UDC 341.362.1

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The Value of the Historical Material the Harvard Draft Convention

In this article analyzes the provisions of the Harvard Draft Convention, containing the norms that are the basis of the contents of the further provisions of piracy legislation with the cardinal value for maritime law, reflect the nature of the piracy regulation, which are, nowadays, the basis norms against piracy of the United Nations Convention on the Law the Sea.

Keywords: Harvard research, Draft Convention, opposition to the piracy.

У статті проаналізовано положення проекту Конвенції Гарвардського юридичного факультету, що містить норми, які є основою змісту подальших положень регулювання піратства, які мають базове значення для морського права, відображають характер регулювання морських міжнародно-правових відносин, та які, на сьогоднішній день, є основою змісту норм проти піратства Конвенції Організації Об'єднаних Націй з морського права 1982 року.

Ключові слова: дослідження Гарвардського університету, проект Конвенції, протидія піратству.

В статье проанализированы положения проекта Конвенции Гарвардского юридического факультета, содержащие нормы, которые являются содержанием дальнейших положений по регулированию борьбы против пиратства , имеют базовое значение для морского права, отображают характер регулирования морских международно-правовых отношений, и которые, на сегодня, являются основой содержания норм против пиратства Конвенции Организации Объединенных наций по морскому праву 1982 года.

Ключевые слова: исследование Гарвардского университета, проект Конвенции, противодействие пиратству.

Relevance of the topic. The topic of this article presents a great importance in the history of the codification process of piracy. The issues of combating piratical actions were decided, in conjunction with other problems of using the high seas, by bilateral agreements, national legislation of certain states and customary law, which have been formed over the centuries. One of the most important stages in the history of international law in combating piracy is the Harvard draft Convention on piracy 1932 [Annex 1]. This project incorporates the most useful provisions of the preceding doctrinal projects. The project, developed by the Harvard Law School, edited the basic concepts and features of piracy, as reproduced in the modern sense of this crime. Later its provisions formed the basis of the work of UN Commission on the codification and development of international maritime law.

Analysis of the latest researches. The researches of the Harvard Research Draft Convention were done by a brilliant galaxy of professors such as Alfred P. Rubin – is a distinguished Professor of the Fletcher School of Law and Diplomacy at Tufts University, Barry Hart Dubner – is a Professor of law, Manley Ottmer Hudson – is a project director, M. Halberstam – is a Professor Harold Sprout of Princeton, a Professor Joseph W. Bingham of Stanford University and others.

Research goals. The article's task is to investigate the Harvard Research on the International Law on Piracy.

The basic material.

Piracy has long held a place in international law. As contemporary international trade routes developed throughout the Seventeenth century, slow moving undefended ships were an easy target for pirates set on looting and plunder. Throughout the Nineteenth century a legal regime developed in response to the threat of piracy and customary international law evolved which made piracy in effect the first universal crime over which all states had the capacity to arrest and prosecute. These developments in custom found their way into the modern law of the sea as it developed throughout the Twentieth century. The 1958 Geneva Convention on the High Seas, and then the 1982 United Nations Convention on the Law of the Sea (UNCLOS) both outlined an international regime for the repression of piracy and effectively recognized universal jurisdiction on the part of all states to suppress pirate acts. The Convention – which now has 157 State parties – is generally considered to be reflective of customary international law.

However, contemporary international treaty provisions on piracy, namely those enshrined in the UNCLOS, date back to the beginning of the 20th century. Therefore, the evolution of treaty rules pertaining to piracy starts with the codification efforts on piracy initiated by the League of Nations at the beginning of the last century. A Sub-Committee consisting of M. Matsuda of Japan as Rapporteur and M. Wang Chung-Hui of China delivered its Report to the Committee in January 1926, and the Report, amended by M. Matsuda on 26 January 1926 as a result of the Committee's deliberations, was circulated to Governments for their comments on 29 January 1926.

