

# **When is a Pirate a Pirate? The Evolution of Piracy and Maritime Sovereignty**

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## **Introduction**

It was likely not long after humanity devised the technological capacity to build seagoing vessels that the first instance of maritime piracy occurred. By the time that humans were recording incidences of maritime piracy, it is obvious from the records that these events, though unwelcome, were not unfamiliar to the peoples of antiquity. Thus, the resurgence of maritime crime in the late 20<sup>th</sup> and early 21<sup>st</sup> centuries CE is hardly a new or unique phenomenon. Outbreaks of maritime crime have plagued states across time as diverse as Pharonic Egypt, Greek city-states, Rome, England, France, Spain, the United States, China, and Singapore. While piracy may seem like a simple act to conceptualize and define, the term piracy has come to be used to describe activities as diverse as downloading music from a peer-to-peer network, or copying a DVD for a personal archive or sale on the black market. This makes piracy both a term that a majority of the populace is familiar with, and yet one that can be used to describe a wide array of actions that have nothing to do with maritime commerce or seaborne vessels.

The current academic literature focuses on two competing definitions of maritime piracy (Hastings 2009, Murphy 2009, Ong-Webb 2006, Young 2007, Kraska 2011). The United Nation's (U.N.) draws on centuries of legal precedent and concern regarding state sovereignty and the attempt to balance the independence of states with the shared responsibility of ensuring a global public good. In this case, that is the ability to conduct unhindered interstate maritime trade (United Nations 1982). The second, advanced by the International Chamber of Commerce, considers maritime theft in both domestic and international waters to be acts of maritime piracy (2003). While similar, these conflicting definitions impact the legal enforcement of current outbreaks of maritime piracy, as well as policy to prevent future acts.

The objective of this paper is to focus strictly on maritime crime and analyze how the concept of maritime piracy has evolved over time, from ancient states through to the modern era, culminating in the establishment of the current definitions of maritime piracy

and maritime armed robbery adopted by the U.N. Discussing the evolution of maritime crime as a concept contributes to the current academic literature regarding maritime crime by illustrating that maritime piracy is not a clear cut and static concept. For example, the contemporary usage of piracy in international law does not refer to the same actions described in the epic poems of Greece. The concept of maritime piracy has undergone at least a millennium and a half of gradual evolution. Yet, in terms of application, the U.N.'s definition carries with it a greater level of international legal precedent than the definition advanced by the International Chamber of Commerce.

This legal precedent is of central importance for more than historical consistency. The frequency and severity of acts of maritime piracy has notably increased. For example based on data collected by the International Maritime Organization (IMO) and the International Chamber of Commerce's International Maritime Bureau (ICC-IMB), in 1991 there were 51 reported incidents of maritime armed robbery; in 2007, 222 incidents of maritime armed robbery were reported. This change represents an increase of 335 percent. Further illustrating the dramatic increase in maritime crime, in 1991 a single incidence of maritime piracy was reported. In 2007, 58 incidences of maritime piracy were reported, an increase of 5,700 percent. While the ICC's definition of piracy has a pragmatic appeal, the interstate system favors the definition of piracy adopted by the U.N. as it ensures the territorial integrity of sovereign nation-states, and provides a buffer of maritime space prohibiting potentially hostile naval forces from conducting exercises or dropping anchor off the shore of a major city such as Los Angeles or Tokyo. As sovereign states, rather than shipping companies, are the primary actors in securing maritime space and transit lanes, the U.N.'s definition of piracy and its emphasis on state sovereignty remains relevant in a world that increasingly focuses on transnational corporations.

Without an understanding of the evolution of the meaning of piracy anchored in historical texts and legal documents, the United Nations Convention on the Law of the Sea (UNCLOS), division of maritime crime into the separate acts of maritime armed robbery in domestic waters and maritime piracy in international waters based on international maritime borders can appear arbitrary. In fact, the current focus on state sovereignty and the division of the sea into domestic and international zones found in the

UNCLOS remain useful and carry the weight of historical and pragmatic legal precedent. They are the result of centuries of states gradually adjusting international norms in an attempt to share the burden of identifying and reducing one of humanity's oldest crimes while protecting the sovereign maritime space of states.

### **Defining Piracy in the Ancient World**

Piracy has been a documented problem confronting states as far back in history as the Egypt of Ramses the III in the 12th century BCE. However, the Greeks are most frequently associated with developing concepts and terms to identify an act of piracy, and these served as the genesis for succeeding Latin terms as well as the contemporary English term 'pirate'. The first term used by the Greeks in reference to piracy was leistes. The origin of this term can be traced back to classical Greece between the years 500-330 BCE. Leistes is derived from the root leis, which means 'booty' or 'plunder'. Therefore leistes identifies someone who is engaged in either armed robbery or plundering. The common English interpretation for this term is either 'bandit' or 'pirate' (deSouza 1999). A limitation to the term leistes is that it did not differentiate between land based banditry and maritime crime. Instead, a qualifying term could be placed in front of leistes to denote the location of the activity, thus allowing authors the ability to separate a highwayman from someone engaged in maritime theft or kidnapping, which are generally accepted as the acts of a pirate (Powell 1997).

A second term used by the Greeks to identify an act of piracy was peirates. At first glance, a casual reader might believe that peirates clearly relates to maritime activity as it bears a striking resemblance to the contemporary English term pirate. Despite the similarity between peirates and pirate, classical Greek authors did not use peirates to clearly identify seaborne crime from banditry on land. Rather, peirates was a synonym for leistes. When peirates was used to identify seaborne crime, it required a qualifying phrase in the same manner as leistes. (deSouza 1999).

