forum's best understanding of that law regardless of its harmony with "natural law" or possible inconsistency with the substantive municipal law of the forum.

The phrase "law of nations" dropped out of use except as an archaism of the sort some judges and publicists like to employ when clarity of expression is not their first priority. Increasingly, from about 1820 through the 1840s, it was replaced with regard to the law between states with the dualist-positivist phrase "international law."⁸

To complicate matters, the conception of a *jus gentium*, a necessary concurrence of municipal laws, continued in the nineteenth century and even today, with regard to those private law matters in which uniformity of rule was believed necessary to permit the exercise of what were conceived as natural rights, such as rights to property and to private commerce. The most notable survivor was in maritime law, in both its admiralty and prize phases, where the decrees of one state's tribunal had to be respected by all other states in order for ships to ply the seas, visit foreign ports, and for merchants to pass title to their cargoes.

Of course, the conflict of laws framework was subverting this model as well. The Jones Act⁹ is municipal law in the United

7. J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1834).

8. "Dualist" refers to the theory under which international law is regarded as a legal order distinct from the municipal legal orders of the "states" that are its subjects. The phrase "international law," with its implication that the *jus inter gentes* was not a mere subset of the *jus gentium* in a single legal order, is normally attributed to Jeremy Bentham. J. BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789). *But see* 2 J. BENTHAM, THE WORKS OF JEREMY BENTHAM 535 (Bowring ed. 1843), where an essay using the phrase in 1786 is reprinted. In fact, the distinction dates back in Latin to ancient times and was brought to English consciousness by the mid-17th century at the latest. *See* ZOUCHE, IURIS ET IUDICII FEICIALIS Li. (1650).

9. 46 U.S.C. § 688 (1989). In *Romero v. International Terminal Operating Co.*, 538 U.S. 354 (1959), the Supreme Court held that the Jones Act does not apply to an action by a foreign seaman against a foreign owner arising out a voyage between two foreign ports even though the accident took place in the United States.

States and is not the law of England. Indeed, as early as 1853 in *The Magellan Pirates* case,¹⁰ Dr. Stephen Lushington cited Story's opinion in *United States v. Smith* for its collection of citations to learned publicists, but ignored the leading American cases pertinent to the jurisdictional point that was at issue.

Fortunately, none of this evolution of language and conception had to be faced for long with regard to the 1819 Piracy Act. Active interference in navigation by persons unlicensed to take "prizes" generally ceased to be a serious problem in the two decades after Smith and his friends were hanged. Where it survived, suppression was normally not by trials in admiralty tribunals but by self-defense on the part of the ship attacked or by political means. Imperialism, the extension of national law into foreign territory or the coercion of foreign sovereigns to enact and enforce a positive municipal law congenial to some European or American interest, superseded the notion of national enforcement of universal rules based on right reason and nature. Some of the natural law rhetoric survived, and survives still, but the practice ignores it. Such leading American cases as *The Ambrose Light*¹¹ turn out on careful reading to be mere dicta; an essay by a judge actually deciding a relatively simple case on positivist grounds and seizing the opportunity to write at length to support the conception of "piracy" under inapplicable naturalist theory. Similarly exaggerated is the British case, *In re Piracy Jure Gentium*.¹² That case, despite its grand title, dealt only with the petty question of whether an "attempt" to commit "piracy" was an offense under the criminal law of Hong Kong applicable to "piracy" itself. Since the case was tried in Hong Kong, both the accused and the victims were Chinese on board Chinese vessels on the high seas and the alternative was to leave the accused to Chinese jurisdiction in 1934, the real issue was jurisdictional and the answer cannot have been in serious doubt in a British colonial court, however unpersuasive the argument.

II. JURISDICTION

The second elision in the 1819 formulation that must be addressed is its silence with regard to the extent of American jurisdic-

10. *The Magellan Pirates* [1853] 1 Adm. & Eccl. 81, *reprinted in* 3 BRIT. INT'L L. CASES 796 (1965).

11. *The Ambrose Light*, 24 F. 408 (S.D.N.Y. 1885), 18 Deak 112.