Attempts at codification have been made internationally. The League of Nations attempted one in 1926. This purported codification was severely criticized and eventually dropped as not "of sufficient real interest in the present state of the world to justify its inclusion in the programme of the proposed conference," and the Assembly of the League requested the Council to arrange for the codification conference without including "piracy" in its proposed agenda.

The Harvard Research was the result. A Committee was set up by the Harvard Research program to consider the international law of "piracy" independently of the efforts of the League and its Reporter (M. Matsuda). With no disrespect intended toward the Californians, who included many scholars, of the 15 named advisers, only three were resident outside of California, and they included one from the West Coast, one from Idaho, and Professor Harold Sprout of Princeton. The Harvard Research reporter was Professor Joseph W. Bingham of Stanford University, who chose as his advisers a learned body composed almost exclusively of residents of California. The result of this effort was a full draft Convention of 19 articles,[1, p.5] the last one, obviously relevant to "piracy" and de lege ferenda, being a commitment to the peaceful settlement of disputes arising out of the interpretation or application of the Convention and referring to arbitration by a panel set up in 1907 or adjudication by the Permanent Court International Justice set up in 1920 or the arbitration procedures provided in the Hague Convention of 18 October 1907 for the Pacific Settlement of International Disputes. It is thus obvious that the drafters of the Convention regarded it as not merely codifying, but also as blending the international law of "piracy" in to the system of legal relationships that they believed applied in the world of their time. The draft could thus reflect formulations de lege ferenda without violating the funda-

mental conception of its function, as an aid to the attempts of the time to "codify" the rules of international law as they ought to exist rather than as they could be shown to exist by an examination of theory and past practice.

The Harvard Researchers recognized immediately that the public international law relating to "piracy," if any such existed, had to be analyzed separately from municipal law: "Piracy under the law of nations by which the authors clearly meant public law, although the coincidence of the two is subject to challenge, but this is not the place to analyze the matter further and piracy under municipal law are entirely different subject matters and ... there is no necessary coincidence of fact-categories covered by the terms in any two systems of law" [2, p.754]. The Harvard Researchers adopted the view that "pirates are not criminals by the laws of nations, since there is no international agency to capture them and no international tribunal to punish them and no provision in the laws of many states for punishing foreigners whose piratical offense was committed outside the state's ordinary jurisdiction.."[3, p.756].

The Harvard Researchers adopted this view, not only for purposes of discussion, but as the jurisprudential basis for their draft Convention: "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 offenses which are committed outside the territorial and other ordinary jurisdiction of the prosecuting state and which do not involve attacks on its peculiar interests" [4, p.732].

As to the key jurisdictional point, the Harvard Researchers do not seem to have undertaken the research proper to their product. Instead, resting on argumentative secondary sources, much of it by scholars who do not seem to have done much primary research either, the Harvard Researchers said: "Indeed it is difficult to find cases of exercises of jurisdiction over piracy which would not be supported on one or more of the ordinary grounds. They are very rare" [5, p. 235]. Recourse is then had to writers who support "universal jurisdiction," not on the basis of state practice, real incidents, diplomatic correspondence and municipal court cases referring to what was asserted to be international law by a municipal judge, but on the basis only of the writers' conceptions of the structure of the international legal order and filtered interpretations of state practice asserted to exist but difficult to demonstrate in particulars. Thus "naturalist" scholars, such as Judge Joseph Story, are quoted extensively, but their conclusions and jurisprudential viewpoint are not adopted.