There was a lone word developed by classical Greek culture which was used exclusively for seaborne piracy, and that was katapontistes (Powell 1997). Katapontistes translates as 'one who throws into the sea'. While katapontistes is the closest in meaning

to the modern conception of maritime piracy, the term was used infrequently by classical authors (deSouza 1999). Philip deSouza (1999) theorizes that this is because *katapontistes* is a long and relatively inelegant word when compared to *leistes* or *peirates*. Therefore, it was too cumbersome for composing graceful poetry intended to recount historical events. One of the few historians who consistently used *katapontistes* to denote individuals who always launched attacks from sea was Casius Dio in his discussions of the early political career of Pompey and his campaign against Mediterranean piracy (Leach 1978).

The lack of specificity provided in either *leistes* or *peirates*, combined with the sporadic usage of *katapontistes*, suggests that the ancient Greeks did not typically view the term piracy in the same maritime manner as the contemporary world. However, this ambiguity was not unique to the Greeks. Latin also utilized terms that could be, but were not always, used to describe maritime piracy. The two primary words utilized were *praedo* and *pirata*. The usage of *praedo* is similar to the Greek *leistes* as it can be used to describe land based banditry or seaborne piracy based on the presence, or lack thereof, of a qualifying phrase such as *maritimos* to indicate that the act did not occur on land (deSouza 1999). The second term *pirata*, which was developed later in history, came to be definitively associated with seaborne piracy and not land based banditry. *Pirata* is derived from the term *transire*. When used in the form *transeudo mare*, *transire* referred to one who ‘roves upon the sea’. *Pirata* developed as a phrase that contains the maritime usage of *transire* and refers to one who attacks or attempts to attack. When the base of the word sea roving is combined with the usage of the word to attempt or successfully attack, the result is a phrase that clearly and consistently differentiates seaborne attacks from land based banditry (Dubner 1980, Young 2007).

In addition to offering a clear definition of piracy as robbery at sea and serving as the basis for the English term *pirate*, the usage of *pirata* in Roman philosophy began to establish piracy as not only a maritime act but one clearly occurring outside of the approval of a state. Dubner (1980) emphasized Cicero’s quote, ‘*pirata non est ex perduellium numero definitus, sed communis hostis omnium.*’ Dubner translates this quote as, a pirate is not included in the list of lawful enemies, but is the common enemy of all; among pirates and other men there ought to be neither mutual faith nor binding

oath. This places all acts of maritime crime occurring at this point in history under the blanket classification of ‘pirate’. Individuals who chose to take part in these acts were not only at odds with the state and merchants but the entire civilized world.

Contrary to the modern division of maritime space into domestic and international zones, Roman law emphasized that the sea in its entirety was a common space, and it was the responsibility of the state to assume jurisdiction and provide for protection from foreign attack and obstacles to commerce. As Roman territory expanded on land around the Mediterranean, so did its maritime claims. At the maximum extent of Rome, the entire Mediterranean fell under Roman legal jurisdiction and came to be viewed as a closed sea or *mare clausum* (Society for Underwater Technology 1986). As Rome became the dominant political power in the region, this meant that the Roman state was solely responsible for ensuring that Mediterranean trade routes remained open and free of harassment from pirates, as there were no other notable maritime threats to commercial trade.

When the Roman perspective of piracy is contrasted with the Greek view, there are clear distinctions. For the Greeks, maritime piracy was predominantly another form of theft that was not substantially different from any other form of robbery. While this was a position initially shared by the Romans, piracy came to be viewed as clearly distinct from banditry on land. As maritime pirates became the only remaining maritime threat to Rome’s maritime trade, pirates were classified as and treated in the same manner as Rome dealt with former state challengers such as Carthage. They were a clear threat to the interests of Rome. This conception that piracy was a crime unique to maritime spaces and occurring outside of the bounds of state approval or societal acceptance remained a central component to defining piracy for nearly a thousand years following the collapse of the Western Roman Empire.

### **Defining Piracy in the Medieval and Near Modern Periods**

The concept of the closed sea, or *mare clausum*, utilized by Rome served as a model for defining maritime sovereignty and determining which state actors were responsible for controlling piracy until the 16<sup>th</sup> century CE. At this time, English trade

had expanded in scale and surpassed the seas that England was capable of patrolling regularly (Murphy 2009). This situation was not unique to England. Unlike the trade routes of Rome, the sea lanes utilized for trade in the 16<sup>th</sup> century had now become too vast for any one state to unilaterally police. This created a unique problem for European states. Increasing levels of trade required freedom to navigate without fear of robbery, kidnapping, or death. However, how could this freedom of commerce be maintained when states lacked the resources to effectively close off and impose order on vast areas of the open sea?



**Figure 1** Frontispiece of Hugo Grotius' *de Mari Libero*, 1633. G.W. Blunt White Library, Mystic Seaport.

Hugo Grotius attempted to answer this question when he proposed a fundamental restructuring of the sovereign claims of maritime territory. Rather than advocating for a *mare clausum*, Grotius advocated for the acceptance of a *mare liberum*, or open sea. This concept advocated dividing the sea into two sections. States would maintain sovereign control over a narrow belt of littoral water around their coast. Beyond these littoral waters would lay the high sea, or international waters, where no lone state's jurisdiction would prevail, except for the flag state over its own ships.

This division gained widespread support and was considered a mutually beneficial division. It divided the task of controlling piracy among multiple states: within domestic waters, it was the responsibility of a sovereign state; in international

waters, any state could detain and prosecute pirates in accordance with their domestic laws. In international waters, pirates were considered *ex hosti humani generis*, or the enemies of mankind, a continuation of the Roman conception of pirates as a nefarious force operating outside of civilized society (Murphy 2009). In 1536, the government of Henry VIII reinforced this view of piracy when it declared that piracy encompassed any

form of treason, felony, robbery, or murder committed on the high seas for private motives and without the authority of a sovereign (Konstam 2008, Banker 2003). The usage of the high seas is interesting, as it suggests that theft, which occurred within territorial waters, may not be considered piracy. This wording may have, in some part, served as the genesis of the modern division of maritime crime into maritime piracy occurring on the high seas and maritime armed robbery occurring within domestic waters.

