

*Hostis Humani Generis: Piracy, Terrorism
And a New International Law*

By

Douglas Richard Burgess II

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Department of

Law

The University of British Columbia
Vancouver, Canada

Date

6/2/03

ABSTRACT

In order to facilitate the pursuit and prosecution of terrorists worldwide, and to ensure upon capture that they receive equitable treatment under the law, a new international law of terrorism must be created. This law must provide a universal definition of terrorism, include a list of terrorist offences, offer guidelines for international pursuit and capture by states, and give the parameters of domestic and international jurisdiction. This thesis argues that the crime of terrorism be based on the existing international crime of piracy, most particularly with regard to pirates' definition as *hostis humani generis*, enemies of the human race. Such definition would also allow universal jurisdiction over terrorist crimes, as well as distinguishing terrorists as international criminals from legitimate, politically-motivated persons such as insurgents and revolutionaries, and from crimes committed by the state itself. Moreover, this thesis demonstrates that piracy and terrorism are not separate crimes under the law, but inextricably bound in both legal and historical precedent. A recognition of terrorism as a crime of piracy not only has felicitous effects in determining future prosecutions, it also gives terrorism its correct definition in international law.

TABLE OF CONTENTS

Abstract.....	ii
Table of Contents.....	iii
Dedication.....	v
Acknowledgements.....	viii
FORWARD.....	1
INTRODUCTION.....	6a
CHAPTER 1 Piracy and the Law, a Historical Overview.....	15
Introduction.....	15
I. Beginnings of Piracy; Piracy in the Ancient World.....	17
II. The Resurgence of Piracy in the Middle Ages and Renaissance: The Genesis of Terrorism and a Challenge to the Law of Nations.....	22
III. Piracy as Sponsored Terrorism, 1562-1609: The Rise and Fall of the Privateer in Elizabethan England and the Dawn of the Golden Age.....	26
IV. Waging a Private War Against the World: The Golden Age of Piracy.....	30
V. Enemies of the Human Race: The Evolution of Piracy Law, 1700- 1858.....	39
Conclusion.....	48
CHAPTER 2 Modern Piracy Law, Problems and Synthesis.....	52
Introduction.....	52
I. Piracy in American Law: The Municipal Trend Towards Equating Piracy and Terrorism.....	56
II. The Problem of Definition: Scholarly Debates.....	64
III. The Harvard Draft Convention of 1932: A Genesis for International Criminal Law.....	71
IV. The Geneva Convention on the High Seas of 1958.....	82
V. The United Nations Convention on the Law of the Sea 1982.....	89
VI. The 1999 Working Group.....	90
Conclusion.....	93

CHAPTER 3	The International Response to Terrorism.....	100
	Introduction.....	100
I.	A Brief History of Terrorism and the Law, 1937 to the present..	104
II.	Groping Towards Definition: Scholarly Debate in the New Millennium.....	115
	Conclusion.....	144
CHAPTER 4	Proposing a New International Terrorist Law.....	149
	Introduction.....	149
I.	A Model Definition for the Crime of Terrorism.....	154
II.	Suggested Jurisdiction for the Crime of Terrorism.....	158
	Conclusion.....	169
APPENDIX.....		173

Dedication:

I knew from the very first moment that I would always have a friend in David Gritz. We met as undergrads in McGill University; he from France, I from the United States. We met in the laundry room. I will never forget my first sight of him: sitting placidly on top of a washing machine, legs crossed, reading Proust. He was utterly absorbed in the book, in the washing machine, in everything. That was David. His concentration was like an intense beam of light focused on a single object. And when you spoke with him, he was utterly absorbed in *you*.

David was quite simply the most beautiful person I have ever met. Beautiful in every sense, including physical. He had a long, lean body with dark hair on his arms and legs, and a surgeon's long-fingered hands. He played the violin. His face was Byronic, a study of light and shadow with huge, inexpressibly deep brown eyes. Women adored him. When he spoke his voice was soft and deep, a gentle growl with the round intonations and occasional hilarity of a French accent. I do not remember our first conversation, nor do I remember much of the hundreds since. They have become for me not many but one; a single, unending bond of thought and word that endured for seven years, between oceans and continents.

David returned to France at the end of that year, and my visits with him came only intermittently thereafter. He liked to say that we became friends at McGill but best friends on the telephone, and this was true. The distance crystallized our relationship, making each conversation all the more poignant, each e-mail more memorable. And the visits, when they occurred, were cataclysmic. Tired of flinging sparks at one another from opposite ends of the world, we met and embarked on marathon sessions that went uninterrupted through days, nights, and far too many bottles of wine.

I came to love David as I had never loved anyone else. He was a philosopher, in fact and in spirit. When he returned to Paris in 1997 it was to begin research on the French philosophers,

and his studies soon branched out into the realms of science, politics, religion, and mysticism. The son of a Jewish father and a Catholic mother, he was profoundly spiritual. This spirituality came not from without but within: a struggle within himself to find the perfect, the absolute, the eternal, the good. David never doubted his own immortality. In all his spiritual tribulations, that was the fixing point from which all else radiated. So certain was he that he inspired everyone who knew him—even myself, an indifferent agnostic—to share his conviction.

I will never fully understand the contradictory emotions fueling his strange spiritual odyssey that eventually led David to Israel. He justified it to me first as academic interest, a chance to study Biblical philosophy at its fount. This was almost credible. I once told him he would hang upside down off Mt. Fuji if he felt he could learn something from it; he delighted to remind me of that when I protested the expedition to Israel was far too unsafe. Underneath, however, I detected something else, something stronger than scholarly curiosity. Many said afterwards that he was trying to reconnect with his Jewish faith, but I doubt it. David was fascinated with Judaism as he was fascinated with Kant, Mahler, totalitarianism and bicycles. If a subject caught his interest he pursued it doggedly, as he did with his music, but no one creed ever held him fast. Perhaps it was intellectual curiosity after all, or the desire to see a new world, or the possibility of realizing something else about himself. Whatever it was, he remained deaf to my protestations. Our last conversation was strained. He was weary of everyone reminding him of the dangers—his mother had been particularly vehement. Resigned to the inevitable, I told him to take every possible precaution. David answered patiently, reassuring me with promises. In an earlier e-mail he had gently admonished me about my intention to visit him in Paris, “I hope you’re not planning the journey as a last visit to a future corpse!” He left for Jerusalem on July 15, 2002.

On July 31, a bomb exploded in the Frank Sinatra cafeteria of the University of Jerusalem. David was sitting with friends some distance from the epicenter. His friends all survived; he

should have too. But an errant nail loosed from the blast pierced his heart. He was dead within minutes. I do not know if he was ever conscious.

This book is dedicated to my friend David Gritz, author, philosopher, musician and spiritual guide, in the hope that his will be among the last sacrifices to the barbaric maw of terrorism.

ACKNOWLEDGMENTS

The author wishes to express his gratitude to Professor Peter Burns, without whose help this thesis would never have been written. Professor Burns not only provided invaluable commentary and criticism, he took a chance on an untried idea (and an untried author), and it is because of his encouragement that this thesis was created. The author would also like to thank Professor Daniel Prefontaine for his help and guidance, both throughout the year and in the nick of time. Finally, the author acknowledges an enormous debt to his father, Douglas R. Burgess Sr., for pressing him to pursue this topic in spite of overwhelming advice to the contrary.

Forward:

On October 17, 1985, members of the Palestinian Liberation Organization (PLO) seized control of an Italian cruise ship, the *Achille Lauro*, while it was at anchor in the Eastern Mediterranean. Four hijackers boarded the ship with fake identification papers and concealed weapons, then proceeded to incarcerate the captain and his officers along with the passengers—many of whom were American—in the ship's lounge. During this time one of the passengers, an elderly and wheelchair bound Jewish-American named Leon Klinghoffer, was murdered. His corpse was thrown over the side of the ship.¹

Despite this act of homicide, a deal was eventually reached whereby the hijackers were given safe passage to Egypt. In a furor of media criticism, the Egyptian government refused to try or extradite the Palestinians, providing them instead with a flight out of the country. Fighter aircraft from the United States Navy intercepted the flight and forced a landing at a NATO base in Italy.² The problem then passed to the Italian government, who took custody of the four men. Almost instantly the United States demanded their extradition, citing the crimes of hostage taking under the Comprehensive Control Act of 1984 and piracy under 18USC sub. Sec. 1651.³ This was the first recorded instance of piracy as a grounds for extradition to an American court. Nevertheless, the Italians refused the warrant, claiming their own right to prosecute the malefactors and—in an ironic twist—citing the inherent barbarity of the United States' adherence to capital punishment. Two years later the four Palestinian terrorists were convicted of murder and hijacking.⁴ The masterminds of the crime remained at large, under the protection of sympathetic governments.

¹ Gerald P. McKinley, "The *Achille Lauro* Affair—Implications for International Law." *Tennessee Law Review* 53, 1985, 690.

² *Ibid.*, 691.

³ N. Ronzitti, *The Achille Lauro and International Law* (New York: Martinus Nijhoff, 1991), 213.

⁴ Jack Gottschalk and Brian Flanagan, *Jolly Roger with an Uzi* (Annapolis: Naval Institute Press, 2000), 36.

The *Achille Lauro* incident, as an act of terrorism, was not singular. On the scale of international outrage it pales in comparison to the Munich Olympics a decade earlier, or the pattern of downed aircraft throughout the 1980's. But the public response it generated was unprecedented. Columnists throughout North America decried it as an act of rank piracy, an opinion shared by most Americans and their President, Ronald Reagan. In a speech given shortly after the event, Reagan specifically labeled the terrorists as pirates and called for immediate justice.⁵ Public expressions of rage continued for several years, including an operatic tribute entitled "Klinghoffer" and a motion picture starring Burt Lancaster and the actual *Achille Lauro* herself, by then an abandoned pariah of the cruise industry.

Yet the most significant developments from the events of October 1985 went almost entirely unnoticed. Commentators had quickly dubbed the *Lauro* terrorists as "pirates," a definition which carried the pungent imagery of black powder and skullduggery and affixed them firmly in the public's mind. But this term was, strictly speaking, inaccurate. Piracy, under international law at the time (as articulated by the 1958 Geneva Convention and 1982 Convention on the Law of the Sea, discussed *infra*) required an act of seizure or destruction "for private gain."⁶ The distinction was so semantic as to be irritating, and one author aptly dismissed it with a reference to the American Supreme Court Justice asked to define pornography. He couldn't define it, he said, but he knew it when he saw it.⁷ The Italian government, which had borne the wrath of the American press for refusing extradition, was particularly anxious to settle the matter. In addition to the four existing international conventions defining terrorism and proscribing terrorist acts such as aerial hijacking, the Italians proposed a fifth: a

⁵ Ibid., 37.

⁶ Samuel P. Menefee, "The *Achille Lauro* and Similar Incidents as Piracy: Two Arguments," in Eric Ellen, ed., *Piracy at Sea* (Paris: ICC Publishing, 1989), 179,

⁷ Gottschalk, 38.

convention to the International Maritime Organization which came to be known as the "Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation."⁸ Alongside the existing crimes of hijacking, assassination and the taking of hostages, a new crime was added: "maritime terrorism." By this phrase the Old World of piracy and the New World of terrorism were officially wedded—for the first time—in international law.⁹

This formal recognition was a long time coming. The *Achille Lauro* incident and its aftermath did not engender the interrelatedness of piracy and terrorism; rather, they brought to the fore of western legal consciousness a symbiotic and interwoven relationship which had existed *sub rosa* for hundreds—perhaps even thousands—of years. It was not surprising, moreover, that it took so long for the relationship between them to surface; in 1985, international terrorism law was still in its infancy (as many would argue it still is) and legal recognition of piracy as an international crime was so longstanding as to be considered archaic. The idea of pirates as "enemies of all humanity," promulgated in the later days of the Roman Republic, had been codified by the Declaration of Paris in 1858 and reiterated thereafter, most recently in 1982. Yet piracy and terrorism had been close cousins for as long as trade existed between empires: from the Phoenicians to the Vikings to the Elizabethan corsairs, terror has been an elementary component of successful piracy. In fact, most acts of piracy—then and now—rely on the inspiration of terror in the breasts of their victims to avoid the necessity of a fight between them. The terrorist foundations of piracy have been recognized by the law almost as long as piracy itself has existed. The definition of pirates offered by Marcus

⁸ George Constantinople, "Toward a New Definition of Piracy: The *Achille Lauro* Incident," *Virginia Journal of International Law*, 26 (1986), 749.

⁹ *Ibid.*, 750.

Tullius Cicero, alluded to above, remains the best: *hostis humani generis*, enemies of the human race. It is a phrase which could apply equally to pirates or terrorists.

In the past year these terrorists have launched their most formidable attack on civilization to date. The world after September 11 is in a state of profound flux, as the United States pursues its "war on terrorism" and President George W. Bush has declared unilaterally, "You are either with us or with the terrorists." International law is struggling to keep pace with this new form of conflict, and failing. Despite recent efforts there remains no formal definition of the crime of organized terrorism, but rather a hodgepodge of covenants addressing such individual elements as the abovementioned aerial hijacking and hostage taking.¹⁰ The necessity for an international law on terrorism is doubly immediate, for at this moment both the United States and its terrorist nemeses pursue each other across a vast chessboard of states with no international covenants governing their actions. The United States currently holds several hundred persons captive at Guantanamo Bay, Cuba, and has engaged the full weight of its secret services in a covert and silent manhunt. The terrorists, meanwhile, continue to plan and execute their crimes beyond the jurisdiction of the International Criminal Court or like international judicial bodies. The current state of international law falls well behind addressing this new reality, written instead for a world where terrorism existed only on the lunatic fringe of international society and the greatest enemy to the nation state came from another state. Thus the 21st century "war on terrorism" is being conducted—by both states and non-states—in a relative vacuum of international law.

Recent efforts to formulate a comprehensive international law on terrorism and place it within the jurisdiction of the newly-formed ICC are noteworthy, but fruitless. As

¹⁰ See, generally, Edward McWhitney, *Aerial Piracy and International Law* (Dobbs Ferry: Oceana Pub., 1971) and James A. Arey, *The Sky Pirates* (New York: Charles Scribner, 1972).

with earlier attempts concerning the crime of aggressive war, the debate has deadlocked over a workable definition, in this case for the crime of "terrorism." The hackneyed adage that "one man's terrorist is another man's freedom fighter" renders any attempt at definition virtually impossible, dividing states on ideological lines and convoluting the situation all the more. Yet it also presupposes a conception of terrorism starkly different from the reality. Terrorists rarely fit the semi-romantic imagery of ragtag revolutionaries; as al-Qaeda recently demonstrated, today they are organized, well-funded and multinational bodies which have more in common with international corporations than freedom fighters.

Romantic imagery aside, there is an easily recognized legal entity with whom these new terrorists have remarkable similarities: pirates. This thesis intends to demonstrate that piracy is, in fact, the legal genesis of modern organized terrorism. The commonalities between the two are profound, both from the pirate/terrorist's aims, methods, and motivations on the one hand, and the deleterious effects on and legal responses of the victimized state on the other. I will argue that the best and easiest course for formulating a new international law on terrorism is to root it in the existing customary and statutory law of piracy. This will serve two purposes. First, it will make terrorism a crime of international universal jurisdiction, proscribing offences and determining punishment. Second, conversely, it will check the impunity of the state's actions in pursuing, capturing and prosecuting terrorists, placing these actions within the framework of international law.

On April 16, 2003, American military forces in Iraq captured Abu Abbas, the mastermind behind the *Achille Lauro* hijacking. He had been at liberty for eighteen years. During that entire time he enjoyed the protection of friendly governments, and was entirely safe from extradition. It required an armed invasion and the overthrow of an

entire regime to bring Abbas to justice. Yet if terrorists and pirates are equated under international law—if terrorists are defined as *hostis humani generi* and subjected to universal jurisdiction—state protection of international terrorists will become an international crime, and the Abu Abbas' of the world will have nowhere to hide.

Introduction:

This thesis will examine the existing state of international law regarding terrorists and terrorism with the aim of recommending a new stratagem for recognizing organized terrorism, placing it within the context of international criminal law, and establishing parameters for a state's ability to respond to it. I intend to argue that the existing international common law regarding piracy—particularly as a crime of universal jurisdiction—will be the most useful framework for defining terrorism and determining a legitimate state response.

International law is largely predicated on the assumption that all parties to a given conflict will be states. Furthermore, we are given to understand statehood as a distinct and recognizable category, determined principally—but not exclusively—by established territorial boundaries, an acting government, and international recognition. Many centuries of history have reinforced the truism that only states may make war upon each other, form treaties, or in general act as principals on the international stage. Consequently, the current body of international law today remains rooted in traditional concepts of statehood and aggression which have existed, virtually unchanged, since the very beginnings of diplomacy.

Yet recent events have demonstrated how perilously arcane these concepts have become. For the presumption of state vs. state conflict fails to take into account the threat of non-state actors which nevertheless possess enormous financial and human resources and pose a terrible threat to established states. These, of course, are the terrorists. While international law does not ignore their existence entirely, documents such as the Geneva Conventions reflect the conception of terrorism as either an isolated act perpetrated by individuals or as a state-sponsored activity

which shares many similarities to genocide and other forms of proscribed state conduct. Neither definition confronts the reality of international terrorism; highly organized, well-funded and potent organizations whose strength is derived from the very properties that discern them from states: lack of territorial boundaries, lack of recognized government, lack of international recognition. They pose the greatest threat to the precepts of international law it has ever faced, for they commit atrocities at which most recognized states would pall while remaining—by definition—outside of international jurisdiction. A single perpetrator of a terrorist act may be brought to justice, but the organization itself remains beyond the law. There is currently no recognition in international law of the crime of terrorism *per se*: that is, the crime of belonging to a terrorist organization without necessarily committing acts of violence. The crucial problem facing international jurists is to formulate a working definition of terrorism (and terrorist) which recognizes the threat they pose, while placing them within the parameters of established international law.

The impetus for this law has been greatly increased by the attacks of September 11, and the subsequent American response. Currently the United States is intent on pursuing a “war against terrorism”: a war which it defines in strictly Manichean terms (“You’re either with us or with the terrorists”). This American “war” possesses many traditional characteristics: the identification (and damnation) of an enemy, the mobilization and use of the armed forces, the diplomatic activity directed towards securing allies, and the intense concentration of intelligence services on gathering data. Yet this war is also unprecedented, for it is being conducted against an entity which is far from being a recognizable state. Hence it is not a “war” at all. But the question remains, what is it? International law provides little guidance. Concepts of pre-emptive self defense and universal

jurisdiction have been raised in justification of individual activities, but the United States has thus far offered no real definition of what this "war" may entail. Nor has the international community forcefully demanded one. International law, which theoretically governs all activity of states outside their borders, is silent. Hence the problem posed by organized terrorism for international law is twofold. On the one hand, there is no international law which specifically defines "terrorist," nor does it proscribe any conduct as "terrorism" beyond that which is traditionally criminal (i.e. murder). On the other, international law does not define the means by which states may pursue terrorists outside their borders: neither their pursuit, capture, extradition nor treatment. In short, the first decade of this century has given rise to a completely new form of international conflict: state vs. non-state. And, as of this moment, there is no international law available to govern it.

There is, however, a precedent. Though organized terrorism may be a creature of the late 20th century, the idea of state vs. non-state conflict has a long and colourful history in the law of piracy. Since the days of the Mycenaean empire, states and pirates have enjoyed a unique love-hate relationship in the law, ranging from acquiescence and sponsorship of "legal" privateers to the pursuit and hanging of *hostis humani generis*.¹¹ Yet, however each state chose to define the crime of piracy, there are strong resonances to contemporary organized terrorism throughout. Terrorism, in fact, not only bears superficial legal similarity to piracy¹², but may be regarded as its

¹¹While seemingly in conflict, the legality and illegality of piracy could sometimes be found side-by-side in piracy law, as in the case of Britain's sponsorship of the "barbaric" corsairs and its concurrent Piracy Act against its own citizens in the 18th century. Discussed fully in Chapter I, *infra*.

¹²Though a strong case could be made for applying the law of piracy to terrorism solely on the basis of those similarities, even excepting the argument that they are, in fact, the same legal creature.

evolutionary descendant, and thus subject to the same international law. This is not an attempt to wedge a square peg into a round hole; my thesis will demonstrate that terrorism and piracy are truly brothers beneath the skin. Even absent legal analysis, there are some obvious correlations. Both are directed against civilian targets; both endanger the trade and livelihood of the affected state; both employ terror and homicide committed as part of a greater strategy, not merely as ends in themselves; both represent a threat to the nation-state distinct from traditional state vs. state conflict, yet with equal potential for harm.

The most convincing argument for linking piracy and terrorism, however, lies in the law of states. The legal recognition of piracy as a crime against all humanity, and of the pirate himself as an enemy of the human race, emerges from centuries of intermittent conflict and cooperation between states and pirates. The idea of pirates as *hostis humani generis* may be two thousand years old, but it has taken almost all of that time (specifically, until the Declaration of Paris in 1858 and the Geneva Convention on the High Seas a century later) for that conception to gain ultimate acceptance in international law. Until that time the legal geopolitical conception of piracy fluctuated between criminality and barbarity on the one hand to an essential adjunct of the state's navy (and useful tool of political coercion) on the other. The idea of piracy as a universal crime was the final result of this conflict, as states ultimately determined that piracy was too heinous to be a legitimate tool of political persuasion. Hence piracy gained its current status as an international crime, a crime not against one state, nor even all states, but against humanity itself. And, by the same logic, pirates could no longer take refuge behind the protection of a sponsor state; their status made them international criminals subject to universal jurisdiction. In effect, the categorization of pirates as *hostis humani generis* created a third legal category in international law

between states and individuals; pirates were declared at "war" with civilization itself, and thus granted neither the protections of citizenship nor the sovereignty of states. In human terms, pirates were like a virus to the international body politic; sharing some of the qualities of a living organism, but limited in function to the destruction of the body and thus not meriting the dignity granted to a living being.

The greatest problem facing international jurists in the 21st century is formulating a cogent definition for the crime of terrorism—a task which is frustrated by the relative newness of terrorist organizations as international actors and the corresponding dearth of international terrorist law. Yet in the legal definition of pirates as *hostis humani generis*, I will argue, the battle for defining terrorism has already been waged and concluded. If it can be shown that the proposed "crime" of terrorism—as defined by its acts, motivations, perpetrators and effects—is tantamount in all respects to the crime of piracy, then terrorism may adopt perforce its legal history. In other words, the crime of piracy will serve as a valid legal precedent ^{for} terrorism, as well as a basis for its law. This precedent will serve two functions. First, as indicated above, it will provide a working definition for organized terrorism as an international crime—outside and in addition to individual terrorist acts which already have international law proscribing them--and will likewise offer a definition of "terrorist" which meshes neatly within existing international customary and statutory law. Second, and of equal importance, it will prescribe the legitimate actions of states in the pursuit, capture, and trial of terrorists. The United States' "war against terrorism" need not be legal *terra incognita*: history is replete with examples of states employing their armed forces to root out piracy. The first use of the American navy, in fact, was to quash the Barbary pirates' interference with trade. Equating terrorists with pirates has the efficacious effect of recognizing their level of organization

and potential threat, without granting them the legitimacy reserved for states. Furthermore, the crime of piracy is far from arcane in contemporary international law: it remains, alongside genocide and a select few other crimes against humanity, a crime of universal jurisdiction. Thus, by equating terrorists with pirates, the problem of capture in an unfriendly state is neatly avoided. A pirate may be captured wherever he is found, provided that capture is undertaken within the boundaries of international law. If the same rule were to be extended to terrorists, states might enter and retrieve terrorists within the borders of other states without risking impingement on that state's sovereignty.

This thesis is divided into four chapters, followed by a conclusion and appendices containing a proposed definition of terrorism as an international crime. As the central premise involves equating terrorism and piracy in international law, the thesis' structure will be directed towards building its case from the ground up, first tracking the evolution of piracy law from its earliest auspices to its current manifestation, then weaving in the concurrent threads of latter day terrorism and terrorist law, and finally proving a synthesis.

The first chapter will give a brief historical overview of piracy and piracy law, as determined by the changing pattern of state response. The purpose here is twofold; first, to familiarize the reader with piracy law (which can often be seen as an obscure and even arcane facet of international customary law); second, to demonstrate the historical linkages between terrorism and piracy. By examining the early recognition of terror as a political weapon, the history of state sponsorship, the motivations of the later pirates' "war against the world," and the legal evolution of the crime of piracy, it will be shown that piracy is in fact both the legal and factual ancestor of terrorism.

In the second chapter the discussion turns to the current state of international piracy law, as articulated by the 1958 Geneva Convention on the High Seas and subsequent UN conventions and declarations, the laws of individual nations such as the United States, and earlier declarations from the League of Nations. In examining the current state of piracy law and the debates—past and present—surrounding it, there are numerous parallels to the concurrent issue of organized terrorism. Hence these debates may provide a blueprint for resolving the disputes surrounding the creation of an international crime of terrorism.

The third chapter has two parts. First, it will examine the rise of organized terrorism, beginning with its early historical auspices in Europe, Asia, America and the Middle East. The pivotal influence of western imperial policy, from 16th century Britain to 20th century America, is credited for the birth and growth of reactionary terrorism as a means of rebelling against colonial masters. It then tracks the evolution of terrorist organizations in the wake of decolonization in latter half of the 20th century, with specific emphasis on the rise of terrorist cells in the Middle East. This discussion will also raise possible linkages between acts of piracy and terrorism in the recent past, most notably in the seizure of vessels (such as the aforementioned *Achille Lauro*) and in aerial hijacking, termed “air piracy.”

Second, this chapter will chart the concurrent legal response of states and international organizations, with particular attention to the present state of international terrorist law. This actually involves three distinct, but related, inquiries concerning: 1) the laws of individual states against terrorists at home and abroad; 2) the laws promulgated by international organizations (most notably the UN) against individual acts of terrorism; 3) the continued influence of western foreign policy on the rise and pattern of organized terrorism, both during the Cold War and in the

present day. As with the former discussion, the similarities between government response and influence on piracy and terrorism will be evaluated.

Finally, in the fourth chapter, the thesis will turn to the recent emergence of a new form of conflict, in the wake of September 11 and related attacks. The current dimensions, level of organization, and potential threat of organized terrorist groups will be evaluated. It will examine how the previous policy of the international legal community mirrored that of the states themselves; a policy of willful blindness, motivated by the prevalent conception of terrorists as existing on the disorganized fringe of society, and thus not worth—nor deserving of—serious attention. The discussion also addresses how, while the states' policies have radically altered following September 11, international law has remained static. The resulting harm, it argues, is that both states and terrorists will act with impunity, outside the jurisdiction of international law.

The necessity for a new legal framework regarding terrorism having been established, the thesis will then pose the question of whether it should be entirely *de novo*, as a reflection of a new form of conflict and new potential actors, or whether it should be grounded in existing international customary law. It concludes the latter, for two reasons. First, the difficulty in formulating an entirely new set of laws to govern new situations is a herculean task, virtually unequalled since the first recognition of international accountability at Nuremberg. States would be loath to undertake it, since it would involve a) creating an entirely new definition of terrorism; b) similarly, a new definition of terrorist; c) a list of proscribed conduct; d) an international body suitable for jurisdiction (presumably the ICC); and, most importantly, e) establishing guidelines and limitations for states intent on pursuing, capturing and 'rooting out' terrorism extra-territorially. Considering the painful—and long--machinations prior to the creation of the International Criminal

Court, such an undertaking could hardly be completed in time to address a problem which is as timely—and threatening—as international terrorism. Secondly, even were this possible, the legitimacy of such laws might come into question. States whose sovereignty would be under question (i.e. those deliberately or unwittingly harboring terrorists) could complain, with cause, that the international community was discarding all its traditional customary law in deference to an isolated attack against the United States. Far better to ground anti-terrorism law in an existing, preferably ancient body of law, so that it may be seen as an extension, not a departure.

Having demonstrated in previous chapters the common ancestry of piracy and terrorism, the fourth chapter will go on to suggest a definition of terrorism based on the existing laws of piracy, as both the logical and most efficacious means of addressing the problem of organized terrorism and state response; logical, because terrorism may be regarded as an evolutionary form of piracy, and thus subject to its laws, and efficacious, because this approach avoids the pitfalls of legitimacy inherent in creating “new” law.

To provide a final proof for the legal validity of a piracy-based international terrorist law, it concludes by making the case for prosecuting the perpetrators of the World Trade Center attacks on the basis of *existing* piracy law, absent any new definitions. It will thus be shown that the extension of piracy law to terrorism does not require a leap of faith, but rather a necessary recognition of the commonality of the crimes of piracy and terrorism: a commonality not only through inference, but reflected in the current state of international law.

Chapter 1: Piracy and the Law, A Historical Overview

Chapter Summary:

Piracy and terrorism have been incorrectly interpreted as separate entities in the law; in fact, piracy is the legal antecedent of modern organized terrorism. Beginning with the Roman definition of pirates as *hostis humani generis*, western nations gradually moved away from criminalizing acts of piracy, as they became increasingly useful to governments as a means of hurting enemy nations and disrupting trade—a use which bears remarkable similarities to current government-sponsored terrorism. After governments in the late seventeenth century ceased to use piracy as a weapon against nations and adopted more stringent measures against pirates, the pirates themselves removed to outlying areas of empire and launched their own private “war against all the world”—becoming, in effect, the first terrorist organizations. Jurists re-adopted the idea of pirates as “enemies of all humanity” to counteract this threat, and governments became so passionately committed to hunting down and capturing pirates that the idea of universal jurisdiction emerged. The twin concepts of universal jurisdiction and *hostis humani generis* would be the cornerstones of piracy law long after the golden age of the pirates had passed. Governments continued to employ non-western privateers against each other throughout the 18th century even as they criminalized the conduct for their own citizens, but this policy backfired, resulting—in the 19th century—in the modern definition of piracy as a crime against humanity itself.

Introduction.

The purpose of this chapter is to examine the roots of piracy law in the western world, and track its evolution from the first Roman precepts to the modern juridical standards of the 19th century. The framework of historical analysis also serves a second, more pertinent function: demonstrating the traditional linkages between concepts of piracy and terrorism. By tracing the history of piracy and government response throughout the ages, we find also the birth and genesis of modern terrorism. Granted, this is terrorism in its earliest larval form; nevertheless, it shares many of the political and methodological components of its 21st century descendant.

Throughout this chapter frequent comparisons will be made between historic persons, activities and laws concerning piracy, and modern ‘terrorism.’ The inverted commas denote the fact that terrorism in its current form is not an easily identifiable creature; indeed, the efforts of

countless scholars, the International Criminal Court, and much of this thesis are directed towards determining a workable definition. I do not hesitate to make these comparisons, however, for in drawing the parallel between historical and modern terrorism, one might take a lowest common denominator approach. Webster's Dictionary defines "terrorism" as "the systematic use of terror especially as a means of coercion."¹ Organized terrorism might similarly be defined as the directed use of acts of terror to further a political aim.² To those who would argue that one cannot compare the separate entities of piracy and terrorism before fully defining both terms, the response is that they are not separate at all, but one single entity at two different periods of time. Thus separate definitions are not only unnecessary but incorrect. What I hope to demonstrate through historical analysis is that piracy *is* terrorism, in its earliest manifestation. This train of logic will then lead us to an even more momentous conclusion: that terrorism, in its current form, *is* a form of piracy. It is a common belief that terrorism is a by-product of the 20th century: of wars and empires, de-colonization and Cold War.³ While these may explain the existence of certain terrorist groups, they do not in themselves account for the greater question of how terror became a political tool in the first place. That is the central consideration for any code of law; not the circumstances which motivated a particular act, but the criminality of the act itself. Thus we

¹*Webster's New Dictionary* (New York: Webster's, 2000)

²I have employed this definition as a starting point for discussion; its efficacy lies in focusing on the *actus reus* rather than the *mens rea* of terrorism, thus sidestepping the scholastic debate of freedom fighter vs. homicidal maniac. As noted earlier, I do not intend this to be the *only* definition of terrorism gleaned from this text, but rather a foundation for later construction.