Instead, the most influential single publicist whose views are cited at length and for many points of approach, is a German "positivist," Paul Stiel [6]. Stiel regarded the jurisprudential split between "naturalists" and "positivists" as a split between Anglo-American jurists, whom he regarded as "naturalists," despite the cases and the writings of John Marshall, Richard Henry Dana and others, and the "*Kontinentalen*" as positivists, despite the writings of Grotius, Pufendorf and others. From this point of view, and without much detailed analysis, Stiel concluded that a definition is possible: "Piracy is a non-political professional course of forcible robbery against nearly all countries undertaken at sea." From this he isolated the elements of the legal concept, including location (high seas, the word "high" seems to have been inserted by him here), physical means (force), intention (to take property), and whom (anybody, disregarding his own modifying word, "nearly"), purpose (private

enrichment), etc. Since this framework excludes privateering or the regular course of raiding attributed (falsely) by many European publicists to the Barbary States before 1830 and to others, and yet such activities had been routinely been called "piracy" by many European scholars and some European (and American) courts, Stiel had some difficulty. He resolved this, not by reconsidering his definition or breaking the concept into parts, but simply by asserting the old state-authorized "piracy" to be obsolete, even though there seemed to him to be some similarities between the acts for which a "piracy" conviction was obtained by English officials in Singapore in 1858 and the Roman practice against Illyrian raiders.

His analysis is not deep and his assertion about the Malayan case of 1858 is unattributed and not evidenced in any other known source; his citation to Roman practice is not to any original source, but to the great 19th Century German historian of Rome, Theodore Mommsen. This leads Stiel into further difficulties when he finally comes to consider the doctrinal aspect of Sir Stephen Lushington's opinion in *The Serhassan (Pirates)* case, and those difficulties are avoided rather than solved by relegating the discussion to the section on political ends, denying that the legal concept of "piracy" applies to political actors, but finding some States to be capable of being classified "piratical" because they lack political goals for their takings. It is not at all clear that the desire of the Serhassan communities to be free of British visits and other influences, which prompted the attack on British warships that led to the punitive raid held by Lushington to entitle the victors to the bounty paid under British statutory authority to those who engage "pirates," was non-political, and Stiel does not explain why he classifies it as such.

Similarly, the British position in the *Huascar* correspondence with Peru is not analyzed. In that correspondence, the British suggestion that unrecognized "rebels" can be properly considered "pirates" as a matter of international law is dismissed by Peru and British non-governmental experts [7, p. 291] as questionable because, as long as the rebels' victims are only government vessels of their own State, nobody would consider them "pirates," and an *ad hoc* denomination as "pirates" solely because of the nationality of the victim vessel seems more than any criminal law conception should bear.

Now, none of this analysis of Stiel diminishes the utility of Stiel's proposal *de lege ferenda* for the law of "piracy" as it might have been acceptable to States in the early years of the 20th Century, and the use of Stiel's suggestions regardless of the doubtful soundness of the historical and legal evidence on which they rest is justified for that purpose. Indeed, there is much in Stiel's work that could as well have been based on a more thorough analysis, and, regardless of soundness, seems consistent with the conclusions possible to reach from cases and jurisprudential discussions. In taking the general orientation proposed by Stiel as the basis for their own draft, the Harvard Researchers thus did not necessarily diminish the value of their proposal as an exercise *de lege ferenda.*

In their use of earlier scholarship in general, however, the Harvard Researchers themselves seemed somewhat confused. Long quotations from Stiel are preceded or followed with what appear to be supporting quotations from a variety of sources addressing different problems from different jurisprudential perspectives and at different times. Art. 3, the definition of "piracy" for purposes of the draft Conven-

tion, quotes at some length from what seem to be 54 different sources in addition to Stiel, mostly European publicists of the 19th Century, who were supposed to support in one way or another various parts of the proposed definition. There is no apparent attempt to evaluate those writings by jurisprudential view or any other clue as to their relative persuasiveness; there is no chronological consistency or indication that perhaps the rules found persuasive in Italy or other States deriving their experience from Roman or Mediterranean interactions were rejected by world- stage actors, like England in the 17th Century and later, because of possible differences in the political structure of the overall society whose trade was to be protected from interference, or the self-image of the state accepting or denying the role of world policeman against "piracy."