12. *In re Piracy Jure Gentium* [1934] A.C. 586, *reprinted in* 3 BRIT. INT'L L. CASES 836 (1965).

tion to apply American legal process to the acts of foreigners in foreign vessels on the high seas. Although slipped over in many of the supposedly leading cases, like *In re Piracy Jure Gentium*, the real issue was frequently whether national criminal jurisdiction, implying the applicability of national formulations of the *jus gentium* supposedly defining "piracy," were appropriate as a measure for the conduct of foreigners in foreign vessels on the high seas. The concept of "universal" jurisdiction presumes the existence of a *jus gentium* sufficiently defined that it should make no difference, and there was an implied analogy to property adjudications in admiralty or prize by which a national result should be considered determinative in foreign jurisdictions as well for all relationships before the tribunal. But in fact, despite repeated judicial assertions of universal policing authority, there are few cases in which such an authority was actually exercised, and then, exercised only when there are reasons for suspecting something else was involved. In *In re Tivnan* (1864)¹³ and others, for example, a British court held Confederate raiders not to be privateers but to be "pirates" *jure gentium* specifically to hold them to be within British jurisdiction and thus not subject to extradition under the term of the Webster-Ashburton Treaty of 1842¹⁴ requiring trial or extradition of those accused of "piracy." The extradition of accused "pirates" under the Webster-Ashburton treaty was in effect nullified by *In re Tivnan's* holding that universal jurisdiction removed such extradition from the contemplation of the negotiators of the 1842 Treaty. I have found no record that Tivnan and his accomplices were ever in fact tried for "piracy" in England.

I should suggest, after a review of what the cases actually held and the legal and political context of the holdings, that a true rule of universality exists, but is conditioned on a legal interest existing in the capturing state: standing. Standing to adjudicate 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

13. *In re Tivnan*, Q.B. Rep. 645 (1864).

14. Webster-Ashburton Treaty, Aug. 9, 1842, U.S.-Gr. Brit., 93 C.T.S. 415 reprinted in 1 Malloy 650. Article X states:

It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisition by them, or their Ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder . . . or piracy . . . committed within the jurisdiction of either, . . . shall be found within the territories of the other. . . .

the crew of "pirates" up for trial, in order to dispose in a single case of all defendants involved. But where there was no basis for asserting the legal interest, "universality" alone was held adequate only in political context, like *In re Tivnan*, and colonial contexts, like *In re Piracy Jure Gentium*, and usually led to illogical results. An example of this last was *People v. Lol-Lo & Saraw*,¹⁵ in which an American court in the Philippines asserted universal jurisdiction over "piracy" to uphold the conviction of an obviously wicked defendant for "rape," and condemning him to death, despite the fact that "rape" and the death penalty were both excluded from the definition and legal result of "piracy" under the remnant of Spanish colonial law cited as applicable by the tribunal. Moreover, the incident had occurred within three miles of Dutch territory in the East Indies and not on the high seas at all, thus not within the applicable Philippine statute or, indeed, any of the usual *jus gentium* formulations.

III. MENS REA

The third confusion created by the 1819 formulation, and perhaps the most troubling of all, derives from the attempt of defending governments to label their seaborne rebels "pirates" as they try to label their land-borne enemies "terrorists." The cases have followed two lines of reasoning since the 16th century, when Philip II of Spain hanged the French privateers allied with Dom Antonio as "pirates" despite the murmuring within his own fleet that, as Philip could deny Antonio's authority to license privateers, indeed, the French King's authority to license privateers to serve with Dom Antonio, so Antonio and the King of France could deny Philip's authority with regard to their activities in Portugal. The fuss is preserved as significant by Gentili¹⁶ and surfaced during the equivalent disputes in England in the 1690s when James II licensed Irish privateers to seek to recover his throne from William and Mary.¹⁷ American licensees of Latin American "freedom fighters" raised the identical issues in the second and third decades of the 19th century: whether the *mens rea* necessary for a criminal conviction

15. *People v. Lol-Lo & Saraw*, 43 Phil. Islands 19 (1922), as digested in 1 ANN. DIG. OF PUB. INT'L L. CASES 164 (1932).

16. GENTILI, *DE IURE BELLI LIBRI TRES* Liv. (1612) (last paragraph).

17. *R. v. Golding, Jones* (eight Irish Commissioners) (1693), reprinted in 12 HOWELL'S STATE TRIALS at col. 1269 (1816), and see the excerpt from Tindall, *Essay Concerning the Law of Nations*, in the note beginning at col. 1271, esp. col. 1274.

could exist in persons who believed themselves licensed to capture "enemy" vessels and "neutral" contraband on the high seas when the forum state withheld recognition from the licensing authority.¹⁸

It thus appears that the American legislation, if it codifies public international law at all, codified its confusions and inconsistencies more than any conceptions clear enough to be the basis of criminal convictions. That is why there is the "Historical and Revision" note.

IV. CODIFICATION

This view of the evolution of doctrine is supported by the attempts to codify the supposed *jus gentium* relating to "piracy" in order to translate the *jus gentium* concept into positive law on the international plane, the *jus inter gentes* level. Those attempts have all failed.