### *The Emergence of Exclusions – Subcontracting the Ability to Wage War*

Over the span of a millennium and a half, the concept of piracy underwent a gradual evolution. Piracy originated as a subcategory of banditry plaguing the Greek world, became associated with a clear link to the seaborne crime occurring outside of the permission of the state or civilized society by the Romans, and later served as one of the driving forces for establishing domestic and international maritime spaces during the 16<sup>th</sup> century. However, rather than providing clarity regarding how piracy should be addressed by the international community as a whole, the states of the 16<sup>th</sup> century quickly created legal exceptions to what behavior did, or did not, constitute an act of piracy. These technicalities



**Figure 2 Privateer Articles of Agreement. HFM 198. G.W. Blunt White Library, Mystic Seaport.**

led to the creation of ‘privateers’, ‘buccaneers’, and ‘corsairs’ (Konstam 2008). While these terms have been frequently used as synonyms in literature and film for a pirate or act of piracy in a general sense, they possessed distinct classifications that were linked to a sovereign state that elected to temporarily grant private groups the right to wage public war on the behalf of the state. The official sanction of a state arguably made an act of

privateering legal, whereas piracy was still considered an illegal act committed for private benefit that occurred outside of the permission of states and civilized society.

A privateer operated with the permission of a sovereign state that granted the privateer permission to carry out attacks on enemy ships at sea during periods of wartime. The privateer was allowed to profit from goods seized and provided a portion of the earned income to the state. The term corsair is a synonym for privateer. While corsairs are commonly associated with the Mediterranean, they were originally privateers recruited by the government of France who were then granted a *marque de course*. Privateers and corsairs served as a cost effective subcontracted navy for states that lacked a sufficient level of formal naval power to meet their wartime objectives (Konstam 2008, Ronald 2007). Unlike a privateer or corsair, the term buccaneer was used to denote an individual or crew with a wider range of operational latitude than that of the privateer. Rather than limiting potential targets to enemy vessels during a time of war, buccaneers were granted permission to raid coastal cities as well as ships at sea (Konstam 2008). At first this distinction may seem trivial. However, at least on paper, it is the difference between retaining a freelance navy and a freelance corps of marines.

Despite a clear distinction in sanctioned activities, differentiating the term privateer and buccaneer frequently becomes murky in the historical record, as there are examples of buccaneers described as privateers and vice versa (Exquemelin 2000 [1684]). The more important distinction to draw from these classifications of maritime activity is the central role that state permission played. Both privateers and buccaneers were granted the right to wage maritime war on behalf of a sovereign state. This is a distinction from the individuals and crews that remained classified as pirates. A true act of piracy involved a crew and vessel beholden to no government and potentially hostile towards all. They would attack any vessel they had the means to intercept that was likely to provide a financial windfall for the crew (Konstam 2008). This makes piracy a crime that is motivated by private means and distinct from the actions of privateers and buccaneers, which are arguably acting in the interest of the perceived greater good of the citizens of a state.

Regardless of the efforts of states to legally separate piracy from privateering and buccaneering, the term piracy began to occupy a grey area in the international system



with little tangible meaning. This created a complicated maritime legal environment where the English considered a privateer such as Sir Francis Drake as a national hero serving his sovereign while the Spanish government considered him to be an outright pirate breaking the laws of civilized society. The legal qualifiers introduced during this time did little to help identify and limit maritime piracy. Arguably, they actively rolled back the attempts made in the first half of the 16<sup>th</sup> century to clearly define piracy and establish a shared international standard for deterring and prosecuting pirates.

*Back to Basics: The End of Legal Exceptions to Piracy*

The tolerance of privateers and buccaneers offered a clear benefit to both the governments of England and France during the mid and late 16<sup>th</sup> century. This, in part, explains the willingness of these states to break with the recently established international standards regarding piracy. Privateers generated income for the state and allowed naval power to be quickly augmented without increasing the number of ships, personnel, or the budget of a national navy. Essentially, privateers and buccaneers were a form of government contractor for the Tudor period that operated on commission. However, by the 19<sup>th</sup> century the dominant states of Western Europe could afford larger navies and saw less need to subcontract the ability to wage war to private naval captains and squadrons. In 1853, the United Kingdom of Great Britain and Ireland altered their definition of piracy as follows:

All persons (whatsoever their origin, or under whatsoever flag or papers they may sail, or to whomsoever their ship may legally belong) will be pirates by the Law of Nations who are guilty of forcible robberies, or captures of ships or goods upon the High Seas without any lawful commission or authority. They and their vessels and cargos may be captured by officers and men in the public service of any nations, and may be tried in the Courts of any nations. For the purpose of jurisdiction in capturing, or trying them, it is of no consequence where, or upon whom, they have committed their crimes, for piracy under the Law of

Nations is an offense against all nations, and punishable by all nations (Rubin 1998, 91-95).

This revision removes privateering and buccaneering as legal activities as it disregards letters of marque, or papers, as a manner to avoid being labeled a pirate. While wording is still included that references the, 'lawful commission or authority,' this is used in references to the formal navies of states (Rubin 1998). It also reinforces the concept of the *mare liberum* introduced by Hugo Grotius with the emphasis it places on the high seas. This revised definition of piracy was a return to the original intent of the Offenses at Sea Act of 1536. It identified piracy as an activity occurring in international waters and outside of the approval or sanction of a sovereign state or society in general.

This concept of piracy for the United Kingdom was later expanded to include states that did not respect the freedom of movement of vessels on the high seas, such as the states of the Barbary Coast (Rubin 1998). The United States adopted a similar definition of piracy in the 19<sup>th</sup> century. From 1819 forward, U.S. law has defined piracy based on the law of nations reinforcing the U.S. Constitution's conception of maritime piracy discussed in Article 1, Section 8, Clause 10. What this has come to mean in practical terms is that piracy requires a robbery or assault on the high sea (Mason 2010). This central component for identifying piracy was again reinforced in The Piracy Act of May 15, 1820 (United States Congress 1963). The British and American definitions of piracy are useful to illustrate how relatively modern definitions of piracy reinforced that piracy was no longer viewed in the same manner as the land based banditry of Bronze Age Greece. It had clearly come into its own as a distinct legally recognized maritime crime occurring in a specific area of maritime space, international waters or the high seas.

