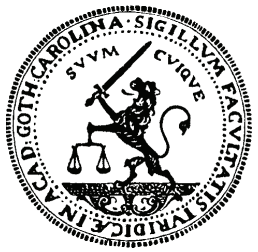

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Changes in the Views on Jurisdiction over Piracy under International Law

Master Thesis
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Contents

Summary

Jurisdiction over piracy under international law is universal according to UNCLOS, but piracy itself has changed since the regulations that UNCLOS is based on was concluded. This thesis discusses the question whether the views on jurisdiction over piracy under international law has changed and the conclusion that is reached is that views have changed, at least in areas that are badly affected by piracy, but they have not changed enough to make any changes possible to, for example, UNCLOS. The starting point is the definition of piracy under international law, both the traditional view and the more modern view and the way that it has influenced the jurisdiction over piracy and what the differences are.

It is clear that differences exist and that the traditional universal jurisdiction was based on the fact that piracy could only occur on the high seas where no state had exclusive jurisdiction and it was therefore accepted that all states could exercise jurisdiction over pirates. When comparing the traditional view on piracy with the modern view, or the acts that occur today it is apparent that the traditional view on jurisdiction over piracy is no longer effective and does not match the incidents. After looking at cases that have been reported to IMB/PRC it can be shown that piracy is no longer a problem mainly on the high seas as it used to be. Piracy is now getting more and more common in areas that are under the jurisdiction of a state, for example in territorial waters, international straits and even in internal waters and in ports.

The problem is therefore that the regulations under international law that apply to acts of piracy and jurisdiction over such acts are still used to fight piracy on the high seas and not in areas that are under the jurisdiction of a state. It would not be a major problem if all states had the capability of dealing with piracy in their own waters, but the fact is that most states that are now badly affected, do not have any resources to do so. One example that is used in this thesis is Somalia, which is considered to be one of the most dangerous places in the world for international shipping and where the number of incidents of piracy has risen considerably.

The conclusion reached is that since no changes have been made regarding jurisdiction over piracy in international conventions like UNCLOS and because the likelihood of such changes taking place is very small, other solutions have to be found. Various suggestions of such solutions are discussed in the thesis and the most useful is to consider regional agreements between states that have severe problems with piracy. It is then possible to find solutions especially designed to deal with the problems in the specific area and ultimately to assist each other with policing the waters in order to apprehend and prosecute the pirates.

Abbreviations

A.C	Appeal Cases
AJIL	American Journal of International Law
ASEAN	Association of South East Asian Nations
Geneva Convention	The 1958 Geneva Convention on the High Seas
Harvard Draft	The Harvard Draft Convention and Research
ICC	International Criminal Court
ICJ	International Court of Justice
ILC	International Law Commission
IMB	International Maritime Bureau
NAFTA	North American Free Trade Agreement
OAS	Organization of American States
OAU	Organization of African Unity
PCIJ	The Permanent Court of Justice
PRC	Piracy Reporting Centre
UNCLOS	The 1982 United Nations Law of the Sea Convention
YBIL	Yearbook of the International Law Commission

1 Introduction

Jurisdiction over piracy under international law must surely be of no importance today, or is it? Imagine the following scenario: A large tanker is transporting oil through the heavily trafficked Malacca Strait when it suddenly, without warning, is attacked by a number of armed men in small boats who board the ship, threaten the crew and take control of the vessel. They lock up the crew and then search the ship for any valuable items they can find and eventually disappear as suddenly as they had appeared. The ship will then have been unmanned for some time in one of the busiest straits in the world. The ship is also transporting oil that could be a complete disaster for the environment and the people in the area if the unmanned ship collided with another ship or crashed into something.

Another scenario could be a ship that is transporting food, perhaps rice, to ports in Africa. The ship is then approached by an innocent looking fishing boat that soon turns out to be a pirate ship in disguise. The pirates seize the ship by force and perhaps injure or kill some of the crew and the captain is ordered to take the ship into a port in a country where no help can be expected. The ship and the crew are then used to demand a high ransom and might be held hostage for a long time before they are released, that is, if they are ever released, and not just disappear.

These two scenarios are not taken from any films or books and they are not examples from centuries ago, but they are examples of the kind of incidents that occur all around the world today and particularly in some badly affected areas. Jurisdiction over these kinds of incidents or the question of which state can pursue, arrest, prosecute and punish the pirates is therefore far from unimportant. The question of whether the views on jurisdiction over piracy have changed since the pirates of the old days preyed on merchant ships on the seven seas is equally important. Jurisdiction over piracy is crucial if states are going to be able to suppress such incidents and to protect ships, their crew and passengers when travelling at sea.

1.1 Purpose and Method

The main purpose of this thesis is to investigate whether the views on jurisdiction over piracy under international law have changed, and if so, how they have changed and what consequences these changes have. It is therefore necessary to look at both traditional piracy as well as modern piracy. The starting point will be to describe the historical background, how the view on traditional piracy has developed and how it eventually was codified in the Geneva Convention and in UNCLOS and how the executive jurisdiction was enforced through history. In chapter two, the modern piracy will be described stating how piracy is currently committed, where such incidents occur and how enforcement of jurisdiction should be exercised in

the present day. The next step is to compare the traditional piracy with the modern piracy to distinguish what the differences are and to look at why and when it changed. The final step is subsequently to examine the consequences as a result of the changed views on jurisdiction and the different solutions that have been suggested to solve the problems that surround piracy today. Therefore, in order to answer my main question on whether the views on jurisdiction have changed, I addressed the following questions:

- What is traditional piracy under international law?
- What is modern piracy under international law?
- What are the differences between traditional piracy and modern piracy?
- Have the views on jurisdiction over piracy changed?
- What are the consequences of the changed views on jurisdiction over piracy under international law?

1.2 Material and Theory

When working on this thesis, I have relied greatly on the Geneva Convention on the High Seas from 1958 and the United Nations Law of the Sea Convention from 1982, as well as the work by the International Law Commission that lead to the adoption of those Conventions. The work of the Harvard Law School and the draft articles that eventually were published in 1932 have been very valuable, especially when describing the traditional view on piracy under international law they were of great significance. The ICC International Maritime Bureau has monitored modern piracy and the incidents that occur today and their reports and statistics are the foundation that I have used when describing modern piracy.

In addition, I have relied on the opinions that have been expressed by different authors like Alfred P. Rubin, Barry H. Dubner and a few others when analyzing the work of the Harvard group and the ILC and the Conventions adopted. Other material, like various articles, has also been used. The subject of piracy has been discussed and analyzed for centuries and it is therefore not easy to give a complete list of available books etc. but the Harvard Draft research contains most of the works on piracy up to that time. It is interesting to see that in the work by the Harvard Draft group, as well as in the work by the ILC, when drafting the Geneva Convention, there are very different opinions on the different aspects of piracy that are discussed.

Piracy is not a subject where it is possible to find one definition or one regulation of jurisdiction that all states and authors believe is the correct one, instead it has been surrounded by conflicting interests and still is. The views that have been adopted in the Geneva Convention and in UNCLOS are the views that were acceptable to most states, but there are almost as many different opinions as there are states. Rubin has been very critical of

the Conventions and the way they were drafted, while other writers like Dubner believe that they do not relate to the problems states have with piracy today.

2 Traditional Piracy

Jurisdiction of a state under international law means that the state has the authority to prescribe laws and to enforce those laws. It has the authority to make binding laws within its territory, to try cases in courts, even when foreign factors are present, and to enforce those laws. These different types of jurisdiction are also called legislative, judicial and executive jurisdiction.[1] In criminal law, the legislative and the judicial jurisdiction are the same because when a criminal court applies the criminal law of the state it simply exercises the prescription. It is important to remember that jurisdiction is not one single concept and that jurisdiction to prescribe and jurisdiction to enforce do not always coincide. The prescriptive jurisdiction refers to the right for states to make certain behaviour criminal and the jurisdiction to enforce represents the other side of the coin, the right for a state to actually enforce the laws and to arrest, prosecute and punish a criminal in its municipal courts.

The jurisdiction to prescribe in customary law contains different bases of jurisdiction. It means that it is necessary that the state can show a sufficient link between the criminal conduct and the state itself. The most common are of course territoriality and nationality, which means that the state can criminalize certain acts that are committed within its own territory or acts committed by its own nationals abroad. They are not the only basis available and states can base prescriptive jurisdiction over people that are not nationals of the state on the principle of passive personality. The victim of the offence will then have to be a national of the prescribing state. According to the protective principle, it is also possible for a state to prescribe jurisdiction over offences that would be a serious threat to a national interest. In addition, there is the flag state principle, where if a crime is committed onboard a ship, it is under the jurisdiction of the state where the ship is registered. Lastly, there is the principle of universality, which makes it possible for a state to claim jurisdiction over some specific offences even when the state has no link to the offender, or the offence.

It is therefore clear that prescriptive jurisdiction can be extraterritorial, but the jurisdiction to enforce is limited to the states own territory. A state can never enforce jurisdiction on another states territory, as it would be a violation of that state's sovereign rights to do so. That is why it is important to keep the prescriptive jurisdiction and the jurisdiction to enforce apart. A state can prescribe that certain acts are criminal, but it can also lack the authority to enforce the prescriptive jurisdiction if the offender is abroad[2].

Jurisdiction over piracy is very interesting and has developed through centuries. It was first dealt with in municipal laws and courts and in

[1] M.N. Shaw, *International Law*, p. 593
[2] R. O'Keefe, Universal Jurisdiction- Clarifying the Basic Concept, *Journal of International Criminal Justice 2*, pp. 738-740

international customary law and then finally in different international conventions. To be able to see what jurisdiction applies to piracy and if the views on jurisdiction over piracy have changed, it is necessary to start with the international customary law and the origins of jurisdiction over acts of piracy.

2.1 The Historical Background of Traditional Piracy

Pirates have often been described in a rather romantic way in books and movies as brave freedom fighters that rob the rich ships to help their people. That is the conception of piracy known to most people around the world. That conception is, however, very far from the truth and is indeed, not what piracy is under international law. Piracy has existed for centuries and has been more or less common at different periods, but it has always been a major threat to international trade and shipping and to the people that work or travel on ships. The traditional conception of piracy was not included in a convention until the Geneva Convention was adopted in 1958. That means that piracy under international law until 1958 was dealt with mainly by international customary law (or what later would become international customary law). The customary law regarding piracy had been created and accepted by states during the centuries when they had to find ways of dealing with the problem of piracy. It was necessary to find a solution to a major problem that faced all states that used the high seas to transport goods and for international trade. Traditional piracy as it has been seen in customary law often describes pirates as *hostis humani generis* or 'enemies of all mankind'. That description also led to that it became accepted among states that pirates on the high seas could be captured, prosecuted and punished by all states. Piracy under international law, or piracy *jure gentium* as it is often called, means that it violates the principles of law, as they are interpreted by all nations.[3]

From the 17th century onwards, the emergence of a jurisdictional basis of the law of the sea coincided with a period of growth for piracy. At this time, it was accepted that robbery, torture, rape, plunder and murder could be considered as piracy if it was committed against another ship. It could be committed by a private ship or by a warship if it belonged to a state that was at peace with the flag state of the victim. It was not yet clear whether piracy could only occur on the high seas, because the maritime territorial zones were not yet fixed.[4]

In the following centuries, the seas were divided into rather narrow parts that were put under the exclusive jurisdiction of the coastal state and it lead to that piracy could only occur on the high seas. The coastal state then had

[3] N.D. Joyner, *Aerial Hijacking as an International Crime*, p. 2
[4] E. Ellen (ed.), *Piracy at sea*, p. 135

complete sovereignty over that area and all areas beyond were considered as high seas where no state had exclusive jurisdiction or sovereign rights. Instead, freedom of the seas was the accepted doctrine. Freedom of the high seas is a general principle of law and has been accepted as such for centuries, but it has for just as long been threatened by people who are willing to resort to piracy and to attack mainly merchant ships. Freedom of the high seas and of navigation was essential to the development of trade and the economic growth of many states and that was the main reason that piracy was seen with such dislike by states and had to be dealt with at any cost. The pirates threatened the international trade and they attacked all states indiscriminately and thus caused all seafaring nations serious damage with their violent plundering.[5] This was the reason why states accepted that all states could capture and punish pirates on the high seas even though the acts were committed on the high seas, an area where national jurisdiction normally would not apply at that time. The jurisdiction over piracy had become universal.

The universal jurisdiction was the most powerful legal weapon that was available to the nations in the fight against piracy and was a way of ensuring that pirates who were captured on the high seas would be punished regardless of their nationality. The principle of universal jurisdiction over piracy was described by Wheaton:

> It is true, that a pirate *jure gentium* can be seized and tried by any nation, irrespective of his national character, or of that of the vessel on board which, against which, or from which, the act was done. The reason of this must be, that the act is one over which all nations have equal jurisdiction. This can result only from the fact, that it is committed where all have a common, and no nation an exclusive, jurisdiction,- *i.e*., upon the high seas; and, if on board ship, and by her own crew, then the ship must be one in which no national authority reigns. The criminal may have committed but one crime, and intended but one, and that against a vessel of a particular nation; yet, if done on the high seas… he may be seized and tried by any nation.[6]

A problem that the application of universal jurisdiction over acts of piracy creates is if the jurisdiction of a state usually extends to its ships on the high seas and to its own nationals, why would states give up that jurisdiction and instead allow the universal jurisdiction of all states? It has been suggested that in the case of piracy, the ships and the pirates lose the right to protection of the flag state and the national character and therefore all states have the right to capture and punish the pirates. However, Joyner does believe it to be misleading to say that the pirate and the vessel lose their "nationality" completely, because nations do not give up their jurisdictional rights. The universal jurisdiction over piracy would then be in conflict with the jurisdiction over the ship and the nationals that belong to a certain state. She believes that it would have been wrong to prosecute a pirate if a state that sees him as one of its nationals would be willing to prosecute the pirates in its own municipal courts. Therefore, it means that universal jurisdiction

[5] Ibid. p. 132
[6] H. Wheaton, *Elements of International Law*, p. 163.

does not exclude the customary national and territorial jurisdiction of a state. [7]

When discussing early traditional piracy in customary law it is difficult to find a proper definition of what piracy *jure gentium* was, but robbery has often been seen as a primary element of piracy. Piracy has therefore been just a term used at sea for the kind of acts that at land would be robbery.[8]

Even if it was far from clear under customary law what constituted piracy *jure gentium,* it is often assumed that robbery was an essential element. It makes sense since it was the fact that pirates plundered ships in such a brutal way that it led to them being regarded as enemies of all mankind and fell under the universal jurisdiction of all states. The most common way of describing traditional piracy is to call it robbery on the high seas and according to Joyner; piracy *jure gentium* could be defined as:

> The indiscriminate plunder by a private (i.e., pirate) vessel against commercial vessels on the high seas.[9]

To summarise the early conceptions of piracy and piracy under customary law it is clear that jurisdiction over what traditionally has been seen as piracy developed during a long period and it was not codified until 1958 when the Geneva Convention was adopted. The universal jurisdiction that applies to piracy *jure gentium* is a very effective weapon and it was accepted because it was necessary to get rid of pirates to protect the international trade and as these acts were committed on the high seas, the universal jurisdiction did not clash with the territorial jurisdiction of a state. The states normally did not have any interest in exercising jurisdiction based on perhaps the flag state principle or the nationality of the pirates because they were seen as enemies of all mankind. Therefore, it was perceived that they no longer had any nationality or flag state and it was instead left to all states to do as they saw fit with the pirates.

