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## Frank Stuart Dethridge Memorial Address 2000

### Piracy and Other Perils: Can the Law Cope?

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**Sir Kenneth Keith \***

Judge of the Court of Appeal of New Zealand  
Judge of Appeal in Samoa, the Cook Islands and Niue

The words “pirates” or “piracy” may bring to mind Long John Silver and Robert Louis Stevenson, the Pirates of Penzance and Gilbert and Sullivan, or Henry Morgan and the Spanish Main, the Barbary States and the beginnings of the United States Navy,<sup>1</sup> “Bully” Hayes and Arrowtown,<sup>2</sup> or the South China Sea and the Strait of Malacca. The words may also have an extended meaning as in the case of aerial or sky piracy, pirate radio stations and the piracy of intellectual property.

I begin with some facts about present day piracy of the traditional kind – that is at sea. I do that to emphasise that it is a real and present problem, as indeed the Comité Maritime International recognises in its current programme of work.<sup>3</sup> I then consider aspects of the substantive law of piracy with the purpose not just of description but also for reasons of legal method – to see how the law has developed, how it is enforced and how it is written, and to see as well its extension by analogy. The call is on lawyers’ imagination and intuition as well as on their intellects. I trust that this broader call is appropriate to this memorial occasion for a man who was plainly a great lawyer.

When I last spoke in this splendid part of New Zealand it was to the Aviation Law Association of Australia and New Zealand and I quoted then, in the spirit of poets being the true legislators of mankind, lines from Lord Tennyson’s *Locksley Hall* (1837-38) in which he anticipated by almost a century not just travel by air, but ferocious aerial combat:

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\* KENNETH JAMES KEITH has been a Judge of the Court of Appeal of New Zealand since 1996. He is also a Judge of Appeal in Samoa, the Cook Islands and Niue. Before 1996 he was a member and President of the New Zealand Law Commission (1986-96), a member of the Law Faculty of the Victoria University of Wellington (1962-64, 1966-91), Director of the New Zealand Institute of International Affairs (1972-74) (of which he is now President), a member of the United Nations Secretariat (1968-70) and a member of the New Zealand Department of External Affairs (1960-62). He studied law at the University of Auckland, Victoria University of Wellington and Harvard Law School.

<sup>1</sup> Eg S E Morison, *The Oxford History of the American People*, Oxford University Press, New York, 1965 at 334, 340, 343-344, 363-64, 371 and 399.

<sup>2</sup> A nineteenth century mariner, trader, swindler, hotel keeper, blackbirder and alleged pirate. See *The Dictionary of New Zealand Biography: Vol I 1769-1869* (Allen & Unwin, Wellington, 1990) at 180-181. This address was given nearby, in Queenstown.

<sup>3</sup> In 1998 the CMI initiated the Joint International Working Group on Uniformity of Law re Piracy and Acts of Maritime Violence. As its name suggests, the Group aims to combat modern piracy through uniformity of national laws and to go beyond “piracy” to other “acts of maritime violence”. It intends to finalise its model code by October 2001. See also the activities of the Committee of the Council for Security Cooperation in the Asia Pacific (CSCAP) and the International Maritime Organisation (IMO). The IMO’s work also goes beyond the crime of piracy to “armed robbery against ships”. See eg the Draft Code in MSC/Circ. 984 20 December 2000.

For I dipt into the future, far as human eye could see,  
 Saw the Vision of the world, and all the wonder that would be;  
 Saw the heavens fill with commerce, argosies of magic sails,  
 Pilots of the purple twilight, dropping down with costly bales;  
 Heard the heavens fill with shouting, and there rain'd a ghostly dew  
 From the nations' airy navies grappling in the central blue;  
 Far along the world-wide whisper of the south-wind rushing warm,  
 With the standards of the peoples plunging thro' the thunder-storm;  
 Till the war-drum throb'd no longer, and the battleflags were furl'd  
 In the Parliament of man, the Federation of the world.  
 There the common sense of most shall hold a fretful realm in awe,  
 And the kindly earth shall slumber, lapt in universal law. ...  
 Not in vain the distance beacons Forward, forward let us range  
 Let the great world spin for ever down the ringing grooves of change<sup>4</sup>

### Three recent cases ...

According to the International Maritime Board,<sup>5</sup> there were three hundred reported pirate attacks worldwide in 1999, 40 percent more than in 1998 and triple the 1991 figure.<sup>6</sup> According to a July 2000 report pirate attacks rose by some 40 percent worldwide in the first six months of 2000. The Board reports that there were more than 160 incidents compared with 115 in the same period in 1999.<sup>7</sup> These reports single out East Asia, especially South East Asia, with the Indonesian figures in 1999 almost double those for 1998. The International Institute for Strategic Studies suggests that actual figures could be three times as high as this since shipping companies often avoid publicity for fear of deterring cargo owners from using their vessels.<sup>8</sup> In addition, getting local security and customs officials involved frequently results in shipments falling behind schedule as investigations get tangled in bureaucracy and corruption. The increase in our part of the world was predicted after the outbreak of the Asian financial crisis in July 1997. A map prepared by the Institute shows six of the attacks which have occurred over the six months from December 1999.<sup>9</sup>

I mention three recent cases, the first of which appears on that map. In October 1999 the cargo ship *Alondra Rainbow* left the Indonesian port of Kuala Tanjung bound for the port of Mike in Japan. The ship never arrived. Instead it was boarded by armed pirates who put the seventeen crew members in an inflatable life raft and set them adrift. Although they were passed by six ships, it was not until eleven days later that they were finally rescued off Thailand by fishermen. The following month the incident was brought to a dramatic close off Goa, when the Indian Coast Guard succeeded in boarding the cargo ship. They prevented attempts to scuttle the ship and so destroy evidence of the crime and fifteen suspects were arrested. Information circulated by the United States Office of Naval Intelligence suggests that the attack was not executed solely for personal gain. Three thousand tonnes of the cargo of aluminium may have been bartered in either Cambodia or Thailand for weapons destined for use by the Tamil Tigers who have long been waging a civil war against the Sri Lankan armed forces.