The British and American definitions of piracy were hardly the only domestic efforts to criminalize robbery at sea during this time. Given the widespread acceptance of dividing maritime territory into domestic waters and international waters during the 1500s, it is somewhat surprising that it took nearly 300 years before the international community made a collective effort to codify piracy. While the primary objective of the 1856 Treaty of Paris was devoted to ending the Crimean War, it also possessed the tertiary objective of abolishing privateering and removing the legal protection that a letter of marque had previously provided to the crew of a privateering ship (Keyuan 2009).

One of the recurring arguments for banning privateers was linked to the difference in naval technology available to the privateering vessels compared to merchant vessels of the time. The Earl of Clarendon argued in front of the British Parliament that:

When the merchantman and the privateer both depended upon the wind for their power of motion they were comparatively upon a footing of equality, find, if the former were the faster sailer, she could escape from her enemy. But the greater part of our commerce, being still carried on in sailing vessels, Would be absolutely at the mercy of a privateer moved by steam, however small; and I think, therefore, that the abolition of privateering will be of the utmost advantage to a commercial community like that of England (1856).

This is an interesting statement because it indicates that outlawing privateering was influenced primarily by economic concerns. During the mid-1800s, privateers were considered to have such a pronounced technological edge over the merchant ships they might prey upon that privateering possessed the latent ability to destabilize interstate trade in general, rather than temporarily impede the trade of a specific state. To this end, no trading state could truly benefit by commissioning privateers in 1855 in the same manner they had in 1555.

### **Defining Maritime Piracy (and Maritime Armed Robbery) in the Modern World**

When maritime piracy is considered in a broad historical context, it is a concept that gradually emerged as a distinct act occurring at sea. Following its recognition as a uniquely maritime activity, states attempted to find mutually beneficial arrangements to control what was arguably a common threat. Debates regarding piracy during the 20<sup>th</sup> and 21<sup>st</sup> centuries CE have continued to focus on how maritime crime should be defined and controlled. Much like the states of Europe during the 16<sup>th</sup> century CE, there is no lone dominant political or military power that possesses the capability to effectively patrol existing international maritime trade routes in their entirety. Just as the previous

discussion of piracy focused on classical societies and explained how the concept of piracy developed, this section will focus on how modern international law has gradually built upon the foundations established by Rome and the states of the Middle Ages, specifically the importance of state sovereignty and the role it plays in identifying acts of modern maritime crime.

*League of Nations: Attempting to Establish International Standards*

The common usage of ‘maritime piracy’ during the 20<sup>th</sup> century identified piracy as a universal threat occurring outside the sanction and territorial boundaries of a state. However, the hodgepodge of varying domestic laws used to identify specific acts of piracy and how the crime should be controlled, reduced, or punished has varied widely (Murphy 2009). Rather than providing clarity of purpose allowing all states to act decisively to counter maritime piracy, Grotius’s divided seas, which remained widely accepted by the international community, had become a source of jurisdictional confusion. This point is best illustrated in the Report of the Sub Committee of the League of Nations Committee of Experts for the Progressive Codification of International Law (1927):

The confusion of opinion on the subject of piracy is due to failure to draw a clear distinction between piracy in the strict sense of the word, as defined by international law, and piracy coming under the private laws and treaties of individual states. In our view, therefore, it would be preferable for the Committee to adopt a clear definition of piracy applicable to all states in virtue of international law in general. To this end, the Committee of Experts circulated a draft of provisions for the suppression of piracy that had been written the previous year along with a questionnaire of topics that the League of Nations should consider addressing at the international level (1927).

The Draft Provisions for the Suppression of Piracy sought to establish a unified definition of piracy to which the international community as a whole would conform. It

outlined eight articles that identified piracy as motivated by private means, occurring only on the high seas, voided any protection that flying a state flag might provide, granted every warship the right and responsibility to investigate possible pirate ships, and the right to stop and capture any vessel conducting acts of piracy on the high seas. Article 6 of the draft clearly laid out how the search and seizure of ships should be conducted. If an investigated ship turned out to be conducting legitimate business, it would be entitled to reparation or an indemnity. If an investigated ship was actually conducting piracy, the commander of the warship could proceed to try the pirates, if the arrest occurred on the high sea, or deliver the pirates to competent authorities (1927). While restricting piracy to the high seas, the draft would have provided a unified standard operating procedure clarifying procedural and jurisdictional issues.

Unfortunately for the League of Nations, the member states did not consider maritime piracy an issue ripe for international regulation. While eighteen of the twenty-nine surveyed states recognized the possibility of establishing an international standard for maritime piracy, they did so only tentatively. While the British Empire considered this a topic that of potential interest to establish standards, Japan and Greece expressed serious reservations about the draft. The United States, France, Brazil, and Germany did not consider codifying piracy at the international level a pressing issue (1927).

The few states that expressed clear support for codifying piracy included Bulgaria, Cuba, Poland, and El Salvador. Although the draft failed to muster enough support to lead to a formal convention on maritime rights and piracy, it did provide an interesting sounding board. For example, the governments of Portugal and Romania expressed concerns regarding the Draft Provisions for the Suppression of Piracy. Both states viewed the provisions as too limited (1927). In expressing these reservations, both governments raised issues that currently complicate controlling maritime piracy and maritime armed robbery in East Africa and Southeast Asia.