2.2 The Codification of Traditional Piracy Jure Gentium in Conventions

The question of how to define piracy jure gentium and different jurisdictional questions appeared again when the first attempts to adopt an international convention regarding piracy was made. It was then the beginning of the 20th century and different attempts to codify piracy in international law were made. Three such examples are the Harvard Draft Convention (hereinafter referred to as Harvard Draft), the 1958 Geneva Convention on the High Seas (hereinafter referred to as the Geneva Convention) and the most recent which is UNCLOS. Both the Geneva Convention and UNCLOS are based on, or at least influenced by, the

[7] N.D. Joyner, *Aerial Hijacking as an International Crime*, pp. 32-33
[8] Ibid. p. 19
[9] Ibid. p. 236

Harvard Draft and therefore it seems fitting to start with how piracy was defined there and what solutions were reached regarding the jurisdiction.

The controversy on how to define piracy did of course not start with the Harvard Draft, but it had been discussed for a long time. In 1927, the Permanent Court of Justice (the PCIJ) described piracy in the S.S Lotus case. They then said that:

> Piracy by law of nations, in its jurisdictional aspects, is *sui generis*. Though statutes may provide for its punishment, it is an offence against the law of nations; and as 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 all mankind-*hostis humani generis*- whom any nation may in the interest of all capture and punish.[10]

The PCIJ makes it clear that they do not include all kinds of violence or plunder at sea in the definition of piracy because that could lead to that every crime that is committed at sea would be considered as piracy.

2.2.1 The Harvard Research Draft Convention

In February 1929, the Harvard Law School decided to prepare a draft convention on the subjects that were selected by the League of Nations as suitable for codification. One of those subjects was piracy. The draft convention was discussed at four different meetings in 1930 and 1931.[11] The final draft was published in 1932, but after that nothing happened for a long time and it was not until 1958 that it was incorporated into an international agreement (the Geneva Convention) and then only the parts of the draft convention that had been recommended by the International Law Commission (the ILC) were adopted.[12]

The draft convention was one-step in the evolution and codification of piracy under international law. Even though it is only a draft convention and it was never adopted by states, it is still very important, as it was the foundation of the later Geneva Convention and then the Law of the Sea Convention. When working on the draft articles the ILC tried to review what had been written on the subject previously and referred to almost all writings and opinions at that time. Their intention was not that the draft would be a final solution, but instead that the draft would be updated when international law relating to the subject developed. Dubner sees this as the reason why the draft convention is important, because it contains almost all writings on the subject. In addition, it explains the reasons for all the different points of view and because they selected the opinions they believed could be part of an international convention.[13]

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[10] S.S Lotus, p. 70 (Judge Moore's dissenting opinion)
[11] General Introduction to Harvard draft, *The American Journal of International Law*, pp. 10 & 13
[12] B.H. Dubner, *The Law of International Sea Piracy*, p. 103
[13] Ibid. p. 47

According to Rubin, the Harvard Draft is an attempt to codify rules of international law as they should be and not as they would be if an examination of theory and past practice were made. Therefore, he sees it as a work *de lege ferenda* and does not agree with Dubner.[14] At this point there was no real definition of what piracy meant in customary international law and most states seemed to have their own ideas about what should be included and what should not. The drafters were aware of that and they state in the comment to Article 3 that it is important to realise that so much has changed in international law through the centuries. For the law of piracy to fit in with the international law they say it may be necessary to change what piracy was seen as when the international law and relations between states were much different.[15] They give the examples of the doctrine of the freedom of the seas and jurisdiction based on territoriality, nationality and protection of the states interests as quite recent developments. The drafters state that because they see it as such a vital part of the common jurisdiction (universal jurisdiction) that pirate ships can be seized by any state when outside territorial jurisdiction it will also affect the definition of piracy to include cases which probably would not be included if only the judicial jurisdiction were in question.[16] They further state that:

> It may be expedient to concede common jurisdiction over certain sorts of events which are not beyond dispute piracy by tradition, but bear enough analogy to cases of undoubted piracy to justify assimilation under that caption. Therefore the draft convention excludes from its definition of piracy all cases of wrongful attacks on persons or property for political ends, whether they are made on behalf of states, or of recognized belligerent organizations, or of unrecognized revolutionary bands.[17]

The definition of piracy can be found in Harvard draft Article 3:

> Piracy is any of the following acts, committed in a place not within the territorial jurisdiction of any state:
> 1. Any act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, for private ends without bona fide purpose of asserting a claim of right, provided that the act is connected with an act on or from the sea or in or from the air. If the act is connected with an attack which starts from on board ship, either that ship or another ship which is involved must be a pirate ship or a ship without national character.
> 2. Any act of voluntary participation in the operation of a ship with knowledge of facts which make it a pirate ship.
> 3. Any act of instigation or of intentional facilitation of an act described in paragraph 1 or paragraph 2 of this article.[18]

A definition of a pirate ship can be found in draft Article 4:

[14] A.P. Rubin, *The Law of Piracy,* p. 395
[15] Harvard draft, *The American Journal of International Law*, p. 787
[16] Ibid. p. 786
[17] Ibid. p. 786
[18] Ibid. p. 743

> 1. A ship is a pirate ship when it is devoted by the persons in dominant control to the purpose of committing an act described in the first sentence of paragraph 1 of Article 3, or to the purpose of committing any similar act within the territory of a state by descent from the high sea, provided in either case that the purposes of the persons in dominant control are not definitely limited to committing such acts against ships or territory subject to the jurisdiction of the state to which the ship belongs…[19]

The Harvard Draft includes in the definition of piracy not just the intention to rob, but also intention to rape, wound, enslave, imprison and kill. The Harvard Draft committee explained the inclusion of for example rape and wound in Article 3, as there is no good reason not to include it. They adopt the view that if someone has planned to wound, rape, or destroy property they should fall under the jurisdiction of all states just as they would have done if they had an intention to rob. They further state that it makes it more probable that the pirates will be punished if their acts are under common jurisdiction and not only under jurisdiction of one state. Whatever it is that inspired the act does not matter, as it is still a threat to international shipping and trade outside the territorial jurisdiction of states.[20]

The draft states that it is necessary that the acts are committed for private ends. Private ends is not explained or defined, but what can be found in the commentaries is that it is supposed to exclude acts made by unrecognized insurgents that only attack ships belonging to the State they are seeking independence from. It is not clear in the draft article if private ends mean that all acts with a political motive are excluded, but in the commentary it says that all attacks for political ends are excluded and it does not matter if they are made on behalf of states, of recognized belligerents or unrecognized bandits as seen above in the quotation. This means that no difference is made between such persons that are recognized as belligerents and only attack ships belonging to the state they are attempting to overthrow and such persons that have not reached that status and have not been recognized by states as belligerents. Both those groups are in the Harvard draft excluded from the piracy definition.[21]

2.2.2 Jurisdiction in the Harvard Draft

The jurisprudential basis adopted in the draft Convention regarding the jurisdiction was that:

> The theory of this draft convention, then, is that piracy is not a crime by the law of nations. It 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 offences which are committed outside the territorial and other ordinary jurisdiction of the prosecuting state and which do not involve attacks on its peculiar interests.[22]

[19] Ibid. pp. 743-744
[20] Ibid. p. 786
[21] Ibid. p. 786
[22] Ibid. p. 760

When commenting on the jurisdiction adopted in the Harvard Draft, Rubin is very critical. He says that the drafters base the universal jurisdiction on conceptions of the international legal order and interpretations of state practice that are difficult to demonstrate and not on the basis of state practice, real incidents and municipal court cases where municipal judges refer to international law as they should have done according to Rubin.[23] He also states that the drafters adopted a "positivist" view when they said that:

> 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 offence was committed outside the state's ordinary jurisdiction, it cannot truly be said that piracy is a crime or an offence by the law of nations...[24]

In the Harvard Draft, Articles 6, 7, 9, 13 and 14 are devoted to the problem of jurisdiction, but Articles 7, 9, 13 and 14 regulate the enforcement of executive jurisdiction and will be discussed in Chapter 2.3 below. The Harvard Draft starts with the universal jurisdiction that all states have when encountering a pirate ship and the Article states that:

> Article 6
> In a place not within the territorial jurisdiction of another state, a state may seize a pirate ship or a ship taken by piracy and possessed by pirates, and things or persons on board.[25]

It is evident that the universal jurisdiction is an exception to the "normal" territorial jurisdiction of states and only applies when the pirate ship is in a place outside territorial jurisdiction. Even if the universal jurisdiction is accepted in the Harvard Draft, it is limited and cannot be used in most waters as they are within the jurisdiction of a state and then the territorial jurisdiction takes over.

2.2.3 " *In re* Piracy Jure Gentium"

The question of whether it is necessary with an actual robbery, or if it is enough that an attempt has been made to attack and rob another ship came up in an important English decision called "*In re* Piracy Jure Gentium". The question had been referred to the judicial committee of the Privy Council in England and was as follows:

> The question whether actual robbery is an essential element of the crime of piracy jure gentium, or whether a frustrated attempt to commit a piratical robbery is not equally piracy jure gentium, is referred to the Judicial Committee for their hearing and consideration.[26]

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[23] A.P. Rubin, *The Law of Piracy,* p. 338
[24] Harvard draft, *The American Journal of International Law*, p. 756
[25] Ibid. p. 744
[26] A.C. 1934, In re Piracy Jure Gentium p. 586

In this case, the question was referred to the Privy Council after the full Court of Hong Kong acquitted the accused in a piracy case as it found that robbery was necessary to convict them of piracy. That was a final decision and it was not appealed, but the Privy Council was still asked to answer the question. The Privy Council then concluded that:

> Actual robbery is not an essential element in the crime of piracy jure gentium. A frustrated attempt to commit a piratical robbery is equally piracy jure gentium.[27]

The Privy Council looked at different definitions made by different scholars before they reached their conclusion and they did in fact rely on the Harvard Draft commentaries when reaching their conclusion and did refer to writers like Hale and Hawkins who also had been trying to define piracy. The Privy Council made it clear that the matter that was being discussed was not what piracy is under municipal law, but what piracy *jure gentium* or piracy in international law is. They further added:

> When it is sought to be contended, as it was in this case, that armed men sailing the seas on board a vessel, without any commission from any State, could attack and kill everybody on board another vessel, sailing under a national flag, without committing the crime of piracy unless they stole, say, an article worth sixpence, their Lordships are almost tempted to say that a little common sense is a valuable quality in the interpretation of international law.[28]

As shown, the Privy Council did not agree with the court in Hong Kong that it would be necessary that an actual robbery took place, but instead took the view that even if the attack was not successful in the way that something worth money was taken from the ship it would still constitute piracy in international law. That killing someone onboard the other ship and not be defined as a pirate just because nothing was stolen was not accepted by the Privy Council. The definition that the Privy Council thought was the closest to being accurate is if piracy is seen as any armed violence at sea as long as it is not a lawful act of war. If any armed violence is accepted that of course makes it easier to classify acts as piracy in cases where the motive was not money and personal gain, but maybe wanting revenge or just a desire to wound and kill.[29]

To summarise what the definition reached in the Harvard Draft included in piracy. It was first of all necessary that the act took place outside the jurisdiction of a state and that it was a violent act with an intention to rob, wound, rape, enslave, imprison or kill or to destroy property. It was a requirement that it was made for private ends, that at least one ship involved in the attack was a pirate ship and that excludes all governmental ships and warships as being able of committing piracy.

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[27] Ibid. p. 588
[28] Ibid. p. 594
[29] M. Halberstam, Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety, *The American Journal of International Law*, p.148

2.2.4 The 1958 Geneva Convention

The first real attempt to codify piracy in international law after the Harvard Draft, was made when the Convention on the High Seas was done at Geneva in 1958 (the Geneva Convention). The Geneva Convention entered into force on 30 September 1962 and it has 46 Signatories and 62 Parties.[30] The ILC prepared the Convention and in doing so, they relied on the Harvard draft convention and did, in fact, generally endorse the findings of the Harvard research.[31] However, when drafting the Geneva Convention practical solutions had to be reached and they only adopted provisions that would be acceptable to a majority of states. That means that not all of the 19 Articles in the Harvard Draft were incorporated into the eight articles in the final Geneva Convention.[32]

During the Geneva Conference on the Law of the Sea in 1958, some complaints were made by states. One was that articles regarding piracy no longer were needed as piracy in its traditional form was no longer a problem and that such articles might conflict with other conventions and also that the articles on piracy already were obsolete because they failed to consider piratical acts that were politically motivated.[33]

The protests made during the discussions did not stop the Articles from being included in the Geneva Convention and the ILC did first define piracy in Article 39 of their draft to the Convention and it states that:

> Piracy consists in any of the following acts:
> 1. Any illegal act 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 against persons or property on board such a ship;
> (b) Against a ship, persons or property in a place outside the jurisdiction of any State.
> 2. Any act of voluntary praticipation 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 incitement or of intentional facilitation of an act described in sub-paragraph 1 or sub-paragraph 2 of this article.[34]

The draft articles were then discussed and the definition that eventually was agreed upon in Article 15 in the final Geneva Convention was as follows:

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:

[30] UNTS, vol. 450 p. 11
[31] YBIL, Vol. II 1956 p. 282
[32] B.H. Dubner, *The Law of International Sea Piracy*, p. 104
[33] Ibid. p. 123
[34] YBIL, Vol. II, 1956 p. 282 (praticipation = participation)

(a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
(b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
(2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
(3) Any act of inciting or of intentionally facilitating an act described in subparagraph 1 or subparagraph 2 of this article.

As can be seen the Articles are in principle identical except for some minor changes in grammar, but the content is the same in the ILC draft as in the final Geneva Convention.

It is important also to look at the drafting history of the Articles that eventually were included in the Geneva Convention. It was during the seventh and eight sessions of the International Law Commission that the new regime of the high seas was discussed and then included in what was piracy in international law. A draft convention on the high seas was adopted in 1955 during the seventh session and the final report was adopted in 1956 during the eighth session. The discussions that lead to the creation of the Geneva Convention are interesting and do explain the views of the participants.

In the Harvard Draft Article 3, specific categories like "kill" were used, but in the Geneva Convention, it was instead replaced by the broader term, "illegal act of violence". This shows the opinion of the Commission and it became obvious during their discussions that the members had different opinions. Some believed that it should be a crime to fail to suppress piracy and that the definition should not be too restrictive. The objection was made by Mr Zourek during the discussions in 1955. He believed that Article 14 (that later would become Article 15 in the final Geneva Convention) was too restrictive in defining piracy and that it did not correspond to international law, but his objection did not cause any changes to the Article.[35]

When trying to define piracy the ILC had to reach a conclusion regarding some rather controversial aspects of piracy. They decided that it is not necessary with an intention to rob (*animus furandi*), as motives for piracy vary and it is not always robbery, but can be everything from wanting revenge to hatred and it is therefore not limited to intention to rob. It is, however, necessary that the acts are committed for private ends and that they are committed on the high seas or in a place outside the jurisdiction of any State just as it was concluded in the Harvard Draft.[36] That was also a part of draft Article 14 (now Article 15 Geneva Convention) that was discussed in length during the seventh session in 1955.