Thus, the Harvard draft must be evaluated on its own merits as a legislative proposal, and cannot be supported as a reflection of a scholarly analysis of precedent and theory. Indeed, the Researchers themselves seem to throw up their hands in dismay with regard to the definition of "piracy":

An investigation finds that instead of a single relatively simple problem, there are a series of difficult problems, which have occasioned a great diversity of professional opinion. In studying the content of the definition article, it is useful to bear in mind the chaos of expert opinion as to what the law of nations includes, or should include, in piracy. There is no authoritative definition. Of the many definitions, which have been proposed most are inaccurate, both as to what they literally include and as to what they omit. Some are impromptu, rough descriptions of a typical piracy [8, p. 453]. In these circumstances, the legal analysis implicit in the Harvard draft is of minimal interest.

As an exercise in proposing a legal formulation taking due account of the confusions of the period regarding "piracy" and the persistence of the concept as a factor in justifying some legal results, the Harvard draft has had a major impact on the development of legal thought. For present purposes, only the definitional article and the articles dealing with jurisdiction seem important.

But there is some weaknesses in the draft. As to the substance of the offense, why are "rape," "wound," "enslave," and "imprison" there? There seem to be no cases supporting any such inclusions, however horrible those acts may be. Participation in the slave trade had been expressly ruled out of European (including British) definitions when the trade was a serious matter in international commerce [9, p. 201]. And if "rape," "wound" and "imprison" should be included merely because they are serious and violent offenses, why not "torture" or even generally "assault"?

Why is there a distinction drawn between acts "committed in a place not within the territorial jurisdiction of any state" for the purpose of defining the offense and an act otherwise within the definition (indeed, more broadly stated in art. 4 also to include "any similar act") "within the territory of a state by descent from the high sea" for the purpose of defining a "pirate ship"? The definition of *what* is "piracy" in art. 3 includes an implied definition of who is a "pirate" (whoever commits an act of defined "piracy" as well as any of the fringe connections specified in paragraphs 2 and 3 of that article). Art. 4 defines a "pirate ship" more broadly. It would seem that there could conceivably be a "pirate ship" with no "pirates" on board and that had never been involved in the commission of an

act of "piracy" if all its assaults were raids ashore. Presumably to make sense of this, it was to establish a category for ships not wholly lacking nationality from which an act of "piracy" within the definition of art. 3 could be committed. But why, if the attacking vessel had national character, should the law of "piracy" come into play at all? At least, it is not clear why a ship which had been involved in shore raids should be considered a base of piratical acts when it acted at sea, and the identical vessel that had not previously committed shore raids would not be considered a base for "piratical" acts on the high sea unless it had first lost its national character. And if any vessel had first lost its national character, it would seem to be within the definition of a base of "piratical" acts at sea whether or not it had first been involved in shore raids. Art. 4 seems senseless.

As to jurisdiction, clearly territorial jurisdiction is dominant and pursuit into the territorial waters of any State can be forbidden under art. 7. The language shifts the burden to the territorial sovereign to prohibit the chase, rather than limiting the authority of the policing state to pursuit of a "pirate," but that seems to be as far as the Harvard Researchers were willing to go to meet the British position in principle [10, p. 92]. Art. 9 seems to take even that concession back by providing, not only for a turning over to the territorial sovereign of the persons and property seized, but even the paying of reparations.

Finally, as to "universal" jurisdiction, art. 13 refers back to the lawfulness of the seizure to determine if the seizing state can apply its own law to property seized. If the seizure was "lawful," then the seizing state can apply its own law, apparently even if there is no identifiable national interest in the incident beyond the fact of the seizure by its officials. Art. 6 appears to make lawful (although the word is not used) the seizure of "a pirate ship" or a ship "taken and possessed by pirates," and the property connected with it; but the same seizure of the same ship and property would appear to be unlawful if the ship had been used for depredations only "against ships or territory subject to the jurisdiction of the state to which the ship belongs" [11]. In that latter case, the ship would not be classifiable as a "pirate ship," and whether the ship's company were "pirates" could not be determined until after the seizure; the seizure itself could not be regarded as "lawful" when done. And if the ship had not in the first instance been "taken by piracy," but had been lawfully acquired, or even taken by robbery under the law of some territorial State while not on the high sea and not by descent from the high sea, then it is not clear that any taking by a second country's officials would be "lawful" in the sense of art. 6. And if art. 6 did not make the seizure "lawful," then art. 13 would apparently not apply.