³David Halberstam, "Terrorism on the High Seas: The *Achille Lauro*—Piracy and the IMO Convention on Marine Safety," *American Journal of International Law* 82 (1998), 115.

do not inquire *why* a despot commits genocide,⁴ but rather whether genocide itself is a crime that must be punished, and how to manufacture a law to do so. Hence, it will be shown that centuries of piracy and piracy laws provide a legal foundation for a new international law on modern terrorism. The questions of “what is terrorism?” and “how can we approach it in the legal context?” can only be answered in one way: by understanding its historical foundation in the law of piracy.

I. The Beginnings of Piracy Law; Piracy in the Ancient World

Piracy has flourished on the high seas for as long as maritime commerce has existed between states.⁵ While incidents and methods vary from one region to another, both the practice and its practitioners bear universal similarities. Piracy is an act of taking by force, whether that taking be seizure of goods or destruction of property. Pirates, likewise, may be shortly defined as persons existing beyond the natural scope of society—both its actual and juridical borders—whose activities are directed against the commerce of that state.⁶

Until the UN Convention of 1958, the law of sea piracy was largely confined to two

⁴Or, if we do, it is confined to the evidentiary phase in determining the breadth of the crime and the despot's individual culpability.

⁵Henry Ormerod, *Piracy in the Ancient World: An Essay in Mediterranean History* (Baltimore: Johns Hopkins, 1997), 13.

⁶As with the earlier definition of terrorism, these brief definitions are meant only as a starting point and foundation for discussion; as later chapters will discuss, even the most basic concepts such as “taking” and “on the high seas” are fraught with difficulty. A good example of this is Sir Henry Morgan's attack on Hispaniola in the late 17th century, which was neither a seizure of a vessel nor was it committed on the high seas, yet was indisputably found to be an act of piracy.

sources: international customary law and the municipal laws of individual states.⁷ What strikes the scholar at first is the comparative dearth of written law on the subject. While each country has its own Piracy Acts, there is not the same paper trail of cases and revisions to such laws which typify the legal history of common law states, nor do civil law states, such as France, possess the body of statutory law one might expect to deal with this grave problem.⁸ The reason is that piracy and government have always enjoyed a strangely symbiotic relationship, fluctuating between active sponsorship and ruthless purgation. Piracy has long been employed by states as a form of undeclared warfare between them, a maritime fifth column which deprives the enemy of her life support while preserving the diplomatic vestiges of peace. Likewise, during actual warfare, pirates frequently traded their black colours for the banner of a sponsoring nation state and became privateers. Acting under the infamous "letters of mark" given by the Crown, pirates pursued their activities with impunity and made vast fortunes for themselves—and occasionally, as in the case of Sir Henry Morgan and Sir Francis Drake, became knights.⁹ The purpose of privateering, from the government's point of view, was not in enriching the pirate but bleeding the enemy. Likewise, the looting and pillaging of coastal towns was actively encouraged as a form of demoralizing psychological warfare.¹⁰ Thus privateering was nothing more or less than government-sponsored terrorism. As a weapon of war, it was enormously successful. Yet at the end of hostilities these

⁷See, generally, Gordon Paulsen, "An Historical Overview of the Development of Uniformity in International Maritime Law," *Tulane Law Review* 57 (1983).

⁸Barry Dubner, *The Law of International Sea Piracy* (London: Martinus Nijhoff, 1980), 40-45.

⁹Hugh Rankin, *The Golden Age of Piracy* (New York: Holt Rinehart, 1969), 4.

¹⁰*Ibid.*, 4.

royal licenses were customarily revoked, as a sign of good faith, and pirates drifted inevitably back to the windy side of the law.

Piracy waxed and waned, depending on the level of government response. Despite their fearsome reputation, pirates as a group were a cowardly lot. When governments actively pursued them, they simply melted away.¹¹ When interest faded, they returned. Like bacteria, piracy flourished best in neglect. The pattern of its history, from the ancient Rhodians to the Barbary pirates of the 19th century, is a wave chart of resurgence and decline, determined by the relative interest or indifference of the nation-states. In ancient times, the only evidence of piracy is the record of the states' response. Thus, while the first recorded mention of piracy occurs in the Cretan state of Minos in the fifteenth century B.C., it is certain that it already enjoyed a long and colourful career before that time.¹²

The first recorded use of piracy as a tool of government was during the Persian War between Athens and Persia in 479 B.C. . The Athenians successfully rooted out the Persian pirates, but the cost to their navy was too great and piracy returned in force during the Peloponnesian war in 431 B.C. . At the war's end the Athenian navy had been decimated, and the state could never again mount sufficient force to deter the pirates.¹³ Piracy flourished in the Mediterranean for several hundred years, and it was not until the accession of Rhodes as an economic power that the pirates met their match. Rhodes employed a sophisticated network of anti-piracy treaties, armed

¹¹Rankin, *Golden Age*, 21.

¹²Ormerod, *Ancient*, 8.

¹³M.J. Peterson, "An Historical Perspective on the Incidence of Piracy" in Eric Ellen, ed., *Piracy at Sea* (Paris: ICC Pub., 1989), 46.

merchantmen, and naval patrols which effectively deterred piracy in the Eastern Mediterranean for over a century. It was the Rhodians, moreover, who first codified the law of the sea.¹⁴

The Rhodians ultimately proved too weak to control the pirates, however, and the job eventually fell to the Roman Republic. In the mid-second century B.C., Rome severely curtailed the power of the Rhodian navy, which led to a brief but potent resurgence of piracy in that area. By the time of the Punic Wars, piracy had become so widespread and pervasive that naval combatants often feared the pirates more than each other. It is also credited with furnishing one of the justifications for Caesar's invasion of Britain; perceiving the necessity of crushing the Veneti pirates of Brittany, Caesar was forced to first subdue the Britons, from whom the Veneti drew their crews.¹⁵ Perhaps the most notorious incident of piracy in the ancient world was the capture of young Julius Caesar himself, who in 79 B.C. was seized by corsairs and held for ransom. The ransom was paid and the general returned to his troops, but Caesar was enraged. He swiftly returned to the camp with a posse of men and overwhelmed his erstwhile captors, who were still quite drunk and celebrating their good fortune. Exacting his toll, Caesar cut their throats and then, as they still bled, crucified them.¹⁶

With the end of the Punic Wars came the end of the pirates' first golden age. Their last recorded appearance was as privateers for Cleopatra's Egypt, where there is some evidence they played a part in the battle of Actium. On Octavian's accession to imperial rule, however, among

¹⁴Alan Villiers, *Men, Ships and the Sea* (Washington: National Geographic Survey, 1973), 29.

¹⁵Rankin, *Golden Age*, 1.

¹⁶*Ibid.*, 1.

his first acts as Augustus was a ruthless pogrom intended to blot the pirates out of the Roman world entirely. It was a measure not entirely without precedent. Pompey the Great had in 67 B.C. established a patrol force which was quite successful in suppressing pirate activity. With the crushing power of the Roman navies turned against them, pirates virtually vanished from the Mediterranean and were not heard from again for almost three hundred years.¹⁷

It was the Roman Republic which first gave definition to the crime of piracy, and much of its law still holds true today. First and foremost is Cicero's aforementioned definition as *hostis humani generis*, but of nearly equal importance were the attendant laws furnished by Cicero and the Roman Senate which first construed piracy not as a mere crime against individuals but against the nation as a whole. The Romans, already mindful of the efficacy of piracy as a tool of hostile governments, gave the offence a common jurisdiction which exceeded traditional legal boundaries, thus in effect creating a very early example of international law.¹⁸ The claim that *pirata est hostis generis humani* is in fact drawn from a larger argument by Cicero that "*pirata non est ex perdullium numero definitus, sed communis hostis omnium.*"¹⁹ The twin concepts of *hostis humani generis* and the law of nations led to the following conclusions in Roman law: 1) all crimes which constitute piracy must occur in areas outside the jurisdictional competence of any nation; 2) the pirate is, consequently, an enemy of no one state but the human race entire; 3) the pirate must and should be prosecuted under municipal law after capture, but the right to prosecute

¹⁷Peterson, 47.

¹⁸Ormerod, 113.

¹⁹"Piracy is not a crime directed against a definite number of persons, but rather aggression against the community as a whole." Cited in John W. Sundberg, "Piracy: Air and Sea." *De Pauw Law Review*, 20 (Winter 1970), note 17, p. 338.

is common to all nations and singular to none.²⁰ These early precepts form the basis of all international practice regarding piracy up to and including the present. Most particularly, the Romans must be credited with introducing the central element of international criminal law: universal jurisdiction. It is interesting to note that piracy is not merely one of the crimes for which such jurisdiction is applied (the others being slavery, genocide and crimes of aggression) but the *first* such crime. The idea that pirates may be seized anywhere they are found, and prosecuted by any country that captures them, is of critical importance when considering the possibility of a linkage between piracy law and organized terrorism.²¹ At the dawn of the Roman Empire, the foundations were already laid for an international customary law of sea piracy which would remain almost unaltered in definition for two millennia.

II. The Resurgence of Piracy in the Middle Ages and Renaissance: The Genesis of Terrorism and a Challenge to the Law of Nations.

By the fifth century A.D. the Roman Empire was in decline and disarray, and its fleet no longer held sway over the oceans. In 789 A.D. pirates along the coasts of Western Europe who termed themselves "sea-warriors," or Vikings, commenced annual raids on England, Scotland and Ireland. Such was the success of the Vikings that they eventually turned their attention to the continent, and by 912 A.D. they had conquered Normandy and were moving inexorably south

²⁰ Barry Hart Dubner, *The Law of International Sea Piracy* (Boston: Martinus Nijhoff, 1980), 42.

²¹ As will be fully discussed in later chapters, a recent attempt was made to include the crime of terrorism as one of universal jurisdiction. It failed, largely because of the inability of drafters to agree on a definition. I will argue that the melding of piracy and terrorist law will surmount this difficulty.

through Spain towards the Mediterranean.²² Viking raids on coastal cities introduced a new element to the crime of piracy: directed terrorism. Pirates made a policy of looting, pillaging, and destroying nearly every settlement they attacked, often at pecuniary loss to themselves. As a strategy of intimidation it was without par; for as soon as word of mouth could travel, the mere sight of a Viking ship on the horizon was sufficient to send townspeople scurrying for the hills.²³ In such a manner did the Vikings move easily through Europe, greasing their passage with the ferocity of their reputation.

With the rise of statecraft and corresponding growth of trade in the early Middle Ages came a resurgence of piracy. The first known pirate haven was England, where coastal raiders savaged vessels on the English Channel while the Royal Navy, still in its infancy, was powerless to stop them. Such was the gravity of the situation that the towns of Hastings, Romney, Dover, Hythe, and Sandwich—the so-called “Cinque Ports”—banded together to form anti-piracy patrols and police the Channel. Likewise the Hanseatic League, a trading organization formed in 1241 between the continental cities of Hamburg, Lubeck and others, began hiring dubious mariners to protect their ships from the English pirates. Yet this attempt to “send a thief to catch a thief” was, for both the Cinque Ports and the Hanseatic League, disastrous. The pirate-hunters soon realized the opportunities presented to them, and became pirates themselves.²⁴

The situation was little improved by the attitude of the monarchies. The Hanseatic League made overt alliances with pirate commanders in its war against Waldemar IV of Denmark, though

²²Rankin, *Golden Age*, 2.

²³*Ibid.*, 2.

²⁴*Ibid.*, 2.

soon found the situation so out of control that they were forced to employ a second fleet to curtail the excesses of the first. Taking a leaf from the Persians' book, Edward I of England (1272-1307) offered "Commissions of Reprisal" to the owners of merchant ships who had been victimized by pirates. The Commission entitled such merchants to seize in turn any merchantman flying the colours of the pirate which had first attacked them. Not surprisingly, there was no necessity to limit one's captures to the amount lost, nor any cap on the number of vessels one could legally plunder.²⁵ The ingenuity of the scheme was not lost on Edward's colleagues, and soon every sea-going nation offered similar incentives to bold adventurers. So began the era of the privateer, or government-sponsored pirate, who was actively encouraged to wreak havoc on maritime trade, so long as he did not fire on his own country's flag. A portion of the captured wealth went to the coffers of the Crown.

For several hundred years, before the establishment of formidable navies, pirates dominated the trade routes of Europe. Nor was the problem confined there. In an early example of the use of clemency to deter piracy, Kings T'aejo and T'aejong of the Yi dynasty in Korea (1392-1418) offered pardons to the Waco pirates who surrendered themselves and their vessels, while ruthlessly pursuing those who did not with a combination of naval force and international agreements. So widespread was the problem that the Korean kings brokered a deal with the pirate base itself, the So daimyo of nearby Tsushima, Japan. In return for reining in their countrymen, the So were promised exclusive trading rights between Japan and Korea.²⁶ Similarly, Muslim pirates

²⁵Ibid., 5.

²⁶Takeo Tanaka. "Japan's Relations with Overseas Countries" in John Whitney Hall and Toyoda Takeshi, eds., *Japan in the Muromachi Age* (Berkeley: University of California Press, 1977), p. 173-4.

bedeviled Mediterranean trade throughout the Middle Ages, allying themselves with the Ottoman Turks in their bid for domination of the region.²⁷ Muslim "corsairs" operated out of the Barbary states of Algiers, Tunis and Tripoli, while their Christian nemeses sailed from Rhodes and Malta under the protection of the Knights of St. John. While the decisive sea battle of Lepanto in 1571 ended Turkish domination of the region, the North African pirates remained a resilient and potent menace until the American engagement at Tripoli in 1805.²⁸

The ambivalent attitude of medieval governments towards piracy made formulating prohibitive laws a near impossibility. As long as privateering was condoned as a legitimate act of commerce, the Roman idea of *hostis humani generis* was irrelevant and unworkable. Great fortunes were amassed by the so-called "pirate brokers" (merchants who commissioned and outfitted pirate voyages) and seized plunder remained a staple of the Crown economy for several centuries. Moreover, even when an industrious king did try to curb the pirates, he was met with the recalcitrance of his people. Edward III of England became incensed when he learned that nearly all piracy trials ended in acquittal by sympathetic juries. In 1361 he shifted jurisdiction of piracy from the common law courts to the Admiralty Courts, facilitating as well a change from common to civil law.²⁹ But the common law judges, feeling the insult keenly, employed every ruse to limit the Admiralty's authority. By 1500 a pirate could only be convicted if he confessed;

²⁷See, generally, J.B. Wolf, *The Barbary Coast: Algiers under the Turks, 1500-1830* (New York: St. Martin, 1979).

²⁸Edward Lucie-Smith, *Outcasts of the Sea: Pirates and Piracy* (New York: Paddington Press, 1978), p. 56-59

²⁹Peterson, 48.

possession of seized vessels or goods was deemed inadmissible evidence.³⁰ The government tried again to wrest power from the common law courts in 1536, establishing special commissions of Oyer and Terminer appointed directly by the Crown. This attempt at bypass was as unsuccessful as the last; the appointed Commissioners were either drawn from or influenced by local merchants whose fortunes were owed to the wages of piracy. It would not be until 1700 that the English government effectively curtailed this leniency.³¹

III. Piracy as Sponsored Terrorism, 1562-1609: The Rise and Fall of the Privateer in Elizabethan England and the Dawn of the Golden Age.

One cannot speak of the so-called "golden age" of piracy, the relatively brief period between the late seventeenth and early eighteenth centuries, without unwittingly bringing to mind the image of a buccaneer—pistol-clad, bearded and bedraggled—yet somehow romantic and adventurous as well. This depiction owes much to the fantasies of Robert Louis Stevenson, but also traces its antecedents to a much more concrete source: the "gentleman pirates" of Elizabethan England. Nevertheless, the distinction between the two is crucial, most especially for determining their identity in the law; while the Elizabethan privateers pursued their trade under the colour of British law, and often under the Royal Ensign as well, the great pirates of the Golden Age—Tew, Avery, Teach and the like—were lawless marauders with no allegiance to any state.³² The legal distinction is a critical one, for while the former were engaged primarily in the war

³⁰Ibid., 30.

³¹The Piracy Act of 1700, discussed *infra*, was limited in its jurisdiction to the British Isles. Consequently, local collaboration with pirates continued in the colonies for several decades thereafter, most notably in the American port cities of Boston, New York, Newport and Baltimore.

³²Rankin, *Golden Age*, 25.

against Spain, the latter pursued their own private "war against all the world."

Yet the conditions which facilitated the rise of Teach and Avery were a direct result of England's maritime policy against the Spaniards. Queen Elizabeth viewed the pirates as an essential adjunct to the Royal Navy, and was lavish in granting them letters of mark against Spanish trade.³³ In the last uneasy years of peace between the two nations, piracy was regarded by the Crown in much the same way as state-sponsored terrorism is viewed today; an ideal way to strike one's enemy and hide the blade. By 1562 it was estimated that over 400 pirate ships cruised the English Channel, and the Crown had by this time abandoned even the pretense of curtailing them.³⁴ The English people--and their queen--believed themselves to be in imminent danger of attack by the formidable Spanish navy. The early years of Elizabeth's reign were devoted almost entirely towards furnishing a Royal Navy to check the Spanish advance. State-sponsored piracy aided this aim in numerous ways; 1) it trained future captains by testing their skills against the Spanish before the navies could meet in force; 2) it bled Spanish resources and frustrated their governance of empire, most particularly in the New World; 3) it vastly enriched the English government, providing for the construction of the new fleet; 4) it provided a huge resource of trained and experienced seamen to man the fleet once it was ready; 5) most importantly, it provoked the Spanish into waging war before they were fully prepared, on the necessity of countering the pirate menace.³⁵ It is interesting to note that only one of these motivations was entirely monetary. The case for correlating English privateering and contemporary government-

³³Peterson, 52.

³⁴Rankin, 3.

³⁵Ibid., 3-5.

sponsored terrorism relies on an understanding of piracy as more than theft for private gain. In its Elizabethan form, piracy—like modern terrorism-- was a means of employing force and terror to achieve political ends.

The colourful career of Sir Francis Drake is a fine example of this policy. With a commission from the Crown and the encouragement of the Queen herself, Drake set off on a round-the-world voyage in which he sacked and burned Spanish ports in the Americas and seized Spanish ships with virtual impunity. He returned to England with a fortune of £2,500,000 in the hold of his flagship, the *Royal Hind*. Drake made such a nuisance of himself that the Spanish king, Alfonso III, sent repeated entreaties to England begging them to prosecute "this notorious pirate." Queen Elizabeth responded equably that she would do something about it immediately, then boarded the *Golden Hind* and knighted Drake.³⁶ If there was any legal standard on piracy at this time, it was best summed up by Sir Walter Raleigh, commenting on Drake's exploits: "Did you ever know of any that were pirates for millions? They only that work for small things are pirates."³⁷

With the accession of James I to the throne in the first years of the seventeenth century came the end of the Spanish wars (by the Treaty of London, 1604) and, for a brief period, the return of law against the pirates. The first years of James' reign are punctuated by yearly anti-piracy proclamations: 1603, "A Proclamation concerning Warlike ships at Sea" and, three months later, "A Proclamation to repress all Piracies and Depredations upon the Sea"; 1604, "A Proclamation

³⁶C.M. Senior, *A Nation of Pirates: English Piracy in its Heyday* (London: David and Charles, 1978), 15-24.

³⁷Quoted in Rankin, *Golden Age*, 4.

for the search and apprehension of certaine Pirats"; 1605, "A Proclamation for revocation of Mariners from forreine Services" (aimed at Englishmen serving aboard foreign pirate vessels) and "A Proclamation with certaine Ordinances to be observed by his Majesties' subjects toward the King of Spaine"; 1606, "A Proclamation for the search and apprehension of certaine Pirats" (interestingly, the list contains several of the same names as its predecessor two years before); finally, on 8 January 1609, a general "Proclamation against Pirats" was circulated.³⁸

Ironically, James' efforts achieved precisely what he most wished to avoid. The sudden illegality of privateering deprived scores of men of their professions, while the decommissioning of much of the Royal Navy left hundreds of seamen abandoned on the wharves. In 1604, in an act of good faith towards the Spanish, James I formally revoked all letters of mark. Though he would later offer clemency to those pirates who sought it, most of the Crown's privateers simply shifted bases and professions and became pirates in earnest. The sorry situation was best expressed by Captain John Smith:

King James, who from his infancie had reigned in peace with all Nations, had no employment for those men of warre so that those that were rich rested with what they had; those that were poore and had nothing but from hand to mouth, turned Pirats; some, for that they could not get their due; some, that had lived bravely, would not abase themselves to poverty; some vainly, only to get a name; others for revenge, covetousnesse, or as ill.³⁹

As Smith alludes, the reasons for turning pirate were not always monetary. Though many pirates were little more than "sea-robbers" (as several contemporary jurists term them), almost as many went to sea to work out demons within themselves: feelings of inferiority, rebelliousness

³⁸J.F. Larkin and P.L. Hughes, eds. *Stuart Royal Proclamations* (1973-1983), vol. 1, nos. 15, 28, 46, 50, 53, 67, 93. Note: this is only a partial list of such proclamations against piracy from that period.

³⁹Quoted in Rankin, *Golden Age*, p.5.

against their low station in life, anarchical hatred, jealousy, revenge. Sometimes the motivations were so bizarre as to be ludicrous: Daniel Defoe relates that Stede Bonnet, one of the most notorious pirates of the Golden Age, allegedly turned pirate to escape the clutches of a shrewish wife.⁴⁰ The pirates of the later seventeenth century were an ill-assorted, disorganized and malcontent lot, and as England pushed them further from her shores they eventually established themselves in two secluded corners of her empire: Madagascar, and the New World.

IV. Waging a Private War Against the World: The Golden Age of Piracy, 1692-1725.

The pirates of the Golden Age were, in the words of one historian, "a sorry lot of human trash."⁴¹ Though often courageous, sometimes merciful and occasionally even pious, they were on the whole the dregs of England's merchant marine, cast out from the fold and seeking vengeance on the society that "wronged" them. Ironically, a pirate's greatest ambition was often neither wealth nor freedom, but respectability. In the midst of a burgeoning merchant class in the late seventeenth century, pirates who had made their fortunes sometimes found an *entrepot* back into polite society by virtue of their newfound wealth.⁴² Among the most fortunate was Sir Henry Morgan, who after plundering the Caribbean for several years (and enduring the indignity of a public trial) eventually gained not only a knighthood, but governorship of Jamaica.

Yet for every one Morgan, there were at least twenty Blackbeards; men who took their private demons to sea and vented them on hapless merchant ships, and on their own crews. Frustrated and vengeful, these men regarded piracy as a means of exacting personal vengeance on

⁴⁰Rankin, 91.

⁴¹Ibid., 22.

⁴²See Douglas Botting, *The Pirates* (Alexandria: Time-Life Books, 1978).

civilization itself. A pirate ship was a kingdom unto itself, and a pirate captain its king. Some captains, like Teach, amassed this power totally unto themselves and ruled as despots through a combination of terror, senseless barbarism, and good seamanship. Edward Teach, also known as Blackbeard—arguably the greatest and most notorious pirate of all—refined psychological terrorism to an art. One night, as he and his shipmates drank and played cards in the captain's cabin, Teach quietly removed two pistols from his belt, cocked them, and leveled them under the table at his innocuous first officer, Israel Hands. All but Hands fled the table; he himself did not see the menace. Teach suddenly blew out the candles, and fired. Israel Hands was permanently wounded in the knee. When asked why he would intentionally attack a man he considered a friend, Teach responded amiably that “if I did not now and then kill one of them, they will forget who I am.”⁴³

Terrorizing his crew into obedience was just one aspect of Teach's considerable repertoire. More than any other pirate before or since, Teach understood the symbiotic relationship of terrorism and piracy. While some pirate captains gave quarter to their captured prizes and were often deposed as weaklings by their own crews in response,⁴⁴ Blackbeard was a terrorist *par excellence*. When boarding a prize in battle he wove long-burning fuses into his enormous beard, wreathing his face in green sulphuric smoke and giving him a truly satanic appearance. Like the Vikings before him and the al-Qaeda long afterwards, Blackbeard recognized the value inherent in a reputation for unparalleled barbarism and ferocity.⁴⁵

⁴³Rankin, *Golden Age*, p. 111.

⁴⁴One such pirate, Edward England, earned such a reputation for leniency that his crew deposed and marooned him, leaving him to die a penniless beggar in Madagascar.

⁴⁵Botting, *Pirates*, 125.

Yet while some pirate vessels resembled dictatorships, others had the markings of a crude democracy. Pirate captains were often elected, and interchangeable. The level of organization on a pirate vessel could be startling. Totally removed from the laws of society they made their own, and lived by them scrupulously. These so-called "pirate articles" were often as specific and meticulous as acts of Parliament. An excerpt from those of Captain John Phillips in 1723 provides an example of the articles' scope and breadth:

1. Every man shall obey civil Command; the Captain shall have one full Share and a half In all prizes; the Master, Carpenter, Boatswain, and Gunner shall have one Share and a quarter.
2. If any Man shall offer to run away, or keep any Secret from the Company, he shall be maroon=d with one Bottle of Powder, one Bottle of Water, one Small Arm, and Shot.
4. If at any Time we shall meet another Marrooner (that is Pyrate) that Man shall sign his Articles without the Consent of our Company, shall suffer such Punishment as the Captain and Company shall think fit.
8. If any man shall lose limb or joint in time of an Engagement, shall have 400 pieces of eight; if a limb 800.
9. If at any time you meet with a prudent Woman, that Man that offers to meddle with her, without her Consent, shall suffer present Death.⁴⁶

The most remarkable aspect of these laws is the ironic emphasis on propriety and charity found within. Nos. 2 and 4 indicate the importance of personal trust among the crew, while nos. 1 and 8 are singular both in the generosity awarded to an injured comrade and the relatively small difference between the captain's share and that of his men. No. 9 is the most extraordinary of all, suggesting a modicum of gentility quite at variance with the popular image of piracy. These articles indicate that the pirates did not exist in the state of Hobbesian anarchy so often attributed to them, but were instead frequently as organized and disciplined a crew as any in the navy. Captains often furthered this image by mimicking the navy's practice of reading the Articles

⁴⁶ Quoted in Rankin, *Golden Age*, 31.

of War aloud each Sunday after prayers. While the crew stood at attention, the pirate captain recited each article and punishment with due solemnity.⁴⁷

The pirate articles are of particular relevance when considering the nature of piracy and its relation to organized terrorism, for they provide an early example of an organization with its own directors, codes of conduct and punishments, functioning for the sole purpose of disrupting trade and wreaking havoc. This further removes the pirate from legal definition as "sea robber" and closer to *hostis humani generis*. While some might argue that the pirate acts are synonymous with, say, rules of membership in an inner-city gang, I believe instead that they indicate the legal separation and distinctiveness of a pirate crew, fostered by actual separation from any nation or rule of law. Thus the pirate ship becomes a quasi-state unto itself, a legal anomaly which customary international law recognizes in granting universal jurisdiction on its capture.

The most interesting element of piracy in the Golden Age, and the most crucial in establishing a nexus between piracy and terrorism, is the motivation of the pirate himself. As I have already suggested, it was frequently as much political as pecuniary. Pirates often saw themselves as rebels against the established order, meting out ferocious revenge on a society which they believed had wronged them from birth. Much of their rage was justified. The pirate captains of the late seventeenth century, unlike their gentlemanly forbears, came almost exclusively from the lowest castes of society. They had been pressed into naval service at a young age, spending most of their lives as ordinary seamen. At that time there was hardly any movement

⁴⁷Botting, *Pirates*, 53.

in the ranks, and a cabin boy of twelve could—and most often did—die a seaman at fifty.⁴⁸ The rank of officer was purchased rather than earned, or inherited by virtue of aristocratic title. Thus the ordinary seaman with twenty years' experience often felt—quite rightly—that he knew more about seamanship than his captain. When abruptly released from service and left destitute ashore, it was hardly surprising that many such men found piracy a means not only of gaining personal wealth but taking it as their pound of flesh from aristocratic society. This resulted in a paradox: the pirate's personal war against society was only won when his fortune gained him entrance to that society he so much despised. And the game was worth the risks, as pirate captain Bartholomew Roberts aptly stated:

In an honest service there is thin Commons, low Wages and hard Labour; in this [piracy] there is Plenty and Satiety, Pleasure and Ease, Liberty and Power. And who would not balance Creditor on this Side when all the Hazard that is run for, at worst, is only a forelock or two at choaking.⁴⁹

The idea of piracy as personal war against civilization is recurrent throughout the literature of the time. Daniel Defoe tells of one pirate who “reduced himself afresh to the savage state of nature by declaring war against all mankind...”⁵⁰, while another contemporary account describes the pirate career of Edward Low, who after assailing his captain fled with a small party of confreres and “took a small Vessel....[hoisted] a Black Flag, and declare[d] War against all the World.”⁵¹ Captain Charles Bellamy employed almost exactly the same language as he lambasted a

⁴⁸David Hebb, *Piracy and the English Government, 1616-1642* (Aldershot: Scholar Press, 1994), 10.

⁴⁹Quoted in Rankin, *Golden Age*, 23.

⁵⁰*Ibid.*, 22.

⁵¹*Ibid.*, 147.

recalcitrant merchant captain:

Damn ye, you are a sneaking puppy, and so are all those who submit to be governed by laws which rich men have made for their own security, for the cowardly whelps have not the courage otherwise to defend what they get by their own knavery..... You are a devilish conscious rascal, damn ye! *I am a free prince and have as much authority to make war on the whole world as he who has a hundred sail of ships and an army of a hundred thousand me in the field* [italics mine].⁵²

Vengeance surfaces most tellingly in the names pirate captains chose for their ships. The most common word by far was “revenge,” as in *Revenge*, *Queen Anne’s Revenge*, *New York’s Revenge* and, strangest of all, Captain Richard Worley’s *New York Revenge’s Revenge*. Along a similar vein were such titles as *Defiance*, *Bravo*, *Vengeance*, *Scowerer* and *Sudden Death*. The pirates had a healthy sense of irony as well, and the idea of a silly name striking terror in the hearts of merchant captains seemed a rich joke. Thus several notorious pirates sailed on ships bearing the names *Childhood*, *Amity*, *Blessings*, *Most Holy Trinity*, *Happy Delivery* and *Peace*. The best joke of all was the work of the aforementioned Edward Low, who embarked on an extensive and successful pirating career in a ship called the *Merry Christmas*.⁵³

The concept of piracy as a war against the world reflected a profound shift in governmental attitudes towards the practice. The golden age of piracy began in earnest just as two wars ended; the conflict between England and France known as “King William’s War,” concluded in 1697 by the Treaty of Ryswick, and yet another war between England and Spain ending with English victory in 1692.⁵⁴ With the empire in a state of uneasy peace, England—as it had before—abruptly

⁵²Quoted in *Ibid.*, 25.

⁵³*Ibid.*, 28.

⁵⁴Senior, *Heyday*, 15.

revoked the licenses of its privateers. Frustrated and cheated, the privateers turned on their erstwhile government sponsors and directed their activities against all trade, English or otherwise, between Europe and her dominions. Thus came a remarkable inverse: piracy, which had for centuries been a weapon used by governments against each other, suddenly became a weapon against themselves.

Corollaries between the Golden Age pirates' "war against the world" and modern terrorism are striking. Here, for perhaps the first time in history, one finds a group of men who band themselves together in extra-territorial conclaves, remove themselves from the protection and jurisdiction of the nation-state, and declare a personal war against civilization itself. As Elizabethan piracy bears many similarities to state-sponsored terrorism, so too must this later form of rebellion be seen as a precursor to Jihad. One might argue that the comparison fails on the grounds of motivation; while the pirates sought nothing more politically than to strike back at their states, most terrorists seek by their acts to effect a political transformation. Yet once again the means outweigh the motivations. Both parties have effectively declared war against the state, a form of state vs. non-state conflict which is virtually unique. Moreover, both use the same tools—homicide, terror, wanton destruction, and disruption of trade—to achieve the common aim of gaining notice to themselves. This parallel cannot be stressed enough, for it represents the most significant nexus between terrorism and piracy yet mentioned, and in itself forms the basis for a new understanding of terrorism based on piratical antecedents. The idea of attracting attention to one's self and one's cause is the *modus vivendi* of all terrorism, whether government-sponsored, organized, or anarchical. Terrorism is a means of projecting individual, extra-governmental aims onto the world's consciousness through the commission of acts so horrific as to captivate the

world's attention. Thus the pivotal issue is not whether the terrorists seek by their act to achieve a change on governmental policy, a revolution, or even (as with the 19th century anarchists) a collapse of all governments—it is only whether they employ terror to achieve this notice.