Whether political acts could be piracy and how to determine what is an act committed for private ends or for political ends was also discussed by the

[35] YBIL, Vol. I, 1955 p. 228
[36] A.P. Rubin, *The Law of Piracy*, pp. 350-355

ILC. During that discussion, Mr Krylov thought that it should not be included that acts committed for political ends cannot be seen as piratical attacks because he thought that it would be impossible to find a criterion that could tell the acts committed for private ends and the acts committed for political ends apart. Sir Gerald Fitzmaurice thought that it would be better to use another expression than for private ends. He also added that the real problem is the authorized and unauthorized acts and acts committed in a public or private capacity. He described that an act that had been committed in a private capacity could be for political ends, but be unauthorized. For example, if a member of the opposition party in a state would seize a vessel.[37]

In 1956, during the eighth session, the Commission began their work by studying replies from 25 governments regarding their views on piracy. The discussion in the Commission did again mainly concern the problem on how to limit piracy. Two different views were presented and discussed, one by Mr Zourek and one by Sir Gerald Fitzmaurice. Zourek believed that it should be considered piracy even when an act of violence was committed for political ends, by warships/ military aircraft, by aircraft/ seaplanes against another foreign aircraft or from the high seas against ships, persons or goods in territorial waters or against the land. The view represented by Fitzmaurice was that piracy should be limited to the traditional acts and locations.[38]

The view presented by Fitzmaurice seems to have been the view of the majority and Article 14 was then renamed Article 39 and was changed but only in a grammatical sense.[39] The reason for limiting piracy to acts on the high seas is that it has been seen as unnecessary to include acts that are committed within the territorial seas of a state because they are then within the municipal jurisdiction of that state. States were supposed to be able to fight such piracy committed for private ends in their own territory.[40] However, Dubner did state that the fact that piracy was restricted to acts committed for private ends and to acts on the high seas or outside the jurisdiction of any State made the Geneva Convention less meaningful and believes that they should have included acts committed for political purposes as well.[41]

The ILC also decided that mutiny is not an act of piracy even if the purpose is to seize the ship. Since the Geneva Convention and the Harvard draft are quite similar it is also possible to see the same sort of reasoning. However, some major changes were made in the final version of the Geneva Convention, especially the definition. Rubin is very critical and does not agree with the way the Harvard Draft and the Geneva Convention were made. He believes that the Harvard Draft was not based on proper research

[37] YBIL, Vol. I, 1955 p. 266
[38] YBIL, Vol. I, 1956 pp. 46-48, paragraph 37 and paragraphs 42-44
[39] YBIL, Vol. II, 1956 p. 282
[40] B.H. Dubner, *The Law of International Sea Piracy*, p. 6
[41] Ibid. p. 113

of past definitions of piracy and neither was the Geneva Convention. Moreover, his criticisms were that the reporter did not reflect on the fact that the Harvard Draft that he based the report on was a work *de lege ferenda* and that the drafters never found a clear conception of piracy under international law.[42] Of course, when trying to codify international law it will always be different views in different states on how to define for example piracy as in this case. Even more so since all states had their own conceptions on what piracy is in their own municipal law that goes back a long time and made it harder to agree on one international definition. China, for example, tried to include mutiny as a part of piracy based solely on the fact that it existed two different definitions in Chinese municipal law. As Rubin explains, such a definition could lead to where every mutiny, even on foreign vessels, anywhere in the world would be under Chinese jurisdiction.[43]

In the end, most of the Convention is based on politics and trying to get states with very different conceptions of piracy to agree on one definition of piracy under international law. Many of the older conceptions of piracy would simply not work in the world of today. The Chinese proposal is similar to the British approach during colonial times, but such a broad jurisdiction will not work unless the state has complete dominance of the seas, which is not possible today. This shows that even if states have conceptions of piracy, it might be based on very old and historical events that came from a different era and that would not work if applied in the modern world with for example larger territorial waters and a duty not to interfere in other state's affairs.

2.2.5 The 1982 Law of the Sea Convention

The 1982 Law of the Sea Convention (UNCLOS) entered into force on November 16, 1994 and now (2006) has 150 parties, which means that most states are parties to UNCLOS. One exception is The United States of America that never accepted the Convention and is not a party. At present time, it is UNCLOS that contain the accepted provisions on piracy in international law and it becomes very important considering that most states are parties to UNCLOS.[44] The definition of piracy that is used in international law today can be found in Article 101 UNCLOS

Article 101 UNCLOS has in essence been copied from the 1958 Geneva Convention on the High Seas and it states that:

> 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:

[42] A.P. Rubin, *The Law of Piracy*, pp. 350-355
[43] Ibid. pp. 362-363
[44] G.O.W. Mueller/ F. Adler, *Outlaws of the Ocean- The Complete Book of Contemporary Crime on the High Seas*, pp. 308- 313

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

When looking at the definition made in UNCLOS, it is evident that the definition of piracy today is still the same as when the Geneva Convention was drafted in 1958, now almost 50 years ago. The reason for using the same articles in UNCLOS as were used in the Geneva Convention was probably political. To be able to come up with a draft that would be acceptable to as many states as possible it was easier not to start debating the different opinions on how to define piracy.[45] UNCLOS contains, as mentioned above, a definition of piracy in Article 101, but Article 100 and Articles 102-107 are also devoted to piracy.

The fact that the definition of piracy in UNCLOS and international law can be different from definitions in municipal law leads to that a variety of acts can be included in municipal law that are not included in the category of piracy under international law. For example, Article 101(a) in UNCLOS, clearly states that piracy consists of acts committed for private ends, which means that all acts committed for political reasons, for example, will not be classified as piracy according to UNCLOS, but can be considered as piracy according to municipal law. Different definitions of piracy also makes it more confusing and more difficult to understand what piracy really is and that it depends on what zone the attack occurs in. If the attack occurs on the high seas then it can be an act of piracy according to international law, but if it happens in territorial waters, it can never be piracy according to international law.[46]

In UNCLOS it is necessary for the act to be classified as piracy that the act of violence or detention is illegal which brings out the first question and that is illegal according to which legal order? Is it supposed to be illegal and tested under national or international law? UNCLOS does not make it clear what illegal acts mean. Rubin has written an article called "Is piracy illegal or not?" He discusses the use of the word illegal in Article 15 of the Geneva Convention, but since the same definition has been used in UNCLOS, it still applies and Rubin states that 'the provision is the product of confusion, not of contemplation.'[47]

He asks what illegal is supposed to mean and how is it supposed to be measured, by international or municipal law? He believes that the Article makes no legal sense and that it should have been rejected when UNCLOS

[45] E. Ellen (ed.), *Piracy at Sea*, p. 139
[46] Ibid. p. 140
[47] A.P. Rubin, Is piracy illegal?, *The American Journal of International Law*, p. 92

was concluded.[48] His reasoning behind this is that the word illegal was not included in the first draft article in the later Geneva Convention, but appeared the first time in Article 13 that was submitted to the Commission by the Drafting Committee. The Commentary made by the ILC does not make it any clearer as to what illegal means. In fact, they hardly mention it at all. One state, Greece, did object to the use of the word illegal at the First United Nations Law of the Sea Conference, but the Greek proposal was rejected.[49] Rubin's theory is that the parties were looking for a way to turn legal violence for private ends into piracy. However, according to Rubin this leads to a strange result because it would be like going back to a system where violence on the high seas for private ends with the authorization of a state is accepted. It was called "privateering" and has been forbidden for at least 120 years now.[50] Rubin also questions if a rebel group would be able to licence such acts of violence on the high seas. Usually when a power-struggle breaks out in a state and reaches a certain point, it is almost necessary for other states to give the rebels a legal status. The most common is then "belligerency" or maybe to call it an "armed conflict not of an international character".

States usually would not admit to rebels as having a governmental status before they can exercise a certain level of authority as a representative for the state. Rubin then says that if legal violence like privateering would be accepted again it would also mean that states would have to give rebels a governmental status a lot earlier than is the case now. There are cases where laws of piracy have been used against rebels, but states usually do not want to get involved in other states affairs by labelling a political group in a foreign state as pirates. Rubin's view is that the word illegal in Article 15 of the Geneva Convention or Article 101 in UNCLOS would lead to that the law of privateering would come to life again and also force states to give rebels governmental status instead of belligerent status and he does not think that this was intended when the article was drafted.[51]

The next problem in the definition is that it also says illegal violence. Does that include all types of violence, everything from wounding someone to raping and killing? Does UNCLOS in fact contain the same "definition" as the Harvard Draft where wounding, raping and killing were mentioned in the definition? If the act does not consist of illegal violence or detention, it could also be any kind of depredation. It is also necessary that the act is committed for private ends by the crew or the passengers of a private ship. Menefee has found a counter-argument to that it would be necessary that two ships are involved. He bases his argument on the fact that even if it states in Article 101(a) UNCLOS that the act has to be directed against another ship, it does not state that it has to be directed against another ship in Article 101(a)(ii) UNCLOS. There it is only required that the acts are committed against a ship in a place outside the jurisdiction of any State and

[48] Ibid. p. 95
[49] Ibid. p. 93 & UN Doc. A/CONF.13/L.62. & A/CONF.13/40, at 84
[50] A.P. Rubin, Is piracy illegal?, *The American Journal of International Law*, p. 93
[51] Ibid. p. 94

the high seas is such a place. Therefore, he thinks that it is unnecessary that two ships are involved for the act to be classified as piratical.[52] The requirement in Article 101(a) UNCLOS, that it is a private ship and the attack is made for private ends effectively excludes all kinds of governmental ships and warships and all attacks or seizures made for political reasons. The attack has to be made against another ship and then excludes for example mutiny by the crew of one ship against the commander of that ship. Even if they use illegal violence or depredation, if the attack is committed for private ends and if it is a private ship, such an attack can never be seen as piracy according to UNCLOS and international law as it has to be an attack that is directed against another ship. After such a mutiny has taken place, it is of course possible that the ship can be used for piratical attacks and Article 102 in UNCLOS is devoted to that problem:

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

Article 102 is not very surprising even though it concerns warships and governmental ships, but what could be controversial and could cause problems are the effects it actually would have. The flag state is no longer in control of the ship after a mutiny has occurred on the ship and therefore it should not be treated any different from a non-governmental ship. Of course, it could be a very sensitive situation if, for example, a warship is taken over by a mutiny and then used for piracy. That would mean that a very dangerous ship would be in the hands of violent pirates. It would also be damaging for the state that owns the ship if it is used for violent attacks and also so if it would be necessary for other states to actually try and capture it as it might contain sensitive information and maybe weapons and other important property to the flag state.

According to Article 105 UNCLOS, it is the courts of the State that seized the ship that will be in charge of the case and decide penalties and what will happen with the crew and cargo as well as the ship itself. That means that it is up to the courts in the State that seized the ship to decide what will happen to it and its crew and cargo. It does state that they have to take into consideration the rights of third parties that have acted in good faith. This is not so difficult to understand when it concerns "normal" pirate ships that from the start are private ships, but does the same really apply to a warship that has been turned into a pirate ship after a mutiny by its crew? It seems very controversial that a foreign state would decide the fate of a warship and property of another state in its own municipal court.

The most obvious limitation is of course that the attack has to occur on the high seas or in a place outside the jurisdiction of any state according to Article 101(i) and (ii) UNCLOS. Again, it does not cause problems when

[52] S.P. Menefee, Foreign Naval Intervention in Cases of Piracy: Problems and Strategies, *The International Journal of Marine and Coastal Law*, p. 358

just defining the word piracy as being attacks on the high seas, but it does cause problems when it comes to fighting piracy and the question of jurisdiction.

2.2.6 Jurisdiction in the Geneva Convention and in UNCLOS

In UNCLOS it is not just the articles that are devoted to piracy that are important to the subject, but also the new articles concerning jurisdictional zones like the territorial waters and the exclusive economic zone (EEZ).[53] The different zones changed in UNCLOS and they are very different from the ones in the Geneva Convention. Firstly, the territorial waters were expanded and it is now allowed with a territorial sea with a breadth of up to 12 nautical miles according to Article 3 UNCLOS. In the Geneva Convention, no breadth limit had been agreed upon and different states claimed everything from three nautical miles to 200 miles. The limit of three miles was, however, the most common one during all the 19th century and it was probably so because the naval powers wanted to keep as much freedom of navigation as possible.[54] The exclusive economic zone (the EEZ) was a new invention in UNCLOS and it does therefore not appear at all in the Geneva Convention. According to Article 57 UNCLOS, the EEZ can extend up to 200 miles from the baseline and that does of course limit the high seas even further.

2.3 Enforcement of Executive Jurisdiction over Traditional Piracy

Traditional piracy under customary law and in the different conventions clearly falls under the universal jurisdiction of all states. That means that all states have the right to capture and punish a pirate, but the executive jurisdiction to actually apprehend a pirate is not universal. It is important to keep in mind that the executive jurisdiction of states is limited to the states own territory or, as in the case of piracy *jure gentium*, to the high seas. The universal jurisdiction over piracy has been accepted because it does not violate the sovereign rights of any state because traditional piracy can only occur on the high seas.

During the centuries when piracy was solely under customary law the executive jurisdiction was often enforced in a brutal way. If a pirate ship was seized, it was almost certain that the pirates would end up hanged; sometimes after a trial and sometimes without. It happened frequently that pirates simply were hanged on the ship to save valuable time. The punishments that have been applied to piracy have always been severe and

[53] E. Ellen (ed.), *Piracy at sea*, p. 139
[54] R.R.Churchill & A.V. Lowe, *The Law of the Sea*, p. 78

most often it has been a death sentence to be captured as a pirate. It was in many cases also permissible to try to punish the captured pirate on board the ship if for example it was not possible to get a court in the closest coastal state to prosecute the pirates. It means that pirates lived a very dangerous life. It was almost guaranteed that if they were captured they would be killed. They had virtually no rights and they were shown no mercy.

When the Harvard Draft was concluded, it certainly did include more human regulations on how to treat pirates and the kind of actions that were allowed when apprehending pirates on the high seas. Article 7 in the Harvard draft explains what is required of the state when pursuing and seizing a pirate ship:

> Article 7
> 1. In a place within the territorial jurisdiction of another state, a state may not pursue or seize a pirate ship or a ship taken by piracy and possessed by pirates; except that if pursuit of such a ship is commenced by a state within its own territorial jurisdiction or in a place not within the territorial jurisdiction of any state, the pursuit may be continued into or over the territorial sea of another state and seizure may be made there, unless prohibited by the other state.
> 2. If a seizure is made within the territorial jurisdiction of another state in accordance with the provisions of paragraph 1 of this article, the state making the seizure shall give prompt notice to the other state, and shall tender possession of the ship and other things seized and the custody of persons seized.
> 3. If the tender provided for in paragraph 2 of this article is not accepted, the state making the seizure may proceed as if the seizure had been made on the high seas.[55]

Article 7 in the Harvard Draft is a good example of when the territorial jurisdiction of one state takes over the universal jurisdiction of all states. The Article deals with the pursuit of pirate ships. It is clear that a state that has started to pursue a pirate ship in its own territorial waters or in a place not within the jurisdiction of any state (high seas) may continue into the territory of another state to seize the pirates only if that state does not prohibit them to do so. The sovereign rights of the state are here considered more important than the capture of the pirates.