This construction opens up complications of a magnitude that cannot repay further analysis in this place since the Convention has never been adopted. But it is clear that the provisions as drafted do not represent a simple assertion of universal jurisdiction over ships and property involved in "piracy" or of universal jurisdiction with a simple exception. This gingerly handling of ships and property involved in alleged "piracy" is particularly interesting as showing a complete denial of the concepts of a universal international law (or law of nations) despite the use of the phrase "law of nations" by Blackstone and the framers of the American Constitution; concepts which included all maritime law with the "law of nations" and denied the legal significance of the place or sovereign authority of the tribunal erected to

apply that supposedly universal law. The implication is not only that there is a cloud on the notion of universal jurisdiction over the goods involved in suspected "piracy" cases, but that the same rules of "standing" applied to determine which sovereign's courts should even hear the case; that standing *ratione materiae* and standing *ratione personae* must both be present in any "piracy" adjudication.

Art. 14 seems to attempt to change that situation with regard to criminal trials, but again the universality of the jurisdiction is made to rest on the "lawfulness" (without defining what "law" applies) of the "custody;" and that lawfulness seems to depend on the interpretation of art. 6. In the Researchers' commentary to art. 6, no clue is given as to the complications involved; the Researchers seem to have thought that art. 6 merely codified an ancient "right of any state to capture on the high sea a foreign ship which has committed piracy or is the booty of pirates" [12, p. 832]. But there is no citation to any case or writer to support this grand assertion, and it seems wrong both historically and legally to the degree that it ignores the general international law of "standing." It seems to reflect the misconceptions of the time growing out of British assertions of a world-wide policing jurisdiction taken as a matter of policy and applies to foreign military vessels of non- European subordination in the absence of *animum furandi,* and not applied by any State to "pirates" in the context of the Harvard Research, i.e., persons acting *animo furandi* within art. 3 as "criminals" under the laws of all states.

There are many other peculiarities and questions raised by the Harvard Research draft Convention on Piracy, but since it was presented *de lege ferenda,* and was not in fact adopted as such, it seems unnecessary to analyze it further in this place.

Nonetheless, it is odd and significant for the trend of thinking in the United States that the "piracy" section in the major compilation of American (and some foreign) legally significant practice published in 1941 [13, p. 681], normally a source of balanced reportage and minimal comment. For example, a statement that *U.S. v. Smith* [14, p. 153] is the leading American case supporting the notion that there is such a thing as an international law of "piracy" and that it is properly incorporated into American law by mere reference in the Act of 1819 is immediately followed by a long excerpt from Lenoir [15, p.532], including the passage, "it is doubtful whether the Court would hold this view today, nor is it considered a correct statement of the present international law on piracy," reasoning that Justice Livingston's dissent was more persuasive than the majority opinion and that in near universal practice "piracy" was not only punished, but, for sound jurisprudential reasons, defined only by municipal law. Lenoir quotes [16, p.552] the passages set out above from both *in re* Piracy *jure gentium* and *People* v. *Lot- Lo and Saraw* without any counterbalancing comment [17, p. 686]. Universal jurisdiction seems to have been adopted as the official American position by 1941, and the contrary cases and logic forgotten. There is some evidence that this position maintains its influence among American officials [18, p. 432]. As part of a more or less complete review of the law of the sea, with an eye to eventual codification, the United Nations General Assembly asked the International Law Commission to prepare a text that could form the basis for international agreement on the law of the sea [19, p.298]. The text, originally prepared by J.P.A. Franfois, the Commission's Special Reporter, titled *Regime of the High Seas,* was published on 1 March 1952 [20, p.1] and contains six articles