This understanding of terrorism—and its relation to piracy—has two prerequisites. First, the terrorists' activities must be in some way politically motivated; it is not enough merely to commit terrorism to bring notice to one's self. Were that the case, there could be no distinction between ordinary homicide committed for personal fame (as in the case of John Hinckley's attempted assassination of President Reagan), and acts of terror. While this political element is essential, it may also be broadly defined. It is not necessary, for example, that the terrorist seek some specific political goal, such as the release of prisoners or the creation or the removal of American forces from the Middle East; rather, it need only be an act committed with the intention of gaining the notice of the world governments, even if it is only to arouse their ire.

Second, this idea of terrorism presupposes an organization of some sort, not merely an individual. While I have mentioned assassination as an act of terrorism, the current understanding of 'organized' terrorism is distinct from the actions of individual terrorists in that it has two components: the act itself, and the conspiracy to commit the act. As a conspiracy requires the collaboration of more than one person, we must conclude that the crime of organized terrorism requires (not surprisingly) some form of organization, whether it be a small band of disgruntled misfits or, as is more often the case, a vast and intricate multinational entity.

With these two caveats in mind, let us consider the parallels between seventeenth century piracy and modern organized terrorism. They can briefly be listed as follows: 1) Both are organizations composed of volunteers, which; 2) have a common goal of gaining the notice of the

nation states by; 3) committing acts of terror, which may include destruction and seizure of state or private property, frustration of commerce, and homicide; 4) Both exist outside the territorial and jurisdictional boundaries of any state, and thus may not be properly said to be resident in any state; 5) Both use this extra-nationality as a means of pursuing their activities against states and, consequently; 5) both may be considered not as the enemy of one particular state (even if that is the only state directly affected) but of *all* states; 6) Both are fully cognizant not only of existing outside jurisdiction, but outside of society itself, and use this also as a weapon against the states.

While the similarities between the pirates' and the terrorists' wars against the world are remarkable, there remain two potential problems with their synonymy. The first is that the idea of a modern terrorist as an enemy of all states does not have any basis in international law (as there is no international law providing a definition), but comes instead from popular understanding. It forms the underlying logic behind President Bush's statement to all nations that "You're either with us, or with the terrorists," and his repeated assertion that the Afghan war was not against the Afghan state but the terrorists within it. It also underpins the recent attempt to make terrorism a crime of international jurisdiction under the ICC. However, though it is difficult to conceive of a definition of terrorism which does not include the recognition that it is a crime against all humanity, for the moment the rule of *nullum poenum sine legis* applies. Therefore it will be the task of later chapters to prove the certainty of this conclusion on the basis legal inference; this chapter intends only to lay the foundation through historical linkages.

In addition, one cannot ignore the fact that while many pirates invested their activities with a political symbolism, others saw it (like Bartholomew Roberts did) as a monetary investment with high risks and high returns. Even among those pirate captains who saw themselves as warriors

against the state there were many serving in their crews who had less lofty and more mercenary ambitions. But while the pecuniary aspect to piracy cannot be ignored, it must also not be aggrandized. The fact that even the most politically-motivated pirates sought to enrich themselves does not denigrate the political significance of their enterprise, nor does it pose an insurmountable barrier between piracy and terrorism. We have already seen that monetary considerations were secondary to political ones throughout piracy's long relationship with its government sponsors. In its Golden Age manifestation, the most remarkable aspect of piracy was, similarly, the transformation of its relationship with the state: a metamorphosis from adjunct to enemy. While the pirates might not have sought to transform their governments, the idea of piracy as personal war reflects a profound shift in the nature and understanding of the act itself, both by pirates and by states. Piracy divested itself of its quasi-military privateer linkages and came to be regarded in its earliest and ultimate form: a crime against the human race entire. Nowhere is this reflected more tellingly than in the creation, in the eighteenth and nineteenth centuries, of a new body of national and international anti-piracy law.

V: Enemies of the Human Race: The Evolution of Piracy Law, 1700-1858.

By the turn of the seventeenth-eighteenth centuries, widespread piracy in the Caribbean and elsewhere had virtually halted legitimate trade⁵⁵ in those areas. England, which by revoking its privateering licenses had inadvertently begun the scourge, now resolved to stamp out piracy altogether. Suddenly one finds a flurry of piracy trials, ranging from the swift and unremarkable convictions of Channel pirates to the sensational public spectacles given for Captains William

⁵⁵ Arthur Newton, *The European Nations and the West Indies, 1493-1688* (London: A & C Black, 1933), 22.

Kidd and Stede Bonnet. As attitudes towards the pirates became increasingly hostile, jurists began to rediscover the elegant simplicity of *hostis humani generis*.

In his address to an Old Bailey jury in 1696, Justice Sir Charles Hedges announced what would, ultimately, become a working definition for all piracy trials:

Now piracy is only a term for sea-robbery, piracy being committed within the jurisdiction of the Admiralty. If any man shall be assaulted within that jurisdiction, and his ship or goods violently taken away without legal authority, this is robbery and piracy. If the mariners of any ship shall violently dispossess the master, and afterwards carry away the ship itself or any of the good, or tackle, apparel or furniture, in any place where the Lord Admiral hath, or pretends to have jurisdiction, this is also robbery and piracy.⁵⁶

While commendable in its clarity, Hedges' definition of piracy as "sea robbery" fails to address a host of problems, among them the difference between piracy and privateering, the extent of the Lord Admiral's jurisdiction, and what exactly is meant by the "violent dispossession" of a ship's master by its crew. For the answers to these questions we must turn to a later and more notorious trial, that of Captain William Kidd.

The problems raised in Kidd's trial began in 1700 with the passage of the Piracy Act, which replaced jury trials for high seas piracy with Crown-appointed commissions applying the rules of admiralty and civil law.⁵⁷ The Act was remarkably similar to that promulgated by James I half a century before, and Edward III three hundred years before that. Why, one might ask, did the latter succeed where the former had failed? The difference lay in the popular perception of piracy in the English mind. Though sympathetic juries might still be inclined to look the other way, the vastly-increased bureaucracy resulting from the Restoration created a body of civil servants whose

⁵⁶Gottschalk, *Jolly Roger*, 31.

⁵⁷P. Bradley Nutting, "The Madagascar Connection: Parliament and Piracy, 1690-1701," *American Journal of Legal History*, 22, pg. 209.

allegiance was owed neither to local burghers nor to the King *in persona*, but to government.⁵⁸

Under the aegis of the Admiralty, the Crown commissioners prosecuted pirates with the same fervor that the Navy hunted them.

The trial of William Kidd provided a bizarre example of both aspects of this new policy. In a fantastic twist of irony, Kidd was among those captains whom the Crown had recruited to chase down and capture the pirates. The story of his transformation from pirate hunter to pirate is both fascinating and contentious, but nevertheless irrelevant to our purposes. Suffice it to say that when brought before the Old Bailey on May 8, 1701, he was charged with six separate offenses including piracy against four merchant ships of foreign nationality, piracy in regard to an Armenian vessel sailing under British protection, the *Quedagh Merchant*, and the murder of crewmate William Moore, a gunner.⁵⁹

The story of how Kidd ended up before the Old Bailey is an interesting commentary on the fluctuating state of English law. Kidd had actually been arrested in Boston on the 6th of July 1699, but was held at Newgate prison in England for over a year, awaiting trial. During this interval came the passage of the Piracy Act, which should have placed Kidd before a Crown commission. In accordance with the Act, he was initially sent for examination to the Board of Admiralty. The Admiralty then asserted a legitimate claim that, as a traitorous captain holding a Royal warrant, he should properly be sent before an Admiralty courts-martial. Instead Kidd was returned to Newgate prison, awaiting the next session of Parliament for a decision on venue. Parliament duly convened and ordered that papers concerning Kidd be delivered to them to facilitate their inquiry.

⁵⁸Ibid., 209.

⁵⁹Graham Brooks, ed. *The Trial of Captain Kidd* (London: William Hodge, 1930), 30-47.

At this point the gap between old and new attitudes towards piracy became painfully evident. For Kidd's papers revealed that much of his allegedly piratical activities had been done with the full knowledge and consent of no less than four English peers—the erstwhile sponsors of his voyage. A split occurred between the two Houses, as Commons pressed for a full examination of the culpatory evidence against the peers (which might have exonerated Kidd), while the lords fought tooth and nail for their brethren. In the end a compromise was reached, pinning the blame entirely on poor William Kidd and sending him to an ordinary jury trial, where his grisly notoriety virtually assured him a conviction.⁶⁰

An even more thorny problem surfaced during the trials themselves, as the Justices groped for a definition of piracy which would encompass Kidd's actions. William Kidd argued two defenses: first, that he had been coerced against his will into piracy by mutinous members of his crew; second, that he held a commission from the Admiralty which entitled him to plunder vessels of French origin.⁶¹ Both defenses had considerable evidentiary support and it became clear that, if either were accepted, Hedges' earlier definition of piracy as sea-robbery (and his further comments on mutiny and coercion) would be inadequate to meet the case. In their charges to the jury, the justices emphasized that piracy meant considerably more than "only a term for sea-robbery":

I need not tell you the heinousness of this offence wherewith they [Kidd and his confederates] are charged, and what ill consequence it is to all trading nations. Pirates are called *hostes humani generis*; the enemies of all mankind; but they are especially so to those that depend on trade. These things that the prisoners stand charged with are the most mischievous and prejudicial to trade that can happen. But, as it is not my business to aggravate the offence, so

⁶⁰Ibid., 39-40.

⁶¹Ibid., defenses drawn from 1st, 3rd and 4th trials.

it is yours to consider whether they, or any of them, are guilty or not.⁶²

A fundamental shift was occurring in the law, from the laissez-faire attitudes of Elizabethan privateering to a new, more stringent concept of pirates as enemies of the human race. It was Kidd's misfortune to fall exactly at the moment when this shift was taking place. By the time Major Stede Bonnet was tried for piracy in 1718, the attitudes of the courts—and, by extension, the Crown—had hardened. Bonnet's trial was markedly different from Kidd's; there was no moral ambiguity in his acts or his intentions for the courts to ponder over. Bonnet was a pirate, pure and simple.⁶³ In addressing the jury the court of Vice-Admiralty in Charlestown, South Carolina, the justices employ almost the same language in defining his actions as in the trial of Kidd, seventeen years earlier:

As to the heinousness or wickedness of the offense, it needs no aggravation, it being evident to the reason of all men. Therefore a pirate is called *hostis humani generis*, with whom neither faith nor oath is to be kept. And in our law they are termed "brutes" and "beasts of prey" and that it is lawful for any one that takes them, if they cannot with safety to themselves bring them under some government to be tried, to put them to death.⁶⁴

The twenty year lapse between Hedges' definition and that of the South Carolina Vice-Admiralty also indicates an evolution in piracy jurisdiction from government prerogative to universal jurisdiction. Hedges confines the Crown's purview to "any place the Lord Admiral hath, or pretends to hath jurisdiction," a fuzzy concept which seems to indicate merely that the Lord Admiral may assert jurisdiction freely at his own discretion. Nevertheless, by vesting jurisdiction

⁶²Quoted in *Ibid.*, 154.

⁶³Dubner, *Law*, 38.

⁶⁴*Trial of Major Stede Bonnet and thirty-three others at the Court of Vice Admiralty, Charlestown, South Carolina, for Piracy*, 5 George I. A.D. 1718, pp.1234-1237, at 1236.

with the Lord Admiral, Hedges indicates that this is the *only* place it may exist. During the trial of William Kidd, the Lord Admiral's personal prerogative was transferred to the Admiralty as a whole, and confined to acts of piracy "against the King of England or other nations in amity with the King of England," suggesting that jurisdiction only existed if English commerce itself was directly or indirectly affected. Yet, by the trial of Bonnet in 1718, even this limitation was removed. A pirate might now be captured and executed by "any one that takes them," with the scant provision that the captors must first attempt to bring them to "some government" to be tried. As it had been in the Roman Republic, piracy was now a crime of universal jurisdiction.

The passage of an even more draconian Piracy Act in 1720, stating that all persons who "shall trade, by truck, barter, or exchange, with any pirate....if found guilty will be esteemed pirates," spelled the end of the pirates' Golden Age.⁶⁵ Within a few short years the sea lanes were reopened for unimpeded trade and the greatest pirates of the age were either dead, hiding, or respectable. There was nothing mysterious about this sudden collapse; as I remarked earlier, piracy flourishes best in neglect, and fades rapidly when attention is turned upon it. The combination of a ruthless naval pogrom, new and potent Piracy Acts, and the changing attitudes of the British justices combined to tip the balance of piracy's risks and rewards, making it an uncomfortable and unprofitable profession. Nevertheless, piracy did not disappear. Spanish privateers continued to harass the Americas, while the Barbary corsairs profited from the sudden lack of competition and entrenched themselves as a permanent menace to Mediterranean trade.⁶⁶

⁶⁵Quoted in Nutting, 209.

⁶⁶Peter Earle, *Corsairs of Malta and Barbary* (Annapolis: U.S. Naval Institution, 1970), 89.

In fact, the greatest consequence of English law was to remove piracy's domain from the center of imperial affairs to its periphery. The pirates of the eighteenth and nineteenth centuries were no longer the flotsam of Europe's mercantile labor force, but tightly-woven bands of Eastern corsairs; succeeding generations of piratical clans sharing familial, tribal, ethnic, religious, or political identities.⁶⁷ Their continued survival was assured by the Great Powers themselves, as Britain and France actively encouraged the corsairs to disrupt the other's trade.

This sort of government sponsorship seems, at first glance, like old Elizabethan policy writ large, but there was a crucial difference. The combined influences of English law, burgeoning empires, and the Enlightenment effected a profound shift in the western conception of piracy. It became, in effect, an act of savagery. When committed by an Englishman, Frenchman, or anyone belonging to the fraternity of states which comprised 'civilization' in the eighteenth century, piracy was treason—or sheer madness--tantamount to declaring one's self at war with the nation state.⁶⁸ But if committed by 'savages' (defined as anyone existing outside 'civilization') it was not only permissible, but politically useful. In the same way as England and France employed First Nation tribes as proxies in North America, so too did each fund and outfit their "own" corsairs to bedevil each others' trade. By terming piracy an act of barbarity, the law was thus able to meld the competing doctrines of political utility and *hostis humani generis*. A pirate, in this latest incarnation, was a ruthless savage whose existence was not only in conflict with the nation's laws, but with civilization itself.⁶⁹ This led to a paradoxical situation, for the more the imperial powers

⁶⁷Ibid., 90.

⁶⁸A concept which owes much to the golden age pirates' "war against the world."

⁶⁹Peterson, 50.

employed pirates against each other, the more their laws responded by driving the definition of piracy further towards *hostis humani generis*, until it finally achieved its modern definition as a crime so heinous and barbaric that all who committed it were not only criminals, but enemies of humanity.

The 18th century's bizarre double standard for piracy came back upon itself early in the 19th, when the European governments realized they had created a beast they could no longer control. The corsairs continued their attacks on trade long after peace was concluded, a source of prolonged embarrassment and a serious economic threat to the Great Powers. It was a pattern repeated throughout the history of government-sponsored piracy, from the Hanseatic League to the Enlightenment. Now, however, the perceived 'barbarity' of the pirates gave western nations an added impetus for declaring it an act of *hostis humani generis* once and for all.⁷⁰ As early as 1775, Edward Rutledge of South Carolina, speaking to his colleagues at the Continental Congress, expressed the hope that it would not authorize privateering, lest it "ruin the character and corrupt the morals of all seamen," making them "selfish, piratical, mercenary—bent wholly on plunder."⁷¹ He was ignored, but the precedent was set. In the period of conflict between 1790 and 1820 there were numerous treaties between states pledging not to employ or encourage privateers unless actually at war. The fledgling United States Navy scored its first major victory in an engagement against the Barbary pirates in 1804, signaling a new perception of pirates as an international menace and providing an early example of the United States as "world policeman." But the most significant development did not occur until the 1858, when the Declaration of

⁷⁰Ibid., 54.

⁷¹Ibid., 54.

Paris--signed by nearly all the imperial powers--abolished all forms of piracy, privateering and government sponsorship.⁷² Proposals for such a measure had been circulating as long ago as 1820, and even when it finally emerged the motive was as much to legitimate their navies as to end the scourge of piracy. Nevertheless, as one historian argues, the link between piracy and government was permanently severed. Pirates would thenceforth be *hostis humani generis*, subject to capture and trial wherever they were found.

This chain of events leading to our modern understanding of piracy bears chilling similarity to the rise of organized terrorism in the Middle East. Just as England and France created the renewed menace of piracy through their sponsorship of the corsairs, so too is the United States credited for manufacturing its own enemy by training, funding and outfitting terrorist groups in the Middle East during the Cold War. Indeed, criticism that the United States is responsible for the very threat it now seeks to eliminate has been a formidable stumbling block against the creation of any new international law on terrorism. But the lesson to be drawn here is not merely one of history repeating itself, nor even a reaffirmation of the close historical linkages between the problems of piracy and terrorism. Here, the history of piracy law not only provides a precedent to our current dilemma, but also the solution. The 1858 Declaration of Paris is, on one level, a recognition of shared guilt and a promise that the behavior of states which produced the problem will not be repeated. On another level, it represents the first recognition of piracy as a crime in and of itself, separate from state sponsorship. The central premise of *hostis humani generis* is that a pirate is not an enemy of the state, but of humankind itself. He exists like a malevolent satellite to the law of nations, waging war upon them not only through his acts, but through his identity.

⁷²Ibid., 54.

Until 1858, international law recognized only two legal entities; persons and states. Persons were subject to the laws of their own governments; states were subject to the laws made between themselves. The Declaration of Paris and subsequent legislation created a third entity: persons who lacked both the individual liberties and protections of law for citizens, and the legitimacy and sovereignty of states. The creation of this third legal entity--pirates--was a recognition by the states, 1) that piracy as a political tool was beyond the pale of legitimate state behavior, and 2) that pirates themselves forfeited the right to the protections of citizenship. In order to create a just and lasting body of law on organized terrorism, states must apply a similar understanding of their own behaviour and of the crime itself.

Conclusion.

I have sought in this chapter to highlight the numerous linkages between the history of piracy law and modern organized terrorism. The purpose of doing so is twofold; first, to demonstrate that piracy and terrorism are not separate concepts, but rather share a preponderance of similarities so extensive as to render them interchangeable; second, to suggest that, as they are similar in fact, so might they be similar in law, and that the historical legal approaches to piracy form the best foundation for a new international law on organized terrorism. To briefly recap, the arguments for a historical link between piracy and terrorism are as follows:

1) Since its earliest manifestation, the directed use of terror has been an integral part of piracy. One finds it throughout the history of piracy, from the Vikings to Sir Francis Drake and Edward Teach. Each understood the political as well as personal benefits of terror; terror inspired fear in the breast of the victim before the first shot was fired, an invaluable reputation which facilitated many bloodless captures. Each also understood that piracy, unlike its tame counterpart,

privateering, did not obey gentlemen's rules. Ferocity and barbarism were essential components to the trade. Thus, piracy represents the first use of terror as a means of coercion by a non-state actor against the flag and trade of the nation-state itself.

2) The history of piracy as a political tool of governments negates its popular image as mere "sea-robbery," a definition which bears little similarity to terrorism. Piracy must properly be understood as being as much a political as a commercial enterprise. From the time of Attic Greece until the Declaration of 1858, governments employed pirates as privateers to hinder an enemy's trade, distract its navy, frustrate its relations with its empire, deplete its coffers, and—in some cases—drive it towards open warfare. The extra-legal, 'privatized' quality of government-sponsored piracy provided a means of wounding a hostile state while continuing to maintain diplomatic relations. As such, it bears remarkable similarity in both execution and purpose to modern government-sponsored terrorism. In both instances, the pirate/terrorist acts as a private individual (or organization) acting beyond the nominal purview of the sponsor state, yet whose actions are directed towards a coercive political aim of that state.

3) When employed not as an agent of governments but as a weapon against them, as in the so-called "Golden Age," the motivations of piracy has strong resonances in the modern context of terrorism. The pirates' "war against the world" provides the earliest historical example of non-state vs. state conflict, the same sort of "war" which the al-Qaeda wages today. This form of conflict must be distinguished from revolutions and civil wars, which also might be termed state vs. non-state, in that here the aggressors detach themselves both politically and (more importantly) physically from the nation-state—leading the revolt from without rather than within. The argument that terrorists are a form of revolutionaries falls apart on these grounds, for

revolutions are defined as uprisings within a state to change its government. The terrorist organization, by becoming "international" and therefore extra-legal in character, divorces itself from such terminology. Likewise, the methods of the contemporary terrorist have much in common with their piratical forbears; the terrorist, like the pirate, appears suddenly, attacks his target, and disappears. The amorphous, extraterritorial composition of modern terrorist organizations provides much the same function as the Atlantic did for their predecessors; the al-Qaeda and their kin move covertly through the world like ships across a vast ocean, surfacing without warning, wreaking havoc, and retreating into an obscuring mist of anonymity.

4) Once we have established that the means and motivations of piracy and terrorism are analogous, there remains only to demonstrate that their legal definitions should be so as well. The case is already a strong one; pirates and terrorists have been shown to share the same means, the same motivations, and the same extraterritorial identity. It is a small but crucial step to make the final link: that terrorists share too the legal definition of pirates as *hostis humani generis*, enemies of all humankind. As with the Declaration of 1858, this would involve recognizing; first, that terrorism, like piracy, is not a legitimate political tool; second, that therefore states may not use it as a means of political coercion; third, that *all* instances of terrorism—as defined by international covenant—are equally illegal, whether state-sponsored or not; fourth, that terrorism, like piracy, is therefore an international crime *sui generis*, not to be confused with the recognized right of peoples to change their forms of government; fifth, that this crime is by nature international in scope, and consequently falls under the jurisdiction of the International Criminal Court; sixth—and finally—that terrorists, as *hostis humani generis*, are likewise subject to universal jurisdiction.

The reason I have termed this logical step a small one is that—for all the reasons I have set out

above--terrorists already seem to fit easily within the definition as enemies of humanity. But historical similarities, however persuasive, do not alone provide the basis for defining terrorists as *hostis humani generis* under international law. For that argument to be made, we must also consider the current state of international law on piracy. The following chapter will make the case for placing terrorist law within the existing framework of piracy law by examining the national and international standards on piracy culminating in the 1958 Geneva Convention on the High Seas.

Chapter 2: Modern Piracy Law, Problems and Synthesis

Summary:

The law of piracy has evolved from its traditional definition as "sea robbery" to a far more complex legal concept encompassing the various elements of seizure, destruction, wanton violence, and homicide. It is likewise no longer restricted to the "high seas" but may occur anywhere outside the jurisdiction of states, even (by some definitions) on inland state territory. Despite this evolution the most recent drafts of piracy law, the 1958 Geneva Convention on the High Seas and the 1982 United Nations Convention on the Law of the Sea, are retrogressive in their terminology of piracy as a "private" rather than "political" act. This reflects an ongoing debate among scholars between those who advocate a broader definition which would include politically-motivated piracy and traditionalists who fear that such a definition would intrude upon legitimate naval warfare between states. Yet despite the limitations of the current law the continuing revision of scholarly perceptions of piracy, contemporary arguments for including maritime hijacking within its jurisdiction, and the comparatively advanced state of municipal law all argue for an equation of piracy and terrorism.

Introduction:

Despite its status as a crime of universal jurisdiction in customary international law, piracy is still regarded as a quaint, if arcane, legal anachronism.¹ Its romanticization in the media has engendered two false presumptions: first, that piracy is not as serious a crime as its brethren; second, that piracy no longer exists. As Philip Buhler writes:

The mention of maritime piracy usually elicits gentle chuckles and guffaws, and off-Broadway imitations of Blackbeard, Errol Flynn and the Hollywood romance of the Spanish Main. It shouldn't. Most people who hear stories of pirate attacks dismiss them as relics of our distant past, a mere modern fantasy. They shouldn't. Maritime piracy incidents have increased in geometric proportions over the past decade and pose a very significant threat to the safety and success of modern commerce.²

¹Philip Buhler, "New Struggle with an Old Menace: Towards a Revised Definition of Maritime Piracy," 8 *Currents Int'l Trade L.J.* 61 (1999), 62.

²*Ibid.*, 61.

The problem of piracy is very real. It occurs worldwide, mainly in areas of heavy maritime commerce. In Southeast Asia, specifically the South China Sea, the Malacca Straits, and the coasts of Thailand, Malaysia, Indonesia and the Philippines, attacks on merchant ships and tankers are becoming increasingly frequent. In 1997 there were 229 incidents of piracy throughout the world; 118 occurred in those areas.³ Like the Barbary pirates, clans have arisen which pass the pirate trade down from one generation to the next, like an apprenticeship. Pirate attacks are also frequent in certain parts of Latin America, most often the coasts of Brazil, Colombia and Ecuador.⁴ The popular perception of modern piracy as attacks on private yachts accounts for a relatively small percentage of actual incidents. More often, the attack is made on a large merchant vessel; some tankers are favored because their low freeboards facilitate easy boarding via rope ladder.⁵

Still, piracy is not what it once was. The creation of modern navies ended the era of the pirates, and the sheer size and speed of modern merchant vessels preclude its re-emergence. The days when piracy formed a significant threat to the trade between nations are long over. But even as one form of piracy declines, another is on the rise. The commercial enterprise of piracy has been largely replaced by a new, more sinister creation: piracy as a weapon of terrorism. The seizure of a Portuguese cruise vessel, the *Santa Maria*, by political insurgents in 1961 provoked a flurry of advocates for extending the definition of piracy to include acts of terror on the high

³Ibid., 62.

⁴Ibid., 63.

⁵Justin Mellor, "Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism," 18 Am. U. Int'l L. Rev. 341, 343.

seas.⁶ Instead jurists adopted a 'wait and see' policy, holding back to determine whether such incidents would be repeated.⁷ Time seemed to prove the sagacity of this decision, for it was not until the *Achille Lauro* affair in 1985 that another similar incident occurred. But the lapse of time was so great that legal prudence again held sway, and the issue of maritime terrorism and piracy was again deferred.⁸ Despite several incidents in the last two decades, culminating with the attack on the *U.S.S. Cole* in 1999, piracy remains limited in scope to crimes committed "on the high seas," "for private gains."

Recently, however, this traditional notion of piracy has come under fire. Scholars such as Buhler, Alfred Rubin, Samuel Menefee, Justin Mellor and Barry Hart Dubner, along with many others, have argued for a re-evaluation of the international crime of piracy to include acts of maritime terrorism. Their efforts produced, in 1999, a Joint International Working Group on Uniformity of the Law of Piracy, dedicated to settling the issue of definition once and for all. Hence while the crime of piracy (as currently defined) becomes increasingly obsolete, the debate concerning maritime terrorism is among the most contentious in the international arena. The strong trend towards melding piracy and terrorism has succeeded in shaking the foundations of piracy law itself, questioning whether piracy requires an act committed on the high seas⁹, and

⁶P.W. Birnie, "Piracy Past, Present and Future," in Eric Ellen (ed.), *Piracy at Sea* (London: International Maritime Bureau, 1989), 144.

⁷*Ibid.*, 144.

⁸*Ibid.*, 145.

⁹A nebulous term if there ever was one. It has been traditionally interpreted as "further than 12 miles from any coast," but various municipal laws have construed it as being anything from territorial waters to mooring slips, even ports and--in some cases--the port cities themselves.

what is meant by 'private gains.' The historical presumption conflates 'private' with monetary, but one wonders why that is necessarily so. Some scholars argue that the distinction is meant to exclude 'political' ends, which would effectively negate maritime terrorism.¹⁰ Others, however, point out that 'private' might be more reasonably interpreted as being distinct from government-sponsored--a felicitous definition for including acts of terror.¹¹

The *modus vivendi* of these debates seems to be in fighting a rearguard action to save the crime of piracy from slipping into obsolescence. The inclusion of maritime terrorism will, according to its advocates, infuse piracy with a lifesaving dose of relevance.¹² Laudable as that aim may be, it ignores a far more tantalizing possibility. The same arguments which would--if adopted--make piracy an act of terrorism may be turned, by the same logic, to make terrorism an act of piracy. In removing the requirements that acts of piracy be committed on the high seas for private gain, the legal distinction between pirate and terrorist diminishes almost to nothing. All that remains is the requirement that piracy be committed either on or in close proximity to the sea: a vague limitation which includes not only the attack on the *Cole*, but possibly even the World Trade Center as well.¹³ It would hardly be worth having two separate legal categories, pirate and terrorist, if the only difference between them was the *situs* of their actions. Thus, the

¹⁰Thomas A. Clinigan, "The Law of Piracy," in *Piracy at Sea*, 174.

¹¹See, generally, Buhler, "Old Menace."

¹²Samuel Menefee, "Anti-Piracy Law in the Year of the Ocean: Problems and Opportunity," 5 *ILSA J Int'l & Comp L* 309, 318.

¹³In Chapter 4, I will specifically make the case for September 11 as an act of piracy. By way of early introduction, it is worth noting here that the WTC was not only within close proximity to water, but was also the seat of the New York Harbour Master and Port Authority.

definition of piracy becomes, by inference, a definition for terrorism. The purpose of this chapter, therefore, is to examine the creation of a modern definition of piracy, and the recent debates surrounding it, from the alternate perspective of formulating a new law on organized terrorism. To fully understand the nature of the problem, we must ask the following questions: 1) what is the current state of municipal law on piracy, and how did it achieve this result?; 2) *ditto* the current state of international law?; 3) what are the arguments for amending these laws in the wake of new geopolitical realities?; 4) are these laws amenable to change--that is, does their legal history furnish the precedent for extending their definition as argued?; 5) how can this new definition be applied to the creation of a like definition for terrorists and acts of terrorism in international law?

I. Piracy in American Law: The Municipal Trend Towards Equating Piracy and Terrorism.

It is beyond the scope of this thesis--as well as its length--to examine the municipal laws of each nation on piracy. Better, therefore, to concentrate on a single nation and examine how its laws have evolved to their current state, and the relevant implications for international law. Piracy, unlike most crimes, has both a municipal and an international element. As a crime against the state, and often committed within a state's territorial waters, states frequently have first jurisdiction over acts of piracy. But it is also an international crime, since pirates under universal jurisdiction may not only be seized by the aggrieved state, but by *any* state who effects their capture.¹⁴ The problem of defining the crime of piracy is thus one of dual legal construction. It was for this reason that the aforementioned Working Group of 1999 chose to formulate a model

¹⁴Barry Dubner, *The Law of International Sea Piracy* (London: Martinus Nijhoff, 1980), 42.

municipal law of piracy (similar in effect to the Model Penal Codes produced in the United States) rather than suggest a new definition for the International Criminal Court and its attendant offices.

The selection of the United States as an example is not random, nor is it based solely on that nation's predominance. It is instead a recognition that America has been, is currently, and will continue to be the leading actor in the pursuit of terrorists throughout the world. The 'war on terrorism' is an American war, though it counts many allies in its fight. The question of how the United States defines piracy within its own jurisdiction is also of particular relevance to our discussion, as its piracy laws may furnish a blueprint for guiding its present struggle against organized terrorism.