The Portuguese government responded to the definition of piracy proposed by the League of Nations with skepticism. Identifying piracy in international law as occurring only on the high seas was considered to overlook the broader historical trend of maritime crime. This position was emphasized in a rebuttal that stressed that, during both the Classical Period and Middle Ages, the majority of documented pirate attacks occurred

near port towns and inhabited coastlines, not on the open sea. Therefore, Portugal did not see any substantive difference in offenses committed in territorial and international waters. The Portuguese government also opposed the idea of providing reparations to vessels that were searched under suspicion of conducting acts of piracy. This procedure was considered detrimental to searching potential pirate vessels, as it would require the captain of a warship to possess a high degree of certainty when detaining a vessel suspected of piracy. Otherwise, the captain would risk committing his state to providing financial compensation to detained vessels not engaged in piracy. (1927).

When compared to the League of Nations definition of piracy, the Portuguese favored conducting anti-piracy patrols in the same manner as a traditional military patrol, granting the ability to search a belligerent vessel to determine the alignment and intentions of the vessel. Once the vessel's neutrality was established, no repayment was due for delaying the voyage. In theory this approach guaranteed a non-material compensation by the sense of security these checks were intended to create (1927).

Romania, with its sole coastline bordering the Black Sea, has never been considered at the forefront of crafting global maritime piracy. That position fell to states such as the United Kingdom, Germany, the United States, and Japan in the early 20<sup>th</sup> century. Nevertheless, Romania offered an interesting series of counter proposals to the League of Nations, ones that would have established a very aggressive anti-piracy platform for the international community. Like Portugal, the Romanian government viewed the line dividing littoral seas from the high seas as a clear problem when attempting to control maritime piracy. To address this issue, they proposed an additional article granting the pursuit of pirates begun on the high sea to be continued into the territorial waters of a state if the coastal state was unable to continue the pursuit itself. When these pursuits crossed into domestic waters, the detained pirates would then be handed over to the authorities of the state which claimed the littoral waters (1927).

Neither of the suggestions introduced by the governments of Portugal or Romania played a definitive role in shaping the modern definition of piracy. It is interesting to consider these proposed modifications from the perspective of piracy in the 21<sup>st</sup> century. The idea of a divided sea was intended to improve the ability of states to share the burden of controlling maritime piracy and created the image of maritime piracy as a common

threat to all states. However, the concerns raised by the Portuguese and Romanian government illustrate that the implementation of a divided sea could serve, at best, as a minor obstacle to controlling piracy due to the wide myriad of domestic legal definitions and concerns regarding the sovereignty of littoral seas. At worst, the division of the sea into an international and state controlled spheres could render it nearly impossible to control piracy as the division of international and domestic waters would become a de facto fence limiting the pursuit of pirates and range anti-piracy patrols exclusively to international waters. In addition to limiting the pursuit of pirates, this division of responsibility into a domestic and international realm potentially allows states to ignore acts of maritime crime that are committed within their territorial waters. While these concerns did not appear to be an imminent concern to the major powers in the early 20<sup>th</sup> century when incidences of maritime crime were rare, they accurately describe the jurisdictional difficulties that confront states in the 21<sup>st</sup> century in areas where the volume of maritime piracy and maritime armed robbery have dramatically increased since the 1990s, such as the Straits of Malacca and Bab el Mandeb.

*The Harvard Draft: The Continued Pursuit of International Standards*

The inability of the League of Nations to successfully craft an internationally accepted definition of piracy in international waters, address piracy's as of yet unnamed but implied counterpart in domestic waters, or outline standard operating procedures for controlling piracy in general did not lead to the abandonment of these topics. In 1932, the Harvard School of Law assembled a collection of scholars with the objective of creating a provisional draft on maritime piracy that could serve as the basis for future international conventions focused on maritime piracy. While piracy at sea was rare in the 1920s and 1930s, the Draft Convention on Piracy with Comments, frequently referenced as the Harvard Draft, intended to pick up where the League of Nations had left off. The Harvard Draft consisted of nineteen articles striving to update and clarify the international definition of piracy, establish an agreed upon standard operating procedure for the pursuit of pirate ships, and address liability for damages caused during a pursuit (1932).

Similar to the League of Nations Draft Provisions for the Suppression of Piracy, the Harvard Draft defined piracy as consisting of a broad range of activities. Article 3

defined piracy as ‘any act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison, or kill a person with intent to steal or destroy property, for private ends.’ In addition to reasserting that piracy is not a state sanctioned activity, the draft also defines how to identify a pirate ship and pirates. Any seagoing vessel involved in any of the activities outlined in Article 3 would be defined as a pirate ship. Any individual who voluntarily participated in the operation of such a vessel and had knowledge of its activities was to be classified as a pirate (1932). The basic activities that constitute maritime piracy and how a pirate vessel and crew should be adopted remained unchanged from the League of Nation’s Draft Provisions for the Suppression of Piracy, with the exception of the requirement that piracy could only occur on the high seas.

Unlike the League of Nations Draft Provisions for the Suppression of Piracy, the Harvard Draft proposed a more aggressive stance for pursuing and detaining pirate vessels. Similar to the counterproposals put forward by the governments of Portugal and Romania, the Harvard Draft proposed that the pursuit of a pirate vessel begun in international waters could be continued into the domestic waters of a state. Additionally, foreign naval vessels in international waters should be prepared to assist in the pursuit of pirate vessels in domestic waters. Granted, this would have required a request for assistance. In the event that the pursuit of a pirate into domestic waters resulted in damage to private property, the pursuing vessel and the state whose flag it flies would be considered liable and responsible for providing compensation (1932). While these proposals did not negate the importance of state sovereignty, they attempted to establish agreed upon procedures, which would have greatly enhanced the ability of pirate vessels to be pursued across maritime borders.