<sup>4</sup> "Locksley Hall", *The Works of Alfred Lord Tennyson*, Wordsworth Poetry Library, 1995 at 154.

<sup>5</sup> The International Maritime Board was established by the International Chamber of Commerce originally to counter maritime fraud but it now also has a mandate in respect of piracy.

<sup>6</sup> "Piracy in South-East Asia : Obstacles to Security Co-operation", (June 2000), *IJSS Strategic Comments*, Vol 6, Issue 5.

<sup>7</sup> BBC News, 31 July 2000.

<sup>8</sup> *Supra* n 6.

<sup>9</sup> *Ibid*.

That is to say, political ambitions may have driven the forces that organised and carried out the crime.<sup>10</sup>

In June 2000 an Italian ship, the *Medstar*, was hijacked by ten Iranian and four Iraqi stowaways. It had sailed from southern Iran and the stowaways had remained hidden in the ship for nearly thirty-six hours before surfacing. Three days later they surrendered to the Indian Coast Guard at Bombay. The negotiation of the surrender involved a P and I Club. The hijackers wished to go to Europe and were seeking refugee status, with the United Nations High Commissioner for Refugees becoming involved.<sup>11</sup>

My third recent example comes from the South China Sea where, according to the *China Daily*, in November 1998 38 people from a number of countries, many of them in military clothes, set sail. The day after their departure they headed off a ferry carrying coal sediment. They jumped on to the ferry, tied up and handcuffed the crew members on board, plundered all the property on the ferry and took the coal sediment to a Chinese businessman. That businessman ordered the pirate crew to kill all the crew members and throw them in the sea. Twenty-three crewmen were “mercilessly murdered” by having their eyes covered, being clubbed, being wrapped with something heavy and being sunk beneath the waters. The pirates later disposed of the ferry and stolen goods and carved up the illicit money. Following further acts of piracy, they were arrested by the Chinese authorities; 23 went to trial being represented, we are told, by 27 lawyers. Thirteen were sentenced to death and, following an unsuccessful appeal, were executed in the South China city of Chan Wai. Their property was also confiscated. Twenty-five accomplices were sentenced to imprisonment. The Vice-President of the Supreme Peoples Court, in upholding the sentences, said “piracy is a serious threat to the safety to those on board as well as to their property. The judicial departments of China will keep on handing down harsh penalties on this kind of crime.”<sup>12</sup>

These, and other, cases raise at least four questions about the law of piracy.

### ... raise four legal questions ...

The first is the place where the offence is committed. Is it limited to the high seas as is often said? A recent International Maritime Organisation study of 244 incidents in the South China Sea and the Malacca Strait area found that 86.5 percent had taken place in territorial waters or within ports.<sup>13</sup>

A second question is whether piracy must involve an attack from outside the ship being taken, the so-called two ships rule. The *Medstar*, the Italian vessel I mentioned earlier, was taken by stowaways rather than from another vessel as with the *Alondra Rainbow* and the Chinese case.

A third question concerns purpose. Is the act of piracy limited to acts of private depredation and private plunder or can it extend to public purposes, as perhaps in the case of the *Alondra Rainbow*?

Finally, there are the difficult questions of enforcement. Who has power or jurisdiction to seize the vessel (and where), to arrest the pirates (and where) and to try them? There may also be questions of jurisdiction in relation to the vessel and property taken. And there are the severe practical questions of the actual exercise of enforcement powers.

<sup>10</sup> “Piracy and Armed Robbery at Sea”, (Jan 2000), *Focus on IMO* at 1 and 7.

<sup>11</sup> BBC News, June 2000 at 11, 14 and 15.

<sup>12</sup> *China Daily*, 13 December 1999 and 29 January 2000.

<sup>13</sup> *Supra* n 10, at 4.

**... answered, but not always clearly, by judges ...**

These questions are not new ones. In an 1853 case Dr Lushington, in the High Court of Admiralty, decided a case about the *Magellan Pirates*.<sup>14</sup> In the course of an insurrection in Chile, an officer of the garrison of the penal settlement of Punta Arenas raised a rebellion against the Governor who was murdered. The officer and his companions then seized an English vessel, the *Eliza Cornish*, on which they murdered the master and a passenger, and also an American vessel, the *Florida*, on which they murdered the owner. The British Commander-in-Chief in the area despatched the *Virago* to the Straits of Magellan where she seized the *Eliza Cornish*. The captured men were handed over to the Chilean authorities. The *Virago* later captured the *Florida* in a Chilean port. Treasure which had been looted from the *Eliza Cornish* was found on board the *Florida*. All persons on board the *Florida* who were not Americans were handed over to the Chilean authorities. The claim under the *Piracy Act* asked the court to declare the persons captured to be pirates, not so that they could be prosecuted but rather so that the claimants could receive bounty. The court declared that those captured were pirates.