While each of the coastal states had their own piracy acts dating from the colonial era,¹⁵ the crime of piracy was first addressed at the Federal level in Article I, Section 8 of the U.S. Constitution. It grants Congress the power "to define and punish Pirates and Felonies committed on the high Seas and Offenses against the Law of Nations."¹⁶ One year later, on April 30th, 1790, Congress enacted its first piracy act. Although it did not specifically define the crime of piracy, it gave jurisdiction to the courts for murder and theft on the high seas. Interestingly, the act extended beyond ships registered in the United States to acts of piracy committed on any ship of

¹⁵These were, incidentally, by no means uniform. Piracy may have been a bane in South Carolina, but it was a blessing in Rhode Island. Colonial Governors (including New York=s notorious Governor Fletcher) frequently abetted the pirates and offered them safe harbor. Moreover, the triangle trade of rum, molasses and slaves surviving well into the nineteenth century often ran in close quarters with privateering; the same captains used the same ships for both purposes, with the financial backing of the same merchants in Newport.

¹⁶Quoted from Buhler, *A Menace*, @ 63.

any flag.¹⁷ Personal jurisdiction was remarkably broad, including “all persons, on board all vessels, which throw off their national character by cruising piratically and committing piracy on other vessels.”¹⁸ In effect, this gave the U.S. courts jurisdiction over practically any act of piracy in the world. In 1819, Congress passed a second act which gave the fledgling United States Navy an even greater mandate. Known as the “act to protect the commerce of the United States and punish the crime of piracy,” it authorized naval vessels to capture “any armed vessel or boat, or any vessel or boat, the crew whereof shall be armed, and which shall have attempted or committed piratical aggression, search, restraint, depredation, or seizure upon any vessel of the United States, or of the citizens thereof, or upon any other vessel; and also to retake any vessel of the United States, or its citizens, which may have been unlawfully captured upon the high seas.”¹⁹

The Act of 1819 emerged at the time when the Navy had just completed its first successful engagement against the Barbary pirates. The significance of this lies in the virtually limitless jurisdiction given to the courts and to the Navy for acts of piracy. The United States could seize pirates of any nationality, wherever they were found.²⁰ Likewise, U.S. courts could bring any pirate to trial, regardless of his or his victims’ citizenship. Thus the law of piracy furnished an early example of universal jurisdiction against a stateless, common enemy. One author has even

¹⁷Ibid., 64.

¹⁸Ibid., 64.

¹⁹Quoted in Ibid., 64.

²⁰Jack Gottschalk and Brian Flanagan, *Jolly Roger with an Uzi* (Annapolis: Naval Institute Press, 2000), 42.

gone so far as to suggest that the incidents in North Africa were "perhaps the first modern assault against the day's version of international terrorists."²¹ He goes on to make an even more remarkable claim: that this might be seen as a "precursor to the multilateral 'peacekeeping' efforts of the twentieth century, or a pioneering effort at the extension of U.S. national jurisdiction over 'stateless' international criminals."²²

The problem facing the U.S. courts was not in defining jurisdiction for piracy, but in defining piracy itself. As noted, the early acts did not specifically identify the crime they proscribed: they rather left it to common knowledge (and the U.S. Navy) to determine what was and was not piracy. Perhaps their reluctance had something to do with the perennial problem of privateering, which was still alive and well throughout the 19th century. Jeremiah Brown and the Texas Navy pillaged Mexican vessels throughout the Mexican-American War, while the Confederate Navy continued to wreak havoc on Union ships throughout the Civil War three decades later. Both these activities could legitimately be called state-sponsored; the latter by the Confederacy, the former by the Federal government itself. Whatever the reason, piracy was not officially defined in Federal law until 1909, which itself simply deferred to international customary law: "Whosoever in the high seas commits a crime of piracy, as defined by the law of nations, and is afterwards brought in or found in the United States shall be imprisoned for life."²³

As such, it was left to the common law to supply a definition for piracy *jure gentium*, and American judges were not loath to undertake it. In 1820, less than one year after the passage of

²¹Buhler, 64.

²²Ibid., 64.

²³18 U.S.C. '1651.

the Piracy Act, the Supreme Court gave a concise (though limited) definition of piracy in *United States vs. Smith*, 5 Wheat. (U.S.) 153 (1820). The case is notable for several reasons, in that it provides not only a definition of piracy but of the pirate himself, as well as providing a more logical *situs* for acts of piracy. As for the pirates, they were *hostis humani generis*, subject to capture by any who found them: "A pirate, under the law of nations, an enemy of the human race; being an enemy of all, he is liable to be punished by all."²⁴ Thus the Act of April 30, 1790 did not require that the defendant be a U.S. citizen, nor that the crime occur on a U.S. ship. As for the *situs* of piracy, it was more precisely defined as being within one marine league of shore, or at anchor in an open roadstead, or on the high seas generally.²⁵

The final and most intriguing question was of piracy itself. Strongly reminiscent of Justice Hedges' terminology of "sea robbery," the Justices concluded that piracy required "a private intent," giving the pirate a very pecuniary definition as one "who, to enrich himself, either by surprise or force, sets upon merchants or other traders, by sea, to spoil them of their goods."²⁶ By this reckoning, piracy was little more than banditry at sea. The Justices made it explicit: "Piracy, by the common law, consists of committing those acts of robbery and depredation upon the high seas which, if committed on shore, would amount to felony there."²⁷

Because of the general scarcity of pirate activities after the 18th century, there are relatively few cases following *Smith* which would expand on its very narrow definition. In *in re The*

²⁴*United States v. Smith*, 5 Wheat. U.S. 153 (1820), 7.

²⁵Buhler, 64.

²⁶*Smith*, 13.

²⁷*Ibid.*, 13.

Marianna Flora the Supreme Court found that piracy requires a *mens rea* of *intending* to act as a pirate.²⁸ The facts of the case were bizarre enough to be farcical; a Portuguese trader, mistaking a U.S. warship for a pirate vessel, opened fire with the intent to cripple her. When the dreadful mess was sorted out, the Portuguese captain and crew found themselves charged with piracy, for having opened fire on a friendly vessel. The Supreme Court acquitted the unfortunate Portuguese, saying that mistaken identity was not sufficient to merit a charge of piracy. But the most interesting aspect of the *Marianna Flora* holding lay in its dicta, where the Justices declared that pirates could be lawfully captured by any vessel, public or private, in peace or war, as *hostis humani generis*.²⁹ The distinction between this and the earlier holding in *Smith* was that here the judges seemed inclined to grant jurisdiction for capture outside of territorial waters on the basis--not of universal jurisdiction--but rather the doctrine of hot pursuit.³⁰ In the modern context, this early recognition of the right to hot pursuit for piracy provides an alternative means of asserting jurisdiction against terrorists whose attacks are launched on U.S. soil.

The narrow, problematic definition of piracy given in *U.S. vs. Smith* was finally overturned in 1844, with the Supreme Court decision in *Harmony vs. United States*. Soundly trumping its earlier limitation of piracy to "sea robbery," the Court here declared that to fall within the jurisdiction of the Act of 1819, or the law of nations, an act of piracy need not be confined to plunder or intention to plunder. Instead, the Supreme Court ruled, piracy could be construed for

²⁸Buhler, 64.

²⁹*Ibid.*, 64.

³⁰*Ibid.*, 64.

any action on the high seas motivated by “hatred, abuse of power, or a spirit of mischief.”³¹ This was truly a landmark decision, paving the way for the modern understanding of maritime terrorism over a century before that term was introduced. Already in 1844 it was recognized that the political gains of piracy far outweighed the commercial ones. The latter half of the 19th century was a time remarkably like our own, punctuated by revolution, civil war, insurgency and anarchy. It was also in this time that terrorism found its first modern expression as a means of political coercion. The assassinations of Presidents Abraham Lincoln, James Garfield, and William McKinley, as well as of Czar Alexander III and numerous other nobility, by anarchists (culminating early in the 20th century with the death of Archduke Franz Ferdinand) provided an early example of deliberate homicide as an act of political terrorism. Similarly, acts of sea piracy became, in both Latin America and the Mediterranean, a tool of directed terror by disenfranchised revolutionary groups.

The broad definition of piracy articulated in *Harmony* remains the prevailing standard to this day. Some might argue that this is simply due to a dearth of piracy trials in the 20th century. Nevertheless it was reaffirmed in the later decision of *United States vs. Flores*, one of the only piracy cases to reach the appellate level in recent times, and the only such case to be heard by the Supreme Court in that century. The *Flores* case is notable for expanding the United States’ jurisdiction for piracy even farther than it had heretofore been allowed. The Supreme Court, in reaffirming the right to seize pirates who have attacked American ships in foreign waters, went on to find, as Philip Buhler describes, that “while criminal jurisdiction is generally based upon the territorial principle, and criminal statutes are not by implication to be given extraterritorial

³¹Buhler, 66.

effect, a statute (18 U.S.C. §451) extending the judicial power to offenses committed 'within the admiralty and maritime jurisdiction of the United States' would include crimes in the territorial waters of a foreign country."³² The net result of this ruling was to give American vessels the unprecedented authority, under the 'admiralty and maritime' jurisdiction provision of Article III, §2 of the U.S. Constitution, to seize pirates outside territorial waters on a third ground distinct from universal jurisdiction and hot pursuit: interference with American trade. Jurisdiction for piracy committed within a states' territorial waters and jurisdiction for attacks against that states' vessels were now concurrent.

That is where the state of American piracy law stands today. It is not perhaps a rich legal history, but it is a very instructive one. The Americans have already addressed--and answered--the problems of 'private ends' and 'high seas' which confound contemporary international scholars. As to the first, the *Harmony* decision explicitly defines acts of piracy as including acts of terrorism. This is a far cry from the earlier *Smith* definition as sea-robbery, and the fact that it took only twenty-four years for the Supreme Court to realize the folly--and irrelevancy--of the earlier definition is an ironic reflection on our current debates. Similarly, as the American courts grapple with the problem of jurisdiction on the high seas, the emerging trend is unmistakably towards universal jurisdiction for acts of piracy *wherever* they occur, even if it be outside America's territorial waters, inside those of another state, or on the high seas. As this trend seems to push jurisdiction further and further from America's shores, so does it also bring that jurisdiction further inland, recognizing acts of piracy against ships at anchor and in roadsteads.

³²Ibid., 66.

While the American legal definition of piracy still retains its aquatic requisites, the ever-broadening scope of jurisdiction and willingness to equate political terrorism with piracy both suggest that the bridge to dry land may not be too far to cross.

II. The Problem of Definition: Scholarly Debates.

Before discussing the current definition of piracy in International Law, it is important to first examine the debates in the academic community surrounding it. As I have stated, the crime of piracy is in a state of flux, and the definition offered by the 1982 Convention on the Law of the Sea is widely criticized for falling far short of contemporary realities.

Burdick Brittin, in advocating a political definition of piracy, begins with quote from Gentile, *De jure belli*. It is particularly appropriate here as well:

Pirates are common enemies, and they are attacked with impunity by all, because they are without the pale of the law. They are scornors of the law of nations; hence they find no protection in that law. They ought to be crushed by us....and by all men. This is a warfare shared by all nations.³³

A quick comparison between Gentile and Hedges, *supra*, indicates the central conflict between two constructions of the crime of piracy. Legal advocates of the narrow definition of 'sea robbery' regard the crime from the perspective of the act itself; while those who--like Gentile and Brittin--advocate a broader political definition, regard it from the perspective of the actor. The resulting definitions are not only divergent, but contradictory. If piracy is merely robbery at sea, as the former would argue, then the logical extent of jurisdiction should be a state's territorial borders³⁴ and the need for an international law on piracy is thus obviated.

³³Quoted in Burdick Brittin, "The Law of Piracy," in *Piracy at Sea*, 159.

³⁴Or, in cases occurring on the high seas, jurisdiction would rest either with the state registry of the victimized vessel or the citizenship of the pirates.

Pirates under this definition are not *hostis humani generis*, but petty miscreants whose actions are distinguished from local felonies only by their maritime locus. If, however, one views the crime of piracy not from its acts but its effects, the discourse becomes markedly different. It is now possible to consider the pirate himself, as distinct from his land-bound cousin, as a threat to the nation-state. Whereas the narrow definition places the pirate within municipal law, the latter recognizes him to be outside and in contravention of the law of nations. It seems logical, given the dual systems of municipal and international law on piracy, that the former should espouse a more limited definition while the latter espouses the doctrine of *hostis humani generis*.

Yet this is not the case. We have already seen how the municipal laws of the United States evolved gradually towards a recognition of piracy as a crime against the law of nations, as well as of its contemporary political components. This is entirely in accord with the Territorial Waters Jurisdiction Act of 1878 (defining the crime of piracy *jure gentium* under English law)³⁵ and the municipal laws of sundry other nations.³⁶ Nevertheless, international law continues to grapple with the problems of *locus* and private ends, and the current definition of piracy articulated by the 1982 U.N. Convention on the Law of the Sea is remarkable only for having perpetuated this conflict into the 21st century.

Blackstone's 'Commentaries' supply an early attempt to reconcile these two conflicting

³⁵Birnie, 135.

³⁶This even includes countries not directly or indirectly affected by piracy. During the efforts of the Harvard Research in International Law group in 1932, the opinion was expressed by Professor Pella of Rumania that "if we can evolve with reference to the suppression of piracy, a new combination of the principles of penal law with those of international law, we shall be able to bring to light hitherto unsuspected aspects of this question which render an international convention indispensable." As cited in the Harvard Draft Convention, 26 Am J. of Int'l L. 749 (1932), 753.

definitions, and is consequently worth examining in detail. He begins with a concise definition almost as narrow as Hedges': "The offence of piracy, by common law, consists in committing those acts of robbery and depredation on the high seas which, if committed upon land, would have amounted to felony there."³⁷ Then, as if recognizing the inadequacy of this definition, he goes on:

But, by statute, some other offenses are made piracy also: as, by Statute 11 and 12 W. III. c. 7. if any natural born subject commits any act of hostility upon the high seas, against others of his majesty's subjects, under colour of a commission from any foreign power; this, though it would be only an act of war in an alien, shall be construed as piracy in a subject. And farther, any commander, or other seafaring person, betraying his trust, and running away with any ship, boat, ordnance, ammunition, or goods; or yielding them up voluntarily to a pirate; or conspiring to do these acts; or any person assaulting the commander of a vessel to hinder him from fighting in defense of his ship, or confining him, or making or endeavoring to make a revolt on board; shall for each of these offenses, be adjudged a pirate, felon, and robber, and shall suffer death....By the statute 4 Geo. I. c. 24. the trading with known pirates, or furnishing them with store or ammunition, or fitting out any vessel for that purpose, or in any wise consulting, combining, confederating or corresponding with them; or the forcible boarding of any merchant vessel, though without seizing or carrying her off, and destroying or throwing any of the goods overboard, shall be deemed piracy....³⁸

Far from equating piracy to sea robbery, Blackstone's ultimate definition is among the broadest on record, encompassing a plethora of acts including privateering, mutiny, cowardice, brokerage, and conspiracy. The conspiracy element is particularly interesting, as it reflects a recognition of the organization behind the crime of piracy. The crime of piracy is not limited to the act itself, nor the principle actors, but extends to all those who in any way facilitated, planned

³⁷Quoted in Buhler, 63.

³⁸Ibid., 63.

or benefited from it. Of even greater note is Blackstone's recognition that piracy can occur where there is destruction of property, but not actual theft. In construing piracy where a crew forcibly boards a merchant vessel and "destroys or throws any of the goods overboard," Blackstone was prescient. The first 'Commentaries' were published in 1765; in 1773, a group of disgruntled Massachusetts colonists (dressed as Native Americans) boarded an English vessel at harbor and proceeded to dump her entire consignment of tea into the bay, in an act of waggish terrorism known as the Boston Tea Party. The reference is particularly apt, considering the effect of combining Blackstone's emphasis on the organizational and quasi-political aspects of piracy. If piracy can consist of an act committed by a group or organization (whose members are jointly responsible, whether they committed or merely aided in it) which results in the deliberate destruction of property with or without actual theft, then piracy is, in effect, organized terrorism. If that identical combination of circumstances occurs on land, then there is an equally strong argument that organized terrorism is, in effect, land-based piracy.

Blackstone's catalogue of offenses was only the beginning of a much larger movement among maritime legal scholars to expand the definition of piracy. In 1934, the English courts produced their own definition in *In Re Piracy Jure Gentium* which held that frustrated attempts to commit piracy were still acts of piracy, whether or not actual robbery occurred.³⁹ Piracy, the justices concluded, applies to any act of armed violence at sea which is not a lawful act of war. This broad definition was reaffirmed by the Scottish Courts in 1971, in the case of *H.M. Advocate v. Cameron and Others*, Scots Law Times 2 July (1971), 206. The case involved an intentional ramming of one vessel to another, but no intent to board or steal. Concluding that this

was indeed an act of piracy, Lord Cameron deferred to *In Re Piracy Jure Gentium* and made reference to a specific passage in that case which stated that “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 jurisconsults were expressing their opinions.”⁴⁰

Numerous scholars have offered their own definitions for piracy; nearly all are in favor of broadening the crime beyond its existing legal parameters. In *The International Law of the Sea*, authors Higgins and Colombos echo the English courts in terming piracy as “any armed violence at sea which is not a lawful act of war.”⁴¹ In *The Law of Nations*, published in 1928, Professor Brierly offers an open-ended definition which is in many ways superior that eventually promulgated by the U.N.:

Any state may bring in pirates for trial by its own courts, on the ground that they are *hostis humani generis*...There is no authoritative definition of international piracy, but it is of the essence of a piratical act to be an act of violence, committed at sea or at any rate closely connected with the sea, by persons not acting under proper authority.⁴²

Brierly’s equivocal comment about acts of piracy “at any rate closely connected with the sea” is telling. Before the 1932 Harvard Draft Convention, there was a subtle recognition among scholars and jurists that crimes of piracy should be construed broadly, both in the criminal and jurisdictional sense. The municipal courts of England and the United States willingly extend the

³⁹*In re Piracy Jure Gentium*, 1934, A.C. 586, 589.

⁴⁰*H.M. Advocate vs. Cameron*, 204.

⁴¹Quoted in Brittin, “Law of Piracy,” 161.

⁴²Brierly, *The Law of Nations* (Oxford: Oxford University Press, 1928), 154.

crime to acts of destruction motivated by "hatred" and "mischief," while scholars like Brierly harken back to the fundamental concepts of universal jurisdiction and *hostis humani generis*. Despite the narrow definition provided by the 1958 and 1983 U.N. Conventions, scholars continue to press for a more relevant, inclusive version of international piracy. P.W. Birnie suggests that "terms such as 'private ends' as used in the Geneva High Seas Convention 1958 and UNCLOS 1982 could be given a wider interpretation,"⁴³ and Samuel Menefee (among others) argues for a definition of piracy which includes acts of maritime terrorism like the *Achille Lauro*.⁴⁴ Burdick Brittin writes: "Broadening the criteria for piracy would include such acts [as the *Achille Lauro*] of terrorism thereby making them an international crime. As such the international effort to contain and meet the challenge of terrorism would be facilitated."⁴⁵

Broadening piracy to encompass a number of non-monetary activities, or "piracy by analogy" as it is often termed, has several distinguished precedents in the 20th century. The horrific effects of unrestricted submarine warfare in the First World War produced, as with poison gas, a strong sentiment for abolition in the early postwar period. In 1922, the nations of France, Italy, Japan, Britain and the United States (but not, interestingly, Germany) signed the Washington Declaration, pledging to punish "as if for an act of piracy" any vessel violating its stringent codes of conduct for submarine warfare.⁴⁶ The Spanish Civil War a decade later

⁴³Birnie, "Piracy Past," 150.

⁴⁴Samuel Menefee, "The *Achille Lauro* and Similar Incidents as Piracy," in *Piracy at Sea*, 179.

⁴⁵Brittin, "Law of Piracy," 164.

⁴⁶Birnie, "Piracy Past," 137.

produced a second treaty, even more explicit than the first. The Nyon Agreement of 1937, concluded between Egypt, Greece, Turkey, Romania, France, Belgium, Britain and the USSR, purported to extend universal jurisdiction against unidentified vessels and aircraft attacking merchant shipping on behalf of the Spanish insurgents. In doing so, the Agreement specifically referred to "piratical acts" by submarines and all other like attacks "which should justly be treated as acts of piracy."⁴⁷

Strict legal constructionists were appalled, and the Washington and Nyon acts were widely criticized for stretching the meaning of piracy beyond all recognition by outlawing numerous forms of legitimate state vs. state warfare. Certainly the Nyon Act blurred the distinction between the two: by punishing revolutionaries as pirates, the concept of pirates as *hostis humani generi* was substantially diminished. Two years later, in the wake of the Nazi's potent U-Boat strikes, these agreements went from being irksome to absurd; appropriate adjuncts to the Kellogg-Briand Pact outlawing war. Nevertheless, they demonstrated a willingness on the part of states to extend the definition of piracy when it suits their purposes, even to acts which are patently not piratical. As such, these precedents cannot be discounted, for they are a potent rebuttal to critics who would oppose the extension of piracy law to acts of terrorism on the grounds that it has never been done before. Moreover, the Washington and Nyon acts evidence a recognition of the interconnection between piracy, terrorism, and politics. This is especially true of the Nyon Agreement. By equating acts by non-state aggressors with piracy, it effectively achieved exactly what this thesis intends. The inclusion of attacks by aircraft underscores this fact, demonstrating that the drafters were not hidebound to traditional notions of piracy occurring "on the high seas."

⁴⁷Dubner, *Piracy*, 116.

The Washington and Nyon agreements, taken together, represent a model approach for contemporary attempts to draw a new international law for organized terrorism from the existing law of piracy.

III. The Harvard Draft Convention of 1932: A Genesis for International Criminal Law

It would only be a slight exaggeration to claim that modern piracy law owes its existence to the obstinacy of a small group of Romanian academics. Alone among the member states in the League of Nations in the early 1930's, Romania pressed for a codified series of international crimes, the basis of an international criminal court.⁴⁸ Piracy was meant to be the forerunner, and model, for all international criminal law. This proposal was met with mixed response by the other nations. Yet persistency finally prevailed, and the League agreed to assemble a research group to codify the law of piracy internationally as a precursor to future, more pertinent crimes. For this task, the League turned to Harvard University Law School.

The result was the 1932 Harvard Draft Convention, or, more fully, Harvard Research in International Law, *Draft Convention on Piracy with Comments*, 26 Am. J. of Int'l. L. 749 (1932). The Draft, a ponderous document replete with notes, corrections and explications, purported to classify the crime of piracy in concise legal terms, including its attendant *actus reus* and *mens rea*. Regardless of whether it accomplished this task, the most notable aspect of the Draft lies not in its conclusions, but its motivations. The Draft was a seminal document, for it created a species of criminal jurisdiction distinct from both municipal law and international treaty, springing instead from a declaration by an international covenant of sovereign states. While previous treaties and municipal laws had recognized pirates as *hostis humani generis*, some even acceding

the principle of universal jurisdiction, the discourse was based hitherto on a state's *right* to suppress piracy. The Draft, in contrast, transformed this right into an obligation. As enemies of the human race, it was the duty of all states to pursue, capture and adjudicate pirates, wherever they were found, whosoever should find them.⁴⁹ The Group made this expanded jurisdiction explicit:

[The] draft convention should include the recognition of a special authority--or jurisdiction--to prosecute foreigners for piratical offences beyond the state's ordinary jurisdiction. Then Stiel's theme that piracy is important in the law of nations as a ground of state authority may be accepted with this modification which brings it into accordance with the traditional Anglo-American view. Piracy, however it is defined, is a special basis of jurisdiction; judicial, legislative, executive, and administrative.⁵⁰

The practical result of making piracy the basis of a new "special basis of jurisdiction" was to create the first true international crime. The drafters wholly espoused the concept of pirates as a special case, *hostis humani generis*. They even quoted from the judgment in *United States v. Smith*, stating that "a pirate, under the law of nations, is an enemy of the human race; being an enemy of all, he is liable to be punished by all."⁵¹ Recalling the dichotomy between Hedges and Gentile, the Harvard Draft Convention sides resolutely with the latter. The crime of piracy outweighs the specific acts comprising it, becoming a distinct crime which identifies more with the odiousness of its perpetrator than the elements--robbery, murder, and the like--of his crime. It is the pirate that must be suppressed, not solely by virtue of his deeds but by what he represents:

⁴⁸Birnie, "Piracy Past," 138.

⁴⁹Dubner, *Law*, 37.

⁵⁰*Ibid.*, 763.

⁵¹*United States v. Smith*, 5 Wheat. (U.S.) 153, (1820), 7, cited in *Ibid.*, 761.

an enemy of the human race, waging private war against civilization itself.

This theme would surface repeatedly as the drafters attempted to define the crime of piracy and the limits of universal jurisdiction. It cannot be overemphasized, for it is tantamount to a recognition that the threat posed by certain crimes, such as piracy, far exceeds the individual harm inflicted by their occurrence. It is an argument which could well be made for acts of terrorism. The task, then, is to inquire whether terrorism can be defined as a species of piracy, within the limitations of the Harvard Draft Convention. This raises the same questions as our earlier discussion of municipal law and scholarly debate; first, is piracy confined to sea-robbery?; second, is it limited to 'private' ends, excluding political ones?; third, is it limited to the "high seas"? If the answer to all three questions is no, then terrorism is perforce synonymous with piracy.

Let us first consider the offences listed as constituting piracy in the Harvard Draft Convention. They are as follows (*italics provided for emphasis*):

- 1) Robbery committed by using a private ship (a pirate ship) to attack another ship.
- 2) Intentional, unjustifiable *homicide*, similarly committed for private ends.
- 3) Unjustifiable *violent attack on persons* similarly accomplished for private ends.
- 4) Any unjustifiable *depredation or malicious destruction of property* similarly committed for private ends.
- 5) *Attempts* to commit the foregoing offences.
- 6) Cruising (in a pirate ship) with the purpose of committing any of the foregoing offences.
- 7) Cruising as professional robbers in a ship devoted to the commission of such offences as the foregoing.
- 8) Participation in sailing a ship (on the high sea) devoted to the purpose of making similar attacks in territorial waters *or on land, by descent from the sea.*⁵²

The first question as to the limitations of the crime is quickly answered. The drafter's definition was a far cry from sea robbery; as indicated above, actual theft represents only one of

eight separate offences. The definition notably includes destruction of property without an act of taking, as well as homicide. The "attempts" provision of #5 may be in direct response to the judgment in *In Re Piracy Jure Gentium* only a few years earlier. Numbers 6, 7, and 8 comprise the conspiratorial element of the crime, extending jurisdiction to those who assist in planning acts of piracy before they occur. In sum, there is no requirement at all that an actual taking occur; the enumerated acts comprising piracy herein could have been more succinctly expressed by again referring to *In Re Piracy Jure Gentium*, defining piracy as "any act of armed violence at sea which is not an act of war."⁵³ An earlier report, brainchild of the ponderously named Subcommittee of the League of Nations Committee of Experts for the Progressive Codification of International Law, similarly concluded that "piracy consists in sailing the seas for private ends without authorization from the Government of any State with the object of committing depredations upon property or acts of violence against persons."⁵⁴ Robbery is defined as theft with violence. Yet in all these definitions, the emphasis is on the *violence*, not the theft. It is the violent aspect of piracy which distinguishes it from mere theft at sea, and warrants "special jurisdiction" under international law.

As to the question of political versus private ends, the Draft is more ambiguous. The most damning language occurs on p. 786, where it states:

While the scope of the draft convention is controlled by the international law of piracy, it

⁵²Harvard Draft Convention, 773-5 (emphasis added).

⁵³*In re Piracy Jure Gentium*, A.C. 586.

⁵⁴Report of the League of Nations Committee of Experts for the Progressive Codification of International Law (1926), C.196.M.70.1927V., 116-117, cited in Harvard Draft Convention, 802.

is expedient to modify in part the traditional jurisdiction because of modern conditions. The modification may work in both directions. It may be thought advisable to exclude from the common jurisdiction certain doubtful phrases of traditional piracy which can now be left satisfactorily to the ordinary jurisdiction of the state...and it may be expedient to concede common jurisdiction over certain sorts of events which are not beyond dispute piracy by tradition, but bear enough analogy to cases of undoubted piracy to justify assimilation under the caption. *Therefore the draft convention excludes from its definition of piracy all cases of wrongful attacks on persons or property for political ends, whether they are made on behalf of states, or of unrecognized belligerent organizations, or of unrecognized revolutionary bands.*⁵⁵

A definition of piracy which expressly excludes political acts cannot accommodate terrorism. But that is not necessarily what the Draft provides. Comparing the earlier section with the italicized, there is an apparent dichotomy. If certain acts of 'piracy by analogy' *should be* conceded, why does the Draft conclude that "therefore" political ends are not piracy? The question hinges on the drafters' definition of political. A cursory glance seems to provide the answer: acts on behalf of "states, unrecognized belligerent organizations, or unrecognized revolutionary bands" are deemed 'political,' suggesting that terrorists—as "unrecognized revolutionary bands"—would likewise be precluded from jurisdiction. But reliance on the words of the Draft alone is misleading. Consideration must also be given to its context, the political climate in 1932. At that time, the European empires were still much in force, and the advent of terrorist organizations—as we know them today—was decades away. In 1932, "political" referred solely to states, and those persons or organizations wishing to change the government of their states. Hence the political aim of the "unrecognized belligerents" could only be national, not international, in scope. This leads to quite a different interpretation of the distinction between "private" and "political" acts: private acts are those which are neither state sponsored nor

⁵⁵Harvard Draft Convention, 786.

undertaken to effect a change of state government. In the Draft's exclusion of acts "on behalf of states," we find a modern reworking of the old distinction between pirate and privateer. The drafters equated "political purpose" with actions taken under colour of the state, removing piracy from the private realm to that of diplomatic interplay between nations. As a result, the relevant question for determining political purpose was whether the pirate was, *de facto*, an agent of the state.

The draft's reference to "belligerent organizations" and "revolutionary bands" is, likewise, far more limited and context-specific than it appears. This is indicated by the quotation within the Draft of Halleck on International Law (3rd ed.) Vol. II, p. 120 footnote: "It is an open question whether privateers, commissioned by a deposed sovereign, are pirates or not...."⁵⁶ The problem facing the drafters lay in the quasi-legitimate status of revolutionary governments. The right to self-determination was already a recognized principle of international law. Understandably, the drafters did not wish to create a definition which would allow besieged governments to cry "piracy" against their revolutionary opponents. The effect would be to reduce all insurgents to international criminals. Instead, the drafters elected to confer a *faux*-state status on such organizations, distinguishing them from common pirates. But this recognition was clearly limited to rebels against an established government. Were it otherwise, pirates could declare (as they had in the 1690's) that they were "at war with the world," and thus be spared from piracy jurisdiction as "unrecognized belligerent organizations." Such a possibility was precluded by the Draft's reliance on the concept of *hostis humani generis*, as well as its quotation of Wheaton on International Law (18th ed.) p. 200:

III. If a foreigner knowingly cruises against the commerce of a State under a rebel commission, he takes the chance of being treated as a pirate *jure gentium*, or a belligerent. In point of law, his foreign allegiance or citizenship is immaterial. In this respect, it is immaterial whether the sovereign whose subject he is has recognized the rebel authorities as belligerent or not. It is not the custom for foreign nations to interfere to protect their citizens voluntarily aiding a rebellion against a friendly state, if that State makes no discriminations against them.⁵⁷

The distinction between private and political in the Harvard Draft Convention recalls our earlier discussion of the three recognized 'actors' in international relations: states, individuals, and international criminals (pirates). While the first and second are self-evident, the third is a term of art: an artificial classification created by customary and conventional international law to define those persons whose activities excommunicate them from their states. It is not surprising, therefore, that the Draft members should wish to distinguish these persons from legitimate state actors. It is also logical that the drafters should extend the "political" category beyond its customary state parameters to include insurgents and revolutionaries. The "private ends" requirement reflects an understanding that desire a change of one's government is not criminal, nor is it a crime to revolt against that government. This must be distinguished, however, from organized terrorism. Even if their aim is one of regime change, international terrorist organizations waging 'war' against nations other than their own forfeit--by this definition--the right to call themselves revolutionaries.⁵⁸ If their attacks are against outside citizens, they shift

⁵⁶Cited in Ibid., 777.