When a state has captured a pirate ship in a place within the jurisdiction of another state it is also required to hand that ship, property and persons over and the only exception is if the other state has no interest in taking over the possession of the pirates. The pursuing state is also required to make reparation if it has seized pirates in the territory of another state without permission and then violated its jurisdiction as can be seen in Article 9:

> If a seizure because of piracy is made by a state in violation of the jurisdiction of another state, the state making the seizure shall, upon the demand of the other state, surrender or release the ship, things and persons seized, and shall make appropriate reparation.[56]

[55] Harvard draft, *The American Journal of International Law*, p. 744
[56] Ibid. p. 745

What happens to the pirate ship and the pirates themselves after the capture is determined by the state that seized the ship, but in doing so they have to follow the criteria set up in Article 13 and 14:

> Article 13
> 1. A state, in accordance with its law, may dispose of ships and other property lawfully seized because of piracy.
> 2. The law of the state must conform to the following principles:
> (a) The interests of innocent persons are not affected by the piratical possession or use of property, nor by seizure because of such possession or use.
> (b) Claimants of any interest in the property are entitled to a reasonable opportunity to prove their claims.
> (c) A claimant who establishes the validity of his claim is entitled to receive the property or compensation therefor, subject to a fair charge for salvage and expenses of administration.[57]
>
> Article 14
> 1. A state which has lawful custody of a person suspected of piracy may prosecute and punish that person.
> 2. Subject to the provisions of this convention, the law of the state which exercises such jurisdiction defines the crime, governs the procedure and prescribes the penalty.
> 3. The law of the state must, however, assure protection to the accused aliens as follows:
> (a) The accused person must be given a fair trial before an impartial tribunal without unreasonable delay.
> (b) The accused person must be given humane treatment during his confinement pending trial.
> (c) No cruel or unusual punishment may be inflicted.
> (d) No discrimination may be made against the nationals of any state.
> 4. A state may intercede diplomatically to assure this protection to one of its nationals who is accused in another state.[58]

The last two Articles (13 and 14) in the Harvard Draft that concern jurisdiction are rather interesting in the way that they also demand certain things of the municipal laws in the state that is prosecuting the alleged pirate. For example, the laws have to make sure that a fair trial is held and without unreasonable delay and that the punishment cannot be cruel or unusual. This is very different from previous treatment where pirates were given a trial at best and often faced cruel punishments if convicted of piracy.

2.4 Right of Hot Pursuit and Right of Visit

The articles that concern the right of visit (Article 110 UNCLOS) and the right of hot pursuit (Article 111 UNCLOS) are important when enforcing the executive jurisdiction. Article 111 in UNCLOS is a bit different from the corresponding Article 23 in the Geneva Convention. The reason for that is again the fact that new jurisdictional zones were added, like the exclusive economic zone, and that made it necessary to change the Article. The right

[57] Ibid. p. 745
[58] Ibid. pp. 745-746

of visit and the right of hot pursuit are essential when fighting piracy, but many problems remain to be solved.

The right of visit in Article 110(1a) UNCLOS gives warships the opportunity to board foreign ships if there is a reasonable ground for suspecting that the ship is engaged in piracy. All that is needed is a reasonable ground for suspicion, but it is not clear what is considered as enough to be a reasonable ground. Do they need almost certain information that the ship is in fact a piracy ship or is it enough that the ship looks suspicious or that someone suspects it might be involved in pirate activities? Misuse of this right of visit could lead to major problems between states if, for example, ships registered in a certain state were repeatedly harassed. It does state in Article 110(3) UNCLOS, that if the suspicions were unfounded, all loss and damage has to be compensated, but that does not really ensure anything.

The right of hot pursuit first appeared in the Harvard Draft, but has changed since then. In the Harvard Draft a pursuit was allowed if it was started by the pursuing state within its own territorial jurisdiction or in a place outside the jurisdiction of all states (like on the high seas) and it could also continue into a place within the territorial jurisdiction of another state if that state did not prohibit it.[59] It was seen in a different way when the ILC were working on their draft to the Geneva Convention. The ILC believed that it was no longer needed because the acts of piracy were very few at that time.[60] That led to a change in the right to seize ships and it is now necessary that the pursuit is made by the coastal state and that they have good reasons to believe that the ship has violated laws of the coastal state. The pursuit must start when the foreign ship is within the coastal states territorial jurisdiction and it can only continue outside the territorial sea if it has not been interrupted according to Article 111 UNCLOS. As soon as the foreign ship reaches the territorial sea of another state the right of hot pursuit cease. The right of pursuit in the Harvard Draft and the right of hot pursuit in the Geneva Convention and UNCLOS are thus very different and Article 111 UNCLOS is more restrictive than the Harvard Draft. It only allows coastal states to begin a hot pursuit and a state cannot begin a hot pursuit of a pirate ship on the high seas and then follow it into the territorial sea of another state.
Dubner has made some suggestions on changes that could be made to make the right of hot pursuit more effective when fighting piracy. He thinks that it should be allowed for states to pursue alleged pirates all the way into another state's territorial seas. He sees this as a "safe" option that would not be easy to abuse. It could, for example, be required that the pursuing state get permission from the coastal state to continue the pursuit. The coastal state would then be given the choice of either allowing the pursuit to continue or to capture the alleged pirates themselves. It would get trickier if the pirates would continue all the way into the internal waters of another state. The pursuing state would then have to choose between allowing the

[59] Harvard draft, *The American Journal of International Law*, p. 744
[60] YBIL, Vol. II, 1956 p. 283

alleged pirates to go or to enter the internal waters of another state and to violate the sovereignty of the coastal state. Another option could be to use sanctions against the coastal state if they fail to take over and arrest the alleged pirates.[61]

In Article 43 (during the eighth session), the ILC defined the conditions that would be necessary to exercise jurisdiction and it was meant to give states the right to seize pirate ships and to have them prosecuted in their courts.[62] When such a seizure was made, it had to be by a warship or a military aircraft according to Article 45. The reason for this was that they were worried that states would be abusing the right if they were allowed to make seizures with other ships than warships.[63] That means that it changed from the view taken in the Harvard Draft where warships were perceived as the common way of seizing pirate ships, but they also thought that states should be able to use police boats and similar ships. They did not see it as a problem that states were allowed to seize a ship with the method of their choice as long as they were held responsible if they caused any damage while making a seizure.[64]

[61] B.H. Dubner, *The Law of International Sea Piracy*, p. 164
[62] YBIL, Vol. II, 1956 p. 283
[63] Ibid. p. 283
[64] Harvard draft, *The American Journal of International Law*, p. 846 & B.H. Dubner, *The Law of International Sea Piracy*, p. 122

3 Modern Piracy

The Convention that applies to international piracy or piracy *jure gentium* is still UNCLOS. It means that it is the traditional conception of what piracy is, what jurisdiction applies and where piracy can occur that is applicable today. The fact that the rules governing piracy have not changed does not mean that piracy has not. Modern piracy has evolved and the Santa Maria, the Mayaguez and the Achille Lauro incidents are examples of when acts committed at sea cannot be classified as piracy because they do not fit the traditional definition that is included in UNCLOS. Many of the incidents that occur today would have been classified as piracy if they had occurred on the high seas. Instead, they are committed within the territory of a state and are therefore not acts of piracy under international law. Such incidents have also increased and have become very common in certain parts of the world.

3.1 Political Piracy and the Santa Maria, the Mayaguez and the Achille Lauro Incidents

When commenting on the Geneva Convention, Dubner states that in his view, the articles in the Geneva Convention have one serious problem and that is that they do not seem to be applicable to the kind of acts and incidents that occur today, but rather to acts which constituted piracy centuries ago. He gives the example of political incidents that have taken place during the twentieth century like the Mayaguez and the Santa Maria incidents (in 1975 and 1961) and concludes that they would probably not be classified as piracy according to the definition in the Geneva Convention (and now also UNCLOS).[65]

The Santa Maria Incident took place in 1961 and the Geneva Convention was not yet in force at that time (it entered into force in 1962). On January 23, a Captain Galvao and his seventy men managed to take over the Santa Maria, a Portuguese ship belonging to the Portuguese Colonial Navigation Company and the ship was at the time carrying over 600 passengers. It had just left the port of Curacao in the Netherlands Antilles and was supposed to go to Florida and then return to Lisbon, Portugal. The course of the ship changed after Galvao had seized the ship. Galvao himself had previously been employed by the Portuguese government to report on the conditions in Angola and Mozambique (then colonies belonging to Portugal). His reports were very critical and he even claimed that people were treated like slaves and this led to that the report never being published in Portugal. Galvao then became an opponent of the Salazar regime in Portugal. He was imprisoned, but managed to escape after eight years and he then joined General

[65] B.H. Dubner, *The Law of International Sea Piracy*, p. 6

Humberto Delgado in South America. Delgado was defeated by Salazar in the elections in 1958 and was of course an opponent of Salazar. The report made by Galvao was published in a London newspaper just a few days after the seizure of the Santa Maria. Galvao made an announcement on the radio on January 24 and he said that the Santa Maria had been captured:

> …in the name of the Independent Junta of Liberation led by the General Humberto Delgado, the legally elected President of the Portuguese Republic, who has been fraudulently deprived of his rights by the Salazar Administration.[66]

The passengers on the Santa Maria were not treated badly, but the crew was not as lucky. The crew on deck had been wounded by machine-guns and hand grenades and eight wounded men and the body of one officer were put in a lifeboat in the British West Indies. It is believed that some of Galvao´s men were hiding among the original crew, but most of them boarded the ship at the same time as Galvao. Portugal requested help to search for and capture the Santa Maria and stated that it was a piratical attack. British and American naval ships in international waters first found the Santa Maria and Galvao subsequently said that he would bring the ship to safety if he and his men were treated as political insurgents. The ship went to Brazil where Galvao was granted political asylum even though the United States claimed that they had acted under international laws against piracy. Delgado, however, claimed that it was a political act and one that was carried out on his orders. It is obvious that Article 15 in the Geneva Convention not would cover the Santa Maria incident as it has a two-ship requirement and this all happened on one ship. It was also an act for political purposes and not for private ends.[67]

The Mayaguez incident raised the question whether a state can commit piracy or not. The Mayaguez, an American ship, was seized by a patrol boat at least 60 miles off the coast of Cambodia. The United States of America saw this as a piratical attack. The incident was different in the way that it was not a private ship and the Cambodian patrol boat was a warship. The reason that the United States of America saw it as a piratical attack was because they had not recognized the Khmer Rouge government of Cambodia.[68]

A more recent incident is the Achille Lauro, an Italian ship that was seized on October 7, 1985, on the way from Alexandria to Port Said. Members of the Palestine Liberation Front made the attack and they got onboard the ship by pretending to be tourists. They demanded that 50 Palestinian prisoners would be released by Israel or they would kill the passengers. When their demands had not been met, an American Jewish man in a wheelchair, Leon Klinghoffer, was shot and then thrown overboard. The hijacking ended on

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[66] As cited by N.D. Joyner, *Aerial Hijacking as an International Crime*, p. 109 (original source, New York Times, January 25, 1961, p. 1)
[67] B.H. Dubner, *The Law of International Sea Piracy*, pp. 147-149 & N.D. Joyner, *Aerial Hijacking as an International Crime,* pp. 106-113
[68] B.H. Dubner, *The Law of International Sea Piracy,* p. 149

10 October 1985 when Egypt granted the hijackers free passage if they let the passengers go. The hijackers were on their way to Egypt on an Egyptian plane when the plane was forced to land by American military aircraft. The plane landed in Italy and four of the hijackers were tried and sentenced in Italy. However, the alleged mastermind did get away.[69] The United States of America saw this attack as an act of piracy.[70]

Halberstam has looked at the Achille Lauro incident from a customary law perspective and found that such acts as the seizure of the ship and the murder of the passenger would be included in piracy as it has been seen in customary law. Even when insurgents were exempted, it applied only to those that directed their acts against a certain state.[71] She also discusses whether it would be considered as piracy under the Geneva Convention. Her conclusion is that the requirement "for private ends" can be interpreted as excluding insurgents as well as those that act with no personal motive, from the laws of piracy. However, this would not exclude the persons that seized the Achille Lauro because even if they were members of a terrorist group they attacked an Italian ship and killed an American Jewish man when they were discovered and according to Halberstam, the motive would then not have been political, but maybe revenge.[72] Even if it could be considered as an act for private ends, it would still not meet the two-ship requirement in Article 15 in the Geneva Convention (and Article 101 UNCLOS).

Halberstam states that the biggest difference between the Santa Maria and the Achille Lauro is that the hijackers of the Santa Maria met the conditions for exemption of insurgents under customary law, but the hijackers of the Achille Lauro did not. In the Santa Maria incident, insurgents fighting for political independence performed the seizure and the acts were directed against the government they were fighting.[73] Dubner suggests that acts today are more influenced by and committed for political reasons and not for private ends like in the Santa Maria incident above. An Example of that are acts of terrorism and acts committed by liberation groups.[74] He also states that traditional piracy is now a dead issue and the reason is that nothing has been done to update the articles in the Geneva Convention to apply to alleged terrorism on the seas. One solution, according to Dubner, would be an international dispute settlement mechanism and instead of having acts of war, they could be piratical acts committed by states or individuals acting on behalf of states or for politically motivated reasons. Dubner continues by stating that three more problems exist in the Geneva Convention. They are that the Articles only apply to individuals, that acts constituting piracy have been enacted mainly for the purpose of expediency and last that the Geneva Convention assumes that the municipal law of the

[69] "Gunmen hijack Italian cruise liner" (BBC article)
[70] M. Halberstam, Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety, *The American Journal of International Law*, pp. 269-270
[71] Ibid. p.276
[72] Ibid. p.282
[73] Ibid. p.287
[74] B.H. Dubner, *The Law of International Sea Piracy*, p. 6

state making the capture or some other appropriate state will contain articles dealing with punishment of pirates.[75] The same problems would then exist in UNCLOS, as it is in essence the same as the Geneva Convention.

3.2 The Characteristics of Modern Piracy

That piracy committed for political reasons has become more common has already been shown in the incidents of the Santa Maria, the Mayaguez and the Achille Lauro. These three incidents were all very different and what they really do have in common is that they were not committed for private ends. Instead, they had other motives and are therefore not included in the traditional piracy. Incidents that are carried out because of political reasons are far from the only ones that happen today. Piracy that is motivated by personal gain has always been the most common and that remains the same today. A major obstacle when working on the problem of piracy around the world has always been the lack of information and statistics on where and how the attacks actually are carried out. Without such information, it is very difficult to see if the laws work or if something different is needed. It can also be difficult to get states to understand the importance of continuity in the fight against piracy if they do not even know that it is a problem.