#### *The United Nations: Consensus and Progress*

As neither proposal was directly implemented, it would be easy to dismiss the efforts to codify piracy made by the League of Nations and Harvard School of Law. However, this would be a mistake as both drafts served as a starting point for the International Law Commission convened by the United Nations in 1949 to propose a comprehensive maritime law (Dubner 1980). Nine years after the process had been initiated the United Nations adopted the High Seas Convention (HSC) in 1958. The HSC



contained 10 articles that were modified versions of articles proposed by the League of Nations and Harvard School of Law. The HSC defined piracy as any illegal acts of violent detention or any act of depredation committed for private ends by the crew or the passengers of a private ship against another ship or against persons or property on board such ship on the high seas (United Nations 1958). Again, the modern conception of piracy required it to be an act conducted by private actors for personal gain and located on international waters rather than in the littoral seas of a sovereign state.

Perhaps the greatest weakness of the HSC is that it did not include any of the proposals advanced by the Harvard Draft or revisions to the League of Nations draft that would have allowed maritime borders to be crossed so long as a vessel suspected of committing acts of piracy was being pursued. For example, Article 23 of the HSC clearly states that, ‘the right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own country, or of a third state.’ The implications of this decision were mixed. On one hand, it clearly reinforced state sovereignty over territorial waters. This legal position had been advocated since the 16<sup>th</sup> century. On the other hand, the HSC treated international maritime borders as nearly impregnable walls. This confirmed the worst fears of the Portuguese and Romanian critics of the original League of Nations draft. Rather than ensuring that every state has an active interest in combatting pirates as *hosti humani generis*, the HSC ensured that the maritime borders of many states became a way for maritime pirates to evade capture.

The implications of the HSC are central when considering modern maritime crime as they were incorporated verbatim into the 1982 United Nations Convention of the Law of the Sea (UNCLOS). In Article 101, the UNCLOS defined piracy as:

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: on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; against a ship or aircraft, person or property in a place outside the jurisdiction of any state(United Nations 1982).

In addition to inheriting the HSC's limitations regarding the maritime pursuit of pirates, the UNCLOS is considered limited in two additional ways. First, for an act to be defined as piracy it must occur on the high seas. Based on the HSC, the high seas begin where the boundaries of the territorial sea end. The extent of the territorial sea was established to be within 12 nautical miles of the shoreline of a state (United Nations 1958). Therefore, any form of robbery or murder at sea within 12 nautical miles of the shoreline of any state is not recognized as piracy. Second, for an act of piracy to be committed it must be motivated by private ends.

An important clarifying point not addressed in the UNCLOS is how to parse a private motivation from a public one. As previously discussed, privateering, buccaneering, and all forms of state sanctioned or public piracy was banned following the Treaty of Paris in 1856. Nevertheless, the wording that identified piracy as a private act, distinct from a public act, continued to be employed despite the legal ambiguities that this created.

An example of the difficulty of continuing to include wording distinguishing between public and private motivations was illustrated in 1961 when the Portuguese cruise ship Santa Maria was boarded in the Caribbean Sea. This action would appear to fall squarely under the definition of piracy established with the HSC in 1958, as an illegal act was committed that involved the detention of the passengers and crew of the vessel while it was located on the high seas. While the U.S. Navy was searching for the cruise ship, a legal team at the Department of State investigated the circumstances surrounding the seizure of the vessel. Before the Santa Maria was located, it had been determined by the legal team that no act of piracy had taken place (Gavuoneli 2008).

This decision was based on the discovery that the men who boarded the ship were Portuguese revolutionaries who were making a political statement by seizing the ship. Thus, they were considered to be committing an act that was not inherently motivated by private gain (Gottschalk et al. 2000). This case serves as a prime example that illustrates how the concept of public motivation has changed in the world of maritime theft and detention. Rather than indicating the approval of a sovereign authority, such as when Elizabeth I commissioned Sir Francis Drake to conduct naval reconnaissance and harass the Spanish on behalf of England, public motivations have transformed into the intentions

of a personal action conducted outside of state approval (Ronald 2007, Pringle 1953). This also adds an additional complicating layer to maritime crime, as it is unclear what criminal activity is occurring when it is not motivated by private means.

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Despite the concerns surrounding the UNCLOS definition of maritime piracy regarding the motivation of maritime marauders, the divisive nature of maritime borders, and restricting piracy as a crime that can only occur on the high seas, the U.N. definition is the generally accepted definition of maritime piracy within the realm of international law. That being said, notable portions of recent scholarship examining maritime piracy have elected to favor an alternative definition that places maritime piracy and maritime armed robbery under a single umbrella. There are several justifications for this methodological decision. It has been advocated that maritime piracy is a transnational crime that ignores national borders and the UNCLOS attempted to define maritime piracy, but failed at its task. Hence, the UNCLOS division of maritime crime may be an inappropriate definition for contemporary research (Murphy 2009).

In lieu of the UNCLOS definition and its focus on state boundaries, the more important criteria when addressing acts of maritime crime is the fact that a ship was detained or robbed at sea regardless of location or maritime borders. This perspective has been adopted in work addressing the potential collusion of maritime piracy and terrorist organizations (Banker 2003), the prevalence of maritime crime in Southeast Asia (Young 2007), and the tactics employed by maritime criminals near the Horn of Africa and Straits of Malacca (Hastings 2009).

In place of the UNCLOS definition, this work has employed a competing definition of maritime piracy advanced by the International Chamber of Commerce's International Maritime Bureau (ICC-IMB). This definition recognizes piracy as:

An act of boarding or attempting to board *any ship* [emphasis added] with the intent to commit theft or any other crime and with the intent or capability to use force in the furtherance of

that act, excepting those crimes that are shown or strongly suspected to be politically motivated (2003).

This methodological choice intentionally downplays the importance of maritime boundaries and essentially creates a universal maritime jurisdiction. While this methodological choice is appealing from a common sense perspective, essentially arguing theft is theft regardless of location, it possesses a fundamental shortcoming. While internationally established maritime boundaries may be of little consequence to shipping companies, sovereign borders, and their integrity, are topics of great importance for governments of states.