The judgment proceeds on the basis that political purposes do not necessarily defeat the law of piracy and that acts of piracy can be done and pirates seized inside ports or territorial waters. On purpose, Dr Lushington said “Even an independent state may, in my opinion, be guilty of piratical acts. What were the Barbary pirates in olden times?”<sup>15</sup> He said he was well aware that it had been said that a state cannot be piratical but he was not disposed to assent to such a dictum as a universal proposition.<sup>16</sup>

On the place of the actions, he said “the objection that the acts were not committed on the high seas and were therefore simply murder and robbery, not properly or legally piratical, well deserves consideration.”<sup>17</sup> As indicated, he held, nevertheless, that the acts were piratical, in part because of the wording of the legislation under which he was handling the matter.<sup>18</sup> As well, the possession at sea of the ships at some point in the course of the whole enterprise was “a piratical possession; to have been a continuation of murder and robbery; and the carrying away of the ships on the high seas to have been piratical acts, quite independently of the original seizure.”<sup>19</sup>

**... or by state practice.**

About twenty-five years later, in 1877, a revolutionary movement took place in Peru, the first step in which consisted in the seizure at Callao of the iron-clad *Huascar* by the crew and some of the ship’s officers. On its voyage to Iquique, where it was expected that the leader of the movement would be met, the *Huascar* took a supply of coals from a British ship without making any arrangement for payment, and also stopped a British steamer and took two government officials from it by force. In the meantime the Peruvian government had issued a decree stating that it would not be responsible for the acts of the persons on board the *Huascar*, of whatever nature those acts might be. The commander of the English squadron in the Pacific, regarding the acts of the *Huascar* as ‘piratical against British subjects, ships, and property’, attacked the ship with the *Shah* and fought an action which remained undecided at nightfall, so the *Huascar* was able to escape and surrender to a Peruvian squadron. In Peru the occurrence gave rise to great

<sup>14</sup> (1853) 1 Ecc & Ad 81; 164 ER 47.

<sup>15</sup> 164 ER 47 at 48.

<sup>16</sup> Ibid.

<sup>17</sup> Id, at 50.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

excitement, in which the government shared or affected to share, and a demand for satisfaction was made upon England. There the question was referred to the law officers of the Crown, who reported in effect that the acts of the *Huascar* were piratical. The conduct of the commander was in consequence approved, and Peru allowed the matter to be dropped.<sup>20</sup>

Just two years later, in 1879, in the United Kingdom the Criminal Code Bill Commissioners (including Sir James Fitzjames Stephen) reported their proposals for the codification of the criminal law of England and Wales. They did that in the context, on the one side, of the great confidence of the codification movement that law could be stated with some precision and, on the other, of the particular uncertainty and disagreement on basic questions about piracy indicated in cases and state practice such as the two just mentioned.

### **Pirates are enemies of humanity ...**

That uncertainty is to be related to the fundamental matter of allegiance. In brief, the pirates on their own vessel have put themselves outside the law. They do not any longer owe allegiance to a State. According to one early statement by a great Dutch international lawyer, pirates are persons who depredate by sea or land without authority from a sovereign.<sup>21</sup> On that view, contrary to that taken by Dr Lushington in 1851, and indeed the Polish government one hundred years later,<sup>22</sup> vessels under the authority of a state, such as the Barbary states, cannot commit piracy.

The rejection of allegiance and accordingly, it may be said, of the exclusive responsibility and powers of the flag state of the ship means two things, at least so far as the high seas are concerned:

- that the vessels of any state can seize pirates, and
- that any state can exercise criminal jurisdiction over them

in both cases because there is no longer a flag state with exclusive authority. In the Latin phrase, pirates were and are *hostes humani generis*, enemies of humanity.

### **... but slave traders are not.**

Before I return to the 1879 report on a Criminal Code, let me mention one rejection of an argument by analogy to piracy by one of the great maritime lawyers, Lord Stowell. Just two years after the nations of Europe at the Congress of Vienna had declared the slave trade to be repugnant to the principles of humanity and the universal rules of morality, and had expressed the desire to cooperate to the most prompt and efficient and universal suppression of the trade by all the means at their disposal, he held that a British warship did not have the right to search and seize a French ship on the basis that it was employed in the slave trade.<sup>23</sup> He stated this “fundamental principle of public law”:

<sup>20</sup> Hall, W. E., *International Law*, 6<sup>th</sup> ed., 1909 at 261.

<sup>21</sup> Bynkershoek, C., *Questionum Juris Publici*, (Tenney Frank, transl.), (1737), Vol I at 122, Vol II at 98, cited in A. Rubin, (1988), *The Law of Piracy*, Naval War College Press, Rhode Island, at 106.

<sup>22</sup> Document A/CN.4/L.53 paras 9, 11 and 17, in 1 YBILC, 7<sup>th</sup> Session, 1955, 1 and 2. The Polish government, in its formal observations on the piracy provisions of the International Law Commission’s draft agreement on the law of the sea, accused the Republic of China of “piracy”, notwithstanding that Chinese vessels interfering with Polish shipping were public vessels.