One important organization that is working on changing that is the ICC International Maritime Bureau (IMB) and its Piracy Reporting Centre (PRC). The PRC was created in October 1992 and is located in Kuala Lumpur, Malaysia. The centre was created in response to the increasing number of piracy attacks and it is devoted to help fighting piracy around the world. For example, the centre issues status reports on piracy and armed robbery daily, reports incidents to the IMO and to local law enforcement in the area, help law enforcement to apprehend and bring pirates to justice and every year an annual report on piracy statistics is published (also quarterly reports).[76] The IMB, however, does not limit the reports to only piracy attacks, but also includes armed robbery at sea. The definition IMB use is the following:

> An act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in the furtherance of that act.[77]

In its Code of Practice, the IMB has defined piracy and armed robbery against ships as follows:

> Piracy means unlawful acts as defined in article 101 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS)…[78]
> Armed Robbery against ships means any unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of

[75] Ibid. p. 7
[76] IMB report 2006, p. 2
[77] Ibid. p. 3
[78] Ibid. p. 3

Formaterat: Engelska (Storbritannien)

> "piracy", directed against a ship or against persons or property on board such ship, within a State's jurisdiction over such offences.[79]

The first definition of piracy and armed robbery is used by the IMB for statistical purposes and the reason is that now most of the attacks occur within the jurisdiction of States and the traditional definition of piracy in UNCLOS does not cover those attacks at all, as they are not classified as piracy according to UNCLOS. This means that most of the attacks reported are not piracy in an international sense, but could instead be classified as armed robbery.

The highest number of attacks (actual and attempted) during 1994-2006 was reported in the year 2000 when 469 such incidents were reported. It is very likely that not all incidents are reported so it is still difficult to tell how many more incidents occur every year and are never reported. The reasons for not reporting incidents vary, but in many cases it could have something to do with that ships do not want more attention and get slowed down even further or maybe for insurance reasons. So far this year (2006), during the period of January to June, a number of 127 attacks have been reported. Fifty-one of those took place in South East Asia; and Indonesia was the worst affected State with 33 attacks reported.[80]

During the same period this year 156 crewmembers have been taken hostage, 13 have been kidnapped, nine threatened, two assaulted, 12 injured and six crewmembers were killed worldwide. Of the six crewmembers that were killed, one was killed in an attack in the Philippines, four in the South China Sea and one outside Somalia. What happened when the crewmember was killed outside Somalia was that on the 27 April 2006, the Al Taj (a dhow registered in the United Arab Emirates) was attacked and hijacked. Several armed pirates took the crewmembers hostage and forced the ship to sail to Haradhere. This is when one of the crewmembers was shot dead and two others were seriously injured. The Al Taj was later released when a ransom had been paid.[81] This is just one of the 127 attacks reported in the first half of 2006 and what is striking is that how successful the pirates are. In most cases they are never found or punished. They have the equipment they need to attack a big ship, like the use of small boats and, in some cases, fast boats. They are in some cases armed. In 41 of the attacks made in 2006, the pirates were armed with knives and in 34 attacks they carried guns.[82]

In the Annual Report of 2005, the IMB looked at the trends and could see that the attacks worldwide had dropped to 276 from 329 in 2004.[83] Statistics provide information on how many attacks occur, but in order to get a clearer picture of what is actually happening, it is necessary to look at all incidents

[79] Ibid. p. 3
[80] Ibid. p. 5
[81] Ibid. p. 16
[82] Ibid. p. 10
[83] IMB report 2005, p. 16

separately and to look at what is really behind the numbers. Somalia is then a good example of modern piracy.

3.2.1 The Situation in Somalia

The coast of Somalia is one of the worst affected areas and had 35 attacks in 2005 and the violence used in those attacks worsened. Somalia did, in fact, rank second highest in the world in 2005 and is considered to be the most dangerous place in Africa. The methods used there by pirates are violent and involve guns and even grenades. Ships are attacked far outside territorial waters, but after the ship is hijacked, it is taken to the territorial waters of Somalia where a high ransom is demanded. Part of the explanation of the high number of piracy attacks is that Somalia is a state with no functional central government and no law enforcement that can fight the pirates and enforce piracy laws and until they have that, it must be considered as quite safe to be a pirate in Somalia.[84]

The crisis in Somalia has been followed by the IMB since March 2005 and they have wanted naval ships to be placed in the area. In 2004, only two attacks were reported in Somalia and in 2005, a sudden increase to 35 reported attacks made the IMB/IMO decide to send a resolution to the Secretary General of the United Nations. The IMB did then see it as very important that the UN takes action before the situation gets even worse and start to spread to other territorial waters in the area.[85] This led to that the Security Council eventually adopted a resolution where they encouraged its Member States to use their naval ships and aircraft to help fight piracy and armed robbery in the area. Of course, such ships can only operate on the high seas and not in the territorial waters of Somalia. For example, the US Navy and the coalition naval forces have arrested suspected pirates off the coast of Somalia.[86] The IMB has issued warnings to all ships in that area to stay at least 150 nautical miles from the coast and to only make port calls if necessary. Unfortunately, pirates attack all sorts of ships that are believed to carry something worth the risk and not even ships transporting aid for the most needing people in the area have been saved and one attack that received a lot of media attention was the hijacking of MV Semlow.

The MV Semlow was a UN Food Programme Ship heading for Bossaso in north eastern Somalia when armed men attacked it. The crew of ten was taken hostage and the ship hijacked about 190 miles (300 km) outside Somalia. A ransom of 500 000 dollars is supposed to have been demanded, but in the end a deal was made with the hijackers and the ship was released.[87] This was, however, just one of many hijackings in the area. In total 16 ships were hijacked in 2005 and of those five ships are still held with their crews by the hijackers. The ships are also held for long periods

[84] Ibid. p. 16
[85] Ibid. pp. 29-30
[86] IMB report 2006, p. 19
[87] " Somalia's dangerous waters", "Pirates hijack tsunami aid ship", "Kenya probes Somalia ship hijack" (BBC articles)

with one ship released after almost a month. Worse still is that it is unknown what happened to the crew of that ship. It is also very common that a demand for a very high ransom is made. Where that money eventually ends up and in what cause it is used is a worrying problem as well.[88]

It might be the fact that piracy has become a way to finance crimes by warlords in certain areas of Africa and other types of crimes around the world. Different kinds of criminal organised gangs have found it an easy way of making money and especially the demands for high ransoms suggest that it is not petty theft, but has a different purpose, like financing smuggling of weapons or drugs. The valuables kept on the ship is then no longer the prime target, but perhaps instead the ship itself, the cargo or the demand of a ransom for the return of the ship and crew. The ship itself could also be used to transport illegal cargo, like different drugs.

The monitoring group on Somalia, which reported to the Security Council in a letter on 5 April 2006, has investigated the situation in Somalia. They looked into the evolution of piracy in Somalia and different groups and organizations that are committing acts of piracy in the area. They describe the pirates during the 1980s as armed sea robbers because they were not as sophisticated as the pirates that operate in the same area today are. They did usually not leave the territorial waters of Somalia and they were only organized to a much lesser extent. They stole whatever they could find and did usually not take the crew as hostage and did not demand high ransoms. However, that kind of sea robbery has evolved into the kind or piracy that is plaguing the area today.

The pirates do act outside the territorial limit of Somalia and on the high seas and use far more sophisticated methods and communication. The monitoring group describe that the pirates have headquarters based on land that gather information about ships that will be in the area and then plan, command and coordinate the attacks and seizures of foreign ships. They train the pirates and keep them with proper equipment. They also describe the typical “pirate group” and it is a frightening description. The pirates are well trained in navigation and communication and about 10 men take part in an attack. They use three boats and are armed with pistols and assault rifles. After seizing the ship, they contact the headquarters and receive further instructions. The pirates also attack for example fishing boats and then use them as “mother ships” to be able to attack ships further out at sea, up to 400 miles from shore. They will then wait where traffic is busy, use radar to see where merchant ships are and then launch their attacks from the “mother ship”. The ransom money is later used to buy arms that can be used in the continuing power struggles in Somalia.

The monitoring group has distinguished four different pirate groups in Somalia. The most advanced group is called the Somali Marines and they work almost in a military way and are lead by an “admiral”. They have the

[88] IMB report 2005, pp. 29-30

capacity to work far off shore and do attack and seize ships and keep crews as hostages and demands ransoms.[89] Somalia is only one example of where piracy has increased considerably and where piracy is highly organized and makes international shipping in the area very dangerous.

The monitoring group has also made a case study of how the Somali Mariners operate and they chose the seizure of an Indian registered dhow called Safina Al Bisarat. The dhow was carrying a cargo of charcoal and was on its way to Dubai when ten armed men in three speedboats attacked it on 16 January about 200 miles northeast of the Somali coast. The pirates boarded the ship and threatened the captain and the crew of 15. Then the pirates contacted the headquarters via the ship's radio. The speedboats were then towed by the dhow and guarded by three of the pirates because of the weapons and supplies that were kept in one. The captain was then ordered to take the ship further out to sea where shipping is most intense. The monitoring group believes that it was clear from the beginning that the Safira Al Bisarat would be used as a mother ship.

The pirates spent the next three days hunting. They attempted to capture two ships. A tanker and a container ship, but both of the ships escaped and did never report the incidents. The pirates were, however, not so lucky when they tried to capture a bulk carrier called MV Delta Ranger because she too escaped and did report the incident to the PRC. This lead to that the information reached the United States naval forces and they located the mother ship and followed her. The pirates heard the noise from a following helicopter and did then try to escape back into Somali territorial waters. The USS Winston S. Churchill continued to follow the mother ship and to contact the pirates via radio, but they refused to answer. The naval ship did then fire warning shots and the mother ship stopped, but the pirates still refused to make contact. They were then warned that actions that were more aggressive would be taken if they did not comply and another warning shot was fired. The pirates did then capitulate and they were taken into custody by naval personnel and were handed over to authorities of Kenya on 25 February.[90]

3.3 Executive Jurisdiction

If it was allowed to hang a pirate, sometimes even without a trial and use whatever force necessary to seize a pirate ship centuries ago, it has changed a lot since then. Modern piracy as well as traditional piracy is governed by UNCLOS and it means that the same regulations apply to incidents of piracy today. When a definition of what piracy is in international law has been reached and when it is clear what state has jurisdiction when an act of piracy occurs it still remains one important question. How can that jurisdiction be enforced in an effective manner to make sure that such incidents are properly dealt with? Even more important is the question of

[89] S/2006/229 p. 26-27 (letter to the Security Council)
[90] Ibid. pp. 29-30

how enforcement can be effective and still respect the rights of the alleged pirates. How are states responding to such incidents today? How are they trying to deal with those kinds of problems in their own territorial waters and can anything be done on an international level to help those states that are worst affected by piracy? This makes executive jurisdiction one of the most serious problems concerning piracy.

Pirates in the old days were more or less private armies ready for battle. It is different today when ships used are smaller, but instead attack more frequently. Rules regarding enforcement in UNCLOS Article 107 limit the right to seize pirate ships to warships/ military ships or for example, coast guard or police boats if they are clearly marked as government ships and have proper authorization. For most nations, this makes enforcement a very difficult task. Many states do not have that kind of ships or any aircraft to assist or any resources what so ever. One way of trying to solve that problem could be to initiate more cooperation on a regional level and for the international community to help with for example ships and other equipment. The regulations regarding who is entitled so seize a pirate ship are very important to make sure that the rights of the alleged pirates are respected. It would be a lot easier for many states if they were allowed to use different ships and methods, but that would seriously endanger that the pirates receive good enough treatment and that they are put in the charge of the right authorities to be prosecuted and punished. It is interesting that the Geneva Convention and UNCLOS not contain any regulations on for example treatment of pirates and punishments as the Harvard Draft did in Articles 13 and 14. It can be explained by the fact that it is left to the municipal laws of the capturing state to deal with those problems.[91] International law over piracy only provide the jurisdiction necessary to apprehend and prosecute the pirates, it does not regulate in what way such a trial should be executed or what kind of punishments that would be suitable.

It is important that states do not use the same methods as the pirates use when trying to seize a ship. It could lead to disastrous results if force is used when seizing alleged pirate ships. Let us say, that if a ship that is being approached by a warship with the suspicion that it might be a pirate ship. The ship does perhaps not fly a flag, refuse to make contact via radio, and even refuse to stop if warning shots are used. A warship could easily make that ship stop by using more force, but what if the ship not really is a pirate ship, but a ship filled with refugees that might be too scared to answer or to stop? It is a risk that has to be taken into account when fighting piracy that too violent methods can cause more harm than the pirates themselves would cause. Menefee believes that because states get more and more frustrated with the increasing acts of piracy they might consider the use of foreign naval forces within their own areas of jurisdiction, which is something that always, have been more or less impossible. He then thinks that it is necessary to look at the different provisions in UNCLOS and the conclusion he reach is that since there is no requirement that states seize pirate ships in

[91] Harvard draft, *The American Journal of International Law*, pp. 745-746

international waters it is instead voluntary. To make it even more difficult, if a state does want to act it will be hindered even further by the different regulations in UNCLOS that governs such seizures like Articles 105, 106 and 107. Menefee thinks that the provision makes it doubtful if it is possible to use old techniques like the ones that were used by the British during World War I. So-called Q or mystery ships were then disguised as merchant ships trying to get U-boats to attack them. The mystery ship would then try to sink the U-boats with guns and torpedoes. The only way such a technique would be allowed, would be if Article 107 only requires that non-warships be clearly marked.[92] A method that is just as brutal as the methods that the pirates themselves use when disguising their ships as innocent fishing boats to later attack unsuspecting ships and if the rights of the pirates are respected in any way such a method cannot be allowed.

Menefee then considers the possibility of using foreign naval ships in areas where the coastal state has jurisdiction, like in territorial waters and archipelagic waters. Rules regulating those areas can be found in UNCLOS and according to Article 19, all ships have the right of innocent passage in territorial waters. However, warships do face more regulations in Article 29. If the warship would not obey the laws of the coastal state, it can be ordered to leave. Menefee describes it as a very sensitive balance that has to be upheld between the coastal state and the naval state. Article 32 does make it clear that except that, nothing can affect the immunity of a warship or a governmental ship if it is being used for non-commercial purposes.