The UNCLOS definition has an additional dimension, which makes it a more appropriate choice for U.S. policy makers than the ICC-IMB definition when to deploy the sizable blue water navy of the U.S. Article 1, Section 8, Clause 10 of the U.S. Constitution states that, ‘The Congress shall have Power To... define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations...(1987)’ This is a decisive and substantive statement. There is a clear and intentional alignment of international and domestic legal definitions of maritime crime. The usage of the high seas, a clear reference to international waters from Tudor England forward limits the U.S. conception of maritime piracy to an international act. This alignment also opens the door for the formal usage of maritime armed robbery in domestic waters by the U.S. government, as well as a policy, which prohibits the right of hot pursuit into the territorial waters of a second state. While the ICC-IMB definition may make sense for shippers, the UNCLOS definition carries the weight and authority of international law and the centrality of maintaining the sovereignty of nation-states. As we will see shortly, maintaining sovereign maritime claims is a topic of great concern for coastal states.

### **Consistent Definitions and Avoiding a Slippery Slope**

Maritime piracy is a concept that has changed dramatically over the past millennium and a half. Despite the common labeling of maritime theft as piracy, there are

few historical periods that have consistently applied the same meanings to the words piracy and pirate. By modern standards, it is unlikely that much of the piracy of the ancient world occurred more than twelve nautical miles from shore and thus would not be classified as an act of piracy by the U.N. In the same light, it is unlikely that the legal caveats employed by England or France in commissioning privateers or the creation of the concept of ‘high seas’ would have been accepted as reasonable criteria by Rome. While noting that piracy is hardly a static concept, it is of central importance that a clear definition of maritime piracy is established for the contemporary research and policy communities investigating the outbreaks of maritime piracy at the end of the 20<sup>th</sup> and into the early 21<sup>st</sup> centuries CE.

The definition of piracy drafted by the U.N. during the UNCLOS has clear limitations. It requires the motivations of would be pirates to be strictly private. Additionally, it allows international maritime borders to impede the pursuit of pirates. Nevertheless, it is a definition that was drafted and signed by 159 states, and many of the 38 current states that did not sign the UNCLOS or were not independent at the time have acceded to the terms of the agreement. Granted, multiple states have yet to ratify the agreement in their domestic political systems (United Nations 2010). In terms of U.S. policy making the UNCLOS also carries the endorsement of the U.S. Constitution, as it is the current standard in international law defining acts of maritime crime. Despite the recent preference for the ICC-IMB definition of maritime crime in the academic literature, this project advocates defining maritime crime based on criteria established in the UNCLOS Article 101 of the 1982 UNCLOS:

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
  - (i) on the high seas, against 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 inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

Because piracy is defined as an activity that can only occur on the high seas, it will also be necessary to clearly define maritime attacks that occur within the sovereign territory of a state. These attacks are considered to be acts of maritime armed robbery under current international law. Maritime armed robbery will be defined in keeping with the definition adopted by the U.N. in the Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships (resolution A.1025 (26), annex, paragraph 2.2) as follows:

- (a) any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, within a State's internal waters, archipelagic waters and territorial sea;
- (b) any act of inciting or of intentionally facilitating an act described above.

Applying these definitions of maritime piracy and maritime armed robbery, as opposed to the definition advocated by the ICC-IMB provides several benefits. In addition to a wide level of acceptance at the state level, the UNCLOS definition places a strong emphasis on state sovereignty. While this has previously been discussed as a hindrance from the perspective of the ICC-IMB, it would be a mistake to argue against the relevancy of this issue. Throughout the historical record, the role of state sovereignty has been a recurring theme used in definitions of piracy. Rejecting state sovereignty as a defining criterion, which is informally suggested in the ICC-IMB definition, would require a partial rejection of the concept of domestic and international waters, as well as a

rejection of existing domestic and international law addressing maritime space that has been, if not universally accepted, widely accepted.

Despite the straightforward appeal of the ICC-IMB interpretation of maritime law it possesses limitations. An infrequently discussed hazard of rejecting the UNCLOS is the legal turmoil that could result. If the UNCLOS is an inadequate document outlining maritime rights and state sovereignty effectively ends at the water's edge, who will establish and enforce regulations for what is lawful and unlawful conduct at sea? The implications of a universal maritime jurisdiction are quite substantial regarding issues of offshore resource exploration, fishing rights, littering, as well as the operation of formal navies. Rather than simplifying the ability to police maritime crime rejecting the maritime claims of states and the division of maritime space into the littoral and high seas risks opening a legal Pandora's Box which raises far more questions than it answers.

In addition to the theoretical hazard raised by redefining maritime spaces, when proposals have been advanced which suggest altering naval borders or creating permanent international maritime corridors or zones through littoral seas, there has been strong formal pushback from states. In 1971, Indonesia responded to a proposal to internationalize the Straits of Malacca by stating that Indonesia:

‘[C]annot accept any idea that might lead to the internationalization of the strait, in the sense that among others the right to control and supervise the strait is taken away from the coastal states (Ong-Webb 2006, 147).’

A similar proposal was put forward in 1991 and met with a comparable level of hostility from both Malaysia and Indonesia (Huang 2008). While these examples are limited to Southeast Asia, it seems unlikely that states such as China, the United States, or Russia are likely to argue that the UNCLOS's emphasis on state sovereignty in defining piracy is irrelevant and should be ignored. Doing so would introduce a legal slippery slope. Hence the UNCLOS offers the most pragmatic and widely accepted criteria for classifying acts of maritime crime.

## Summary

Creating a simple and direct definition of maritime piracy, that protects the sovereign maritime claims of states, is something that states have struggled with for centuries. With the exception of Rome's unique position as both political and military hegemon of the Mediterranean, there have been few definitions of piracy that have been both clearly established and easily enforced. The contemporary definitions of maritime piracy and maritime armed robbery adopted by the U.N. are the direct successors of centuries of interstate negotiations and treaties that have attempted to balance the independence of states with the shared responsibility of protecting interstate maritime trade routes.