dealing directly with "piracy." Art. 23 is the definition. It is Franfois' French translation of article 3 of the Harvard Research draft Convention [21, p. 15]. The French text is not directly identified as a mere translation in the draft Convention, but in the discussion at the International Law Commission's 290th meeting on 12 May 1955, the English text is set out [22, p. 5]. It is verbatim the text of the Harvard article quoted, except for changing the word "a" to "the" in the phrase "for private ends with *a* [the] bona fide purpose of asserting a claim of right." Oddly, in the unannotated text of the Harvard Research draft Convention, reproduced above, the text of art. 3 differs from the annotated text set out here with a third variation on that sentence; the unannotated text has neither "a" nor "the" but says merely "private ends without *bona fide* purpose." The confusion seems inconsequential. The other five articles are French translations of arts. 4(1), 5, 6, 10 and 12 of the Harvard Research draft [23, p.51]. Thus, the current language of the "piracy" provisions of the 1958 Geneva Convention on the High Seas and the 1982 Montego Bay Convention on the Law of the Sea are identical in substance, and neither can be said to make sense [24, p. 92]. What seems to be involved in this confusion is not any issue of substance. It seems widely agreed that the taking of property without the blessing of a legal order creates legal consequences in the international legal order, perhaps a claim for damages. The issue is in the designation of an appropriate legal order to determine the legal results of the taking. All municipal legal orders authorize some takings, perhaps as "eminent domain," "recaption," "confiscation" or some other category established by the legal order to cover action by the State or even self-help by aggrieved individuals in some circumstances. The problem with "piracy" seems to be the imposition on foreign "takers" of notions of a municipal legal order that the foreigners deny has purview over the property in question. Calling the taking a violation of "the law of nations" or of "international law" assumes the universality of rules relating to "takings" that is not evident in either the cases or diplomatic correspondence. And yet, all agree that "pirates" go too far.

The major impact of the Harvard Research was when 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 entered into force on 30 September 1962 and it has 46 Signatories and 62 Parties [25, p.11]. 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 [26, p.254]. 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 [27, p.104].

The provisions of UNCLOS, in particular articles 100 – 107, provide a legal framework for the repression of piracy under international law, that are based on, or at least influenced by, the Harvard Draft.

In a word, UNCLOS is a result of the evolution in the development of the adoption the codification act.

Conclusion. This article is analyzed the development of legal regulation in international law on piracy in the period of the research of the legal faculty of the Harvard university. It is examined the codification process the norms of interna-

tional law, aimed against maritime piracy, which began in the beginning of 20th century, and their transformation from the common international law to positive.

The key points in the above research are summarized as follows.

The Group's work was extremely important because it demonstrated both the theoretical and practical problems, which would confront the international community if it were desirous of creating a convention on the subject of sea piracy. It showed us many different municipal views and the inadequacy of attempting to utilize domestic legislation as a substitute for the creation of an international crime or common basis for jurisdiction.

The Harvard Group provided detailed analysis of issues such as:

· the definition of piracy;

· the meaning and justification inherent in the views expressed by various scholars and in domestic laws that piracy was a crime against the law of nations;

· whether universal jurisdiction existed in relation to acts of piracy.

The fundamental elements of the 1932 Draft Convention are that piracy under the law of nations is an illegal maritime act committed beyond coastal state territorial jurisdiction. Piracy is an exception to the ordinary rules of jurisdiction in international law. Within the jurisdiction of the territorial sea, coastal states are responsible for prescribing and enforcing maritime criminal laws. Typically international law recognizes that states exercise exclusive, or at least primary, jurisdiction within their territorial seas. All nations also exercise jurisdiction on board their ships and aircraft registered to the state, wherever they happen to be located.