Archipelagic waters are regulated in almost the same way as territorial waters, but with one major exception. Article 53(1) makes it possible for the archipelagic state to suspend temporarily the right of innocent passage, but only if it is essential for the states security. In international straits (used for international navigation) two different regulations applies depending on the strait. Either a right of innocent passage as above or the more restrictive version called transit passage in Article 37 UNCLOS. The difference is that according to Article 39(1)(b) all ships that travel through the strait have to do so without any delay and they cannot use any force or threat of force against the territorial integrity, sovereignty or political independence of the coastal state. After looking at these Articles, Menefee finds that they make naval intervention in territorial and archipelagic waters and in international straits impossible. A foreign naval force simply cannot act against pirates in those areas unless the coastal state has given permission to do so. To be able to use foreign naval forces in such areas the states involved would have to conclude for example an agreement. Such an agreement could then be bilateral or multilateral or maybe a regional agreement.[93]

Another problem is that in many areas disputes over maritime boundaries make it almost impossible to know what state it is that should be enforcing the laws. There is also the problem of when one state takes enforcement

[92] S.P. Menefee, Foreign Naval Intervention in Cases of Piracy: Problems and Strategies, *The International Journal of Marine and Coastal Law*, p. 357
[93] Ibid. pp. 361-363

action against another when hostilities exist between the two states. Such a situation could then lead to even more political and diplomatic problems.[94] All of these problems were discussed during an international conference on modern piracy in April 1985 and December 1987 in Massachusetts at Woods Hole Oceanographic Institution. At those meetings, the participants discussed piracy and violence at sea and they made suggestions on how to improve enforcement.[95] Some of the suggestions made are to introduce a doctrine of reverse hot pursuit, a revision of the Geneva Convention and UNCLOS. They also considered the possibility of a new convention dealing with maritime hijacking, bilateral or regional treaties, to create an international dispute settlement mechanism, extend the application of related conventions, port state jurisdiction, to interpret terms in existing treaties in a liberal way or to rely on general principles of law concerning self-defence and self-help. All of these suggestions were made during the conference in 1985/1987, but many have also been suggested by other writers like Dubner and Goodman.[96]

[94] E.Ellen (ed.), *Piracy at Sea*, p. 171
[95] Ibid. p. 3
[96] Ibid. pp. 148-150

4 Differences Between Traditional Piracy and Modern Piracy

After looking at both traditional piracy as it has developed in international customary law and how it was codified in the Geneva Convention and in UNCLOS and the modern piracy or what kind of incidents that are common today. It is clear that they are very different in the way they are carried out and where the acts are carried out. The reasons behind those changes are many, but the world has changed considerably since the Greeks and the Romans were faced with problems of piracy and that is of course a major reason. Piracy is also an interesting example, as there really has not been a traditional uniform view. For example, when the Harvard Draft was discussed there was always at least two different views on all the Articles and it was the most popular or better view that in the end was chosen to be included. Dubner has commented on this and says that it is a problem that states after a period come to think of the conventions as the traditional views and that such a belief is not true. He further states that conventions are only of temporary nature and that they represent the understanding of certain problems at the time when the convention was concluded.[97]

The technology has improved so much and it allows pirates to use completely different methods today. The system of nation states that are equal and the delimitation of the seas and creation of different maritime zones and of course the jurisdiction over those different zones has played a part in changing piracy. Political changes around the world has lead to that acts that are committed for political reasons or just simply are terrorist attacks has increased and probably will continue to increase. The political piracy and terrorism at sea is something that has never been included in the conceptions of traditional piracy, but it has always been discussed and many has been arguing that it should be included in the definition of piracy. The question of territorial jurisdiction of one state and the universal jurisdiction of all states as well as when they come in conflict is becoming increasingly important when the areas that are under territorial jurisdiction are growing larger.

4.1 Changes Regarding Piracy

One of the biggest changes regarding piracy was when UNCLOS entered into force. Not the provisions regarding piracy as they still in most aspects were the same as in the Geneva Convention, but the fact that new jurisdictional zones were introduced. The territorial sea was then allowed to be extended up to 12 nautical miles from the previous 3 nautical miles that

[97] B.H. Dubner, *The Law of International Sea Piracy*, p. 159

had been accepted by most states. A completely new zone, the EEZ was introduced and then the states got certain jurisdictional rights in an area reaching up to 200 M. This did of course cause major changes regarding piracy since jurisdiction over piracy *jure gentium is* only allowed on the high seas and the high seas were now drastically reduced. That is especially the case with international straits. Such straits are often very important for international shipping and had before been included in the high seas, at least parts used to be high seas. The fact that the straits are used for shipping also means that they will attract pirates. The suppression of piracy has always been important and Article 100 in UNCLOS confirms that all states have a duty to cooperate to repress piracy:

> All States shall co-operate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.

According to Article 100, states are required to cooperate to repress piracy, but only on the high seas or in places beyond national jurisdiction. That creates a problem when it comes to the territorial sea. According to UNCLOS, there is no duty to cooperate in suppressing piracy in the territorial sea as this zone is under national jurisdiction of the coastal state as can be seen in Article 3 UNCLOS. The territorial sea is, however, the area where most pirate attacks occur and they are therefore left to national jurisdiction and single states to deal with.[98]

The origin of Article 100 in UNCLOS can be found in the draft articles and discussions of the ILC when working on the Geneva Convention. During their seventh session in 1955, the article was named Article 13 and in their comment, it states that it lays down a sound principle, but when they were preparing the Article, they discussed if it should be decided that Article 13 lays down a principle that cannot be challenged. In the end, it was not used, but the discussion shows that they saw piracy as an international crime. However, they could not agree if it would be seen as a violation of international law if a state fails to suppress piracy and that is why they instead used the wording "a sound principle".[99] According to Dubner, it also shows that Article 13 only was a statement of intent and not a duty for states to cooperate to suppress piracy on the high seas.[100] It was changed again during the eight session in 1956 (before the draft was sent to the General Assembly) when Article 13 was renamed Article 38 and they added the part, "or in any other place outside the jurisdiction of any State".[101]

As mentioned above, this limitation, that the attack has to occur on the high seas or in a place outside the jurisdiction of any state, can cause problems today when most cases of "piracy" occur in territorial waters and because of that they do not fulfil the criteria in Article 101 and cannot be seen as piracy *jure gentium*. Where "piracy" is most common today it is quite clear that it

[98] E.Ellen (ed.), *Piracy at Sea*, p. 139
[99] YBIL, Vol. I, 1955 p. 266
[100] B.H. Dubner, *The Law of International Sea Piracy*, pp. 109-110
[101] YBIL, Vol. II, 1956 p. 282

is not enough with territorial jurisdiction to fight piracy. Most of the states do not have enough resources to do so. Piracy is now very common in territorial waters around Africa and in Asia where poor states do not have the means it takes to effectively deal with the problem and maybe in some cases lack the will to do so. International law and UNCLOS do not solve this problem at all, in some aspects it even made it worse when the new maritime zones were included in Articles 3 and 57 UNCLOS.

The area of the Malacca Strait area is one of the worst affected areas in the world when it comes to "piracy" attacks. It is also one of the most important straits for the international trade and shipping and has one of the highest concentrations of ships in the world passing through.[102] Singapore Strait is one of the straits in the Malacca Strait that has been badly affected. 179 incidents were reported to authorities in Singapore during the period 1981-1984, but of those only 35 occurred in Singaporean territorial waters. The Singapore Strait is very narrow and connects the Malacca Strait with the South China Sea. This narrow Strait is also divided in three between Singapore, Malaysia and Indonesia when it comes to jurisdiction.

The problem can also be that it is not clear enough whose territorial waters it is to police. After that UNCLOS made it possible to extend the territorial waters, there are now more narrow straits with heavy traffic of ships that are completely under territorial jurisdiction or as in the case of the Singapore Strait even under the jurisdiction of three different states. Where piracy before could be committed in an international sense, it is no longer possible, because it is now territorial waters and in some cases disputed territorial waters with, for example over-lapping claims. That makes it even more difficult for the states involved to exercise jurisdiction in those waters. Since it is not high seas it cannot be piracy and it is instead classified as thefts or armed robberies.

The conclusion that was reached at the Woods Hole Seminars was that the participants thought that traditional jurisdiction over maritime matters has been divided in two. The national jurisdiction that covers everything except piracy that is under universal jurisdiction. They see two reasons why that system is not working any more. Those coastal states that have jurisdiction are unwilling to investigate alleged crimes because those crimes do not affect that state at all. The other reason they see is that very many crimes that occur on the high seas or against ships on the high seas are not acts of piracy and because of that, no government has jurisdiction over the crimes committed. They think that a solution could be if all criminal acts in international waters were put within the jurisdiction of all states, but they also conclude that it would not be accepted by states. However, such jurisdiction has existed previously and it was then called "Admiralty Jurisdiction" in old English law.[103]

[102] E.Ellen (ed.), *Piracy at sea*, p. 12
[103] Ibid. p. 235

4.2 Sovereignty of States and the Principle of Territorial Integrity

The fact that states are sovereign and have exclusive sovereign rights in their territory and then also in the maritime zones that are under their jurisdiction has lead to major problems regarding piracy and is now one of the biggest differences between the traditional piracy and the modern piracy. Because territorial seas and archipelagic seas are under the jurisdiction of a state, it is impossible for an act of piracy that occurs within that area to be classified as an act of piracy *jure gentium* and the only state that has jurisdiction to capture, prosecute and punish a pirate in such an area is the coastal state.

The principle of territorial integrity is a very well established principle and it prohibits the interference within the jurisdiction of states and forbids all use of force or threat of force against the territorial integrity of a state. It would be a violation of the territorial sovereignty if other states would get involved and decide to pursue pirates within the jurisdiction of another state.[104] Examples of the principle of territorial integrity can be found in Articles 2(7) and 2(4) in the UN Charter. It does cause problems because it can be used by pirates to find safe havens where they can base themselves and use as a starting point for their attacks. Even if the attack occurred on the high seas and qualify as an act of piracy according to UNCLOS and if perhaps, a warship of another state is pursuing the pirate ship, the pirate ship can easily avoid capture by escaping into the territorial waters of another state according to Article 111(3) UNCLOS. The universal jurisdiction over piracy is then no longer applicable and the warship cannot enforce any executive jurisdiction within another state's territory.

There are, unfortunately, plenty of states around the world where it would be safe for pirates to seek refuge and it would then effectively prevent other states from capturing the pirates and make sure that they are properly prosecuted and punished. The territorial jurisdiction over its waters and the sovereignty of the state is something that is guarded very carefully by most states. That is something that has changed considerably during the centuries, first of all that the areas that are under the jurisdiction of a state are now a lot larger. During different periods, the seas were dominated by, for example, the English or British navy and because it, more or less, ruled the seas, they could enforce executive jurisdiction almost everywhere and not worry about violating the territory of another state.

The regulation in UNCLOS has not changed and the view on jurisdiction over piracy in conventions has remained the same, that piracy can only occur on the high seas and that universal jurisdiction over piracy is only applicable on the high seas because of the states territorial jurisdiction and their sovereign rights in the waters under their jurisdiction. Even so, the truth is that in reality, piracy has changed. It is getting more and more

[104] M.N. Shaw, *International Law*, p. 443

common that piracy attacks occur in straits that are under the jurisdiction of a state, in archipelagic waters, in internal waters and even when ships are anchored at ports. All these incidents have for a long time been seen as being under the jurisdiction of a certain state because they occurred on their territory, but it is still the same sort of incidents that have been considered as being so dangerous and such a threat to international trade and shipping when it occurs on the high seas.

The view on jurisdiction over piracy might be starting to change, that the sovereignty of states will have to be considered as being less important than protecting the ships and crews from violent attacks. Even if states have exclusive sovereignty in their territory, they also have the duty to respect the rights of other states. This principle was first discussed in the Corfu Channel case. The International Court of Justice (the ICJ) did conclude that there is:

> …every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States[105].

This would make it necessary for all states to make sure that pirates are not allowed to attack ships within their territorial jurisdiction or that they are allowed to use their territory as a base from where they can attack ships on the high seas or as a hiding place they can return to after attacking ships.

Another important question is the example of Somalia as a failed state. What should be done about the problem of piracy in the territorial waters of Somalia when it is considered a failed state that does not have a functional government? The traditional view on jurisdiction over piracy is that it is the responsibility of the state to suppress piracy within its own jurisdiction, as can be seen in Articles 100 and 105 UNCLOS, but in a situation like the one in Somalia such expectations are unrealistic and impossible to fulfil. When a state is no longer functioning, it cannot be expected to be able to police its waters or airspace for that matter. It leaves the waters open for all sorts of criminal behaviour and makes it easy for pirates to attack ships within the territorial waters or to prey on ships further out on the high seas and then escape back into the safety of the Somali waters.

The traditional view on jurisdiction over piracy and UNCLOS does not provide a solution for this kind of situations. Some other solution will therefore be necessary when there is no functioning government. Not even regional agreements would be of any help, as there is no government to cooperate with and no government that can allow warships or perhaps patrol boats belonging to other states to police the area. It would be a violation of the sovereignty of Somalia to have warships belonging to other states patrolling their waters, but to make sure that international shipping continue to use their ports something has to be done to ensure the safety of those ships. It is also important when considering how to improve the situation for the people of Somalia it is necessary that ships transporting, for example, food and medicine and other supplies can get through and trying to restrict

[105] Corfu Channel case, p. 22

the number of weapons that are smuggled in or bought for ransom money from hijacking ships and its crew.

5 Consequences of the Changed Views on Jurisdicition

The major problem is that the view on jurisdiction over piracy that has been codified in the different conventions is the traditional one. That piracy *jure gentium* falls under the universal jurisdiction of all states, but only on the high seas. It means that the territorial jurisdiction of states has been seen as more important and it was not a big problem when most piracy attacks were carried out on the high seas. That view is starting to change now when most piracy attacks occur within the jurisdiction of states and when those states are left to face the problems alone. Many of those states also find themselves to be incapable of suppressing piracy in their own waters. The result is that the same kind of incidents at sea that always have been seen with such disgust that it became a problem for all states is now increasing, but no state can do anything about it because the traditional view on jurisdiction is still what has been codified in UNCLOS.

Many different solutions have been suggested to improve the ability of states to suppress piracy. Among them are to revise and change UNCLOS, to extend the executive jurisdiction to apply in areas that are under the jurisdiction of a state, to include terrorism at sea in piracy and other solutions like allowing reversed hot pursuit or conclude regional agreements and to cooperate to suppress piracy.

5.1 Revision or Changes of UNCLOS

The first solution that comes to mind is that if the regulations in UNCLOS are no longer effective to fight piracy then they have to be changed. If a revision would be made of the Convention, developments that are more recent could be included, for example the fact that most incidents now occur in internal or territorial waters of states and not on the high seas. After the Achille Lauro incident it could also be an idea to include terrorist acts where internal seizures of ships are made as such incidents may become more common. The definition could then be changed to include acts committed for political ends as well as private ends. It is, however, very unlikely that all the participants would be able to agree on such changes or additions to the Convention. Even if states would be able to reach such consensus it would undoubtedly take a very long time.[106]

The possibility of changing the provisions on piracy was thought of in 1985/87 as well, but then it was the Geneva Convention that would have needed revision. Since then UNCLOS has entered into force and more or

[106] E. Ellen (ed.), *Piracy at Sea*, p. 148

less superseded the Geneva Convention, as most states are now members of UNCLOS. The member states did not take the opportunity that was offered to make any changes when concluding UNCLOS. Therefore, changes will now have to be made in UNCLOS and since nothing has happened in 20 years, it seems that this is not one of the most popular suggestions.[107]

5.1.1 Inclusion of Terrorism at Sea and Maritime Hijacking in Piracy or in Other Conventions

It is not very controversial to say that terrorism seems to be increasing all around the world and terrorists have targeted everything from airplanes to trains so the idea that ships should be an exception might be very dangerous indeed. There have already been a number of terrorist attacks against ships, like the Achille Lauro, and the number is increasing. Terrorism at sea is today a threat that is very real and that has to be taken seriously.[108] Terrorism and all political piracy have been excluded from Article 101(a) UNCLOS and it cannot be treated as piracy or fall under the universal jurisdiction that applies to piracy *jure gentium*. It means that the traditional views on piracy do not include terrorism, but the reality in the modern world is that such incidents are getting more common and probably will continue to increase.