These agreements have fundamentally shaped not only how piracy is defined but also how the sovereign borders and economic interests of states are determined at sea. While these definitions contain technical weaknesses and enforcement remains difficult, numerous states that belong to the U.N. have formally recognized and adopted these standards for classifying acts of maritime crime. Despite criticism raised by the ICC-IMB and recent suggestions, which reject the central components of the UNCLOS in dividing maritime space into domestic and international zones, it is unlikely that the UNCLOS signatory states will abandon these definitions in the near future. Fundamentally reimagining maritime borders could theoretically weaken the sovereign powers of a state within their internationally accepted borders. Thus, the most applicable definitions of maritime crime for policymakers are those grounded in standing international law. Reimagining the maritime borders of states has previously met with strong resistance from coastal states who have rejected internationalizing maritime space that falls under their sovereign claims. In addition to meeting with strong resistance from states, internationalizing all maritime space into a universal jurisdiction raises far more questions than it answers regarding access to maritime resources and the operation of naval force.



## Works Cited

1856. Debate: International Maritime Law - The Treaty of Paris. Parliament of the United Kingdom
1927. Report to the Council of the League of Nations on the Questions which Appear Ripe for International Regulation. Geneva Switzerland: League of Nations.
1932. Harvard Research in International Law: Draft Convention on Piracy with Comments. In *The American Journal of International Law*.
1987. The Constitution of the United States: Analysis and Interpretations. Washington D.C.: Government Printing Office.
2003. Piracy Annual Report. International Maritime Bureau.
- Banker, Scott. 2003. "Enemies of Mankind: The Developing Threat of Modern Maritime Piracy and Terrorism." M.S., Defense and Strategic Studies, Missouri State University.
- deSouza, Phillip. 1999. *Piracy in the Graeco-Roman World*. Cambridge: Cambridge University Press.
- Dubner, Barry Hart. 1980. *The Law of International Sea Piracy: Developments in International Law*. The Hague, Netherlands: Martinus Nijhoff Publishers.
- Exquemelin, Alexander O. 2000 [1684]. *Buccaneers of Ameica*. Translated by Alexis Brown. Mineola, New York: Dover Publications. Original edition, 1984.
- Gavuoneli, Maria. 2008. *Functional Jurisdiction in the Law of the Sea, Publications on Ocean Development*. Leiden, The Netherlands: Martinus Nijhoff.
- Gottschalk, Jack, Brian Flanagan, Lawrence Kahn, and Dennis LaRochelle. 2000. *Jolly Roger with an Uzi*. Annapolis, MD: Naval Institute Press.
- Hastings, Justin V. 2009. "Geographies of state failure and sophistication in maritime piracy hijackings." *Political Geography* 28 (4):213-223.
- Huang, Victor. 2008. Building Maritime Security in Southeast Asia: Outsiders Not Welcome? *Defense Technical Information Center*: 1-19.
- Keyuan, Zou. 2009. "Crackdown on Piracy in Southeast Asian Seas: Need More Effective Legal Regime?" In *Maritime Security in the South China Sea: Regional Implications and International Cooperation*. Burlington, VT: Ashgate Publishing Company.
- Konstam, Angus. 2008. *Pirates: The Complete History from 1300 BC to the Present Day*. Guilford, Connecticut: Lyons Press.
- Kraska, James. 2011. *Contemporary Maritime Piracy: International Law, Strategy, and Diplomacy at Sea*. Santa Barabara, California: Praeger.

- Leach, John. 1978. *Pompey The Great*. Guildford and King's Lynn, United Kingdom: Biddles Limited.
- Mason, Chuck. 2010. Piracy: A Legal Definition. Accessed April 10, 2012.
- Murphy, Martin. 2009. *Small Boats, Weak States, Dirty Money : Piracy and Maritime Terrorism in the Modern World*. New York: Columbia University Press.
- Ong-Webb, Graham Gerard. 2006. *Piracy, Maritime Terrorism and Securing the Malacca Straits*, edited by Graham Gerard Ong-Webb, xi-xxxviii. Leiden, Netherlands: International Institute for Asian Studies.
- Powell, Anton. 1997. *The Greek World*. New York City, New York: Routledge.
- Pringle, Patrick. 1953. *Jolly Roger*. New York City, New York: W.W. Norton and Company, Inc.
- Ronald, Susan. 2007. *The Pirate Queen: Queen Elizabeth I, Her Pirate Adventures, and the Dawn of Empire*. New York City, New York: Harper Collins.
- Rubin, Alfred P. 1998. *The Law of Piracy*. 2nd ed. New York City, New York: Transnational Publishers.
- Society for Underwater Technology. 1986. *Exclusive Economic Zones: Resources, Opportunities and the legal Regime*. London, UK: Graham and Trotman Limited.
- United Nations. 1958. "Convention on the High Seas 1958." United Nations Accessed May 1st.
- United Nations. 1982. "United Nations Convention on the Law of the Sea." United Nations, Last Modified 05/01/2012 Accessed May 1st.  
[http://www.un.org/depts/los/convention\\_agreements/texts/unclos/closindx.htm](http://www.un.org/depts/los/convention_agreements/texts/unclos/closindx.htm).
- United Nations. 2010. "Maritime Space: Maritime Zones and Maritime Delimitation." The United Nations, Last Modified January 8th, 2010 Accessed May 29th.
- United States Congress. 1963. *The Public Statues at Large of the United States of America: From the Organization of the Government in 1799 to March 3, 1845*. Vol. 3. Buffalo, New York: Dennis & Co, Inc.
- Young, Adam J. 2007. *Contemporary maritime piracy in Southeast Asia : History, Causes, and Remedies, IIAS/ISEAS series on maritime issues and piracy in Asia*. Leiden, Netherlands: International Institute for Asian Studies.