⁵⁷Cited in Ibid., 779.

⁵⁸An interesting question is whether, by this reasoning, organizations such as the PLO representing a group of stateless persons could be termed "terrorists" or not. This is addressed more fully later, where I will argue that they can, if they target persons or areas other than their opponent state.

from legal status as insurgents to *hostis humani generis*, pirates.

Also notable is the lack in the Harvard Draft Convention of any equation between “private ends” and pecuniary ones. Recall Hedges, *et al.*, and the earlier limitations of piracy to acts of monetary gain. Such a limitation in the Harvard Draft would not only run contrary to the obvious intent of the drafters, but would be in direct conflict with its specified elements of piracy. How, for example, could there be a private (pecuniary) end in “intentional, unjustifiable homicide” or the “malicious destruction of property”? The drafters merely wished to distinguish acts of piracy from legitimate acts of maritime warfare, and there was need for such a distinction. Absent a “private ends” requirement, navies could be condemned for acts of ‘piracy’ whenever they fired on an enemy vessel. What the drafters most certainly did *not* intend was to limit piracy jurisdiction to old-fashioned ideas of loot and plunder. Dispelling the popular identification of piracy with this Hollywood cliché was the chief purpose of the Harvard Draft Convention.

The third and final question concerns whether acts of piracy must be committed on the high seas. The drafters concluded decidedly in the negative, for several reasons. First, there was the issue of new technology. In 1932, air routes were still in their infancy, but the potential was there. The Reply of Rumania, conjuring up images of pirate airplanes swooping hawk-like upon their prey, nevertheless ends by suggesting a pre-sentience of aerial hijacking fifty years before its advent:

[T]he word ‘aircraft’ might be added, especially as it is quite possible that piracy may be practiced in the future by means of hydroplanes....[The] notion of piracy by aircraft may find a new application in the future if certain regions of the air above State territory are ultimately regarded as free.⁵⁹

⁵⁹Reply of Rumania, drafted by Pella, November 20, 1926 to Questionnaire 6, Report of League of Nations *op. cit.*, 204, cited in Harvard Draft Convention, 781.

The drafters themselves considered the possibility of aerial piracy a viable challenge to “traditional” concepts, and explained its inclusion within the Draft thus:

The pirate of tradition attacked on or from the sea. Certainly today, however, one should not deem the possibility of similar attacks in or from the air as too slight or too remote for consideration in drafting a convention on jurisdiction over piratical acts. With rapid advance in the arts of flying and air-sailing, it may not be long before bands of malefactors, who now confine their efforts to land, will find it profitable to engage in depredations in or from the air beyond territorial jurisdiction. Indeed there may even occur thus a recrudescence of large scale piracy. *A codification of the jurisdiction of states under the law of nations should not be drafted to fit only cases raised by present conditions of business, the arts, and criminal operations.*⁶⁰

Second, the draft members deferred to “traditional wisdom” on the permissible *locus* of piracy. The fanciful possibility of aerial piracy was joined by a much more concrete example: piracy in unowned territories. Though a century of western imperialism had taken its toll, there were still unclaimed corners of the world in 1932. They were, like the high seas, outside the jurisdiction of any state. Why, the drafters argued, should the same acts that would be piracy at sea be unpunishable on *terra incognita* ashore? Pressing their case by hypothetical, the drafters displayed a surprisingly fertile imagination:

It is quite untrue that the special legal notion of piracy is due to its maritime character... Besides the high seas, there are also *unowned territories*, and though, of course, they are always becoming rarer, they still exist; and until some State acquires exclusive sovereignty over them, every State, in virtue of the principles described above, will naturally have a theoretical right of punitive jurisdiction over them. Supposing, for example, that a band of brigands in some unowned territory attacks and plunders a convoy or caravan and escapes capture by its victims, what is the difference from the legal point

⁶⁰Harvard Draft Convention, 809 (emphasis added). It is interesting to note that the drafters were willing to consider not only technological innovations affecting the law of piracy, but social transformations as well. Though one wonders what effect the arts could have.

of

view between piracy on the high seas and pillage in unowned territory? If the act was committed in unowned territory, it is universally punishable *in virtue of the same principles* as those which make piracy on the high seas universally punishable. It would therefore be most desirable to substitute for the term "high seas" the words "places not subject to the sovereignty of any State."⁶¹

Yet whimsical depictions of rogue hydroplanes and roving brigands could only go so far. Even allowing these special circumstances, non-maritime piracy was still seemingly confined to areas outside state jurisdiction. The drafters noted that the "central idea in recent times of the traditional concession of a common jurisdiction to all states over piracy has been that the offence occurs out of the territory of every state--generally on the high sea."⁶² The backhanded use of "traditional" suggests that the drafters did not concur. This was further proven by their recognition of acts of piracy occurring "by descent from the sea," as quoted above. In support of this extension, the drafters referred to Hall, *International Law*, 8th ed., section 81, p.313:

Piracy no doubt can take place independently of the sea, under the conditions at least of modern civilization; but the pirate does not so lose his piratical character by landing within state territory that piratical acts done on shore cease to be piratical.⁶³

The door was thus opened for a third possibility alongside aerial and unappropriated lands: acts of piracy on established state territory. The only limitation seemed to be that the pirates

⁶¹Ibid., 781.

⁶²Ibid., 781.

⁶³Cited in Ibid., 776.

come upon the territory by sea, as evidenced by the inclusion of a second passage from Hall stating that:

If the foregoing remarks are well founded, piracy may be said to consist in acts of violence done upon the ocean or unappropriated lands, *or within the territory of the state through descent from the sea, by a body of men acting independently of any politically organized society.*⁶⁴

What this "descent from the sea" actually entailed could be loosely defined. Did it mean sailing brazenly into a port city, dropping anchor, and sending the jolly boats ashore? Clearly not. The inclusion of aerial piracy suggests that the menace could come from above the horizon as well. In fact, the definition of "descent" is so vague as to allow virtually any person arriving from overseas and committing a piratical act to be deemed a "pirate"--even if that act occurred, not in the coastal cities of Boston or New York, but in Butte, Montana.

In sum, the Harvard Draft Convention provides a definition of piracy which is *generally* applicable to contemporary organized terrorism. Clearly, it is stronger on some points than others; piracy is not limited to the high seas, nor to acts of robbery, but the question remains over "political" piracy. While the drafters could not have envisioned the rise of terrorism in the late 20th century, its express language excluding "belligerent organizations" is a thorny problem. It is ameliorated somewhat, however, by the provision of Article 16, which reads:

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 for piracy.⁶⁵

⁶⁴Hall, *International Law*, cited in *Ibid.*, 781.

⁶⁵Harvard Draft Convention, 857.

P.W. Birnie argues that this provision, apparently at odds with the rest of the Draft, may have been the genesis of a modern legal recognition of acts of maritime terrorism.⁶⁶ While distinguishing such acts from 'piracy,' the Draft nevertheless grants states the right to protect their "nationals, ships, and commerce." But if the Harvard Draft Convention predated maritime terrorism, to what does Article 16 refer? The answer must be the aforementioned belligerent organizations and revolutionaries. Article 16 sheds further light on the "political" dilemma, providing more evidence that the drafters intended only to distinguish between 'internal' problems of insurgency and revolution (affecting only an individual state) and the 'external' problem of international piracy.

The political question, never fully answered by the Harvard Draft Convention of 1932, would return to haunt the UN Conventions of 1958 and 1982. It remains open to this day.

IV. The Geneva Convention on the High Seas of 1958

The collapse of the League of Nations in the wake of the Second World War meant, among other things, a postponement *sine die* for the creation of an international criminal court. It would take sixty years and a new century for the I.C.C. to finally emerge. International criminal law, however, received a powerful boost in the Nuremberg trials of 1945. Faced with the unimaginable horror of the Holocaust, the trials of the Nazi 'war criminals' established the precedent that there were certain crimes so heinous as to shock the conscience of the world. As offences not against the state but against all states, such crimes merited universal jurisdiction. The Nuremberg trials enumerated these crimes as aggressive war, crimes against humanity and

⁶⁶Birnie, "Piracy Past," 138.

war crimes. The International Criminal Court awarded jurisdiction for these and added a fourth: genocide. Customary international law supplied the fifth and final: piracy.

Of the four, piracy seems anachronistic. The others are “new” crimes, emerging from the technological and political history of the 20th century. While acts of barbarity and genocide were hardly unique to that era, Nuremberg marked a turning point in international perception from regarding them as the private prerogative of states to the international responsibility of the U.N. Piracy, in contrast, owed its place on the list to historical precedent. It was the first crime of universal jurisdiction, the most debated, the most articulated. The idea of *hostis humani generis*, previously specific to piracy, became the legal norm to describe all international criminals.

Yet it was not until 1958 that the issue of piracy specifically found expression in international law. When it did, in the Geneva Convention on the High Seas of 1958, it was retrogressive. The Convention purported to adopt nearly verbatim the Harvard Draft Convention, which was its principle source.⁶⁷ In fact, it did nothing of the kind. In the twenty-six years between the two documents, the international political climate had changed radically. The murky definition of “political” acts offered by the Draft in 1932 was soundly repudiated in 1937, with the passage of the Nyon Agreement. The agreement, discussed *supra*, branded acts of unrestricted submarine warfare “piratical” and in so doing turned the Draft’s fine distinctions between state and individual on their heads. The Nyon Agreement recognized the folly in attempting to distinguish political and private ends in piracy. Piracy consisted of the act itself and accompanying *mens rea* of--as the U.S. Supreme Court would have said--“hatred or criminal mischief.” Beyond that, inquiry into the pirates’ motivations was both unnecessary and

counter-productive.

Both the Nyon Agreement and the 1958 Geneva Convention were products of their time: the Nyon Agreement of rising fears of Nazi aggression, the Geneva Convention of the Cold War. In the late 1950's, as the Maoists assumed command of the People's Republic of China, the disenfranchised Nationalists began intercepting vessels on the high seas bound for China. The USSR, citing the Nyon Agreement, proposed before the UN that such actions be declared piratical. The Czech government further proposed that the issue of piracy be re-examined, with a view towards expanding the definition to include the Nationalist's activities.⁶⁸ Over the course of three years, beginning with the seventh session of the International Law Commission in 1955 and ending with the Geneva Convention on the High Seas of 1958, the political dimensions of piracy were heatedly debated.

Among the Commission's first acts was to disavow all competency to discuss "political" piracy altogether. After receiving numerous reports from various countries concerning free navigation in Chinese waters, as well as a memorandum from the Polish government stressing the relevancy of the Nyon Agreement, the Commission declined to address the "political considerations" of piracy.⁶⁹ A flurry of memoranda followed, as the democratic nations congratulated the commission on their sagacity and the communist nations protested stridently. The debate was obviously not over.

The distinction between private and political ends, in fact, became the chief bone of

⁶⁷Birnie, "Piracy Past," 138.

⁶⁸Ibid., 138.

⁶⁹Discussions of the 327th meeting, July 5, 1955, 1 Y.B. Int'l L. Comm'n 266 (1955).

contention. Sir Gerald Fitzmaurice summed up the problem:

The real antithesis which needed to be brought out was between authorized and unauthorized acts and acts committed in a public or in a private capacity. An act committed in a private capacity could have a political purpose but be unauthorized--as, for example, the seizure of a vessel by the member of an opposition party.⁷⁰

The same problem facing the Harvard drafters now bedeviled the Commission: where to distinguish between private and political acts of piracy in a miasma of rebels, insurgents, and civil war. Some argued that this was simply beyond the competency of the Commission, claiming that questions of "whether parties to a civil war constituted belligerents or not, as well as that of governments which were not universally recognized" were far too "complex and controversial" to address.⁷¹ Despite these reservations, the Commission eventually broke down along ideological lines. The communist representatives, led by Mr. Zourek and Mr. Krylov, argued strongly for inclusion of political acts within the definition of piracy.⁷² Zourek commented that he "considered, in particular, that the acts of violence and depredation referred to in article 14 [of the 1956 draft] constituted acts of piracy even when committed a) for political ends; b) by warships or military aircraft; or c) by aircraft or seaplanes against foreign aircraft or seaplanes...."⁷³ The opposition of democratic nations, led by Sir Gerald Fitzmaurice, argued for a "traditional" definition of piracy. Yet even Sir Gerald harbored some misgivings, for while he

⁷⁰Remarks of Sir Gerald Fitzmaurice, paragraph 92, Appendix 4, in *Ibid.*, 267.

⁷¹Remarks of Mr. Hsu, paragraph 5, Appendix 5, in *Ibid.*, 286.

⁷²Dubner, *Law*, 110-113.

⁷³Remarks of Mr. Zourek, paragraph 37, Appendix 12, in 1 *Y.B.Int'l L.Comm'n* 46-48 (1955).

saw his stance as necessary to counter the Russian threat, he regretted that such a limitation would be a step backwards, rendering the crime of piracy obsolete and incapable of dealing with new realities. He commented wistfully, "it would be a pity to delete the reference to private aircraft, because the Commission should not disregard an aspect of piracy that was both novel and potentially real..."⁷⁴

Ultimately, the democratic nations won out. Piracy was narrowly construed in Article 39 of the 1958 Geneva Convention on the High Seas to refer to:

1. Any illegal act of violence, detention or any act of depredation, committed for private ends by the crew and passengers of a private ship and directed:
 - a) On the high seas, against another ship or against persons or property on board such a ship.
2. Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft.

⁷⁴Remarks of Sir Gerald Fitzmaurice, paragraph 44, Appendix 12 in *Ibid.*, 48.

So anxious was the Commission to thwart possible communist piracy claims that they effectively brought the definition of piracy back two centuries. Whereas the evolution of both municipal and international law had been towards a broader, more inclusive definition of piracy encompassing both political objectives and actions occurring other than the high seas, the Geneva Convention introduced a slightly expanded version of Justice Hedges' definition; sea-robbery with violence. Piracy was confined to "the high seas or in any other place outside the jurisdiction of any State," and limited to private vessels.⁷⁵ The comment to Article 39 now read: "Save in the case provided for in article 40, piracy can be committed only by private ships and not by warships or other government ships."⁷⁶ The exception of Article 40 referred to ships that had been seized by mutineers.

The Commission also specifically repudiated the Nyon Agreement, in its comment to article 14. This comment also serves to highlight the tensions between two ideological poles, and offers and insight on exactly what the Commission considered 'political':

With regard to point (iii), the Commission is aware that there are treaties, such as the Nyon Agreement of 14 September 1937, which brand the sinking of merchant ships by submarines, against the dictates of humanity, as piratical acts. But it is of the opinion that such treaties do not invalidate the principle that piracy can only be committed by private ships. In view of the immunity from interference by other ships which warships are entitled to claim, the seizure of such ships on suspicion of piracy might involve the gravest consequences. Hence the Commission feels that to assimilate unlawful acts committed by warships to acts of piracy would be prejudicial to the interests of the international community. *The Commission is unable to share the view held by some of its members that the principle laid down in the Nyon Arrangement confirmed a new law in*

⁷⁵Ibid., 287.

⁷⁶Ibid., commentary (iii).

process of development. In particular, the questions arising in connection with acts committed by warships in the service of rival governments engaged in civil war are too complex to make it seem necessary for the safeguarding of order and security on the high seas that all States should have a perpetual right, let alone an obligation, to repress as piracy acts perpetuated by warships of the parties in question.⁷⁷

The stridency of this comment seems to represent a sharp break from the Harvard Draft Convention. In fact, however, it is entirely consistent with the Draft's definition of "political"--even reaffirming it. Both the Draft and the Commission perceived the menace of political piracy to lie in the gray area of state sponsorship and rebellion. Both define "political" as state-oriented, meaning either actual state actions (such as piracy by warship), state-sponsored piracy (privateering), or piracy by revolutionary quasi-governments. None could have anticipated the creation of a third category, distinct from internal state conflict; terrorists. The law, therefore, does not reflect this potentiality.

It does, however, provide some guidance on how it *would* approach the problem of organized terrorism. By centering the concept of political piracy within the framework of inter- and intra-state conflict, the law suggests that other forms of politically-motivated piracy committed outside this framework would still be termed piracy under the law. This reading is reinforced by the comment quoted above, saying that the "questions arising in connection with acts committed by warships in the service of rival governments engaged in civil war are too complex...." The purpose of the anti-political commentary is to distinguish the crime of piracy from legitimate acts of war. But war, as I stated in my introduction, can only be conducted between states, or between rival factions within a state. Terrorism is not a war by any definition,

⁷⁷2 Y.B. Int'l L. Comm'n 282 (1956), Article 39, comment 3.

as it occurs outside the geographic scope of conflict, is cellular and international in character, and pursues its political objectives solely through the illegitimate means of terror and coercion. Despite its retrogressive elements, the 1958 Geneva Convention unwittingly facilitated the interpretation of terrorism as an act of piracy by defining what piracy was *not*. It is not to be found in naval war between states, nor between revolutionaries and the state. The inference, however, is that it *is* to be found in all other allegedly “political” circumstances.

The United Nations Convention on the Law of the Sea 1982 (UNCLOS)

The 1982 Convention is remarkable only in that it completely ignored twenty-four years of evolution in piracy law and deferred, almost word for word, to the terms of the 1958 Geneva Convention.⁷⁸ Among the most notable documents emerging in the interim was the International Law Association Report of 1970, defining piracy as the unlawful seizure of a vessel by violence, threats of violence, surprise, fraud, or other means.⁷⁹ This definition, which would have included maritime hijacks (in fact was specifically intended to do so) was not even addressed in the commentary of the 1982 UNCLOS. Instead, it offered a warmed-over definition of piracy nearly identical to its 1958 precedent, with the added element of new, more stringent concepts of jurisdictional zones. As one commentator lamented, “the old weaknesses and ambiguities not only remain, but are exacerbated by the zonal provisions.”⁸⁰ Piracy was thus defined as:

a) any illegal acts of violence or detention, or any act of depredation, committed for

⁷⁸Birnie, “Piracy Past,” 139.

⁷⁹International Law Association, Fifty-Fourth Report, The Hague, 1970, *Piracy: Sea and Air*, 706, at 710. See also D.H.N. Johnson, “Piracy in modern international law,” *Grotius Society Transactions*, Vol. 43, 1957, 63.

⁸⁰ Birnie, *Piracy Past*, @ 139.

private ends by the crew or the passengers of a private ship or private aircraft, and directed:

- i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
- ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State.
- b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- c) any act of inciting or intentionally facilitating an act described in sub-paragraphs a) or b).⁸¹

As the 1982 UNCLOS was the last published statement of piracy law, it remains in force to this day. On the one hand, it offers a depressingly limited and quite arcane concept of piracy; a fact which has led commentators for the last twenty years to suggest revision. But, on the other hand, it is very amenable to expansion. There is no limitation to acts of sea-robbery, and the acts against "persons or property" outside of state jurisdiction is a short step from the "descent from the sea" concept discussed earlier. Moreover, the familiar phrase of "private ends" is offered without comment, and thus open to liberal interpretation. Desire to inflict terror for political reasons could certainly be considered "private ends"; I can scarcely imagine many other reasons for an attack on innocent civilians without any intention to steal. In short, the 1958 and 1982 Conventions leave open the possibility for expansion of piracy law to include all forms of organized terrorism.

The 1999 Working Group:

In the summer of 1999, the Joint International Working Group on Uniformity of the Law of Piracy met in London to draft a model definition of piracy. The impetus for this gathering came from the efforts of numerous scholars, many of whom are quoted above, to extend the

⁸¹United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982,

definition of piracy beyond its traditional parameters (as articulated in the 1982 U.N. Convention), particularly in regard to acts of so-called "political" piracy.⁸² The Working Group drew from numerous sources, both international and municipal. As a starting point, it circulated a questionnaire among the member states requesting summaries of their laws on piracy. This elicited a number of interesting responses, most especially that of the United States.⁸³ The U.S. Maritime Law Association delivered a report stating that U.S. piracy law was based upon sections 1651-1655 of Title 18 of the United States Code. Section 11651, discussed earlier, defers the question of definition to the law of nations. Sections 1652 and 1653 define jurisdiction for acts of piracy as against anyone who attacks in a piratical fashion a U.S. citizen or is property "on board a vessel, ship, or maritime structure and is afterwards brought into or found in the United States."⁸⁴ Section 1654 concerns American citizens committing acts of piracy. Section 1655, by far the most controversial, defines as piracy acts of privateering--including acts for political purposes--provided that the act is against a U.S. citizen or within U.S. jurisdiction. Taken together, U.S. law provided a model example of jurisdiction against "political" pirates.⁸⁵

The extension of piracy to political acts was further reinforced by the definition suggested by the marine insurance industry. The proposed insurer's definition included acts against vessels

ILM. Vol. 21, 1982, 1245, Article 101.

⁸²Buhler, "Menace," 68.

⁸³*Ibid.*, 68.

⁸⁴Quoted in *Ibid.*, 68.

⁸⁵*Ibid.*, 69.

from shore, a significant departure from the "high seas" model.⁸⁶ Similarly, the International Maritime Bureau (IMB) offered its own definition of piracy as "an act of boarding any vessel with the intent to commit theft or any other crime and with the intent or capability to use force in the furtherance of that act."⁸⁷ Finally, the 1988 Rome Convention altered the traditional jurisdiction of piracy in areas outside any state jurisdiction to include attacks against vessels moored in roadsteads, harbors, even tethered to wharves.⁸⁸ Taken together, the insurers', IMB and Rome definitions propound a version of piracy radically different from that of the 1982 U.N. Convention: the act no longer excludes allegedly political piracy, nor is it limited to areas beyond state jurisdiction. Thus the twin concepts of piracy and terrorism have, in the last fifteen years, moved closer and closer together.

The Working Group has yet to produce its findings. Early reports stated that they would confine themselves to recommending a "model national law of piracy," and there is some evidence that their definition will be based upon the 1988 Rome Convention.⁸⁹ There appears to be particular concern among the drafters (Mr. Menefee among them) to produce a definition which will encompass acts committed against vessels tied to shore, as well as acts "outside of the tradition acts of depredation solely for remuneration, and perhaps include all acts of violence against vessels or persons on the water."⁹⁰ Perhaps the most telling indication of the Group's

⁸⁶Ibid., 68.

⁸⁷Ibid., 68.

⁸⁸Ibid., 69.

⁸⁹Ibid., 69.

⁹⁰Ibid., 69.

agenda lies its recent change of name to the "International Working Group on Uniformity of the Laws of Piracy and Maritime Acts of Violence."⁹¹

Conclusion:

The trend of piracy law has moved inexorably from an early understanding of "sea robbery" to a modern understanding of "maritime terrorism." This is reflected in the municipal laws of England and the United States, the work of countless 20th century scholars, and even in the mangled machinations which produced the 1958 and 1982 Conventions. As the nature of piracy itself evolved, the nature of its legal counterpart proceeded apace. By the early 20th century piracy for monetary ends was a peripheral problem, well within the jurisdictional and legislative purview of individual states. But piracy as an act of political coercion was coming into its own. As the number of unquestionably 'piratical' acts receded, states began on their own initiative to stretch the definition to include newer forms of menace. This resulted in the American Supreme Court decision in *Flores* and the British House of Lords decision in *In Re Piracy Jure Gentium*. Internationally, it also resulted in the Washington Agreement of 1922 and the Nyon Agreement of 1937.

By the end of the Second World War, the logical conclusion to this evolutionary process could be easily anticipated; a new 'politicized' definition of piracy that would replace its obsolete precedent, sea robbery. Yet with the advent of the Cold War the evolution was sidetracked. Bipolar politics introduced a retrogressive element: as the Eastern Bloc sought to hasten the definition of piracy to its fully political end, their Western nemeses clung with increasing

⁹¹Ibid., 70.

desperation to its traditional, irrelevant, ossified antecedent. This can only account for the strangely limited and arcane definition which the crime of piracy holds today. It is the product, not of dispassionate legal inquiry, but a *realpolitik* evaluation of lesser evils. Piracy was thus allowed to become marginalized in the law, to prevent it from becoming a tool against insurgent (perhaps democratic) governments.

There is a middle ground between the Nyon Agreement and the 1983 Convention, and it lies in the arguments advanced on both sides of much-debated issue of "political piracy". One position, briefly stated, would expand the definition of piracy to include virtually any act of armed violence at sea. This would probably (though not certainly) exclude warships, but would most certainly include rebel vessels or those of revolutionary governments. The other position, also oversimplified, states that any inquiry into the political dimensions of piracy necessarily produces a maelstrom of vagaries between political and private acts. Piracy, therefore, must be wholly divorced from such debates and limited exclusively to acts committed for private (i.e. pecuniary) gain.

The middle ground between these two definitions is, appropriately, the spectre of maritime terrorism. Though both the 1958 and 1982 Conventions expressly exclude political piracy, they limit their definition of political to a conventional idea of state vs. state or, alternately, civil war. This is consistent with recorded history to that time, where the pattern of conflict had been exclusively between states or within states. It is not, however, applicable to the current 'war on terrorism.' Organized terrorism presents a third, hitherto unknown form of conflict: state vs. non-state. Unlike the others, it is not waged *within* a given territory nor *over* that territory. Instead, contemporary terrorism--like piracy--is waged all over the world against a multitude of states.

These states, the terrorists' "enemies," share no necessary commonalities among themselves except loss of life and property. As the aims of terrorist organizations vary widely between quasi-legitimate governmental objectives (such as the establishment of territorial boundaries and the enfranchisement of minorities) to seemingly apolitical, cultural, or religious ambitions, so too do the terrorists' motivations vary in determining their 'enemies.' A state may have only peripheral contact with the issue in dispute (as in ex-colonial nations), a past history of diplomatic involvement in the disputed area (as with the U.S. in Afghanistan), or cultural practices, religious observances, and governmental regimes which are anathema to the terrorists. The 'enemy' state might even have no appreciable connection to the terrorists whatsoever. This situation is markedly different from that envisioned by the drafters of the 1958 and 1982 Conventions. As the world has moved beyond the Cold War into a new century and new political realities, so too must piracy law adopt these realities within a new, unabashedly political, definition.

This requires virtually no alteration of the existing law, only a recognition of its logical limitations. By their express language, the 1958 and 1982 Conventions limit their understanding of 'political' to state conflict and civil war. Without denigrating from that definition, international jurists can stress its corollary: that other forms of violence 1) otherwise falling within the definition of piracy, 2) committed by 'private' (that is, non-governmental, non-military and having no direct affiliation with a revolutionary government) organizations, whose 3) only ground for denying jurisdiction is the self-professedly 'political' ends they wish to achieve, is nevertheless piracy under international law.

There is inferential support for this interpretation throughout modern international and municipal piracy law. The most obvious source is the repeated affirmation that piracy

encompasses acts of violence, such as homicide and destruction, which are committed for "private ends" other than pecuniary gain. The solution to the private/political dichotomy lies in considering the logical extremities of these private ends. Suppose a band of pirates board a vessel, kill its crew, and burn it to the keel. Captured as pirates, they advance the argument that they did so to protest the imprisonment of certain key Palestinian rebels. Would they then be entitled to release, simply because they claimed a political motive? Certainly not: the result would be akin to that in Gilbert & Sullivan's *Pirates of Penzance*: the good-natured Pirates release anyone claiming orphanage; therefore every person captured immediately swears himself to be an orphan. The legal limitation of piracy to non-political acts clearly presupposes more than a mere assertion of political objective. Some appreciable nexus to a government, whether existing or insurgent, must be required to separate the wheat from the chaff.

One might argue, in contrast, that an organization such as al-Qaeda becomes a *de facto* political entity by virtue of its size, complexity, and objectives. But this argument fails to account for the crucial difference between a revolutionary government--however disorganized--and a terrorist organization. The difference lies in objective and means: the revolutionaries seek to replace the existing government with their own, directing their attacks solely at that government; a terrorist organization has no such limitations on its agenda, nor on the scope of its attacks. Regime change may or may not coincide with a plethora of other initiatives, and the weapon of terror may be inflicted against any state or its citizens. It is this lack of limitation which distinguishes the terrorist from the revolutionary. For a terrorist organization to represent itself as a belligerent or revolutionary organization within the meaning of the law, it must 1) confine its attacks to within the jurisdictional and/or territorial boundaries of a single state, 2) have no

political objective beyond regime change and 3) represent itself as the alternative governmental regime.

Pirates who do not confine themselves to the abovementioned quasi-governmental limitations fall outside the "political" exemption and become *hostis humani generis*. So too must terrorists. It should be of no greater account whether the terrorist band is comprised of ten members of 100,000 than it would if the pirates attacked by a phalanx of ships or an inflatable life raft. The law rightly concerns itself only with determining whether this is a crime or an act of war, and beyond that it does not inquire.

Having demonstrated that the political dimensions of modern terrorism are not inconsistent with piracy law, it remains to demonstrate that acts of terrorism are likewise amenable. We have already seen that the current definition of piracy encompasses a number of acts which coincide with terrorism, most notably murder and destruction of property. If the same act can be termed both an act of piracy and terrorism, the two definitions meld.

This leaves us with the question of locus. Can piracy occur on the land? By most modern definitions, the answer is yes. Both the 1958 and 1982 Conventions recognize the possibility of piracy in territories outside of any state jurisdiction. The 1932 Harvard Draft Convention goes even farther, allowing for acts of piracy committed on land "by descent from the sea." This idea is reaffirmed by the municipal laws of both the United States and Great Britain. As the 1958 and 1982 Conventions do not specifically discount this possibility, nor offer an alternative definition for it under international law, the possibility of sea descent may be considered still valid under international customary law.

Within this nebulous concept of "descent by sea" lies an exciting possibility. The law does

not specify how this descent should occur, nor where, nor whether the pirate must begin the act of piracy immediately after landfall. And although it implies that such descent "by sea" should be from an ocean vessel, it does not say so explicitly—and the recognized possibility of aerial piracy argues strongly for an extension of definition. Acts of aerial piracy have enjoyed long recognition in international law. Thus it is likely that a definition of "descent by sea" might—in fact, must—include descent by sea *from the air*; that is, the landing of an overseas airplane. This can occur anywhere—even in landlocked countries—provided that the plane crossed over some form of ocean during its flightpath, or originated from another country. There is no requirement that this plane land in a coastal city for it to remain piratical. Therefore the pirate still descends by sea *wherever* he lands, even if it is inland. Finally, there is no time limitation imposed by the law. The pirate need not commence sacking and pillaging immediately; it is sufficient for him to have engineered the idea prior to arrival. Thus, if one defines this act of descent in the broadest possible terms, it may be applied to any person—other than a citizen—who arrives at the victimized state from overseas with the specific intent of committing an act of terror while within that state. This means that any terrorist arriving from abroad with the prior intent of committing an act of terror may be classified a pirate under international law, specifically the uncontested "descent by sea" provision of the Harvard Draft Convention. While this may be something of a stretch from the meaning of sea descent in common parlance, it is quite consistent with the underlying objective of the provision. Whether the pirate arrives by ship or by plane, whether he touches down on the coast or inland, and whether he begins to wreak havoc immediately or waits for his plans to mature, are all irrelevant considerations. To remain true to the spirit of the law, one must only determine whether he arrived from overseas with the prior intention of committing

an act that falls within the definition of piracy.

A crime, in municipal or international law, has three elements: the *mens rea*, the *actus reus*, and the *locus*. For terrorism to fall within the common definition of piracy, it must therefore be consistent in its requisite mental state, actions, and place of occurrence. The *mens rea* of piracy is the desire to inflict death, destruction or deprivation "for private ends." Recognizing the difference between the political ends of a revolutionary government and those of a terrorist organization, we can now conclude that international terrorism falls outside the political exemption, and thus within the common understanding of piracy. Second, the *actus reus* of piracy, which includes acts of homicide and destruction absent actual robbery, is synonymous with the *actus reus* of most forms of modern terrorism. Third, the *locus* of piracy, while traditionally confined to the high seas or other territories outside state jurisdiction, has been expanded to include acts of piracy committed on state territory "by descent from the sea"; a provision which, as outlined above, may likewise apply to nearly all acts of terrorism.