A state also may assert jurisdiction over certain of its persons or nationals abroad under the "nationality principle," in order to safeguard its citizens against threats. Since all nations may assert jurisdiction over persons suspected of piracy, the crime has a special status in jurisdiction beyond the familiar grounds of personal allegiance, territorial dominion, or flag state responsibility.

Piracy is not a crime or offense under the law of nations, but rather international law affords special jurisdiction over the crime by any state. This means piracy is not a universal crime, but rather a crime of universal jurisdiction. The purpose of codifying international law against piracy is not to unify the various national legal frameworks or even to develop uniform standards for punishing pirates, but rather to explore and define the basis of state jurisdiction over offenses committed by foreign nationals against vessels outside of the territory of the prosecuting state. Furthermore, the special jurisdiction is expansive, encompassing judicial, executive, and legislative authority.

Universal jurisdiction of all states to prevent piracy, and to seize and punish persons engaged in piracy, was incorporated into the Harvard Draft text.

The document also suggested that only private vessels could commit piracy.

Warships and other public vessels retained sovereign immunity, but if warships unlawfully committed unjustified acts of violence, the injured state could seek redress from the warship's flag state. Furthermore, hot pursuit was permitted. After committing the crime of piracy, a ship did not erase its status as a pirate ship merely by fleeing to the high seas.

The 1932 draft included a provision imposing liability for any damage to a ship seized by law enforcement authorities that is neither a pirate ship nor a ship taken

by piracy and possessed by pirates. Its articles authorized the approach of a foreign-flagged ship, and stopping and questioning the vessel on reasonable suspicion that it was operating as a pirate ship, stipulates that any state having custody of suspects may prosecute them at trial

for piracy. Furthermore, the prosecuting state retains the authority to define the crime of piracy, and apply its procedural law at trial. The Harvard Draft also recognized states had an obligation to apply a minimum level of due process in such cases, requiring the state to provide defendants accused of piracy with a "fair trial before an impartial tribunal" and proceed with criminal charges without "unreasonable delay."

Furthermore, under principles of international humanitarian law reflected in the Harvard Draft, an accused was entitled to humane treatment during confinement awaiting trial. States also were not permitted to discriminate in the treatment of nationals from any state. Interestingly, under the provisions of the Harvard Draft, a state could not prosecute an alien for an act of piracy for which he had been charged and convicted or acquitted in a prosecution in another state. Such cases really are not tantamount to double jeopardy, since different sovereign states ordinarily would not be debarred from prosecuting a defendant convicted of the same crime in another nation's jurisdiction.

The Harvard Draft also included a dispute settlement provision, in which state parties would refer disagreements to the Permanent Court of International Justice, the predecessor organization to the International Court of Justice.

Having reviewed initiated by the League of Nations, prompted the faculty of the Harvard Law School to commence a research project of its own, with a view to contributing towards future codification of one of the most burning problems such as piracy, which is disturb humanity for many times, I want to sum up, that prior to the work of the Group, the basis had been written on the subject to the establishment of a uniform international approach to sea piracy. Although the Group's draft convention didn't lead directly to the adoption of a multilateral treaty, even they published its draft convention of piracy in 1932, and no effort was made to incorporate the convention in an international agreement until 1958, it did refer to all of the relevant materials regarding piracy by utilizing past international conventions, international custom, general principles of law recognized by civilized nations, judicial decisions, and the teachings of most of the highly qualified publicists as a method of analyzing the topic.

Thus, the examined period was a forming time of the modern international maritime law against piracy.

ANNEX 1

The text of the Draft Convention

Article 1

As the terms are used in this convention:

1. The term "jurisdiction" means the jurisdiction of a state under international law as distinguished from municipal law.

2. The term "territorial jurisdiction" means the jurisdiction of a state under international law over its land, its territorial waters and the air above its land and

territorial waters. The term does not include the jurisdiction of a state over its ships outside its territory.