The League of Nations abandoned its draft in 1927 ostensibly because "the question of Piracy is of insufficient real interest in the present state of the world"; but actually because no agreement on definitions or legal results seemed likely in view of states' responses to the Reporter's draft.¹⁹

The Harvard Research of 1932 is essentially an unanalyzed collection of cases and publicists' views abandoned by the researchers, who concluded that the materials were self-contradictory:

Since, then, pirates are not criminals by the laws of nations, since there is no international agency to capture them and no international tribunal to punish them and no provision in the laws of many states for punishing foreigners whose piratical offense was committed outside the state's ordinary jurisdiction, it cannot truly be said that piracy is a crime or an offense by the law of nations.²⁰

It appears that they were using the phrase "law of nations" in its correct *jus gentium* sense, and preferred to base jurisdiction on the practice of states and a dualist conception of the legal order than on naturalist models derived from Cicero and Kant, who urged the adoption of conceptual models by which moral imperatives were to

18. The cases are very unclear, their positivist language being inconsistent with the naturalist results. See *The Josefa Secunda*, 18 U.S. (5 Wheat.) 338 (1820), and *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827).

19. League of Nations Doc. C.254.1927.V., reprinted in 22 AM. J. INT'L L. SUPP. 216, 222 (1928).

20. 26 AM. J. INT'L L. SUPP. 5, 756 (1932).

be considered legal rules without the intermediacy of any community legislative process. The Harvard researchers proceeded to propose *de lege ferenda* a draft convention creating a crime of "piracy" for purposes of the *jus inter gentes*.²¹ The draft has major flaws.²²

The 1958 Law of the Sea²³ provisions on "piracy" are derived directly from the Harvard draft. It is quickly apparent from the records of the International Law Commission ("ILC") that some of the Commissioners had in mind legislation with political gain for various non-legal interests, more than codification. Given the conclusions of the Harvard Research quoted above, this was to be expected. The result was an exercise in group dynamics with key elements of the evolution of the text concealed in unpublished records of the ILC's "drafting committee." A number of substantive issues were raised that were dismissed without discussion by the ILC. Sir Gerald Fitzmaurice emerged as the single most influential member of the ILC in this exercise, and his views as to law and history are not always supportable by reference to the legal and historical record, but were not effectively challenged by other Commissioners.²⁴ The final text is incomprehensible as a legal document, referring to acts of depredation having to be "illegal" before they could be considered piratical,²⁵ but not saying what legal order determined that "illegality" or, if the international legal order, precisely what the bounds of legality were in that order with regard to depredations on the high seas.

The 1958 Conference made no major changes in the ILC draft of the pertinent articles, and the 1982 UNCLOS III²⁶ repeats the 1958 Law of the Seas provisions essentially verbatim.

CONCLUSION

This leaves us pretty much where we started. The existing American legislation refers to the "law of nations" for its definition of

21. *Id.* at 743.

22. A. RUBIN, *THE LAW OF PIRACY* 314-17 (1988).

23. United Nations Convention on the High Seas, Geneva, Apr. 29, 1958, 450 U.N.T.S. 82, 13 U.S.T. 2312 [hereinafter Convention].

24. A. RUBIN, *supra* note 22, at 319-37.

25. Article 15 states: "Piracy consists of any of the following acts: (a) any illegal acts of violence or detention. . . ." Subsentences (b) and (c) add "voluntary participation" and "inciting" but do not explain or supplement the adjective "illegal." Convention, *supra* note 23.

26. U.N. Doc. A/Conf.62/122, Oct. 7, 1982, signed at Montego Bay on Dec. 10, 1982, arts. 101 et seq.

"piracy." The "law of nations" in its 1819 sense is no longer a comprehensible term. To the degree that it has been replaced by public international law, the latest attempted codification of that law is more depressing than enlightening. To the degree that the "law of nations" survives in admiralty jurisprudence, the conclusions of the Harvard researchers in the absence of any record of analysis or deep thought are supported by some analysis and at least some shallow thought. But even if the conception of *jus gentium* were present in the frame of analysis used by modern jurists, the record of cases and the difficulties of translating publicists' writings into reality without granting to judges the authority to "make" criminal law seem insurmountable. To grant judges that authority raises questions of the balance of authority in the United States constitutional order.

In fact, there seem to be real problems of interference with navigation on the high seas and other interferences with property rights in American vessels, or Americans' rights in foreign vessels, which should be dealt with as a matter of commercial and legal policy. In the light of the foregoing analysis, I should propose that the most productive approach would be to define the problem, define jurisdiction in the normal way, 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. I should further propose that the problems that cannot be handled by this rather undramatic approach, because foreign jurisdiction and other interests are involved, be referred to diplomatic correspondence in the usual way. I suggest, in light of the confusions as to history, jurisprudence, and political interest that are apparent in the ILC records, that those problems requiring international agreement be broken down into small parts, each of which will in practice be found to be complicated enough, and conventions be proposed that are focused on those problems specifically and with as little assertion as possible of the need for grand solutions, universal jurisdiction, and "natural law."