Since piracy and terrorism share a *mens rea*, *actus reus*, and *locus*, we may conclude that they are, in effect, the same crime. They must also, accordingly, share a legal definition. Terrorists, like pirates, are *hostis humani generis* under international law.

Chapter 3: The International Response to Terrorism

Summary:

Despite its long history and the growing threat it poses to the international community, there is no universal definition for terrorism in international law. Nor is there a U.N. Convention on Terrorism, though a recent attempt to create one failed in 1997 on the issue of definition. Instead there are eighteen international conventions focusing on individual terrorist activities, rather than the central problem of terrorism itself. These are buttressed by Security Council Resolution 1373, which gives the U.N. the prerogative to expand its definition of terrorist offenses to any current and unforeseen potentialities. Given the relative paucity of law, the legal community have attempted to supply their own definitions for organized terrorism, as well as proposing international responses to the problem. Such proposals run the gamut from 1) keeping things at the status quo, 2) addressing terrorism through domestic legislation, and 3) giving the ICC jurisdiction over terrorism. Even within this last category there is disagreement between those favoring incorporation of terrorism within existing law and those favoring the creation of a separate category. This chapter argues that piracy provides an ideal solution to the problem by taking a middle ground: giving the ICC jurisdiction over terrorism, yet also encouraging domestic legal reform along similar lines; creating a separate category for terrorism in the ICC, yet giving it the definition, historical legitimacy and precedent of piracy law.

Introduction:

What is terrorism? The short answer is: we don't know. The concept of terrorism has been with us for hundreds of years, often sharing its history with that other great menace, piracy. Yet after centuries of precedent, and scores of covenants in international law, there is no consensus on a definition.

Thus piracy and terrorism share yet another commonality: their respective vagaries in definition. And here, as with piracy, we must ask the question of *why*; why should a seemingly simple and easily identifiable act present such a formidable obstacle to international law? The most common response is that terrorism, like piracy, is context-specific. Recalling the aforementioned terrorist/freedom fighter sliding scale, this argument suggests that there simply is no way of providing a definition for an act which

owes its distinctiveness from ordinary homicide to a convoluted morass of political motivations and vicissitudes.¹ This might be termed the cultural relativist argument, and it is not surprising that its most ardent advocates often emerge from the same cultural antecedents as the terrorists themselves. At the opposite end of the spectrum are the universalists, those who would dodge the problem of definition altogether in favor of quick and decisive action. Their argument might best be represented by the American jurist who remarked that he might not be able to define terrorism, but he knew it when he saw it.

In between these dichotomous positions, one arguing the impossibility of definition and the other its irrelevance, lie the well-intentioned efforts of international law. Beginning with the Convention Against Terrorism of 1937 by the League of Nations and extending to the 1996 UN Resolution 51/210 (establishing an ad hoc committee to draft *inter alia* a terrorism convention)--and most recently to the flurry of debate surrounding its exclusion from the justiciable crimes of the International Criminal Court--terrorism's long struggle for definition reflects competing notions of justice, sovereignty, self-determination, diplomacy, universal jurisdiction, *hostis humani generis*, and the law of nations.

This chapter is devoted to raising, and answering, the many questions surrounding the recognition of terrorism as an international crime. Such recognition is not only appropriate, but vital. The question is how to reach it. Problematically, there are as many different and divergent approaches to dealing with the crime of terrorism as there are to defining it. Often the two are intertwined. There are those, for example, who advocate the

¹ Alfred Rubin, "Legal Response to Terror: An International Criminal Court?" 13 Harv. Int'l L.J. 65 (Winter 2002), 67.

inclusion of terrorism in the ICC as a crime against humanity or, alternately, genocide.² Others, wary of this attempt to pack and stuff terrorism into crimes which are patently distinct from it, argue instead that terrorism should be a separate category altogether.³ But this approach raises the old problem of supplying a definition for this "new" crime; a problem which the former approach, however contrived, managed to avoid.

Though each attempt provides further insight on the crime of terrorism, all fall victim to their own deficiencies. Those who tackle the problem head on by advocating a new body of terrorist law become ensnared by heterogeneous definitions and political disputes; those trying to avoid the problem by fitting terrorism within existing international law often seem to be pounding a square peg into a round hole.⁴ Both endeavors are thwarted by the same paradox: *nulla poena sine legis*, a crime cannot be proscribed until it is defined. As there is no universal definition of terrorism, there can be no universal response.

The second goal of this chapter is to examine the existing international law on terrorism from an evolutionary perspective, with the intention of using its previous course as a yardstick for future progress. Despite the lack of consensus on definition, there have been no less than eighteen international conventions on terrorism since 1963, not to mention a multitude of regional and bilateral agreements.⁵ The most startling aspect of this body of law is its scattered, almost slapdash quality; conventions exist covering nearly every aspect of organized terrorism from hijacking to finance, yet none have

² James Fry, "Terrorism as a Crime Against Humanity and Genocide: The Backdoor to Universal Jurisdiction," 7 UCLA J. Int'l L. & For. Aff. 169.

³ Todd Sailer, "The International Criminal Court: An Argument to Extend its Jurisdiction to Terrorism and a Dismissal of U.S. Objections," 13 Temp. Int'l & Comp. L.J. 311.

⁴ For specific examples of both, see *infra*, pgs. 119-127.

⁵ *Ibid.*, 315.

categorically classified terrorism itself as an international crime. Nevertheless the existing covenants, taken together, may provide the basis for such a classification. Likewise, their lists of proscribed "terrorist" acts offer a collective definition for terrorism itself, not explicit but rather inferred.

The third and final goal of this chapter is to suggest an approach for incorporating the crime of terrorism within international law, an approach 1) built upon the framework of current international law and 2) avoiding the Scylla of culturally relative (and thus ineffectual) legal definitions and the Charybdis of attempting to force non-synonymous concepts into existing law. This solution is based upon the law of piracy. Rather than trying to place terrorism within the framework of genocide or crimes against humanity—both of which are centered almost exclusively on crimes committed by states, governments, or their representatives—the crime of piracy provides an ideal historical precedent embodying the same tenets of universal jurisdiction, law of nations, and *hostis humani generis*,⁶ against private individuals without any government nexus. Piracy is, in fact, the *only* crime which applies such principles against private persons. While the attempt to sneak terrorism "through the back door"⁷ to universal jurisdiction by way of genocide or crimes against humanity is laudable, it is also fraught with inconsistencies and an overall sense of illegitimacy. Similarly, regarding those advocating the creation of a new crime of terrorism, piracy law provides the definition and the precedent to buttress such a law and removes it from the miasma of cultural relativism. In short, this chapter—and this thesis—advocates a middle ground between the two approaches, one which

⁶ Indeed, as will be recalled from Chapters 1 and 2, piracy as the first international crime *originated* these concepts.

⁷ James Fry, "Terrorism as a Crime Against Humanity and Genocide: the Backdoor to Universal Jurisdiction," 7 UCLA J. Int'l L. & For. Aff. 169 (Spring/Summer 2002), 169.

recognizes the need to incorporate terrorism within existing law yet also appreciates its significance as a crime *sui generis*.

I. A Brief History of Terrorism and the Law: 1937 to the present.

Aut dedere aut judicare; either extradite or prosecute. This is the fundamental principle that has governed international criminal law since its inception.⁸ It places the obligation upon states capturing or harboring international criminals to either prosecute the malefactors themselves or extradite them to another country for prosecution. Until the creation of the ICC in 1998, *aut dedere aut judicare* was found primarily in bilateral or multilateral treaties between states.

The existence of a permanent international criminal court, however, removes the obligation (or, in some circumstances, privilege) of prosecution and extradition for states, extending its jurisdiction over certain international crimes for which state prosecution is considered inadequate.⁹ Yet as terrorism does not yet fall within the jurisdiction of the ICC, and most of the conventions regarding it predate the court's inception, the principle of *aut dedere aut judicare* remains in force. The inherently political nature of terrorism confounds a just application of this doctrine, most particularly where the terrorists enjoy the protection of a harboring state. Indeed, regardless of whether the organizations' acts were state-sponsored or not, it would be remarkable if its aims did not coincide with those of some rogue government willing to protect it. Among the most egregious examples of this was the long, difficult process of adjudicating the terrorists responsible for the crash of Pan Am flight 103 over Lockerbie, Scotland. Libya's initial refusal to extradite the accused terrorists, and its persistent delaying tactics after such extradition

⁸ Sailer, 326.

⁹ Ibid., 337.

was eventually achieved, highlight the problems manifest in applying *aut dedere aut judicare* to international terrorism, and argue strongly for jurisdiction over terrorists in the ICC.¹⁰ Nevertheless it remains the governing principle of current terrorist law, and as such forms the foundation of our subsequent inquiry into that law's history.

Following the assassination of Alexander I of Yugoslavia by a Macedonian nationalist in 1937, the League of Nations responded by formulating a Convention for the Prevention and Punishment of Terrorism. It was never entered into force, however, since it only had one signatory, India. The first international convention against terrorism was drafted not long thereafter by the United States and six Latin American nations, with the cumbersome title of The Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion. While the convention had relatively little effect on deterring terrorism in Latin America, it did facilitate extradition, and represents an important development in international customary law.¹¹

The UN Conventions on terrorism are manifold, but are drafted to address the individual threats of terrorist activities, not the crime itself. Beginning with the Convention on Offenses and Certain Other Acts Committed on Board Aircraft of 14 September 1963, they represent a patchwork of individual offenses without any coherent pattern or whole.¹² They seem, indeed, to emerge as responses to individual acts, much as the 1937 Convention came in response to an assassination. There are a total of twelve such conventions passed between the years of 1963 to 1999, with relatively high concentrations of activity in the early 1970's and late 1980's (a full list appears in the

¹⁰ Ibid., 327.

¹¹ Fry, 179.

¹² Jennifer Trahan, "Terrorism Conventions: Existing Gaps and Different Approaches," 8 New Eng. Int'l & Comp. L. Ann. 215, 216.

appendix of this thesis). Jennifer Trahan, in her article "Terrorism Conventions: Existing Gaps and Different Approaches," writes that there are "ten multilateral conventions and two protocols addressing a variety of terrorist acts, but no convention covering terrorism generally."¹³ Referring to such coverage as "piecemeal," she goes on to classify its breadth and scope. As the elements to the crime of terrorism are of particular relevance to our discussion, this excellent analysis is worth quoting in full:

Airplane hijacking and airports. Airplane hijacking is covered by three conventions, known as the Tokyo, Hague and Montreal Conventions. The conventions apply to acts occurring while a civilian aircraft is in flight, destroying or endangering the safety of such an aircraft, or damaging or destroying international air navigation facilities. An additional protocol to the Montreal Convention covers acts against persons at airports, airport facilities and aircrafts not in service.

Attacking 'internationally protected persons.' The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents covers terrorist acts against a) a head of state, a head of government or a minister of foreign affairs, whenever such person is in a foreign state, as well as any accompanying family members, and b) any representative or official of a state or international organization of an intergovernmental character, who is entitled to special protection from attack under international law.

Theft of nuclear materials. The Convention on the Physical Protection of Nuclear Material covers unlawful receipt, possession, use, transfer, alteration, disposal, dispersal, theft, embezzlement or fraudulently obtaining nuclear materials; demanding such materials by use of force; and threatening to use such materials.

Taking Hostages. The International Convention Against the Taking of Hostages covers "any person who seizes or detains and threatens to kill, to injure or to continue to detain another person...in order to compel...a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for release of the hostage.

Unlawful acts against maritime navigation and fixed platforms on the continental shelf. The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation covers acts committed on board a ship, destroying a ship, endangering persons on the ship, or destroying or seriously damaging maritime navigation facilities. A protocol extends coverage to fixed platforms on the

¹³ Ibid., 216.

continental shelf.¹⁴

Terrorist bombing. The International Convention for the Suppression of Terrorist Bombings covers a person who “unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility.

Financing terrorism. The International Convention for the Suppression of the Financing of Terrorism covers “directly or indirectly, unlawfully and willfully” providing or collecting funds to terrorist organizations or persons engaged in terrorism.¹⁵

Marking plastic explosives. The Convention on the Marking of Plastic Explosives for the Purpose of Identification obligates states to mark plastic explosives with certain detection agents, and destroy existing stockpiles of explosives that lack those detection agents.¹⁶

The most striking aspect of this list is the breadth of activities that fall within the rubric of terrorism. Terrorism may well be the most codified and comprehensive crime outside the jurisdiction of the ICC—a potent reason for inclusion in itself. Yet this argument can be reversed; one might equally say that terrorism’s multitudinous character makes it impossible to define singly, thus impossible to classify as an international crime. The approach of international jurists heretofore has been to proscribe individual ‘terrorist’ offenses while avoiding the central question of terrorism itself, thus striking at the beast’s limbs instead of its heart. To further this end, most international conventions on terrorism not only outlaw the activities but obligate states to draft appropriate punishments, search diligently for terrorist within their borders, notify the UN Secretary General of such efforts and, of course, extradite or prosecute.¹⁷ Additionally, many

¹⁴ The issue of maritime terrorism is, if not the only, certainly the most obvious nexus between the laws of piracy and terrorism. This potentiality will be addressed fully in Chapter 4.

¹⁵ Compare this provision to the English Piracy Acts which made it a criminal act to construct, furnish, provision, broker, or in any other way facilitate a pirate voyage.

¹⁶ Ibid., 218.

¹⁷ Ibid., 219.

conventions also provide for an extension of state jurisdiction “in certain contexts,” tantamount to establishing a principle of universal jurisdiction for some acts of terrorism.¹⁸

Despite its apparent stringency, the “piecemeal” approach has glaring flaws. First, by continuing to establish conventions in response to new terrorist threats, the law remains always one step behind the terrorists. It cannot be pre-emptive, nor deterrent.¹⁹ Terrorist organizations have flourished in the later 20th and early 21st century—despite such laws—and have now become hydras furnishing a new head for each one the law destroys. Second, just as the responsive approach fails to address future possibilities, it leaves fatal gaps in coverage under existing conditions. Ms. Trahan points out, for example, that the three conventions addressing aerial terrorism concern acts undertaken “in flight,” but contain no reference to such activities on the ground.²⁰ Furthermore, terrorist attacks in civilian locations are not covered, unless the act occurs in an airport or, bizarrely, a ‘protected person’ is involved.²¹ In sum, says Ms. Trahan, “addressing terrorism topically is necessarily a responsive approach in that it responds to the types of terrorist methods currently in use or used in the past but fails to address new methods of terrorism.”²² She identifies five major problems: 1) the conventions deal with only ‘a piecemeal variety of topics’; 2) their focus is primarily on prosecution, not prevention; 3) they exclude from consideration acts occurring within a single state; 4) the obligations they impose on states are insufficient to deter domestic terrorism; 5) they are inconsistent

¹⁸ Ibid., 243.

¹⁹ Ibid., 222.

²⁰ Ibid., 221.

²¹ Ibid., 221.

²² Ibid., 222.

on the question of extradition for terrorism suspects in allegedly “political” crimes.²³ The ramifications of these gaps are potentially devastating. The September 11th attacks, for example, fall outside the purview of the Montreal Convention because the planes were registered in the United States and the attacks made on U.S. soil—thus a ‘single state’ act of terrorism. Even more repugnant is the possibility that terrorists may escape jurisdiction by claiming political motives.²⁴ Earlier terrorist conventions, like their cognates in piracy, explicitly exclude ‘political’ acts of terrorism, but provide no real guidance on determining such acts. Encouragingly, later conventions such as the International Convention for the Suppression of the Financing of Terrorism seem to have perceived the ludicrous nature of non-political terrorism. This is reflected in the following provision excerpted from that document:

None of the offences shall be regarded for the purposes of extradition or mutual legal assistance as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.²⁵

A provision which states that political terrorism will not be construed as political is perhaps not the most logical approach to the problem; it is rather like saying that if it looks like a duck, acts like a duck and sounds like a duck, it is not for this purpose a duck. Nevertheless, this tautological approach reflects a cognizance among international jurists of the inherently political nature of terrorism, however loosely one may define

²³ A familiar problem which the reader will recall from our earlier discussion of “political” piracy. *Ibid.*, 222-223.

²⁴ *Ibid.*, 220.

²⁵ International Convention for the Suppressions of the Financing of Terrorism, available at http://untreaty.un.org/English/Status/Chapter_xviii/treaty11.asp, Article 14.

either term. It also brings us closer to recognizing its similarities to that other quasi-political crime, piracy.

An attempt was made in the late 1990's to correct the flaws of existing terrorist law by formulating a comprehensive terrorism convention, complete with a universal definition. In 1996 the United Nations General Assembly approved Resolution 51/210, creating an ad hoc committee to draft such a convention. The dimensions of the proposed convention, as reflected in a draft copy, were revolutionary. Its stated aims included: 1) defining the crime of terrorism; 2) requiring states to criminalize it accordingly; 3) defining the parameters of state and international jurisdiction over terrorists; 4) requiring states to investigate and, if possible, capture suspected terrorists within their borders; 5) reinstating the principle of *aut dedere aut judicare* for captured terrorists; 6) obligating states to collectively and individually assist each other in their investigations or extradition of suspected terrorists; 7) mandating that the offence be covered in any and all extradition treaties between states.²⁶ Three years in advance of September 11, this proposed convention would have effectively made terrorism an international crime, perhaps even opening the road to universal jurisdiction. It was not coincidental that this debate ran concurrent to the ratification of the International Criminal Court. There was considerable pressure on member states to include terrorism within the list of the court's juridical crimes. The stage seemed to be set, prior to September 11, for the creation of a new international crime of terrorism. Yet the debate broke down over the familiar bugbear of "political" terrorism, and no universal definition could be agreed upon.²⁷ As of this writing, neither the proposed convention nor the proposed ICC jurisdiction have

²⁶ Ad Hoc Committee Report of Committee established by General Assembly Resolution 51/210 Dec. 17, 1996, Sixth Session, U.N. Doc. A/57/37.

²⁷ Trahan, 239.

emerged. Instead, the General Assembly adopted in 1997 an International Convention for the Suppression of Terrorist Bombings, which bears superficial similarities to the proposed comprehensive convention in that it too provides for prosecution or extradition. Yet it entirely lacks the cohesiveness and definition of the former, and is thus little more than an addition to the piecemeal list of terrorist crimes.²⁸ It entered into force on May 23, 2001. As of April 2003, it remains the most recent international convention on terrorism.

Another source of international terrorist law is the U.N Security Council. In a measure designed to reinforce state obligations to fight and prevent terrorism, the Security Council passed Resolution 1373 less than three weeks after the September 11 attacks, on September 28, 2001. This resolution required member states to undertake numerous measures to combat terrorism, and established a Counter-Terrorism Committee to monitor their progress.²⁹ Significantly, although Resolution 1373 does not provide a definition of terrorism, it mandates state compliance with all existing terrorist conventions. Moreover, it states that it applies to all “terrorist acts,” not merely those recognized by existing conventions.³⁰ By this extraordinary statement, the Security Council recognizes the limitations of the piecemeal approach, acknowledges the deficiencies of current terrorist law, and allows for both states and the UN itself to extend the definition of terrorism to include present realities and future potentialities—in short, to any act which is or could be recognized by either party as terrorism. In absence of a concrete definition of terrorism, this fluid approach suggests that terrorism may mean whatever acts are mutually agreed upon to be terrorist at a given point in time. The

²⁸ *Ibid.*, 239.

²⁹ Security Council Resolution 1373 (September 28, 2001) at P2(a)-(g).

³⁰ *Ibid.*, at P3(d).

provisions of Resolution 1373 require that states: 1) do not provide any support, financial or otherwise, to terrorist groups; 2) take all possible steps to deter terrorist acts, including the establishment of an early warning system; 3) refuse to grant sanctuary to terrorists or their accomplices; 4) ensure through domestic laws that terrorists and their accomplices are brought to justice; 5) give each other "the greatest measure of assistance in connecting with criminal investigations or criminal proceedings."³¹ Thus Resolution 1373 attempts to fulfill the function of the proposed comprehensive terrorism convention without concerning itself with the problem of definition. Its relation to pre-existing UN law is analogous to that between the Monroe Doctrine and the Roosevelt Corollary in the United States; the former as an expression of policy, the latter of the will to enforce it. The current attitude of the United Nations towards organized terrorism could be expressed thus: Terrorism is any act which we have heretofore declared it to be, as well as any act which we may in future decide to include; All states carry the obligation to prevent and punish these acts equally.

While this approach has the virtue of adaptability, it is far from ideal. The persistent difficulty of formulating a definition for terrorism cannot be ignored, nor sidestepped. The attitude of the Security Council is dangerously close to the aforementioned judge who declared he couldn't define terrorism, but knew it when he saw it. The problems inherent in this approach are manifest. Rigid legal definitions become archaic over time as new realities emerge, and must be adapted to fit changing circumstances; the common law system, recognizing this fact, provides within its apparatus a means for the law to evolve. International criminal law is engaged in a similar process of evolution, building upon the precepts established under the law of nations regarding piracy, responding to

³¹ Ibid., at P6.

new atrocities with new forms of criminal conduct after Nuremberg, culminating in the creation of an International Criminal Court in 1997. Just as the ICC was established to replace individual ad hoc tribunals, the recognition of certain international crimes evinces a desire to transcend mutable lists of proscribed offences in favor of universal, immutable definitions. Of these, customary law furnished the crime of piracy, while Nuremberg supplied war crimes, aggression, and crimes against humanity. Even absent all argument of terrorism as a form of piracy, the paramount menace it poses to contemporary society alone provides sufficient grounds for inclusion. In defence of the Security Council, it could be argued that the date of Resolution 1373—September 28, 2001-- reflects a willingness to face the problem of terrorism swiftly and effectively, without miring the international community in further debate over universal definitions. If the immediacy of circumstances post-September 11 prompted Resolution 1373, then its approach is justified. But over a year has passed since then, and no second resolution or convention has emerged to settle the question of definition that Resolution 1373 blithely avoided. The crime of global terrorism promises to be the scourge of the 21st century, no less than piracy was of the 17th. Just as the pirates' "golden age" resulted in the establishment of the first international crime, so too must the United Nations face the problem of terrorism squarely and give it the recognition in law it truly warrants.

Though it admittedly falls short of the sweeping aims envisioned by the General Assembly's Resolution 51/210, Resolution 1373 is nevertheless a crucial step towards the creation of an international crime of terrorism. The divergent approaches (and results) of the General Assembly and the Security Council also reflect a key aspect of international law: duality. Unlike domestic legislation, international law emerges from a variety of

sources: customary law, treaties, scholarly opinions, and multinational organizations. Even within the United Nations there are both distinct sources of law and distinct kinds of law. As to the latter, law may emerge from declarations, resolutions, protocols, covenants, undeclared drafts (such as the failed Resolution 51/210), bilateral or multilateral agreements between specific states, and conventions. Though the viability of enforcement varies widely between them, each serves as a precedent either for future conventions or customary law. As to the former, the debate over terrorism has produced two distinct legal documents from two distinct bodies: the General Assembly's 1997 International Convention for the Suppression of Terrorist Bombings, and the Security Council's 2001 Resolution 1373. These do not exist in conflict, but in tandem; the stated purpose of Resolution 1373 is to serve as an umbrella document for the existing terrorist conventions, mandating compliance on each.

Similarly, although the United Nations is the most widely recognized of the international legal organizations, it is not singular. The problem of organized terrorism has been addressed by a number of different multinational bodies, most particularly in the Americas and the Middle East. The Organization of American States adopted in May 2002 an Inter-American Convention Against Terrorism, criminalizing a host of terrorist crimes in the Americas and facilitating extradition.³² Even more significantly, the League of Arab States recently passed an Arab Convention for the Suppression of Terrorism that binds signatory states to a number of "preventative measures" including declining to allow terrorists to use their lands as training camps, pooling intelligence, coordinating

³² Fry, 180.

joint efforts at capture, and heightening surveillance within their borders.³³ Once again there is a reference to *aut dedere aut judicare* obligations, but there is a significant addendum: states must also undertake to protect prosecutors, informants, and witnesses from harm. The recurring watchword of the Arab Convention is cooperation: states must cooperate with each other in establishing extradition protocols, police forces must cooperate in tracking and capturing terrorists, intelligence services must cooperate by sharing information.³⁴ While the existing state of Arab relations and the burgeoning spread of terrorist activities in the region raise unfavorable comparisons between the Arab Convention and such diplomatic pipe dreams as the Kellogg-Briand Pact, its significance may lie more in precedent than enforceability. The Arab Convention elucidates: first, a recognition of the multi-layered complexity of formulating an anti-terrorism response; second, a willingness—at least in theory—to create such a response. Overall, the Convention is a recognition by states (even those states who continue to harbor and aid terrorist activities) that terrorism is an illegitimate use of force, and that terrorists themselves are not legitimate actors on the international stage. This is but one short step from a final recognition of terrorists as *hostis humani generis* under international law.

II. Groping Towards Definition: Scholarly Debate in the New Millennium.

There may be no universal definition for terrorism, but there is no shortage of attempts to furnish one. One scholar defines it as “the threat or use of violence in order to create extreme fear and anxiety in a target group so as to coerce them to meet political (or

³³ Arab Convention for the Suppression of Terrorism, available at www.leagueofarabstates.org/E_News_Antiterrorism.asp, Articles 3.I.-4.III.

³⁴ *Ibid.*, arts. 3.I.-3.II.

quasi-political) objectives of the perpetrators.”³⁵ Others have attempted to break terrorism down into its component parts, concluding that the “crime” of terrorism consists of 1) violence, actual or threatened; 2) a loosely-defined “political objective”; 3) an intended audience.³⁶ Yet even within these simple approaches, the perennial problem of distinguishing between insurgents and terrorists is apparent. At least one commentator has tried to sidestep the “freedom fighter” dilemma by defining terrorism as the instigation through violence of “mass fear and panic with the ostensible purpose of advancing revolutionary political goals, but often expressing a more prosaic criminal element and motivation as well.”³⁷ Perhaps the best definition is that suggested by Professor M. Cherif Bassiouni. Bassiouni correctly perceives terrorism as inherently international and extending to both private and government-sponsored actors, defining it as:

An ideological-motivated strategy of internationally proscribed violence designed to inspire terror within a particular segment of a given society in order to achieve a power-outcome or to propagandize a claim or grievance irrespective of whether its perpetrators are acting for and on behalf of themselves or on behalf of a state.³⁸

Terrorists are a hybrid: half revolutionary, half street thug. Their ostensibly political motives remove them from the common category of criminals which their crimes would otherwise place them, but this same *faux*-revolutionary status makes them a greater menace, not a lesser one. The United States incorporates an understanding of this potentiality in its own legal code, which defines terrorism as:

An activity that involves a violent act...that is a violation of the criminal laws of the United States or of any State...and appears to be intended—(i) to intimidate or

³⁵ Fry, 182.

³⁶ Ibid., 182.

³⁷ Ibid., 182.

³⁸ Quoted in Sailer, 320.

coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of the government by assassination or kidnapping.³⁹

Yet as numerous scholars actively engage in the search for a universal definition, there are those who maintain that well enough should be left alone. They regard the piecemeal status of current terrorist law as both necessary and inevitable. Terrorism, these jurists maintain, is impossible to define independent of its acts.⁴⁰ This conclusion is based on two presumptions: first, that no universal definition could take into account the myriad acts which terrorism encompasses; second, that it is legally impossible to draw lines fine enough to distinguish between "legitimate" revolutionaries and "illegitimate" terrorists. This rather timid approach seems to owe much to another source: cultural relativism. The nemesis of all universal international law, cultural relativism is briefly defined as the belief that each law is culture-specific and dependant on that culture for its legitimacy. Thus there is no absolute understanding of "right" or "wrong," but merely divergent cultural practices. When applied to the problem of organized terrorism, the relativist approach maintains that any "universal" definition of terrorism will be inherently western-centrist in nature, and thus likely to label the legitimate political aims of revolutionary organizations as "terrorist." The statement that "one man's freedom fighter is another man's terrorist" emerges from this logic. Cultural relativism also provides an ideal excuse for states sponsoring terrorism and advocating it as a quasi-legitimate means of warfare. If there is no absolute definition of terrorism, then terrorism is merely what each state declares it to be. Even if certain acts are declared to be

³⁹ Quoted in Fry, 183.

⁴⁰ See, generally, Rubin, "Legal Response to Terror: An International Criminal Court?" 13 Harv. Int'l L.J. 65 (Winter 2002).

“terrorist” under international law, the lack of a universal definition leaves the door open for counterarguments that 1) the terrorist act was committed as part of a legitimate revolutionary uprising or 2) state military actions such as Operation Iraqi Freedom are acts of “terrorism.” The inevitable result is a Babel of contradictory claims and perspectives, for anarchy and cultural relativism are blood brothers beneath the skin.

The piecemeal approach does have the virtue of flexibility; as long as there is no overall definition of terrorism to defer to--and thus the current state of terrorism never exceeds the sum of its parts--its ‘definition’ can be stretched to include any act which a consensus of jurists agree upon. Yet enticing as it may be to thus avoid the problem of worldwide terrorism by continuing to define it by its acts rather than its character, the piecemeal approach owes less to efficiency than cowardice. It represents not so much the inability of states to agree upon a universal definition as their unwillingness to do so. History shows us time and again that avoiding a problem only worsens it. So it is with terrorism: the continued survival of haphazard, disjointed terrorist law—resulting from the lack of a universal definition—has not only failed to curb terrorism, it has allowed it to flourish. Advocates of the piecemeal approach exist, like terrorist law itself, in the state of legal somnolence which preceded September 11, sharing its worldview within that comforting, illusory sphere. But the United States and its allies no longer harbor such illusions, which is why the “war on terrorism” has occurred thus far in a relative vacuum of international law. It is more apparent now than ever to match the energies of the United States, and those of the terrorists, with a vigorous and pragmatic international law.

With universality as our goal, there remains the problem of approach. As I indicated earlier, scholarly arguments for a universal definition fall into two general categories:

those who advocate including terrorism within existing international law, and those who seek to create a new, independent category. These divergent opinions emerge from a recognition of the most fundamental problem in terrorist law: the establishment of a successful balance between legitimacy and efficiency. Those favoring the incorporation of terrorism within existing law stress the primacy of international recognition, acceptance, and corresponding legitimacy. Defining terrorism as a war crime, crime against humanity or genocide has the undoubted advantage of facilitating its acceptance into the rubicon of international law. Terrorism *qua* genocide means, in effect, that the crime of terrorism is merely a new strain of a pre-existing virus. In contrast, those who favor the creation of an independent category for terrorism argue that terrorism is a crime *sui generis*, both deserving and necessitating a new body of law. They advocate the recognition of terrorism as a violation of the law of nations and the requisite establishment of terrorism as a separate crime under the jurisdiction of the International Criminal Court.

1) The first approach: Terrorism as a species of Genocide, War Crimes, and Crimes Against Humanity.

Shortly after September 11, 2001, U.S. Secretary of State Colin Powell termed the attacks not merely “a crime against the United States, but a crime against humanity.”⁴¹ It is not clear whether the phrase “crime against humanity” was meant to be interpreted in its legal sense—that is, as one of the enumerated crimes of Nuremberg and the ICC—or merely rhetorical. Nevertheless, at least one author has taken him at his word. James D. Fry, in his article “Terrorism as Crime Against Humanity and Genocide: The Backdoor to Universal Jurisdiction,” argues that the

⁴¹ Quoted in Fry, 169.

crime of terrorism may be incorporated into the jurisdiction of the ICC by means of legal analogy. His intentions are very similar to my own efforts with regard to piracy: first, allowing "large scale acts of terrorism to be viewed in their proper light...when the requisite elements are present," (that is, giving terrorism a definition under the law); second, to facilitate "the prosecution of terrorists by all states because universal jurisdiction is available with crimes against humanity and genocide, whereas it is unavailable with terrorism since it lacks a universal definition."⁴²

Fry employs the lawyer's popular device of an "either-or" argument. Terrorism, he writes, may be properly defined as a crime against humanity, or genocide, or both. With regard to crimes against humanity, he cites September 11 as a case in point. "The terrorist attacks of September 11," he writes, "satisfy all of the elements...for a crime against humanity."⁴³ Fry raises the following in support of this proposition:

First, the attack was part of a widespread and systematic war against the United States. These attacks were not random or isolated attacks, but were part of a coordinated assault against the United States that has continued for almost a decade....