Either terrorism could be included in piracy, or it could be dealt with in a separate convention. Both solutions have been suggested, but the most realistic seem to be a new convention. That idea has been pursued by the IMO. It would then create a new offence called maritime hijacking. It has been suggested that it could be made by a new treaty. The new treaty could then be similar to the ones made to suppress aircraft hijacking (Tokyo, Hague, and Montreal Conventions). The offence would then include single ship hijackings by political groups for political ends. It would though still encounter the same problems as a revision of UNCLOS would, that not all states would be willing to participate because the number of maritime hijackings is quite small and states do not see the need for such a convention. If only a few states would be participating such a convention would not make a very big difference.[109]

The IMO did adopt a Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation on March 10, 1988 and it entered into force on March 1 1992. It was the increasing problem of violence at sea that made the IMO consider a new convention and in December 1985 the United Nations General Assembly wanted the IMO to study terrorism against ships and to recommend appropriate measures. In November 1986, Austria, Egypt and Italy did propose that the IMO should prepare a convention of unlawful acts against the safety of maritime navigation and it

[107] B.A.H. Parritt (ed.), *Violence at Sea*, pp. 201-202
[108] Ibid. p. 17
[109] Ibid. p. 202

was later adopted in Rome 1988. The purpose is to make sure that action is taken against those that commit unlawful acts against ships like seizing ships by force, use violence against crew or passengers onboard a ship and to place devices that can damage or destroy the ship onboard. The Contracting States are required either to prosecute or to extradite suspects. The Convention was amended in 2005 and it was adopted on 14 October, but it has not entered into force yet.[110]

Halberstam commented on the Convention before it was adopted and she then referred to the draft articles, but her comments are still interesting.[111] She describes the Convention as being modelled after other conventions that regards aircraft hijacking and sabotage (like Hague and Montreal Conventions). Even though it is called "Convention for the Suppression of Unlawful Acts Against the Safety at Sea", Halberstam believes that it is mainly created to apprehend, convict and punish people that commit violent acts at sea than to suppress such acts. One thing the Convention has in common with other anti-terrorist conventions is that they are required to either prosecute or extradite all offenders (Article 10(1)). Such provisions can also be found in the Hague Convention Article 7 and in the Montreal Convention Article 7. The IMO Convention is thus not dealing with piracy, but instead other violent acts at sea that do not fit the definition of piracy.[112] The Convention was mainly created because of the outrage that was caused by the Achille Lauro incident where a passenger in a wheelchair was murdered. It received a lot of attention and led the United Nations General Assembly and the Security Council to condemn terrorism.[113] The IMO Convention was one way of dealing with those offences that could not be classified as piracy, but still is a major threat to people at sea and international shipping.

5.1.2 Doctrine of Reversed Hot Pursuit and the Right of Visit

The "normal" doctrine of hot pursuit has been discussed above and it has for a long time been a way of capturing alleged criminals that have violated laws of the coastal state. It was first limited to acts in territorial waters, and then expanded to some acts committed in the contiguous zone in the Geneva Convention and then further expanded in UNCLOS Article 111 to include some acts in the exclusive economic zone. That is, however, not of so much help when fighting piracy. A new doctrine of hot pursuit, a reversed version, has therefore been suggested. A state would then instead be allowed to pursue an alleged pirate from the high seas into the jurisdictional waters of another state. The exclusive economic zone and the contiguous zone are

[110] R.R. Churchill & A.V. Lowe, *The Law of the Sea*, pp. 210-211
[111] M. Halberstam, Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety, *The American Journal of International Law*, p. 269
[112] Ibid. pp. 291-292
[113] Ibid. p. 295 & GA A/Res/ 40/61 (Dec., 1985) & SC Res. 579(XXXX) (Dec., 1985 paragraph 13)

considered as high seas except for some particular exceptions when it is under territorial jurisdiction of the coastal state. A warship can therefore enter and capture alleged pirates in those areas, but since the coastal state has sovereignty over their territorial waters, a foreign warship can never enter other states territorial waters to capture a pirate without consent from the coastal state and that is causing problems today when more and more piracy attacks occur in territorial waters.[114]

The problem with the right of visit and hot pursuit is if states abuse their rights and claim that they have suspicions of piracy when their real interest is to see whether the ship is transporting for example weapons to a state that might be in conflict with the state that is enforcing a right of visit. Article 110(1.a) UNCLOS only requires reasonable grounds to believe that the ship is a pirate ship and anyone that is interested in finding out what a ship is transporting could easily claim such suspicions. According to UNCLOS they would, however, be liable for any damage that is caused if the seizure was ungrounded. The right of visit and hot pursuit did also in fact exist in customary law and did then allow warships to verify the nationality of merchant ships on the high seas, but it was limited and in peaceful times, they could only approach a merchant vessel if it was to repress piracy. All other interference with ships on the high seas was forbidden because international law guaranteed ships freedom of navigation when it was peace.[115] To allow a reversed hot pursuit could make the enforcement of executive jurisdiction more effective, but the question remains of how to ensure that states do not abuse the right and that the freedom of navigation not is violated.

5.1.3 Bilateral or Regional Treaties

The IMO included in its draft convention that it would not be needed to conclude bilateral and regional treaties, as it would fall automatically under the extraditable offences. A bilateral treaty could then be based on extradition like the one between the United States of America and Cuba concerning hijacking of aircraft and vessels. Regional treaties could be helpful in the areas where piracy is most common. The problems those states usually have is that they do not have the enforcement capabilities, for example in Southeast Asia and in Africa.[116]

Goodman has also suggested regional solutions. He believes that the international regime of today does not have any effective enforcement mechanisms and, therefore, it is not possible to suppress piracy.[117] Even if international laws on piracy exist, they are not used or enforced. It is important to protect individuals and international shipping. Goodman's

[114] E.Ellen (ed.), *Piracy at Sea*, pp. 164-165
[115] N.D. Joyner, *Aerial Hijacking as an International Crime*, p. 36
[116] E.Ellen (ed.), *Piracy at Sea*, p. 149
[117] T.H. Goodman, Leaving the Corsairs Name to Other Times: How to Enforce the Law of Sea Piracy in the 21st Century through Regional Agreements, *Case Western Reserve Journal of International Law*, p. 141

suggestion is to do so by regional agreements in the worst affected areas like Africa and Southeast Asia and he gives an example of what such an agreement could look like.[118]

Regional anti-piracy regimes have been proposed before, but Goodman believes that a plan of action of how to create such regimes is needed even more now when acts of piracy keep increasing in number. A regional approach is needed because all areas are different. For example, different methods are used when committing piratical acts and there are different causes to commit piracy.[119] Another reason is that acts of piracy usually take place within a states jurisdiction. Goodman believes that international law limit states when trying to fight piracy, because Article 100 UNCLOS does not create an authority that can make sure that states actually do repress piracy and no effective anti-piracy enforcement is encouraged or coordinated.[120]

Instead, groups of states should enforce regional anti-piracy mechanisms and conclude multilateral agreements on piracy.[121] He believes that UNCLOS allows such regional regimes to be created and he bases that opinion on Article 311(3) as long as the regional agreements are consistent with international rights and obligations.[122] Goodman proposes that regional piracy charters should be linked to multilateral regional agreements, like OAS and NAFTA that already exist. That would be a way of improving effectiveness and to avoid that the final agreement would be a compromise between many different interests. It is much more likely that a few states will be able to reach the best possible result than that many states would. He suggests that in Africa the OAU would be a good choice and in Southeast Asia ASEAN.[123]

Goodman believes that a change in international law would have to be made. States are allowed to suppress piracy and arrest pirates according to Article 105 UNCLOS (universal jurisdiction), but to get unwilling states to enforce such laws on piracy he sees it as necessary that the pirate is delivered and prosecuted in the state most affected by the piratical act. He also suggests a "Piracy Commission", an institution that can judge which state that is most effected by an act of piracy and then make sure that extradition is taken care of if needed. [124] Menefee has also discussed bilateral and regional agreements on maritime terrorism and he believes that it could be a possible way of dealing with the problem of piracy, but also says that it would take a lot of time and effort to create such agreements and that it is dependent on the interest of states in different regional areas.[125]

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[118] Ibid. p. 142
[119] Ibid. p. 154
[120] Ibid. p. 156
[121] Ibid. p. 157
[122] Ibid. p. 158
[123] Ibid. pp. 161-162
[124] Ibid. pp. 164-165
[125] B.A.H. Parritt (ed.), *Violence at sea*, p. 202

5.1.4 An International Dispute Settlement Mechanism

The proposition that a court with compulsory jurisdiction is created has been suggested by both Dubner and in the Harvard Draft. At the time of the Woods Hole meetings (1987), the participants thought that it was not the right time for such an International Criminal Court.[126] Since then an International Criminal Court (the ICC) has been established which means that the situation might be different today. However, the ICC does not have jurisdiction over acts of piracy according to its Article 5, but a similar solution might be possible. The suggestion made by Dubner is that jurisdiction would be placed within the competence of a dispute settlement mechanism. The international tribunal could then be of compulsory nature and be given jurisdiction to prescribe penalties. Dubner states that the tribunal would then be able to determine if piracy has occurred, how serious the offence is and then prescribe a punishment. He sees that as the ultimate goal, that if municipal laws no longer could prescribe or enforce penalties over acts of international piracy or terrorism. He also thinks that this would make it easier for coastal states to act if it is an international tribunal that exercise jurisdiction because they would not have to be afraid of reprisals.[127] Goodman does not believe that a supranational criminal court would be a good solution. He states that the establishment of a regional piracy court could be an option. In his opinion the Piracy Commission, as described above, is a better solution since there is no international criminal code that applies to piracy and could be used by a court and because he thinks that states might be unwilling to have a regional court with jurisdiction over its nationals.[128]

5.1.5 Interpreting Terms in Existing Treaties Liberally

The suggestion here is that Article 31 of the Vienna Convention on Treaties could be used to interpret terms like “private ends” in a more liberal way. Authors like Birnie and the IMB suggest that Article 31 requires that a treaty be interpreted in a way that makes it effective if there is any doubt to its meaning and that terms like “private ends” have to be interpreted. The interpretation cannot be made in conflict with the object and purpose of the treaty. Article 31(4) of the Vienna Convention also makes it possible to attribute a special meaning to a term if the “normal” meaning in its context does not support the interpretation. They think it should be possible since the object and purpose of UNCLOS is suppression of piracy and if it can be said that there is no clear meaning of “private ends”. They do state that the

[126] E. Ellen (ed.), *Piracy at Sea*, p. 149
[127] B.H. Dubner, *The Law of International Sea Piracy*, pp. 161-162
[128] T.H. Goodman, Leaving the Corsairs Name to Other Times: How to Enforce the Law of Sea Piracy in the 21st Century through Regional Agreements, *Case Western Reserve Journal of International Law*, pp. 165-167

problem would still be that if not all states would agree to that interpretation it would just make the situation even worse if different states use different interpretations.[129]

Menefee has also made the same suggestion and he believes it could be an advantage that it has proved difficult to define terrorism. The reason for that is that it could allow agreements to be used against political piracy. He questions whether the use of for private ends in UNCLOS really prevents the use of piracy laws on terrorist acts. Even if the Santa Maria is accepted as a political act, it does not mean that the Achille Lauro necessarily was. In that case, it was an Italian ship and an American man that was killed and Palestinians committed the attack. He then believes that there is a point when "political connections become to tenuous" [130]

5.1.6 Other Suggested Solutions

In addition to the suggestions referred to above, it has also been proposed that an extension of the application of related conventions could be used. This view has been adopted in the IMO draft convention and the relevant convention would then be the 1979 Convention Against the Taking of Hostages, Article 5. That Article applies to hostage taking as offences on board a ship registered in state party as well as offences committed in a territory. After the Achille Lauro incident, the United States of America referred to that convention and the idea is then that conventions that are not specifically devoted to terrorism at sea still could be useful when dealing with such incidents.[131]

Menefee believes that it could be a good idea to try to increase the number of ratifications of the useful conventions that already exist than to just try to negotiate new conventions.[132] Port state jurisdiction is another possibility. It is a new concept that was introduced in Articles 218 and 220 UNCLOS and they could then be extended to make it possible for states to enforce jurisdiction against hijackers of a ship if it enters their ports. It would be allowed even if the act took place on the high seas, in the exclusive economic zone or in the territorial seas of another state, but only if that state requested it.[133]

Discussions took place between the participants during a workshop in 1985 at Woods Hole Oceanographic Institute. The topic was the control of piracy and one comment made by Walker was that even if laws and rules exist or are created they are nothing if they are not enforced.[134] Walkate then expressed the opinion that it is important to have actual and recent information to be able to do anything like perhaps drafting articles or some

[129] E. Ellen (ed.), *Piracy at Sea*, p. 150
[130] B.A.H. Parritt (ed.),*Violence at sea*, p. 203
[131] E. Ellen (ed.), *Piracy at Sea*, p. 150
[132] B.A.H. Parritt (ed.),*Violence at Sea*, p. 202
[133] E. Ellen (ed.), *Piracy at Sea*, p. 150
[134] Ibid. pp. 231-232

sort of bilateral or multilateral action. He also said that it is important that flag states do not become less vigilant when piracy attacks are less frequent since that usually leads to the number of attacks increasing again. He therefore wanted the IMB to continue to collect information on piracy attacks and other maritime crimes. That is what the discussion mainly was about: how to enforce the laws in an effective way.

Harlow then talked about the importance of having some sort of international cooperation and coordination to be able to deal with maritime crime, as there is no single solution. He proposed more regional and bilateral discussions and he did not think that a new UNCLOS would be the right solution. [135] The participants at the meeting thought that it will become more common to rely on general principles of law and they gave the example of how the United States of America acted after the Achille Lauro incident. They believe that it would be better if international law make better use of legitimate means of action that already exist than to resort to unilateral action in response to, for example, terrorist attacks on ships. They think that it would be in line with the purpose of first creating laws against international piracy to ensure safe navigation, economic development and for humanitarian reasons.[136]

[135] Ibid. p. 227
[136] Ibid. pp. 150-151

6 Conclusion

Has the views on jurisdiction over piracy changed? My answer would be both yes and no. The views that have been codified in Conventions, for example in UNCLOS, have not changed, there have always been different views on jurisdiction over piracy and the fact that some were chosen in different conventions does not mean that the views by states and different writers have not changed on the subject. The question is though if the views on jurisdiction have changed enough to lead to any changes in, for example, UNCLOS or as other possible solutions for the problems, that concerns piracy.

It would be wrong to think that piracy is an obsolete problem and therefore do not need to be discussed or changed. There is no doubt that piracy still is a major problem in big parts of the world and is a threat against international shipping, but above all, a threat to people working and travelling on the seas. However, it is not the traditional kind of piracy that takes place on the high seas that is a problem any more, and instead, the pirates now work within territorial waters and within the jurisdiction of a state. That means that the acts cannot be classified as piracy according to international law.

The first real definition of piracy in international law was made in the Harvard Draft in 1932. Already at that time the drafters realised that the law of piracy has to change when international law change. When the Harvard Draft was concluded, it was new with a jurisdiction based on territoriality. That was 74 years ago and the world, as well as international law has undoubtedly changed considerably since then, but the law of piracy remains, in many aspects, the same as it was in 1932. Ever since then the same problems concerning the definition of piracy, the jurisdiction over piracy and the enforcement of the jurisdiction by states have been discussed, but it has not lead to any major changes in the definition of piracy.