<sup>23</sup> *Le Louis* (1817) 2 Dods 210; 165 ER 1464.

that all nations being equal, all have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation. In places where no local authority exists, where the subjects of all states meet upon a footing of entire equality and independence, no one state, or any of its subjects, has a right to assume or exercise authority over the subjects of another.<sup>24</sup>

He exempted pirates from that protection on the basis that they were enemies of every country and at all times. He rejected an attempt to equate piracy and slave trading. “Be the malignancy of the practice what it may, it is not that of piracy, to legal consideration”.<sup>25</sup> He then memorably rejected a proposition that the ends could justify the means:

To press forward to a great principle by breaking through every other great principle that stands in the way of its establishment; to force the way to the liberation of Africa by tramping on the independence of other states in Europe; in short, to procure an eminent good by means that are unlawful is as little consonant to private morality as to public justice.<sup>26</sup>

It followed that treaties authorising visit and search were essential if the freedom of navigation of slave traders was to be stamped out. The process of negotiating those treaties was slow and difficult with the major multilateral treaties being concluded only late in the 19th century.<sup>27</sup>

I move back from treaty making, state practice and litigation to national legislative processes.

### **The codifiers hesitate ...**

The Bill on which the Commissioners were reporting in 1879 had contained a definition of “Piracy by the Law of Nations”.

We have thought it better [said the Commissioners] to leave this offence undefined ... as no definition of it would be satisfactory which is not recognised as such by other nations; and after careful consideration, we have not been able to discover a definition fulfilling such a condition. We may observe as to this that the subject has been much discussed in the courts of the United States, and the result appears to justify the course which we have adopted. We do not think it will lead to practical inconvenience.<sup>28</sup>

The relevant provision of the Draft Code said simply:

#### **Piracy by the Law of Nations**

Everyone shall be guilty of an indictable offence, and shall be liable upon conviction thereof to penal servitude for life, who does any act which amounts to piracy by the law of nations.<sup>29</sup>

That approach was adopted in the New Zealand Criminal Code of 1893 s104, the *Crimes Act* 1908 s121 and the *Crimes Act* 1961 s92. The 1961 provision, in terms of my first issue, says that the offence can be committed inside or outside New Zealand.

<sup>24</sup> 2 Dods 210 at 243.

<sup>25</sup> Id. at 248.

<sup>26</sup> Id. at 257.

<sup>27</sup> See also *Sellers v Maritime Safety Inspector* (1999) 2 NZLR 44 at 47.

<sup>28</sup> Criminal Code Bill Commission *Report of the Royal Commission appointed to consider the Law Relating to Indictable Offences* (1879) C.-2345 at 20.

<sup>29</sup> Id. at 85.

**... but in New Zealand try analogy.**

Unlike Lord Stowell, the New Zealand Parliament did attempt to boldly go where he had refused to go and to apply the law of piracy by analogy if not to slavery but rather to the hijacking of aircraft. That activity was occurring essentially for the first time, between Cuba and the United States, when the Crimes Bill was in Parliament.<sup>30</sup> Our Parliamentarians decided to make their contribution by adding this provision to the Bill:

S92(2) Any act that by the law of nations would amount to piracy if it had been done on the high seas on board or in relation to a ship shall be piracy for the purposes of this section if it is done on board or in relation to an aircraft, whether the aircraft is on or above the sea or is on or above the land.

The “two ships” rule and the underlying idea of the rejection of allegiance present major problems for the practical operation of that provision. But that appears not to be a real problem since hijacking and attacks on aircraft were soon the subject of separate treaties and national legislation implementing it.<sup>31</sup>

**The Privy Council answers one question ...**

I leave treaty making and national legislation for the moment to return to the 1930s to an outstanding judicial opinion and a splendid piece of scholarly activity. A Hong Kong court had ruled in 1931 that robbery was a necessary component of piracy and had accordingly acquitted the crew members of junks which had attacked another Chinese vessel with gunfire. The Privy Council, in response to a request for an advisory opinion under the rarely invoked jurisdiction conferred by the *Judicial Committee Act* 1833, in an opinion given by Viscount Haldane LC, disagreed and ruled that actual robbery is not an essential element.<sup>32</sup> The opinion emphasised that pirates had placed themselves outside the protection of any State. They are no longer nationals but *hostes humani generis* and as such justiciable by any State anywhere. At one point he emphasised the two ships rule

Assume a modern liner with its crew and passengers, say of several thousand aboard, under its national flag, and suppose one passenger robbed another. It would be impossible to contend that such a robbery on the high seas was piracy and that the passenger in question had committed an act of piracy when he robbed his fellow passenger, and was therefore liable to the penalty of death.<sup>33</sup>

He then qualified that to some extent. While a shooting affray between two passengers on a liner could not be held to be piracy:

It would, however, correctly include those acts which, as far as their Lordships know, have always been held to be piracy, that is, where the crew or passengers of a vessel on the high seas rise against the captain and officers and seek by armed force to seize the ship. Hall put such a case in the passage just cited: it is clear from his words that it is not less a case of piracy because the attempt fails.<sup>34</sup>

<sup>30</sup> *New Zealand Parliamentary Debates*, Vol 328 at 2990.