Second, these attacks were against a civilian population....In Bin Laden's fatwa of dated February 23, 1998, he ordered all Muslims to "kill the Americans and their allies, civilian and military," and "to kill the Americans and plunder their money wherever and whenever they find it."⁴⁴

Third, Bin Laden had knowledge of the attacks in advance....

Fourth, a course of conduct involving the multiple commission of these types of acts was involved. The September 11 attacks involved the hijacking of four passenger planes, each of which was a catastrophic terrorist attack in and of itself....

Fifth, Bin Laden intended to engage in the conduct....⁴⁵

⁴² Ibid., 198.

⁴³ Ibid., 190.

⁴⁴ It is worth noting in passing the startling correlation between Bin Laden's instructions to his followers—particularly with regard to "killing and plundering the Americans wherever and whenever" they are found—and the crime of piracy.

⁴⁵ Ibid., 190.

Mr. Fry makes a similar argument, though somewhat less detailed, for defining terrorism as genocide. Noting first that the requirements of genocide are similar to those for crimes against humanity, he stresses that the attacks of September 11 were “committed with the intent to destroy a particular group in whole or in part” and were “similar, if not greater, than the acts that led to the satisfaction of this element in previous genocide convictions in the International Criminal Tribunals.”⁴⁶ Generally, he argues that the fundamental requirement for genocide that a significant number of persons are systematically eradicated with the intention of destroying the group as a whole is more than adequately met by the aims and actions of al-Qaeda. Bin-Laden, as its spokesman, declared in 1998 that: “A target, if made available to Muslims by the grace of God, is every American man. He is an enemy of ours whether he fights us directly or merely pays his taxes.”⁴⁷ Fry makes the distinction between Bin Laden’s fatwa and conventional warfare. Bin Laden’s intention is not merely to cripple the United States or to effect a change in its foreign policy, but to wipe it from the face of the earth. As such, Fry argues, his actions are removed even from those of the common terrorist to a higher plane of international genocide.⁴⁸

The policy arguments for adopting Fry’s approach are appealing, to say the least. Classifying terrorism as genocide or a crime against humanity solves the problem of creating a universal jurisdiction—or, at least, sidesteps it. Moreover, it places terrorism within the jurisdiction of the ICC, establishing it as an international crime. For the first time, terrorists could be captured and tried not only by individual nation-states, but the world itself. Fry writes that “by providing all states with

⁴⁶ Ibid., 193.

⁴⁷ Quoted in Ibid., 193.

⁴⁸ Ibid., 193.

universal jurisdiction to prosecute suspected terrorists wherever they are to be found, a strong message is sent to terrorists that they are never safe from prosecution."⁴⁹

This is certainly true: the establishment of terrorism as an international crime rescinds the right of states to provide safe harbor for suspected terrorists. The significance of making terrorism a crime of universal jurisdiction cannot be overemphasized, for it would transform the manner in which terrorists are pursued, captured and adjudicated throughout the world. Moreover, Fry argues, terming terrorism as genocide or a crime against humanity gives it its due recognition as a global menace which exceeds the harm done by individual terrorist acts.⁵⁰ This is also incontestable. The question is not whether terrorism deserves to be classified as an international crime, but whether it can be classified as genocide/crime against humanity.

Herein lies the problem with Fry's hypothesis. His policy arguments are persuasive, but merely demonstrate the need for a cohesive terrorist law, not the form which that law should take. Moreover, his reasons for relating terrorism to genocide and crimes against humanity are hindered by the fact that he bases them only on a single incident of terrorism, September 11. While September 11 may fit the jurisdictional requirements of a crime against humanity, legal scholars would not be hard pressed to supply other acts of terrorism that do not. The problem of relating terrorism to either category is that neither the definitions of genocide nor crimes against humanity were designed to incorporate it. They are predicated on a very different sort of crime, committed not by private actors but by the state. Both emerge

⁴⁹ Ibid., 197.

⁵⁰ Ibid., 198.b

from the same historical precedent, Nazi Germany, and both reflect the implicit assumption of state action in their definitions. While one must applaud Mr. Fry for perceiving the relation between September 11 and these crimes (indeed, this thesis attempts a similar comparison to piracy in Chapter 4), one incident alone cannot serve as the basis for complete legal recognition. Ultimately, the admitted gains of incorporating terrorism within these existing definitions—universal jurisdiction, deterrence, international accountability—will be undermined by the inability of states to determine which acts of terrorism fit within the asynchronous definitions of genocide and crimes against humanity. It is not difficult to foresee fierce battles in the international community over whether a given act was grand enough in scope to be considered genocide, or barbarous enough to be a crime against humanity. Some will be, certainly, but a definition of terrorism must take into account not only *coup de graces* like September 11, but the smaller, seamier aspects of organized terrorism as well.

There has also been an effort to define at least some forms of terrorism as war crimes. Michael Rosetti writes: "War crimes are similar in nature to acts of terrorism because of the illegitimacy of targets and types of violations. War crimes, like terrorism, can be directed at a variety of targets but the true illegitimacy of these actions is evident when the victims are civilians or their property."⁵¹ While Rosetti does not actually advocate classifying terrorism as a war crime under ICC jurisdiction, the parallels he draws between the two are instructive in considering terrorism as a crime of universal jurisdiction. The law of nations, Rosetti writes, was

⁵¹ Michael Rosetti, "Terrorism as a Violation of the Law of Nations After *Kadic v. Karadzic*," 12 St. John's J.L. Comm. 565, 585.

recently expanded to include war crimes.⁵² This international recognition should, he argues, pave the way for a second regarding organized terrorism.⁵³

The second approach: Terrorism as a crime *sui generis*.

As with any law, an enforceable terrorist law must reflect at least two components: it must be perceived as legitimate, and it must be perceived as just. These two requirements are not easily met, nor are they complementary. We have already seen the lengths to which some scholars will go to give the law its legitimacy; they suggest, in effect, an act of legal *legerdemain* by which terrorism is transmogrified into genocide, etc. The problems with this endeavor have already been addressed. A second body of jurists, however, propose to solve the problem of terrorism under the law by focusing on its second component, justice. They advocate the creation of an entirely new body of law, and an entirely new legal definition, for organized terrorism.

The advantage to declaring terrorism an international crime *sui generis* is that this is the only method which insures that terrorism receives its due recognition under the law. The alternatives--the "piecemeal" and (as I term it) "pack and stuff" approaches--leave significant gaps in the law and, by failing to give terrorism a universal definition unto itself, likewise fail to provide a commensurate legal response. Advocates of a universal definition stress that the menace of terrorism and its unique hybrid character mandate recognition as a distinct legal entity. The realities of contemporary terrorism, discussed above, lend credence to this conviction. But the problems raised by the universal approach are no less serious

⁵² Ibid., 589.

⁵³ Ibid., 590.

than those of its counterpart. In fact, they are inverse; the creation of a terrorist law *de novo* would require international consensus on a definition *without* any legal precedent bolstering it (excepting the hodgepodge of existing terrorist conventions), thus raising the same obstacles of legitimacy and consensus which the first approach avoided.

The basic position of the universalists could be summarized as follows:

Terrorism has become a crime of international proportions, affecting not merely the commerce and security of one state or a group of states, but all states; accordingly, the international community understands terrorism to be a violation of the law of nations; this understanding, though tacit, has no expression in written law; such law must be drafted, and it must include 1) a universal definition of terrorism, 2) recognition of terrorism as a crime of universal jurisdiction, 3) adequate provisions for pursuing, capturing and adjudicating terrorists, and 4) demarcation of venue, which may include domestic courts, *ad hoc* tribunals, permanent tribunals, and/or the ICC.⁵⁴

Advocates of the *sui generis* approach unanimously concede the necessities of a universal definition and appropriate venue for terrorism, but that is the limit of their consensus. Debates rage over which definition to adopt, and which courts should have jurisdiction.

Though the proposed universal definitions of terrorism are far too numerous to list, most fall within two basic categories. These may be termed, for convenience, "loose" and "rigid" definitions. The loose definition attempts to paint the crime of terrorism in broad strokes, leaving room for *ad hoc* judicial decisions and unforeseen

⁵⁴ See, generally, Sailer, "International Criminal Court".

contingencies. This school of thought, says Michael Rosetti, "espouses a single unambiguous standard which incorporates the principles of just means and just cause in defining terrorist activity. The thrust of this argument is that whatever form an insurgency takes, the critical elements are whether or not the activity had sufficient justification and, if so, whether the means to carry it out were legitimate."⁵⁵ The virtue of this definition is its adaptability; adjudicators have the prerogative to determine acts of terrorism on a case-by-case basis, guided by a simple legal test of legitimacy in ends and means. But such judicial *laissez-faire* also grants judges enormous latitude in distinguishing between "legitimate" insurgency and "illegitimate" terrorism, without much guidance on how to do so. "It is asserted," Rosetti writes, "that it would be difficult to find support in the international community for an illegitimate insurgency or even a valid one effectuated through the use of violence against civilian targets."⁵⁶

The rigid approach criticizes its counterpart for vagary and suggests that such a definition would be little removed from "knowing terrorism when we see it." By defining the crime in such broad terms, terrorism would thus have no real definition whatsoever. Vague definitions, they argue, "perpetuate the failure to mold international law to insure the effective administration of justice."⁵⁷ Instead, proponents of the rigid approach argue that any definition for terrorism must include a list of enumerated acts which comprise the offence. Rosetti writes:

This approach to defining terrorism seeks to include the condemned activities while also providing for any new forms of terrorism that may emerge. This approach provides a more rigid mechanism for enforcing claims against

⁵⁵ Rosetti, 587.

⁵⁶ Ibid., 587.

⁵⁷ Ibid., 588.

terrorists because it removes the ambiguities inherent in a general approach.⁵⁸

While the rigid approach solves the problem of vagary, it raises many of the same doubts as the "piecemeal" approach discussed earlier. If terrorism is reduced to a list of offences, the likelihood that an incident will eventually come to challenge that list is almost certain. The response of its advocates is that the list may be expanded for "any new forms of terrorism which may emerge," but again, this would be little different from the passage of yet another convention under the current system. To use an old expression, this would be like closing the barn doors after the horses escaped.

If the former approach fails to provide a universal definition of terrorism by defining it too broadly, the latter fails by defining it too narrowly. The loose approach gives terrorism its due recognition but does not adequately enumerate its components; the rigid approach emphasizes those components at the expense of due recognition. The problems encountered here are those which every nation faces when drafting its criminal code: striking balance between broad principles and practical realities to achieve a just law in result. And, as each nation has discovered, the answer lies in compromise. The universal definition for terrorism must give the offence its due status as a violation of the law of nations, and must be sufficiently broad to encompass a variety of activities known and unknown at the time of its drafting. It must also contain some parameters of the offence beyond mere judicial determination, and these must include some kind of list of proscribed offences. One such compromise would be to define terrorism as the advocates of the first approach suggest, follow this definition with a list of terrorist activities, and include a

⁵⁸ Ibid., 588.

provision that this list is not exclusive of new realities, about which judges may employ their discretion under the guidance of existing international law.

As I have argued, placing terrorism within the legal definition of piracy adequately addresses all of these problems by giving terrorism a definition under the law, a history of precedent, a list of offences, and the potential for expanding to include new forms of terrorism should the need arise. The legitimacy test will thus be construed as whether the accused acted as part of a justifiable insurgency—that is, “quasi-state” status as I have defined it above—or privately, in which case he becomes a pirate under the law. Similarly, as the list of piratical offences is virtually synonymous with those ascribed to terrorism, a legal construction of terrorism as a species of piracy provides it with parameters which not only meet contemporary realities, but draw from hundreds of years of legal precedent as their source.

The recognition of terrorism as an international crime subject to universal jurisdiction is meaningless without the correlating establishment of a venue for such crimes to be adjudicated. There are some who favor the creation of a special international court with sole purview of terrorist crimes, but the impracticality of its creation and the unlikelihood of achieving international consensus render this possibility remote at best. Most scholarly debate centers instead on whether the new terrorist law be adjudicated by domestic courts acting under international legal standards (an approach similar to that of the 1999 Working Group for Uniformity of the Law of Piracy), by states enforcing the principle of *aut dedere aut judicare* by traditional techniques of shaming or sanctioning states which harbor terrorists, or by establishing terrorism as a distinct offence under the jurisdiction of the ICC.

The idea of incorporating new terrorist law into domestic legislation is best expressed by Michael Rosetti in his article "Terrorism as a Violation of the Law of Nations after *Kadic v. Karadic*." The Alien Torts Claims Act (ATCA) of the United States has been employed to allow aliens to bring civil actions for tort claims against other aliens when there is no traditional nexus between the actors, the tort and the forum state.⁵⁹ A comparatively obscure provision of the U.S. Code, it was invoked successfully only twice between 1789 and 1979. In the case of *Filartiga v. Pena-Irala* in 1980, however, the U.S. Second Circuit declared that torture, as a violation of international human rights, was legitimate grounds for an ATCA tort action if the accused was served in the United States.⁶⁰ The door was thus opened for a series of cases under the ATCA against both individuals and governments, including those of the Phillipines, Guatemala, Ethiopia, and Argentina. The second landmark case, also decided by the Second Circuit of the U.S. Federal Court, was *Kadic v. Karadic*. Previously, cases involving torture and other violations of the law of nations could only be brought against states or agents acting on behalf of states. *Kadic*, however, extended jurisdiction to private individuals acting without state authority in cases where there was "sufficient international accord that the torts alleged were in violation of the law of nations." This decision, says Rosetti, clears a path for the civil actions against terrorists under the ATCA.

His argument rests on a very specific understanding of international terrorism. As was noted earlier, Rosetti draws the link between terrorism and war crimes, which are universally recognized as violations of the law of nations. If terrorist acts are akin

⁵⁹ Rosetti, 565.

⁶⁰ *Ibid.*, 569.

to war crimes, they are similar violations and judicable under the ATCA. Thus, he says, the United States might avoid the dubious task of deferring to international law to supply a definition for terrorism, especially as no concrete definition currently exists.⁶¹ *Filartiga* and *Kadic* provide precedents under existing domestic law for the adjudication of terrorists in the United States civil courts, even in cases where neither the plaintiff nor defendant are U.S. citizens.

Rosetti's article is also notable for its comment on the relation between piracy and terrorism as violations of the law of nations. He writes:

William Blackstone interpreted the law of nations to cover violations of safe-conducts, infringement of the rights of ambassadors and piracy. *Traditionally, the clearest example of a violation of the law of nations was the act of piracy because the pirate was condemned as an enemy of all mankind.*

Piracy was singled out as a law of nations violation, but this did not mean that early courts limited their interpretation of the law of nations to specific acts; rather there was recognition of the dynamic nature of this concept....

Courts can look at several resources to determine whether or not acts associated with terrorism rise to the level of offenses considered violations of the law of nations.... The common theme of these resources is that the means used by politically motivated terrorists are illegitimate and must be combated. International agreements have taken a variety of forms in an effort to combat specific instances of terrorism. They often occur in response to specific acts of terror such as air piracy....⁶²

Rosetti notes the difficulties inherent in proposing a universal international legal definition for terrorism, and offers the ATCA as a local alternative. He even believes that the ATCA may extend the idea of universal jurisdiction to terrorism, and individual terrorists: "The premise of universal jurisdiction is that certain offences affect not simply the victims, but all nations. The offences initially covered under the law of nations suggest that the ATCA should extend to individuals."⁶³

⁶¹ Ibid., 576.

⁶² Ibid., 569-570.

⁶³ Ibid., 576.

Though Rosetti does not specifically take account for this, such an interpretation in domestic law would be akin to equating terrorism and piracy. As Chapter 2 discusses, piracy is the only crime that the United States grants universal jurisdiction under its laws, as well as the only crime that the U.S. explicitly defers to the law of nations for definition. Rosetti's approach is more tortuous: the United States recognizes the existence of a law of nations in its recognition of piracy as a violation thereof; war crimes have recently been termed similar violations under international law; terrorism is equatable to war crimes; *ergo*, terrorism is a violation of the law of nations under United States law. It is a clever argument and well-advanced, but I suggest it could be made much simpler by removing all the intervening steps and placing terrorism alongside its blood relative, piracy.

The argument for adjudicating terrorism in domestic courts is attractive, but it is scarcely adequate to address the realities of 21st century terrorism. First, nearly all domestic courts have some form of terrorism legislation already, either in the form of comprehensive anti-terrorist laws (which are usually both recent and comparatively rare) and criminal statutes covering most if not all known terrorist activities.⁶⁴ Second, the function of an international terrorist law will be 1) to create an international standard for defining acts of terrorism; 2) recognizing terrorism as a violation of the law of nations; 3) standardizing an international legal response to terrorism through universal means of definition, capture, and adjudication. Domestic legislation cannot do any of this. Third, the invocation of the ATCA only applies to

⁶⁴ Jennifer Trahan, "Terrorism Conventions: Existing Gaps and Different Approaches," 8 New Eng. Int'l & Comp. L. Ann. 215, 220.

civil litigation; even accepting its availability, the problem of criminal jurisdiction is still to be faced.

While Professor Rosetti's arguments are persuasive, the course he proposes can only go so far, and not far enough. In his defense, this article was written in 1997, and the world has changed considerably since then.

Professor Rosetti is not alone in his fears over a successful resolution to the debate over terrorism's definition. Professor Alfred P. Rubin sees grave problems in the recognition of terrorism as a crime in international law, most particularly the possibility of including it within the jurisdiction of the ICC. First, he writes, is the problem of lawyers "ruling the world according to their own versions of the law, in disregard of the notions of law held by those who disagree with them."⁶⁵ He goes on to dispute the entire concept of an international criminal court:

I am reminded of Plato's *Republic*, in which rule by "guardians" is proposed. It is pointed out that those selected by whatever means to be guardians, if they are truly fit for the role, will certainly refuse it... Yet I know of few international lawyers who would refuse selection to positions in the international court or its prosecutorial arm. They would all like to rule the world according to their notions of "law"; but since lawyers notoriously disagree about written, let alone unwritten, law, the anticipation that the members of the tribunal and its prosecutorial arm would share the same liberal values seem unduly optimistic. It also begs the famous question: "Who guards the guardians?"⁶⁶

Although the title of his article is "Legal Response to Terror: An International Criminal Court?", it is perfectly clear that Professor Rubin not only questions the efficacy of giving ICC jurisdiction to terrorism, but of the ICC itself. "[A]n international criminal court," he writes, "seems fundamentally inconsistent with

⁶⁵ Alfred Rubin, "Legal Response to Terror: An International Criminal Court?" 43 Harv. Int'l L.J. (Winter 2002) 65, 68.

⁶⁶ Ibid., 68.

democratic processes.”⁶⁷ The argument here is that the prosecution of individual criminals acting as leaders or agents of a government is an unwarranted intrusion on state sovereignty, subjects these persons to the will of the fickle and perhaps hostile international community, and fails to bring justice to the victims.⁶⁸ In an extraordinary passage that could have been drawn verbatim from the defendants’ arguments at Nuremberg, Rubin declares:

“[A]ll the [ICC] does is have foreigners do what the domestic order would rather not, for fear of provoking an unfavorable reaction by its citizenry....For foreigners to question the governmental acts of any government seems to involve necessarily an intrusion into the internal affairs of the acting state. A large populace might support a repressive regime, as Germany as a whole probably supported Hitler in the late 1930’s....To attach criminal liability to the persons elected or selected to represent that large populace seems to blame a single person or small group for the default of a very large group.”⁶⁹

The principle of individual accountability by leaders or agents of the state for criminal acts committed by that state was established in 1945, and has remained—despite Professor Rubin’s objections--the governing principle of international criminal law ever since. Moreover, his argument that lawyers are inherently unfit to govern the law seems farcical at best, not unlike Groucho Marx’s crack that he would never belong to a club that would take him for a member.

Yet despite their bombastic nature, Rubin’s remarks cannot be entirely discounted. Many of the fears he expresses over fairness and state liability were shared by the United States government, which declined to submit itself to ICC jurisdiction at almost exactly the same time his article appeared. The prevailing grounds for their decision was the fear that the United States would compromise its

⁶⁷ Ibid., 68.

⁶⁸ Ibid., 68-69.

⁶⁹ Ibid., 69.

sovereignty by allowing international adjudication of its citizens; moreover, that the United States as the pre-eminent world power and “world policeman” would be uniquely targeted for its actions.⁷⁰ But Rubin’s insistence on the evils of state accountability seems strangely disjointed from the question of whether terrorism—which is inherently a crime committed by individuals, not states (unless those individuals are acting under state sponsorship)—should fall within the jurisdiction of the ICC. Professor Rubin does not address himself to this issue, but rather proceeds to offer his own alternatives to ICC jurisdiction for terrorism. Perversely, his stance seems to be based not on the assumption that terrorism is not ‘good enough’ for the ICC, but that the ICC is not ‘good enough’ for terrorism: “If not an international criminal court dominated by lawyers,⁷¹” he writes, “then what is the appropriate legal response to terrorism?”⁷² Clearly, it is not to be found among the starry-eyed lawyers: “The international legal order”—a unique term for international customary law—“poses several answers to this question—answers that have been ignored by those whose hearts are set on creating an international criminal court, and those who have not considered the possibility that many others might disagree with their values.”⁷³ Professor Rubin’s idea of an ‘appropriate response,’ as evidenced from the four alternatives he provides, is a resolute adherence to the *status quo*. Thus far Rubin seems a strange addition to our discussion of the “universalist” approach, as he patently rejects any universal concept of terrorism under international law. Yet his

⁷⁰ See, generally, Todd Sailer, “The International Criminal Court: An Argument to Extend its Jurisdiction to Terrorism and a Dismissal of U.S. Objections,” 13 temp. Int’l & Comp. L.J. 311.

⁷¹ Professor Alfred Rubin is a Distinguished Professor of International Law at the Fletcher School of Law and Diplomacy of Tufts University, so one wonders at the source of this vitriolic attitude towards the legal profession.

⁷² Rubin, 69.

⁷³ Ibid., 69.

four alternatives to ICC jurisdiction are predicated—paradoxically—on an implicit recognition of terrorism as violation of the law of nations within U.S. domestic law:

First, of course, is the availability of domestic criminal remedies. Under well-established rules of the international legal order, each state may enact and enforce its own criminal laws with regard to acts done within its own territory, or even by its nationals abroad....Furthermore, there is an Effects or Objective Territoriality Doctrine that seems to permit the enforcement of certain laws (such as conspiracy) against acts committed by foreigners abroad....Second, there are moral remedies for moral defaults: exposure, discussion in a public forum..., a free press, and public shame. Third, there are available national non-criminal remedies, such as refusals to deal or export and import controls....Most intriguing is the fourth possible remedy: civil suits in the United States or other appropriate jurisdictions.⁷⁴

The solutions that Professor Rubin proposes are markedly similar to those of Professor Rosetti, and fail for precisely the same reasons. The restriction of terrorist jurisdiction to domestic courts, as I have argued, cannot address the gravity of the threat which terrorism poses today. As an international crime, terrorism mandates an international response. Domestic remedies can only address individual acts of terrorism that fall within specific criminal parameters, and are thus reactive, not proactive. Moreover, they are silent on the issue of pursuit and capture of terrorists, an issue that is as central to the current “war on terrorism” as the nature of terrorism itself. Professor Rubin’s *status quo* approach stresses the availability of sanctions, shaming, and similar means of traditional pressure. The viability of these methods as deterrents is far from proven; moreover, even if one gives them the benefit of the doubt on that score, they remain effective only against states, not individuals nor organizations. The idea of publicly shaming a terrorist organization, such as al-Qaeda, is laughable.

⁷⁴ Ibid., 69-70

The third and most sensible solution to the promulgation of a new international terrorist law is the inclusion of terrorism within the jurisdiction of the ICC. Professor Rubin's objections on this point seem directed more at the ICC itself than the efficacy of granting it jurisdiction over terrorism. Furthermore, they rely on concepts of state sovereignty and immunity that are not only erroneous since 1945, but irrelevant. If adopted, terrorism would in fact be the only judicable crime in the ICC that would *not* require a nexus to the state.

The possibility of incorporating terrorism within one of the four crimes under current ICC jurisdiction has already been discussed. The alternative, creation of terrorism as a fifth offence, has been the subject of considerable debate. In his article "The International Criminal Court: An Argument to Extend its Jurisdiction to the Terrorism and a Dismissal of US Objections," Todd Sailer discusses this course of action in depth. Recognizing the problem of a legal vacuum in the United States' 'war on terrorism,' Sailer sees ICC jurisdiction as the answer: "A better solution to international terrorism is to lessen the need for nations to respond to terrorists and other international criminals with force. Instead, the international legal system needs to be strengthened, and made more effective in bringing the world's villains to justice."⁷⁵

Some scholars maintain that the ICC was never intended to deal with non-state crimes like terrorism. This, as Sailer points out, is not the case. As early as 1937, the Convention Against Terrorism of the League of Nations undertook to create an international criminal court to prosecute terrorist crimes. The issue of terrorism was again raised in connection with international justice in the 1980's, when the Soviet

⁷⁵ Sailer, 312.

Union—which had previously been opposed to the creation of the ICC—reversed its position on the grounds that an international criminal court would be ideal for prosecuting terrorist crimes.⁷⁶ Even in the United States, the efficacy of ICC terrorist jurisdiction has found supporters. Senator Arlen Specter stated before Congress that “if we could have a convention that lists specific terrorist offences, each with proper elements, and establish an international...criminal court to prosecute these offences, it would actually assist in the battle against terrorism.”⁷⁷ Terrorism’s non-inclusion in the ICC does not denote that it has no place there, but rather that no consensus has yet been achieved on its definition. Sailer offers his own:

[A] simple definition is readily available which would effectively resolve the ambiguities inherent in the term ‘terrorism.’ This would involve drawing the line between an impermissible terrorist act and a political offence according to the victim or target of the act in question. If violence is intentionally directed at civilians or civilian property, then the act should be labeled as terrorism.⁷⁸

There are many reasons, as Sailer points out, for favoring the ICC over strictly domestic jurisdiction for terrorism. First, ICC jurisdiction would prevent incidents such as the Lockerbie dispute, where Libya resisted extradition of suspected terrorists on political grounds. If terrorism is classed as an international crime, states could no longer harbor suspected terrorists; if the ICC had jurisdiction, states could not hamper the extradition process.⁷⁹ “The ICC could avert situations like the Lockerbie affair if it had jurisdiction over terrorism,” says Sailer:

Either the Security Council, a member state, or an independent prosecutor could refer such cases to the ICC.....The ICC is designed to complement national judicial systems in situations, such as the Lockerbie case, where a national judicial system is either unable or unwilling to carry out investigation

⁷⁶ Ibid., 314.

⁷⁷ Quoted in Ibid., 320.

⁷⁸ Ibid., 320.

⁷⁹ Ibid., 328.

or prosecution. *The ICC could thus be very effective in eliminating safe havens for terrorists.*⁸⁰

Second, the ICC would act as a more impartial body than an individual state court situated—as is often the case—in the country where the terrorist act occurred. This would also remove the defense of states harboring terrorists that they fear biased adjudication if extradition was granted. The horrific nature of terrorism, says Sailer, renders it a difficult crime to judge impartially if the court sits in the affected state.⁸¹ For terrorism, like treason, is a crime imputed against all the citizens of a country; thus, in effect, terrorist trials in victim states are being adjudicated by the terror victims themselves. A converse problem occurs where the requested state—that is, the state which has been asked to extradite the suspected terrorist—chooses instead to prosecute itself. Such a decision would likely reflect a political motive other than the desire to do justice, and might insure unwarranted leniency for the defendants.⁸² “These types of problems could be easily circumvented by referring cases of international terrorism to the impartial body of the ICC,” Sailer argues, “Resolving international matters before such judges would greatly enhance objectivity and impartiality, which would result in greater fairness to all parties involved.”⁸³

The idea of an impartial and international body adjudicating terrorism is appealing, for it reflects an understanding of terrorism as a truly international crime meriting an international response. Not only will ICC jurisdiction insure greater impartiality for the accused and the accuser, it will also “be an important step toward

⁸⁰ Ibid., 328.

⁸¹ Ibid., 329-330.

⁸² Ibid., 328.

⁸³ Ibid., 330.

reducing animosity and distrust among the diverse peoples of the world.”⁸⁴ The fundamental problem of domestic jurisdiction is its limited scope; no matter how inclusive a state’s laws may be, no state can force extradition of a defendant from another unwilling state. There are two solutions to this problem. One is to overcome by force all states that refuse extradition; an approach which seems to have been followed in Afghanistan and Iraq. The second is to cede jurisdiction to an international court with the understanding that, under the principles of *aut dedere aut judicare*, states that refuse to grant extradition to this impartial body are committing an offence not merely against the aggrieved victim state, but the international community as a whole. The problem of achieving international consensus, disastrously unsuccessful in the recent war with Iraq, may thus be avoided. Moreover, ICC jurisdiction would prevent the spark of conflict from arising between states over the terrorists’ nationality. The ICC, Sailer writes, “would...enable victims to assign blame to specific individuals rather than to the nation or group to which the criminal or terrorist belongs.”⁸⁵ This would also reflect a correct interpretation of terrorism as distinct from state actions such as genocide, and closer to other forms of international private malfeasance, such as piracy.

The final reason for granting ICC jurisdiction over terrorism lies in the familiar problem, encountered earlier in our discussion of piracy law, of ‘political’ terrorism. Most extradition treaties contain a “political offence exception”: an exception to extradition for crimes committed in furtherance of a legitimate political purpose. The reason for this exception is twofold; first, it prevents states from seeking extradition

⁸⁴ Ibid., 330.

⁸⁵ Ibid., 331.

solely on the grounds of political benefit to themselves, rather than the occurrence of an actual crime; second, it recognizes the right of people to rebel against their governments without fear of international reprisal.⁸⁶ This is also known as the right to self-determination, and is a fundamental tenet of international law. The problem with extradition is that there is no uniform standard among states as to what constitutes a 'political' act. The United States and Great Britain employ an 'incidence test,' meaning that the alleged political act must be in furtherance of a political uprising.⁸⁷ Mere declaration of political motives does not hold weight, any more than in the 'political' piracy exception discussed *supra*. Sailer sees the danger of heterogeneous political offence exceptions as possibly "eroding the people's right to self determination embodied in Article 1 of the U.N. Charter."⁸⁸ He points out that the opportunity for states to declare any act of rebellion as 'terrorism' is great, and posits that even the American Revolution of 1776 might be termed thus under the currently vague international standards.⁸⁹ "There is a much better solution," he writes, "that could resolve most of the difficulties with extradition and the political offence exception that have been outlined,":

This solution would be able to provide impartiality, uniformity, and could also be tailored in such a way as to preserve the people's right to self-determination, while simultaneously fulfilling states' goals of reducing incidents of terrorism more effectively. This solution consists of granting the ICC jurisdiction over terrorist acts.⁹⁰

The concept of the ICC as an impartial, apolitical alternative to extradition has even greater merit considering the refusal of the United States to submit itself to ICC

⁸⁶ Ibid., 331-332.

⁸⁷ Ibid., 331.

⁸⁸ Ibid., 337.

⁸⁹ Ibid., 337.