The definition of piracy in the Harvard Draft, the Geneva Convention and in UNCLOS strictly limit incidents that occur on the high seas or in a place outside the jurisdiction of any state as acts of piracy. The biggest problem with that is that most incidents today, as have been shown, do not classify as acts of piracy. This means that the unique universal jurisdiction that applies to acts of piracy cannot be enforced and instead it will be left to the coastal states to deal with the problem of piracy in their territorial waters on their own. However, I do believe that it would be highly unlikely that the definition of piracy would change. I do not think that all Parties to UNCLOS would be able to agree on another definition, especially not when if they at the same time would have to give up some of their own sovereignty to allow an expansion of the universal jurisdiction into areas that are currently under territorial jurisdiction of a state. In my opinion, it would be more important to suppress piracy in the areas that are badly

affected than to protect the states sovereignty in the territorial waters. The purpose is of course not to violate the sovereignty of a certain state, but to make sure that international shipping can function properly and not to endanger the lives of the crews and passengers.

Acts of piracy could also be a major threat to the environment in many sensitive areas of the world. If a large tanker would be left unmanned during a pirate attack in, let us say the narrow and crowded Singapore Strait; it could lead to a disaster. The environment and the lives of the people in the area would be in grave danger. Such an event could also seriously damage shipping that carry important cargo to businesses around the world. That is why I find it so important to fight acts of piracy. To be able to do so effectively, states will have to cooperate. The definition of piracy in international law is, in my opinion, a problem that has to be solved.

Another problem with the definition is that is excludes acts committed for political ends. A terrorist attack on a ship on the high seas would not fall under the category of piracy in UNCLOS. Universal jurisdiction is therefore not applicable in such situations. In the world of present time, it is unfortunately necessary to try to make it as impossible as possible for terrorists to attack ships and again cooperation of states will be very important. Terrorism has, however, acquired a lot more attention than piracy in recent years and even though it has been suggested that acts committed for political ends should be included in the definition of piracy I do not think that it would be a good solution.

Firstly, I doubt that states would agree to include political acts. A separate convention (like the IMO Convention) is probably more suitable to deal with acts committed for political reasons or terrorism. I think that Halberstam made a very interesting comparison between piracy and terrorism at sea. She believes that the same ground that is used to justify universal jurisdiction in cases of piracy would work on terrorism as well. Pirates are enemies of all mankind just as terrorists are at present time when no state would take responsibility for their acts and they are therefore a threat to all states. I believe it is true that terrorists are the enemies of all mankind, but I still do not think that it would be a good solution to include terrorist acts at sea in the definition of piracy, especially not when it has proved so difficult for states to define terrorism.

To include such a controversial topic in the definition of piracy that already has been discussed for centuries without states finding a good solution would only make the matter worse. It is also important that states do not resort to the same kind of techniques as the terrorists themselves when trying to suppress terrorism at sea and piracy. It cannot be accepted that a state would use terror or unlimited violence to fight those problems. The states would then behave like terrorists to fight terrorism or they would become pirates to fight pirates. They would themselves have become what they see as enemies of all mankind.

My conclusion regarding the definition of piracy in international law is that it is clear that such a definition exists, but it does no longer relate to the real problem. The definition was created to deal with a problem in the way it looked a long time ago and it is not of much help when it does not apply to most incidents that occur in present time. The definition also causes problems with jurisdiction and enforcement of that jurisdiction by states.

6.1 Executive Jurisdiction

The most urgent problem is in my opinion the enforcement. Even if a much broader definition would exist that would apply to all incidents, it would still be of no use if states do not enforce the laws on piracy. All other attempts, like a new definition or no matter how much information and statistics that can be gathered by, for example, the PRC it will do nothing to improve the situation if no enforcement action is taken. I believe it is an area where changes are needed. If the definition of piracy is not changed, and I do not believe it will, then something has to be done about the problems that UNCLOS cause for states that try to enforce their jurisdiction over piracy.

Since most attacks occur within the jurisdiction of a state, it means that the coastal state will have to act on its own to try to capture the pirates because there is no duty in UNCLOS for states to cooperate to suppress piracy in such areas. Most of the states affected by piracy are poor states and in some cases with weak government or perhaps even without a functioning government like Somalia. However, UNCLOS Article 107 does require that a warship or a ship that is clearly marked as being in governmental service make a seizure of a pirate ship. That provision makes it impossible for many states to try to enforce the laws on piracy. They simply do not have that kind of ships they can use and of course, if there is no government, there will be no warships or ships in governmental service. The fight against piracy would probably not be the most urgent problem in such areas either. If people starve and are very poor they might see ships as an easy target, where valuable items can be found, then I doubt that a weak government would spend much time and effort on suppressing such activity.

If universal jurisdiction is not allowed within areas where a state usually have territorial jurisdiction then it is entirely up to the coastal state to take enforcement action, provided that they even have laws on piracy to enforce. The right of hot pursuit in Article 111 UNCLOS also affects enforcement. As has been seen, only coastal states can start a hot pursuit and continue it outside the territorial waters and into the high seas, but that right ceases as soon as the pirate ship enters the territorial waters of another state. Many poor states are not capable of conducting such a pursuit and the pirates will then walk free. When incidents of piracy according to international law occur on the high seas the right of hot pursuit is again a problem, as it does not allow states to begin a pursuit on the high seas or to follow a pirate ship into the territorial waters of another state.

The doctrine of reversed hot pursuit that has been suggested by for example Dubner, would make such a pursuit possible and it would increase the chance that a state would be able to enforce its universal jurisdiction on the high seas. I do not believe that such changes will be made and it is because of the same reasons as above that concern the definition. States are too protective of their sovereignty in their territorial waters. So if changes of the Articles in UNCLOS are not very likely to happen, then what can be done?

In my opinion, the best solution would be if states in badly affected areas would conclude regional agreements and work together to fight piracy and if the rest of the international community would provide help and assistance when needed. As Goodman states, there is nothing in UNCLOS that would make it impossible to conclude such agreements, on the contrary, Article 311(3) UNCLOS allows such agreements as long as they are consistent with international rights and obligations. I believe that regional agreements are necessary because then the states involved can reach agreements that suit the situation in the particular area the best. The fact is that piracy does not look the same everywhere. It is obvious that the techniques used can differ as well as geographical circumstances, and of course, what causes people to commit piratical attacks. All those things have to be taken into consideration when concluding an agreement. It will be easier for fewer states in a specific region to reach the best possible solutions than if all states, or at least a lot more states, would be involved that perhaps do not understand the particular problems in a certain region.

The states involved could then cooperate to suppress piracy by allowing warships or other governmental ships, like coast guard, to patrol in their territorial waters and allow such ships to help catching and seizing pirate ship when the coastal state lack the resources to do so. It would make sense to share the burden of such expensive, but necessary, measures. If neighbouring states cooperate, it could also prevent that pirates walk free because they are hiding in another state. That state could either extradite the alleged pirate or prosecute the pirate in its own courts. It is interesting when looking at Article 100 in UNCLOS that it only states that all states shall cooperate to repress piracy on the high seas. Does that mean that it is a duty to do so? What would happen if a state would refuse or not be capable of doing so?

It is clear that no such duty applies to the territorial waters. That is of course an obstacle when fighting piracy. States are required to cooperate in an area (the high seas) where only a minority of the incidents occur today, but not in the areas where “piracy” now is most common. If it is accepted that it actually is a duty to repress piracy, then it should be possible that it could lead to state responsibility according to Article 2(b) ILC-Draft. It would then constitute a breach of an international obligation and therefore be an internationally wrongful act that the state would have to take responsibility for according to the ILC-Draft. It is an interesting possibility for injured states to invoke responsibility if a state would refuse to cooperate to repress piracy on the high seas. The problem is, however, that the incidents do not

occur on the high seas and the need for cooperation is not as urgent on the high seas as it is in other areas. It is also a question if other states would take such action against a state that might be poor and underdeveloped if it does not cooperate in the fight against piracy.

If a state cannot enforce its own laws in its territorial sea then I find it unlikely that such a state would be able to fight piracy on the high seas. I do not think that measures involving state responsibility would solve any problems with piracy because Article 100 UNCLOS only concern piracy that occur on the high seas. Another possibility that might be more useful is the principle that states have a duty to respect the rights of other states. As mentioned before, it means that if a state would fail to act against known activities within its own jurisdictional territory that would violate the rights of other states it can lead to state responsibility. It is more promising because it actually applies to the states own jurisdictional territory like the territorial waters, archipelagic waters or internal waters. Those are the areas where piracy incidents are most common.

To me, acts of piracy are clearly a violation of other state's rights. Like the right to innocent passage, to be able to use ports in other states and, of course, not to have ships and nationals attacked and, in some cases, even killed. Even though it would be possible for an injured state to invoke state responsibility, in many cases it would not improve the situation. It might be a solution if states only were unwilling to enforce laws on piracy, but in most cases, it is because the states do not have the resources. No matter how responsible the state is, it will not solve anything, if there is nothing the state can do to prevent it. That is why I find it is so much more important for states to cooperate, to conclude regional agreements and to allow foreign warships in the areas that are worst affected by piracy. Then the states would also be acting in compliance with their obligations to protect the rights of other states within their territory.

When thinking of the situation in Somalia as described earlier it is clear that such well-organized pirate groups have to be dealt with. In the case of Somalia, the pirates do commit acts that can be classified as piracy according to international law and not only acts that are committed within the Somali territorial waters. They can then be arrested and prosecuted by any state according to UNCLOS and foreign naval ships can operate on the high seas in the area to help patrol and capture such pirates. They will, however, encounter problems if the pirates manage to get back into the territorial waters of Somalia. They will then have no right to pursue the pirates into that area and since there is no government in Somalia that can assist and capture the pirates, they will get away.

It would be even more important that such instable states get help to patrol their waters by foreign warships or patrol boats. The pirates in the area use a lot of the money they can get from demanding high ransoms, on buying arms and other equipment that will be used to commit crimes against other ships and civilians in Somalia. The problem would be that in Somalia there

is no government to cooperate with or get permission from to patrol the waters. If regional agreements are going to work, they will of course have to be concluded between functioning governments.

The question is then if the views on jurisdiction over piracy under international law have changed enough to make it possible to enforce the executive jurisdiction in an effective manner. The codified regulations that apply to piracy have not changed since 1958, but I do believe that the views on jurisdiction in the worst affected areas have changed. Will those states really be willing to sacrifice some of their sovereignty over their territorial waters to be able to fight piracy by cooperating with other states? That remains to be seen in the future.

Bibliography

Articles

Goodman, T.H. — Leaving the Corsairs Name to Other Times: How to Enforce the Law of Sea Piracy in the 21st Century through Regional Agreements, *Case Western Reserve Journal of International Law*; Winter 1999; Vol. 39, pp. 139-168

Halberstam, M. — Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety, *The American Journal of International Law*, Vol. 82, No. 2, (Apr., 1998), pp. 269-310

Menefee, S.P. — Foreign Naval Intervention in Cases of Piracy: Problems and Strategies, *The International Journal of Marine and Coastal Law*, Vol. 14, No. 3 (1999) pp. 353-370

O'Keefe, R. — Universal Jurisdiction - Clarifying the Basic Concept, *Journal of International Criminal Justice* 2 (2004), pp. 735-760

Rubin, A.P. — Is Piracy Illegal? *The American Journal of International Law*, Vol. 70, No. 1 (Jan., 1976), pp. 92-95

Books

Churchill, R.R. & Lowe. A.V. — *The Law of the Sea,* third edition, (Manchester, University Press), 1999

Dubner, B.H.	*The Law of International Sea Piracy*, (The Hague, Martinus Nijhoff Publishers), 1980
Ellen, E. (editor)	*Piracy at Sea*, (Paris, ICC Publishing), 1989
Joyner, N.D.	*Aerial Hijacking as an International Crime*, (Oceana/ Sijthoff), 1974
Mueller, G.O.W. & Adler, F.	*Outlaws of the Ocean- The Complete Book of Contemporary Crime on the High Seas*, (New York, Hearst Marine Books), 1985
Parritt, B.A.H. (editor)	*Violence at Sea: a review of terrorism, acts of war, and piracy, and countermeasures to prevent terrorism*, (Paris, ICC Publishing), 1986
Rubin, A.P.	T*he Law of Piracy*, second edition, (New York, Transnational Publishers), 1998
Shaw, M.N.	*International Law*, fifth edition, (Cambridge University Press), 2003
Wheaton, H.	*Elements of International Law*, the literal reproduction of the edition of 1866 by Richard H. Dana, Jr, edited and with notes by George G. Wilson, (New York, William S. Hein & Co), 1995

Treaties

26 June 1945,	Charter of the United Nations, Multilateral, San Francisco
29 April 1958,	Convention on the High Seas, Multilateral, Geneva, UNTS vol. 450, pp. 82 ff

10 December 1982,	United Nations Convention on the Law of the Sea, Multilateral, Montego Bay, UNTS vol. 1833, registration number 31363
10 March 1988	Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Multilateral, Rome

United Nations Documents

YBIL, 1955 volume I	Summary Records of the seventh session, 2 May- 8 July 1955, A/CN.4/SER.A/1955
YBIL, 1956 volume I	Summary records of the eighth session 23 April- 4 July 1956
YBIL, 1956 volume II	Documents of the eighth session including the report of the Commission to the General Assembly, A/CN.4/SER.A/1956/Add.1
UN document	A/CONF.13/L.62
UN document	A/CONF.13/40 (UNCLOS 1, 1958, U-192)
United Nations Security Council,	Letter dated 4 May 2006 from the Chairman of the Security Council Committee established pursuant to resolution 751 (1992) concerning Somalia addressed to the President of the Security Council, S/2006/229
General Assembly Resolution	A/RES/40/61
Security Council Resolution	Resolution 579 (XXXX), (1985)

Miscellaneous

BBC homepage news — On this day 7 October 1985: Gunmen hijack Italian cruise liner, last viewed on 27 October 2006 at 14.15, http://news.bbc.co.uk/onthisday/hi/dates/stories/october/7/newsid_2518000/2518697.stm

BBC homepage news — Somalia's dangerous waters, last viewed on 27 October 2006 at 14.26, last updated 26 September 2005, http://news.bbc.co.uk/2/hi/africa/4283396.stm

BBC homepage news — Pirates hijack tsunami aid ship, last viewed on 27 October 2006 at 14.28, last updated 30 June 2005, http://news.bbc.co.uk/2/hi/africa/4636695.stm

BBC homepage news — Kenya probes Somalia ship hijack, last viewed on 27 October 2006 at 14.35, last updated 12 October 2005, http://news.bbc.co.uk/2/hi/africa/4334220.stm

General Introduction — *The American Journal of International Law*, Vol. 26, Supplement: Research in International Law. (1932), pp. 1-14

Harvard Research — IV- Piracy, *The American Journal of International Law*, Vol. 26, Supplement: Research in International Law. (1932), pp. 739-885

ICC/IMB — Piracy and Armed Robbery Against Ships, Report for the Period 1 January- 30 June 2006

ICC/IMB — Piracy and Armed Robbery Against Ships, Annual Report 1 January- 31 December 2005

Table of Cases

Corfu Channel Case	(United Kingdom v. Albania) (Merits), International Court of Justice, Year 1949, April 9th, No. 1
The Lotus Case	(France v. Turkey), PCIJ Series A. - No. 10, September 7, 1927
In re Piracy Jure Gentium	A.C. 1934