<sup>31</sup> Eg Aviation Crimes Act 1972 (NZ), which gives effect to the Convention for the Suppression of Unlawful Seizure of Aircraft (16 December 1970, The Hague); the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (23 September 1971, Montreal); the Protocol for the Suppression of Unlawful Acts of Violence at Airports serving International Civil Aviation (24 February 1980, Montreal); and the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft (14 September 1963, Tokyo).

<sup>32</sup> *In re Piracy Iure Gentium* (1934) AC at 586.

<sup>33</sup> *Id.*, at 592.

<sup>34</sup> *Id.*, at 598-99.



The opinion is also of real interest for its contribution to legal method, first on the sources of international law. They include

a wider range of authority than that which it examines when the question for determination is one of municipal law only. The sources from which international law is derived include treaties between various States, State papers, municipal Acts of Parliament and the decisions of municipal Courts and last, but not least, opinions of juriconsults or text-book writers.<sup>35</sup>

The Privy Council referred to Grotius, Coke's Institutes, Molloy's 1676 book *De Jure Maritimo et Navati*, Casaregis, an Italian jurist of the same time, Hale's, Hawkins' and East's *Pleas of the Crown*, Hall's *International Law*, Stephen's *Digest of Criminal Law*, from the United States John Bassett Moore, Dana's Wheaton and Chancellor James Kent's *Commentaries*, from Scotland Hume and Alison, from France Ortolan, from Switzerland Bluntschli and from Argentina Calvo; relevant judgments came from English and American judges, including Dr Lushington, Sir Robert Phillimore and Joseph Story; relevant United Kingdom legislation was reviewed; as was recent work by a League of Nations codification committee which had concluded:

According to international law, piracy consists in sailing the seas for private ends without authorisation from the government of any State with the object of committing depredations upon property or acts of violence against persons.<sup>36</sup>

The Privy Council also mentioned "the most valuable treatise on the subject of piracy contained in 'The Research into International Law by the Harvard Law School' ... 1932" – to which I return.

Secondly on legal method, Lord Haldane in commenting on a jury direction given in 1696, emphasised the continuing development of international law

International law was not crystallized in the 17<sup>th</sup> century, but is a living and expanding code. In his treatise on international law, the English textbook writer Hall (1835-94) says at p25 of his preface to the third edition (1889) [reprinted in 8<sup>th</sup> edition 1924]: "Looking back over the last couple of centuries we see international law at the close of each fifty years in a more solid position than that which it occupied at the beginning of the period. Progressively it has taken firmer hold, it has extended its sphere of operation, it has ceased to trouble itself about trivial formalities, it has more and more dared to grapple in detail with the fundamental facts in the relations of States. The area within which it reigns beyond dispute has in that time been infinitely enlarged, and it has been greatly enlarged within the memory of living man." Again another example may be given. A body of international law is growing up with regard to aerial warfare and aerial transport, of which Sir Charles Hedges in 1696 could have had no possible idea.<sup>37</sup>

On the last matter, Tennyson was nearly a century ahead of his time.

**... but leaves general codification to ...**

A third aspect of legal method addressed by the Privy Council – the last I mention - relates to the suggestion made to it that it restate the whole of the law of piracy:

their Lordships do not themselves propose to hazard a definition of piracy. They remember the words of M Portalis, one of Napoleon's commissioners, who said : "We have guarded against the dangerous ambition of wishing to regulate and to foresee everything ... . A new question springs up. Then how is it to be decided? To this question it is replied that the

<sup>35</sup> Id, at 588.

<sup>36</sup> Id, at 599.

<sup>37</sup> Id, at 592-93.

office of the law is to fix by enlarged rules the general maxims of right and wrong, to establish firm principles fruitful in consequences, and not to descend to the detail of all questions which may arise upon each topic.” (Quoted by Halsbury LC in Halsbury’s Laws of England, Introduction, p.ccxii.)

A careful examination of the subject shows a gradual widening of the earlier definition of piracy to bring it from time to time more in consonance with situations either not thought of or not in existence when the older jurists were expressing their opinions.<sup>38</sup>

### ... private and public law reform ...

As the Privy Council mentions, the restatement role that was being urged on it had been taken up shortly before in the League of Nations and at the Harvard Law School. The Harvard Law School Research elaborated a draft convention with comments.<sup>39</sup> It is a most thorough, carefully researched text, incorporating 250 pages of relevant authority. That piece of non-governmental scholarship greatly assisted the UN International Law Commission twenty years later when it prepared its 1956 draft articles on the high seas.<sup>40</sup> In general, said the Commission, it was able to endorse the findings of that research.<sup>41</sup> Unlike the Harvard study, the Commission’s work was subject to governmental comment, first, as it was being prepared – including for instance the question of state piracy – and, second, in the diplomatic conference which prepared the 1958 conventions.<sup>42</sup> Essentially, the same text has been included in the 1982 United Nations Convention on the Law of the Sea (UNCLOS) to which Australia and New Zealand are both party.