3. The term "territorial sea" means that part of the sea, which is included in the territorial waters of a state.

4. The term "high sea" means that part of the sea, which is not included in the territorial waters of any state.

5. The term "ship" means any water craft or air craft of whatever size.

Article 2

Every state has jurisdiction to prevent piracy and to seize and punish persons and to seize and dispose of property because of piracy. This jurisdiction is defined and limited by this convention.

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 attack 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.

Article 4

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.

2. A ship does not cease to be a pirate ship after the commission of an act described in paragraph 1 of Article 3, or after the commission of any similar act within the territory of a state by descent from the high sea, as long as it continues under the same control.

Article 5

A ship may retain its national character although it has become a pirate ship. The retention or loss of national character is determined by the law of the state from which it was derived.

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.

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 sea.

Article 8

If a pursuit is continued or a seizure is made within the territorial jurisdiction of another state in accordance with the provisions of paragraph 1 of Article 7, the state continuing the pursuit or making the seizure is liable to the other state for any damage done by the pursuing ship, other than damage done to the pirate ship or the ship possessed by pirates, or to persons and things on board.

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.

Article 10

If a ship seized on suspicion of piracy outside the territorial jurisdiction of the state making the seizure, is neither a pirate ship nor a ship taken by piracy and possessed by pirates, and if the ship is not subject to seizure on other grounds, the state making the seizure shall be liable to the state to which the ship belongs for any damage caused by the seizure.

Article 11

1. In a place not within the territorial jurisdiction of any state, a foreign ship may be approached and on reasonable suspicion that it is a pirate ship or a ship taken by piracy and possessed by pirates, it may be stopped and questioned to ascertain its character.

2. If the ship is neither a pirate ship nor a ship taken by piracy and possessed by pirates, and if it is not subject to such interference on other grounds, the state making the interference shall be liable to the state to which the ship belongs for any damage caused by the interference.

Article 12

A seizure because of piracy may be made only on behalf of a state, and only by a person who has been authorized to act on its behalf.

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 posses-

sion 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.

Article 14

1. A state which has lawful custody of a person suspected of piracy may prosecute and punish that person. 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.

2. The law of the state must, however, assure protection to 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 and unusual punishment may be inflicted.

(d) No discrimination may be made against the nationals of any state.

3. A state may intercede diplomatically to assure this protection to one of its nationals who is accused in another state.

Article 15

A state may not prosecute an alien for an act of piracy for which he has been charged and convicted or acquitted in a prosecution in another state.

Article 16

The provisions of this convention do not diminish a state's right under international law to take measures for the protection of its nationals, its ships and its commerce against interference on or over the high sea, when such measures are not based upon jurisdiction over piracy.

Article 17

1. The provisions of this convention shall supersede any inconsistent provisions relating to piracy in treaties in force among parties to this convention, except that such inconsistent provisions shall not be superseded in so far as they affect only the interests of the parties to such treaties inter se.

2. The provisions of this convention shall not prevent a party from entering into an agreement concerning piracy containing provisions inconsistent with this convention which affect only the interests of the parties to that agreement inter se.

Article 18

The parties to this convention agree to make every expedient use of their powers to prevent piracy, separately and in cooperation.

Article 19

1. If there should arise between the High Contracting Parties a dispute of any kind relating to the interpretation or application of the present convention, and if such dispute cannot be satisfactorily settled by diplomacy, it shall be settled in accordance with any applicable agreements in force between the parties to the dispute providing for the settlement of international disputes.

2. In case there is no such agreement in force between the parties to the dispute, the dispute shall be referred to arbitration or judicial settlement. In the absence of agreement on the choice of another tribunal, the dispute shall, at the request of any one of the parties to the dispute, be referred to the Permanent Court of International Justice, if all the parties to the dispute are parties to the Protocol of December 16, 1920, relating to the Statute of that Court; and if any of the parties to the dispute is not a party to the Protocol of December 16, 1920, to an arbitral tribunal constituted in accordance with the provisions of the Convention for the Pacific Settlement of International Disputes, signed at The Hague, October 18, 1907.

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