### ... which answers the four questions ...

That text, in terms of my four issues,

1. limits piracy to the high seas and other places outside the jurisdiction of any State
2. incorporates the two ships rule
3. requires private ends or purposes, and
4. allows seizure of private ships on the high seas by warships of any state, and the arrest and penalising of those on board and the determination of action to be taken with regard to the ships, aircraft or property by the State which carried out the seizure.<sup>43</sup>

The various processes of codification and law reform, official and unofficial, national and international, might be thought to have reached a conclusion in those texts. They now give much greater certainty to the content of “the law of nations” referred to in the New Zealand *Crimes Act* – although they are not directly incorporated into that statute. By contrast an Australian statute enacted in 1992 explicitly gives effect to those

<sup>38</sup> Id, at 600. The passage from Portalis is included in Lord Hailsham LC’s preface to the 1972 version of the first volume of the fourth edition, but unfortunately not in the reissue.

<sup>39</sup> Harvard Research in International Law, “Draft Convention on Piracy with Comments”, (1932), 26, AJIL Supplement at 741.

<sup>40</sup> The text was originally prepared in French and was titled *Regime of the High Seas* 2 YBILC, 6<sup>th</sup> Session, 1954 7; UN Doc A/CN.4/79.

<sup>41</sup> *Report of the International Law Commission, Comment to Article 13*, (1956) 2 YBILC 25, UN Doc A/CONF.4/ Ser A/1995/add 1.

<sup>42</sup> Convention on the High Seas, 20 April 1958, Geneva.

<sup>43</sup> For 1-3, see article 101 and for 4, article 104 of UNCLOS.

international texts in Australian law, both in its criminal law and in statements of the powers of naval enforcement.<sup>44</sup>

But, notwithstanding that development of the law, the Convention definitions and rules do present problems. I mention three. Two are contradictory : the statement may be seen as too restrictive (as with the “two ships” rule and the high seas limit) and too vague (as with the private ends requirement). And the methods of enforcement may be inadequate both in fact and in law.

**... in ways which are said to be too strict ...**

Sir Guy Green highlighted the first problem by reference to the “two ships” rule in his Dethbridge lecture of 1978.<sup>45</sup> His concern was highlighted a few years later by the case of the *Achille Lauro*, which was taken over from within by PLA agents who brutally killed Arnold Klinghoffer, an American who was confined to a wheel chair. In terms of general doctrine, captured for instance in articles 92 and 96 of UNCLOS, the flag state has exclusive jurisdiction over its vessels on the high seas. Those limits on the powers of other states, along with the related limits on the definition of piracy including the private purpose limit, were seen as unsatisfactory or at least as requiring supplementation and in 1988 a diplomatic conference, under the auspices of the International Maritime Organisation, adopted the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and an associated Protocol relating to maritime platforms. That Convention supplements piracy law by requiring the States parties (50 at November 2000 including Australia, China, Japan, the Marshall Islands, New Zealand and Vanuatu from East Asia and the South West Pacific) to make certain offences against ships punishable by appropriate remedies. Australia in 1992 and New Zealand in 1999 passed the legislation necessary to give effect in their law to the Convention and Protocol.<sup>46</sup>

States are to establish jurisdiction in certain circumstances and to prosecute or extradite alleged offenders present in their territory. The Convention is to be seen along with many other multilateral treaties relating to crimes of international concern. Any notion that all crime is essentially local or national – if it ever was - must now be seen as wrong.<sup>47</sup>

That development does not however have a real impact on the essential exclusivity of the flag state’s jurisdiction over its ships on the high seas – a matter to which the New Zealand Court of Appeal gave some attention in a recent judgment. UNCLOS and related practice touched on in that judgment show that exceptions to that principle are only rarely and carefully conceded.<sup>48</sup>

**... or too vague ...**

I now move to the argument, or indeed to the complaint, that aspects of the law are too vague, too uncertain.<sup>49</sup> Consider in particular the division in the law of piracy between public and private ends or the requirement of private ends. It may be a close relation to

<sup>44</sup> Crimes Act 1914 (Cth) Part IV.

<sup>45</sup> Green, GSM, “Terrorism and the Law of Piracy”, (1989), *F. S. Dethbridge Memorial Addresses 1977-1988*, MLAANZ, Auckland, 9-33. at 12.

<sup>46</sup> Crimes (Ships and Fixed Platforms) Act 1992 (Cth) and Maritime Crimes Act 1999 (NZ).

<sup>47</sup> Eg Clark, R. S, “Offences of International Concern : Multilateral State Treaty Practice in the Forty Years Since Nuremberg”, (1988), 57, *Nordic Journal of International Law* at 49.

<sup>48</sup> See eg *Sellers*, supra n 27.

<sup>49</sup> See the Symposium issue on Certainty and the Law (2000) 9 Otago LR 601-741.

the political offence limit placed on the duty to extradite. So the New Zealand *Extradition Act* 1999 s7, consistently with much other practice and treaties over the past century or more, forbids extradition if the offence for which the surrender is sought is “an offence of a political character”. Twenty years after those words were first included in the United Kingdom *Extradition Act* they came before a Queen’s Bench Division which included Sir James Fitzjames Stephen, one of the 1879 Criminal Code Commissioners. Angelo Castioni, the person resisting extradition, was charged with the murder of Luigi Rossi, a member of the State Council of Ticino, a canton of Switzerland. Dissatisfaction with the government of the canton had developed to the point where a number of its citizens including Castioni

seized the arsenal of the town, from which they took rifles and ammunition, disarmed the gendarmes, arrested, and bound or handcuffed, several persons connected with the Government, and forced them to march in front of the armed crowd to the municipal palace. Admission to the palace was demanded in the name of the people, and was refused by Rossi and another member of the Government, who were in the palace. The crowd then broke open the outer gate of the palace, and rushed in, pushing before them the Government officials whom they had arrested and bound; Castioni, who was armed with a revolver, was among the first to enter. A second door, which was locked, was broken open, and at this time, or immediately after, Rossi, who was in the passage, was shot through the body with a revolver, and died very soon afterwards.<sup>50</sup>

The Court held that the alleged offence was incidental to and formed part of political disturbances and was accordingly an offence of a political character with the consequence that Castioni could not be surrendered. That proposition of law was based on what Stephen had said in his *History of Criminal Law*. That Judge said this about his earlier discussion:

I gave what appeared to me to be the true interpretation of the expression “political character.” It is very easy to give it too wide an explanation. I think that my late friend Mr [John Stuart] Mill made a mistake upon the subject, probably because he was not accustomed to use language with that degree of precision which is essential to everyone who has ever had, as I have had on many occasions, to draft Acts of Parliament, which, although they may be easy to understand, people continually try to misunderstand, and in which therefore it is not enough to attain to a degree of precision which a person reading in good faith can understand; but it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand it. Having given my view upon that subject, I shall say no more with regard to the interpretation of the Act of Parliament.<sup>51</sup>

This provision of the law, along with hundreds, indeed thousands of others, shows, as Portalis said, that some matters cannot be reduced to simple black letter rules at least not all at once. Those who have the responsibility to administer the law are left to make judgments by reference to the range of relevant factors. Sometimes that task can be assisted by legislation or treaties. One way, in the present context, is by saying that certain offences never fall within the definition of political offences (as for instance with the crime of genocide). Another is by stating relevant criteria or tests for the exercise of the power. That second possibility presents the question whether statutory

<sup>50</sup> *Re Castioni* (1891) 1 QB 149 at 150-151.

<sup>51</sup> (1891) 1 QB at 167-168. It is interesting that no point was taken about the fact that John Stuart Mill had expressed his opinion in a debate in the House of Commons. As well the views of the relevant Minister, also stated in the House, were cited by counsel. Like the Judge, counsel were helped in this reference by those speeches being included in a leading text on extradition.

or treaty provisions can assist the decision maker or whether, for a time at least, the decision makers, including judges, can be left to develop the relevant factors. To refer to the subject matter of one of these lectures delivered by one of my colleagues in the Court of Appeal, that issue has recently arisen in the context of the grant of leave to appeal to the High Court against an arbitral award.<sup>52</sup>

**... and which cannot be enforced in any event.**

Next is enforcement. International law and international lawyers are frequently faced with the argument that the rules may have been written down, but they are of no use. It is said that they cannot be enforced in the absence of Tennyson's "Parliament of man, the Federation of the world" enforcing "universal law". One answer to that is that the law I am considering is also part of the national law of many states and subject to application and enforcement through their courts and related institutions. Let me mention a quite different example relating to piracy arising in a national court. A shipowner claimed that a mutual war risks association was obliged to indemnify it for loss of materials, machinery and equipment from its ship occurring as the result of piracy.<sup>53</sup> The ship was anchored within port limits and the territorial waters of Bangladesh, in the Chittagong roads. According to the Judge, the fact that the vessel was not on the high seas at the time was not fatal for the claim in terms of the construction of a marine insurance policy: the international law definitions are affected by the wide powers to seize vessels and to exercise jurisdiction. "Where robbery with violence is committed within the jurisdiction of a state, it is not thought necessary to give any state the right to seize, prosecute and punish the offender." But it was fatal to the claim that the theft had been clandestine and that force had been used by the thieves only when discovered to make good their escape. Piracy in this context meant theft at sea involving force or threat of force to commit the theft.

Another answer to the claim of non-enforceability is the growth of international methods for the peaceful settlement of disputes such as those under UNCLOS. They have been invoked by Australia and New Zealand against Japan and are the subject of a 1999 order for provisional remedies and a very recent award on jurisdiction and admissibility.<sup>54</sup>

So far as the practical application of the powers to seize, prosecute and dispose of the vessel and its cargo are concerned, I recall the facts I have briefly mentioned. I add two points about them. The first is the role of the private sector. The International Maritime Board, an offshoot of the International Chamber of Commerce and with an office in Kuala Lumpur, is heavily involved in the monitoring of maritime traffic, reporting weekly on the latest reported incidents, and giving warnings and advice. Its activities, involving of course state agencies, and carried on in the wider context of International Maritime Organisation recommendations, are frequently successful. The second matter concerns the roles of the States affected. Various attempts have been made to get greater cooperation in the Asian region but difficulties abound. The Indonesian navy's effort has been affected by its duties elsewhere, for instance in Aceh.

<sup>52</sup> *Gold & Resource Developments (NZ) Ltd v Doug Hood Ltd* (2000) 3 NZLR 318; see Rt Hon Justice I. L. McKay's, 1995, Address "Negative Trends to Arbitration".

<sup>53</sup> *Athens Maritime Enterprises Corporation v Hellenic Mutual War Risks Association (Bermuda) Ltd* (1983) QB 647.

<sup>54</sup> *International Tribunal for the Law of the Sea: Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan) Provisional Measures*, (27 August 1999); *Southern Bluefin Tuna Case: Australia and New Zealand v Japan, Award on Jurisdiction and Admissibility*, 4 August 2000.

China, which claims sovereignty over many of the contested islands and reefs in the South China Sea and accordingly the associated territorial waters, insists that it can handle the matter and resists cooperation and outside involvement particularly by Japan. And that country, with its very large commercial interests, called regional meetings in the first part of 2000. It has proposed regional joint exercises and patrols involving Japanese coast guards in the Strait of Malacca – of course a politically sensitive matter, but one which gets some support for cost reasons at least.<sup>55</sup>

### **Should we be sailing (in our heads at least) in a new direction?**

Finally, I ask what the developments, and many like them, mean for our constitution and law making systems and for our understanding of them. Aspects of Lord Haldane's 1934 opinion reminded me of a judgment given almost 200 years earlier by Lord Mansfield when dealing with a shipowner's claim for freight from the cargo owner. He had shipped fish from St John, Newfoundland, to be carried to Lisbon. After 17 days, and four days out from Lisbon, the ship *Sarah* was taken by a French ship. It was retaken three days later by an English privateer. The cargo owner recovered the fish from the recaptors and paid them half of their value. Was the shipowner entitled to the payment of any freight and, if so, how much? Lord Mansfield said he

was desirous to have a case made of it, in order to settle the point more deliberately, solemnly, and notoriously; as it was of so extensive a nature; and especially, as the maritime law is not the law of a particular country, but the general law of nations: '*nec erit alia lex Romae, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes et omni tempore, una eademque lex obtinebit*'.<sup>56</sup>

The master, he decided, should be paid  $17/21 \times \frac{1}{2}$  of the original agreed freight, the proportions arising directly from the facts. This was not simply a matter of arithmetic. The great judge drew, apparently effortlessly, on an impressive range of authority to support his ruling. He found by the most ancient of laws of the world (the Laws of Rhodes) that the master should have a rateable proportion where he was in no fault. Consolato del Mere ("a Spanish book"), the Laws of Oleron, the Laws of Wisby, a series of scholarly publications and an Ordinance of Louis XIV were also to that effect, as, finally, was a decision of the House of Lords.<sup>57</sup>

Even more now, in this globalising world,<sup>58</sup> we should be understanding better the plurality of the sources, including the private sources, of our law, rights and obligations. The New Zealand and Australian statutes I have mentioned have almost no local content. The content is provided by treaties based on international official law reform work and diplomatic processes which in turn were based on a private law reform effort which drew on very extensive state practice, judgments, national legislation and scholarly writing. You will know the proportions better than I when you move across the range of other statutes relevant to your day to day work – including, to give a New Zealand list, Admiralty, Arbitration, Continental Shelf, Customs, Fisheries,

<sup>55</sup> Eg Supra n 6; BBC News, 28 April 2000; China Daily, 2 March 1999.

<sup>56</sup> The quotation is from Cicero, *De Republica; De Legibus* 3.22.33. It may be translated as follows: "Nor will it be one law at Rome and a different one at Athens, nor otherwise tomorrow than it is today; but one and the same law will bind all peoples and all ages."

<sup>57</sup> *Luke v Lyde* (1759) 2 Burr 882, 97 ER 614.

<sup>58</sup> Eg Giddens, *Runaway World: How Globalisation is Reshaping our Lives* (Profile, London, 1999); Rt Hon Sir Owen Woodhouse "Law Reform and International Commerce" in P. Myburgh (ed.), *The F S Dethbridge Memorial Addresses 1989-1998*, Maritime Law Association of Australia and New Zealand, Wellington, 2000 at 15-28.

Immigration, Maritime Transport (with its very extensive treaty base), Reciprocal Enforcement of Judgments, Submarine Cables and Pipelines Protection, Tariff, Territorial Sea and Exclusive Economic Zone, and the United Nations Convention on the *Law of the Sea Acts*. Is it really right to have a model in our head of a top down system of lawmaking with just Parliament and Judges at the top? Can that sensibly accommodate the world wide law making processes? A related more practical question is the extent of the involvement at the professional and official level of Australia, and especially New Zealand given its more limited resources, in bodies such as the CMI and IMO, UNCITRAL, UNIDROIT and the Hague Conference on Private International Law and the legal work of many other international organisations such as the International Labour Organisation, ICAO, and the World International Property Organisation. What priority should be given to those international processes compared with national ones? Can we afford not to be involved in many of them, given the need to attempt to protect what are perceived as important public interests? Will not cost be saved in the long run if New Zealand has had an opportunity to influence the negotiation or at least to reach a better understanding of the legal effect of the text?<sup>59</sup>

I should not leave the final word to Parliament or even Cicero or Mansfield. Rather, I turn to a great New Zealand writer who has just been honoured by the literary community. Allen Curnow, three hundred years after Abel Tasman's arrival at Murderers Bay, urged, us by reference to the journeys undertaken by that great mariner, to think in radically different ways:

Simply by sailing in a new direction  
You could enlarge the world.<sup>60</sup>

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<sup>59</sup> Consider for instance the problems caused by the inadequate legislative implementation in New Zealand of the Hague Convention on the Civil Aspects of International Child Abduction in the Guardianship Amendment Act 1991. See eg *Chief Executive of the Department for Courts v Phelps* (2000) 1 NZLR 168.

<sup>60</sup> "Landfall in Unknown Seas", 1942.