⁹⁰ Ibid., 339.

jurisdiction. Under the current circumstances, the ICC might well become an impartial and apolitical alternative to U.S. courts. This would then put pressure on the United States; first, to ensure that it conducts its prosecutions fairly, consistent with those of its international counterpart; second, to reconsider its refusal to join, since as a member it would be in a better position to arrange for the extradition and prosecution of a far greater number of terrorists than its own laws and treaties would otherwise allow. Conversely, states that feel justified in refusing extradition to the U.S. might not be able to muster the same arguments for extradition to an impartial, international criminal court. In a backhanded manner, this also aids the United States: for the net result is a greater number of terrorist prosecutions. Moreover, as Sailer writes, "the ICC also has the distinct advantage of being able to fight international terrorism more effectively without having to completely eliminate the political offence exception, and the right to self determination that the exception provides for."⁹¹

The preceding arguments make a strong case for ICC terrorist jurisdiction, but two questions still remain: 1) on what basis should jurisdiction be granted? and; 2) should terrorism be given its own category? As to the first, William Schabas argues forcefully that terrorism has no place in the ICC, as the intended purpose of the court is to deal solely with government-related crimes.⁹² As I noted earlier, this is inaccurate. Professor Daniel Prefontaine notes that there is nothing in the Rome Statute which explicitly restricts international crimes to state actors; he believes, conversely, that the loose definition of crimes against humanity is broad enough to

⁹¹ Ibid., 338.

⁹² William Schabas, "The ICC: The Secret of its Success" (unpublished article)

encompass a plethora of terrorist acts.⁹³

Todd Sailer agrees that the ICC mandate is broad enough to include terrorism, but disagrees that it should be incorporated within crimes against humanity. The Rome Statute, he notes, states that the ICC "shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern."⁹⁴ Since September 11, it would be difficult to argue that terrorism fails to meet this standard. Even prior to the attacks, terrorism was recognized as an international menace. Speaking before the U.N. General Assembly on September 21, 1998, President Clinton declared that states should "put the fight against terrorism at the top of our agenda,"⁹⁵ a statement which was underscored with deadly force almost exactly three years later. Sailer takes a *res ipsa loquitur* approach to the question, noting that "the fact that international terrorism is a serious crime of international concern, and should therefore be within the jurisdiction of the ICC, is also evident from the great amount of attention that has been devoted to the problem in the international arena."⁹⁶ His article was written in 1999; it is certain that international attention has only increased manifold since that time.

Yet Sailer does not concur with Fry and Prefontaine on the issue of including terrorism within an existing ICC offense. With regard to crimes against humanity, Sailer notes: "The fact that the typical act of terrorism is not generally a widespread or systematic attack probably means that terrorism would not be found to qualify as a

⁹³ Daniel Prefontaine, "Under International Law is there a Category of Prisoner in Armed Conflicts Known as an 'Unlawful or Unprivileged or Enemy Combatant?'" Canadian Council on Int'l L. Conf. (October 2002), 4.

⁹⁴ Sailer, 318.

⁹⁵ Quoted in *Ibid.*, 323.

⁹⁶ *Ibid.*, 324.

crime against humanity, even though a terrorist act often involves murder or other attack directed against a civilian population.”⁹⁷ Similarly, terrorism fails to qualify as genocide because of its sporadic nature and divergent motives (to recall Fry’s example cited earlier, one might argue that the al-Qaeda wish to destroy all Americans, but that is far from a universal sentiment even among organized terrorist groups).⁹⁸

Sailer argues that terrorism should be given separate jurisdiction and an accompanying definition, noted above. He claims this can be done easily⁹⁹, but that is hardly the case. Persuasive as his arguments for ICC jurisdiction may be, the problem of definition remains. While Professor Sailer’s suggested definition of terrorism as intentionally directed violence against civilians is certainly concise, it is also very problematic. The political/non-political dilemma which has confounded previous scholars is a false dichotomy, he claims: “No political cause can justify atrocities committed against a civilian population.”¹⁰⁰ But this definition does not distinguish between domestic and international terrorism, single actors versus organizations, nor even insurgency versus outright terrorism. It is, in short, not a definition for terrorism at all. While ICC jurisdiction seems like the most promising response to the current threat of international terrorism, the task of creating terrorist law *de novo* remains insurmountable. Terrorism cannot be squeezed into the confines of an existing law which does not fit it, but nor can it be given a definition out of thin

⁹⁷ Ibid., 321.

⁹⁸ Ibid., 321.

⁹⁹ Ibid., 320.

¹⁰⁰ Ibid., 320.

air. The solution, I argue, is to create a separate category and supply it with a definition from existing customary international law.

Conclusion:

This chapter has raised a number of problems surrounding the international legal response to organized terrorism. The most important are: 1) should terrorism be handled primarily in domestic or international courts and 2) should it be a distinct legal category, or incorporated into the existing law?

The first question is made paramount by the United States' refusal to join the ICC. Without American participation, one might argue, international terrorist law would be a paper tiger; a situation easily analogous to the efforts of the League of Nations, which also lacked U.S. support. The question has both an idealistic and pragmatic response. The idealist would probably regard the ICC as the ideal seat of jurisdiction for terrorist crimes, citing all the reasons given above. Clearly, the international scale of terrorism and the pattern of response by such countries as the United States both cry aloud for an international legal framework to address the problem. It would be hoped, as noted above, that the creation of the ICC as an alternative jurisdiction would compel the United States to reconsider membership or, at the least, provide a counterbalance to American efforts to pursue, capture and adjudicate terrorists.

However, under the existing state of things, a pragmatist would argue that a domestic response has the virtue of being more immediately effective. Recognition of terrorism as a crime *sui generis* under American law would, as Professor Rosetti argues, allow for a much more concerted and effective response to terrorist acts

against American targets around the globe. It can certainly be argued that the most efficient means of combating the threat of organized terrorism is to focus on the state whose laws and courts will have the greatest role in adjudicating it. In addition, creation of domestic terrorist law is a far easier matter than its international counterpart, for it does not require the same degree of consensus on definition. The American Congress might simply agree upon a definition which best suits the circumstances and enact it into law accordingly. Hence, another advantage of the domestic approach is *speed*. The threat of terrorism has increased exponentially over the last five years, with no sign of abatement in the near future. The impetus has never been greater for American jurists to respond to this new and potent menace with a coherent, consistent body of law. Numerous criminal statutes notwithstanding, that law exists neither domestically nor internationally. While the domestic approach may not be the most ideal solution over the long term, it is a necessary first step.

Yet even if domestic legislation is warranted, this should not and does not preclude the necessity for an international terrorist law. Domestic and international law are not in competition, but symbiosis. Even without an American presence in the ICC (or, as some might argue, *because* of that fact), the burden is still on the international community to create an effective global response to a truly global problem. Recent events have proved that even attacks launched against the United States do not always occur on U.S. soil; while there have been only two notable attacks in the U.S. itself (both against the World Trade Center, in 1993 and 2001), terrorists have struck against U.S. citizens in Yemen, Bali, Nigeria, Israel, and elsewhere. The ICC could claim jurisdiction over any and all of these offences,

assuming that the locus state was a member. The purpose would not be to pre-empt U.S. jurisdiction, but to act in accord with it under the principle of *aut dedere aut judicare*; states which refused extradition to the U.S. on political grounds could not offer the same argument to the ICC. The ICC would thus be a powerful addition to the war on terror, asserting its jurisdiction over a greater number of suspected terrorists than could otherwise be prosecuted.

As to the second question of incorporation versus categorization in international law, I believe piracy provides the solution to the dilemma. Terrorism is a distinct crime; it merits a distinct classification. But those who favor incorporation recognize the near-impossibility of finding consensus on this classification, as definitions are widely divergent and fail to resolve the crucial question of political motive. Here piracy is immensely useful, for it provides us with the example of a crime that has likewise struggled with the political question, and answered it by distinguishing between state or state-sponsored acts of piracy and 'private motives.' This distinction can be easily applied to the question of terrorism versus insurgency, for the central inquiry is precisely the same: Is this act committed on behalf of a recognized state or quasi-state actor? If it is, then it is 'political.' Acts which are committed by legitimate state/quasi-state actors may still be violations of international law, but they would then fall into the prescribed categories of existing ICC jurisdiction. The function of melding piracy and terrorism law is to provide universal jurisdiction for private actors whose offenses rise to the level of international atrocities but cannot be prosecuted as agents of the state. Pirates are currently the only 'private' criminals recognized by international law, under the twin

doctrines of *hostis humani generi* and universal jurisdiction. An extension of these principles to terrorism not only provides definition and precedent to the crime, but poses a counter-example to the dichotomy between legitimate insurgency and 'illegitimate' terrorism.

This last point requires some explication. Political insurgency has a legal definition, but its inverse—terrorism—does not. The political offence exception defines 'legitimate' insurgency as acting with the intention of overthrowing an existing government. Terrorism is defined as an act that does not meet this criteria. This is equivalent to an equation in which A has a positive definition, and B is defined as not being A. Piracy provides the other half of the equation, defining terrorists as *hostes humani generi*: private individuals committing international atrocities for personal motives, subject to universal jurisdiction.

In sum, the melding of terrorism and piracy in international law solves many of the problems encountered herein. First, it need not favor domestic or international solutions; ideally, *both* the American piracy laws (which defer on definition to the law of nations) *and* international law can be sources for this reform. Domestic legislation provides a swift means for recognition of terrorists as *hostes humani generi* in American law and correspondingly the basis for a new criminal code for the 'crime' of organized terrorism. The ICC, in contrast, provides the opportunity for recognizing terrorism as an offense against the law of nations, and of terrorists as international criminals subject to universal jurisdiction. Moreover, in absence of an American presence in the ICC, it provides an alternative jurisdiction for accused terrorists whose states would not allow extradition to the U.S., as well as providing a

model for American courts to follow in their adjudication of terrorists. Secondly,

problems of legitimacy and definition in the ICC. Terrorism-as-piracy will not be seen as 'new law'; rather, it will be seen as the most contemporary manifestation of the *first* international crime. Thus, the category of terrorism will not lack for legitimacy, nor definition.

Chapter 4: Proposing a New International Terrorist Law

Introduction: The Need for an International Law of Terrorism

During one scene in the Broadway play *A Man for All Seasons*, the famous English jurist and martyr Sir Thomas More is confronted by his evangelical son-in-law, William Roper. Disagreeing with More's apparent passivity in the face of an unjust law, Roper declares, "I would tear down every law in England to get at the Devil!" To which More responds:

"And when the last law is down and the Devil turns round on you, Roper, where will you hide, the laws all being flat? This country is planted thick with laws from coast to coast—man's law's, not God's. If you tear them all down (and you're just the man to do it!) do you think you could stand upright in the winds that blow then? Yes, I give the Devil the benefit of law—for my own safety's sake."¹

More's warning has never been more apt. As the United States and her allies pursue their war on terrorism across every continent, the international community struggles to respond to the two greatest challenges in its recent history: the unparalleled menace of organized terrorism that threatens to undermine the very foundations of established states, and the sudden emergence of a brash, aggrieved, hegemonic world power that threatens the delicate balance of alliances in its implacable hunt for those who wronged it. Questions are suddenly being asked of institutions and principles that long went unchallenged: What is the proper role of the United Nations, or its laws? Of the ICC? Of international law itself? The new millennium has provided us with an entirely

¹ Robert Bolt, *A Man for All Seasons*, 1962. Quoted from Joseph Lash, *From the Diaries of Felix Frankfurter* (New York: W.W. Norton, 1975), 50. Lash remarks that at this particular scene during the performance, Justice Frankfurter of the U.S. Supreme Court whispered repeatedly in the darkened theatre, "That's the point! That's it, that's it!"

new form of conflict: state vs. non-state. Hence, military operations in Afghanistan and Iraq may one day be seen as a prelude to the actual conflict between states and terrorists; a necessary step, to be sure, as the first stage of the battle against terrorism must be to remove the aegis of state-sponsorship. Ultimately, however, these operations may serve only to clear the board for an entirely new game: a game unlike any other, for which there are no rules. The principles of international relations and international law are predicated on the premise that war is either inter-state or intra-state; in other words, between two nations or within one, as in revolution or civil war. This concept is already becoming obsolete in the face of the war on terrorism. Sharp breaks have appeared in the relations between the United States and her erstwhile allies, breaks that may be further exacerbated as this new form of conflict is played out. The rift between the United States and the United Nations has been termed an indication that "the gloves are off": in the face of a very real and entirely novel threat to its security, the United States no longer feels bound to defer to international consensus on the means by which it may protect itself.

Thus the world may be experiencing a shift in power politics as great as the collapse of the Soviet Union in 1991. In the following decade the United States reigned as an uneasy hegemon, still feeling the aftershocks of fifty years' Cold War and unsure of its place on the international scene. During this time America experienced a decade of unparalleled prosperity, security, and optimism. Under the liberal leadership of President Bill Clinton, the United States seemed determined to fulfill its destiny as the champion of international human rights, freedom, and the rule of law. In the midst of this euphoria the International Criminal Court was finally brought into being, with the enthusiastic support—at first--of the United States. In the ten years between 1991 and 2001, the

United States held its position on the international scene as Caesar Augustus once did in Republican Rome: *primus inter pares*, first among equals. It was an illusion, of course--as much as it had been in Augustus' time--but it was a grand illusion all the same.

On September 11, 2001, the illusion ended. Threats which had seemed remote in Yemen and Nigeria suddenly became paramount in the American consciousness. The United States, under the leadership of President George Bush, adopted an approach to diplomacy which is best summarized by the president's own words: "You're either with us, or with the terrorists." It embarked on a campaign to root out terrorism at its source, beginning with states known or suspected to have harbored terrorists. Gaining international consensus to remove the Taliban in the wake of September 11 was not difficult. Convincing an uneasy international community about the similar threat of Iraq one year later proved impossible. Yet the lesson that the United States has drawn from its failure to obtain U.N. support for Operation Iraqi Freedom may not be what was intended; a majority of Americans, among them many in the leadership, now question the efficacy of requesting U.N. consent at all for actions regarding state security. International denunciation of 'American imperialism' rings like a cry of "*O tempora, O mores!*", and leads to the question: has the United States abandoned the pretence of the world Republic in favor of Imperial rule?

The arguments of many scholars post-September 11, including the aforementioned Alfred Rubin, seem to suggest it has. The United States has abruptly withdrawn its support from the ICC, as it had with the Kyoto Agreements not long before. As it pursues its war on terrorism the question is no longer what international guidelines it must obey, but whether it need obey them at all. Efforts to create a new international terrorist law

may face their greatest obstacle--not from the terrorists--but from the state most directly affected by that law: American indifference. Bizarrely, the United States might regard the legal vacuum surrounding terrorism as an ideal climate for its actions: without the gridiron of legal responsibility, all is permissible.

The United States is, in effect, laying the law flat to get at the Devil. But More's warning suggests the danger of this course: with law governing neither states nor terrorists, this 21st century conflict has the potential to degenerate into anarchy. Civilization itself is predicated on the primacy of immutable law over transient conflict. Thus the rule of law is more important than the threat, however great, to the nation-state. It is so because it *is* the nation-state; law is the matrix for society, and the government's source of legitimacy. International law translates this relationship from citizen-to-government to state-to-state, providing a code of diplomatic conduct that ensures the continued survival of the international community from lawless war and universal destruction. Organized international terrorism strikes at the very heart of these relationships. Terrorists, like pirates, engage in a 'war against the world,' challenging both the sovereignty of the state's laws and the fundamental structure of the state itself. Domestic legal responses, while an imperative first step, cannot fully address the problem. The limit of a state's criminal law extends to its borders and its citizens; it was for this reason that an international criminal law was created to deal with offenders whose crimes transcended the menace to an individual state.

In determining the necessity of an international terrorist law, one must consider the dual purpose of every criminal law. First, by prescribing certain conduct, it terms that conduct anathema to society and effects through punishment to deter it. Second, by

delineating the state's role in the capture, trial and punishment of offenders, it legitimizes the state as the just enforcer of universal social principles. International terrorist law performs both functions: first, terrorism is recognized as a crime *sui generis* which is contrary to the social good; second, by ceding their impunity the United States and its allies gain legitimacy to capture, adjudicate, and punish offenders under the law.

It is not enough for the United States to declare that terrorists are international criminals. For the threat of terrorism to be successfully countered, this *de facto* status must be accompanied with a definition *de jure*. International terrorist law will not only govern the legal parameters of jurisdiction and capture, it will also give terrorists legal status as enemies of the human race and subject them to universal jurisdiction. Terrorists will not be enemies of *one* state but of *all* states. Thus the United States' burden will be shared by every nation. The war on terrorism will become an international effort, transforming itself from personal vengeance and individual state security to international condemnation and the eradication of a global scourge. Only in this manner can the threat of global terrorism be successfully countered. Today, Americans question why we must give terrorists the benefit of international law. The answer is that we must do so for our own safety's sake.

This thesis has argued that the only means of addressing the problem of terrorism in international law is through the law of piracy. Piracy is the ancestor of terrorism, sharing its essential characteristics; its history in both fact and law mirrors that of terrorism. Piracy is also terrorism's blood brother in the law, raising the same problems of definition and political exception that have frustrated recent attempts to create an international crime of terrorism. Moreover, pirates share with terrorists the unique status

of individual menaces to the international order, the only such criminals existing independent from state agency or sponsorship. Based on the arguments raised in the preceding chapters, the interrelation between piracy and terrorism cannot be doubted. The question remains, however, of how best to approach this relationship in the law. This concluding chapter will address the question of formulating a new international terrorist law based on the existing law of piracy. A proposal outlining this law's definition and jurisdiction will be advanced. Finally, the events of September 11, 2001, will be used as a test case. The purpose of this test will not be to prove merely that September 11 fits the definition of an act of piracy, but that all international acts of terrorism, as defined *infra*, share certain commonalities with piracy sufficient to make them analogous under the law.

I. A Model Definition for the Crime of Terrorism:

The first chapter of this thesis demonstrates the strong historical linkages between piracy and terrorism. The second chapter outlines the synonymous *mens rea*, *actus reus* and *locus* of piracy and terrorism. The third chapter has shown that there is no universal definition of terrorism to draw from, but rather a list of proscribed offences, all of which could fit within the aforementioned definition of piracy. The only remaining task, therefore, is to bring together these separate strands into a cohesive definition of terrorism-as-piracy.

Drawing from the 1982 United Nations Convention of the Law of the Sea as the most recent source of piracy law, and mindful of all the debates surrounding the question of political exemptions, piracy on land, and the problem of maritime terrorism, I recommend that the new definition of the crime of terrorism—including acts of piracy—to be defined as follows:

1) The crime of terrorism is defined as:

- a) any illegal acts of violence or detention, or any act of depredation, destruction of property or homicide;
- b) as well conspiracy to commit such acts, membership in an organization which conspires to commit these acts, and any form of active sponsorship including financial support, refuge, or withholding knowledge of such activities from the authorities;
- c) committed by persons not acting under the colour of a state, government, or revolutionary organization engaged in the replacement of an established regime within the borders of its own state;
- d) against the citizens or property of another state;
- e) with the purpose of inflicting terror on the citizens or government of that state or achieving international recognition for a private cause;
- f) none of these provisions is meant to contradict or negate the existing terrorist offences currently proscribed by UN convention, covenant, treaty, agreement, or customary international law.

2) Terrorists do not lose their definition under the law if they are sponsored by a state, government or revolutionary organization acting in accordance with clause (1)(b):

- a) political exemption is only to be inferred if the terrorists act as *de facto* agents of that state, government, etc. by committing their acts by its direct order and in furtherance of its policy;
- b) in that event, criminal liability transfers from the terrorists as agents to the state as agency; and
- c) the state is then inferred to have committed an act of war.
- d) states which sponsor terrorist activities as outlined in clause (1)(b) are not inferred to have committed acts of war, but share criminal liability with the terrorists for any acts undertaken during their sponsorship.

3) The crime of piracy is defined as sharing the definition given in sections (1) and (2), specifically for crimes committed:

- a) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
- b) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- c) against persons or property within the jurisdiction of the State, where the pirates have:
 - i) descended by sea to a coastal port;

- ii) descended by air to any city or township;
- d) the crime of piracy also includes acts committed for pecuniary gain.

- 4) Terrorists and pirates are defined as *hostis humani generis* under the law of nations, and therefore they are subject to universal jurisdiction, meaning:
 - i) as enemies of all nations, any state may effect the capture of a suspected offender;
 - ii) such capture must be made in accordance with international law;
 - iii) the capturing state must then either prosecute the offender under its own laws and in good faith, or;
 - iv) extradite the suspect to the jurisdiction of a requesting state, or to a requesting competent international tribunal.

There are many reasons for providing a joint definition of piracy and terrorism, but the most crucial is that it solves the dilemma between political and non-political acts. We have already seen how piracy law reflects a gradual shift away from the doctrine of "sea-robbery" to one of "maritime terrorism": an evolution which was delayed, though not deterred, by the events of the 20th century. We have also seen how contemporary scholars face the same obstacle with terrorism. The political spectrum of terrorism ranges from legitimate acts of insurgency at one end to isolated, individual acts of destruction or homicide on the other. The former is protected by the right of self determination; the latter falls within the jurisdiction of ordinary domestic criminal law. The hybrid crime of terrorism lies in the murky gulf between them. Without some precedent from which to draw, no universal definition of terrorism can ever be agreed upon: for states and lawyers will battle ceaselessly over what constitutes a 'legitimate' insurgency on the one hand, and what is an 'ordinary' crime on the other.

Piracy provides the way out of this conundrum, as the definition offered above indicates. In distinguishing between political and non-political piracy, the consensus is that for the political exemption to apply, the pirate must have some direct and appreciable

nexus to a recognized government. This, in short, is the difference between pirating and privateering. While both acts are offences against international law, the latter criminalizes the *government* rather than the individual. The government is perceived to have committed an act of war against the victim state; moreover, the illegality of employing pirates as a fifth column suggests that the agent state may be subject to charges of war crimes as well. This is precisely the same approach that I suggest should be applied to the difference between private terrorism (including state sponsorship as outlined above) and terrorists as agents of the state. We need not become mired in the difference between state sponsorship and state agency: the former assumes only that the state aids or finances the terrorist, whereas in the latter example he or she is acting on direct orders from the state, in furtherance of state policy. In both cases the state is equally guilty, though the precise nature of the crime differs between conspiracy to commit terrorism and war crimes.

The crucial difference between them is not in the culpability of the state, but of the individual: whereas a terrorist is defined above as *hostis humani generis*, persons acting under colour of the state are regarded as agents of that state, and thus not individually liable for the crime of terrorism.² Similarly, revolutionaries acting on the orders of a revolutionary government are likewise not terrorists, if their activities are in furtherance of a regime change within their own state. Some might question how to distinguish between revolutionary regimes and terrorist organizations. I addressed this question in Chapter 3: revolutionaries seek to replace an existing regime with their own and direct

² This would not, of course, exempt them from other crimes of international jurisdiction, including war crimes, genocide and crimes against humanity. In fact, the purpose of a terrorist law is to apply to persons falling *outside* the jurisdiction of these crimes due to their 'non political' status. Additionally, they would be chargeable under applicable domestic law, including murder, assault, and robbery.

their attacks toward that end, within that nation; terrorist organizations have neither these political nor geographic limitations.

A melding of piracy and terrorism settles the problem of political exemptions once and for all by removing the gray areas and reducing it to a simple question: does the suspect act as an agent of a state or revolutionary regime? If he does, then the other four offences of the ICC govern his actions. If he does not, then he is a private actor and thus exempt from prosecution for these crimes. The central purpose of equating piracy with terrorism is to create a separate category specifically for these individuals,

II. Suggested Jurisdiction for the Crime of Terrorism:

The question of appropriate jurisdiction for the crime of terrorism has been dealt with extensively in Chapter 3, with considerable attention given to arguments on all sides of the issue. It has also been advanced that the law of piracy provides a solution to the legitimacy-efficiency dichotomy raised by many scholars, giving terrorism both a definition and a history of precedent.

This thesis argues that the combination of piracy and terrorism allows for domestic and international legal recognition, and indeed both are equally necessary to combat the threat which terrorism poses. The United States has criminalized most terrorist acts under its own laws, and has provided a definition of terrorism in its code. It has also, in 2001, passed the Patriot Act, which covers a range of terrorist activities and commensurate state responses, including everything from protecting the northern border to extending the permissible use of wire intercepts. Title VIII, which is headed "Strengthening the Criminal Laws Against Terrorism," amends the definition of domestic terrorism outlined in U.S. Code Section 2331. Revealingly, the words "assassination or

kidnapping” have been replaced by “mass destruction, assassination, or kidnapping.”

Under the new definition outlined in the Patriot Act, domestic terrorism is defined thus:

(5) The term ‘domestic terrorism’ means activities that—

- (a) involve acts dangerous to human life that are a violation of the criminal laws of the U.S., or of any State.
- (b) appear to be intended—
 - (i) to intimidate or coerce a civilian population
 - (ii) to influence the policy of a government by intimidation or coercion; or
 - (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
- (c) occur primarily within the territorial jurisdiction of the U.S.

Section 808 of the Patriot Act offers a list of proscribed terrorist activities, which is striking in its inclusiveness. A far cry from previous enumerated lists (as discussed *supra* in Chapter 3), the Act includes offences ranging from the destruction of an energy facility to the manufacture or use of biological weapons. In sum, the Patriot Act is a significant advance in domestic terrorist legislation. Yet despite its breadth, the Act does little to legitimize the crime of terrorism. The domestic definition remains largely intact, with the significant addition of “mass destruction,” but no linkage is made or even attempted with any other form of criminal activity, nor does the law draw from any stated precedent. As such, it is a definition without *gravitas*, and has already been widely criticized for its reactionary emergence in the wake of September 11. For the Patriot Act to gain recognition and legitimacy it must be wedded to American piracy law. Indeed, by giving terrorism the definition and precedent of piracy, the United States will in fact be complementing both laws; a melding with terrorism and the Patriot Act gives piracy a revitalizing boost of current relevance, while piracy provides this new terrorist law with both the legitimacy and definition it so desperately needs. This same function will be

served on the international level, but it is vital in U.S. law; the United States is the principle actor in the war on terrorism, and hence its laws are the logical locus for the first reform to occur.

It must be emphasized, however, that this is indeed the *first* reform. This thesis advocates a two-stage process by which piracy and terrorism are wedded in both domestic and international law. As it will be easier—given the legislative structure of the United States—to effect this change domestically, it seems preferable to begin the process with domestic laws. A bill should be introduced before Congress providing a definition along the lines of that advanced above. This will not be in conflict with any existing American criminal law. Neither the Patriot Act nor Federal Code S. 2331 contain any provisions which prohibit the marriage of piracy and terrorism; neither provide any historical precedent for the crime of terrorism at all. Moreover, there is nothing in the U.S. piracy laws—in definition or practice—which would preclude its alliance with terrorism. The *Harmony* decision expressly includes acts of terrorism in its definition of piracy; the legal trend of the 20th century has been unmistakably towards universal jurisdiction for these crimes. In fact, the explicit joining of piracy and terrorism would merely serve to make apparent a relationship that has existed *sub rosa* for decades.

There is no doubt that such a reform is permissible under American law. The question, however, lies in the will of American legislatures to undertake it. Why should they effect this change, when the current status of the law allows them to pursue terrorists with relative impunity? One answer, outlined above, is that the United States has the duty to grant due process to even the worst criminals. One might also argue that democratic nations have a special responsibility to make their criminal laws explicit, and their

punishments just. Yet neither of these reasons, I fear, would be sufficient to persuade a reluctant legislature bent on extracting its pound of flesh from international terrorists. The primary reason, then, for creating a cohesive American terrorist law must be to facilitate the pursuit, capture, extradition and adjudication of terrorists. All these aims would be vastly aided by a crime of terrorism that owes its source to piracy and shares its principles of universal jurisdiction and *hostes humani generis*. Under the current law, terrorists can only be tried for the crimes enumerated under Section 808 of the Patriot Act, not for the crime of terrorism itself. Thus, terrorists must either commit these acts or conspire to commit them; in any event, the focus is on the *act*, not the *actor*. The crime of terrorism, as defined above, includes liability for mere membership in a terrorist organization. This is analogous to numerous provisions in piracy law which criminalize membership in a pirate band, absent any overt piratical actions. The assumption there, as here, is that membership itself signifies a willful break from the laws and protection of society and thus classifies the culprit as an enemy of the human race.

Secondly, the classification of terrorists as enemies of the human race gives legal credence to almost any action undertaken to capture them, at home or abroad, under the doctrine of universal jurisdiction. It has already been remarked that the American courts recognize this principle in piracy law; a similar recognition for terrorism would mean, in effect, that the United States may capture suspected terrorists anywhere they may be found, and compel the extradition of such persons from hostile states on the grounds of *aut dedere aut judicare*. A new terrorist law would not signify that the U.S. could do these things when previously they could not; in fact, both have been done repeatedly already. Terror suspects such as Osama bin-Laden are pursued worldwide; the United

States has repeatedly demanded extradition of terrorists ranging from the *Achille Lauro* hijackers to the Lockerbie bombers, on the basis of *aut dedere aut judicare*. The difference, however, is that it would now be able to do so with the foundation of universal jurisdiction behind it. Defining terrorists as *hostis humani generis* has no adverse affect on their capture or adjudication under the law. On the contrary, such a classification would primarily serve to 1) justify past captures, and insulate them from international liability as breaches of state sovereignty and 2) provide a foundation of legality for similar captures undertaken in the future. It is an established principle among states that it is always better—given the choice—to act in accordance with the law rather than in absence of it. A reform of domestic law along the lines I have outlined will give the United States' war on terrorism a solid bulwark of legal legitimacy.

Domestic recognition of terrorism and piracy will aid the U.S.' efforts to combat terrorism worldwide, but alone it provides only part of the solution. Equally vital is a parallel recognition in international law, and the demarcation of jurisdiction to an international court to try offenders for the crime. For all the reasons stated in Chapter 3, I advocate the creation of a separate crime of terrorism in the ICC, with the definition stated above. The arguments of numerous scholars have already demonstrated the efficacy of ICC jurisdiction in contrast to any other alternative, yet there are also singular reasons for creating a crime of terrorism-as-piracy in international law, irrespective of which court should have jurisdiction. First and foremost, the function of international criminal law is to recognize certain forms of conduct which the international community abjure as threats to society itself. Prosecution is only one aspect of this criminalization; equally important, if not more so, is the mere recognition of criminality, absent any

mechanism for capture or enforcement. The primacy of the second purpose is evident from the law's history: whereas certain activities—including piracy--have been deemed 'crimes' against the law of nations for hundreds of years, a viable and permanent international court designated to try them is still in its infancy. The problem of enforceability redolent in nearly all international law suggests that the purpose of such law is as much symbolic as actual. Thus, while there are many practical arguments for extending ICC jurisdiction to the crime of terrorism, it is just as important to remember the symbolic significance of establishing terrorism as an international crime, and terrorists as *hostis humani generis*.

Yet the practical arguments cannot be overemphasized, either. Symbolic significance without actual enforcement has been the persistent bugbear of international criminal law, and is the primary reason the ICC was created. The Court's purpose is to provide a permanent locus of jurisdiction for crimes that transcend national borders or confound national judiciaries. Terrorism qualifies on both counts. It is, by definition, an international crime: committed by persons of one state against persons of another. It is also a considerable problem for domestic courts, as previous difficulties in extradition and political disputes aptly attest. Yet the mere creation of terrorism as an international crime is almost meaningless without a cognate recognition of terrorists themselves as enemies of the human race. This is because all of the crimes currently judicable by the ICC concern actions made by a state or its agent; introducing the concept of 'private' terrorism among (or within) these definitions is fraught with difficulty. Persuasive as it may be to term terrorism as a crime against humanity (which it certainly appears to be), the hurdle of state nexus remains to be faced. I have suggested that the problems

encountered in finding international consensus on terrorism's definition lie in the impossibility of reconciling the private, non-state nature of terrorism with its overtly state-oriented criminal brethren. The debate then becomes one of sophist line-drawing between "political" and "non-political" terrorism; a problem which can easily be avoided by giving terrorism the legal definition of piracy.

In sum, the best course for approaching the problem of international terrorism is to effect the creation of a new terrorist law—based on the laws of piracy—for both domestic and international jurisdiction. As long as the United States continues to abstain itself from the ICC, that court will serve as both a guarantor of due process for accused terrorists and an alternate source of jurisdiction for suspects for whom states including the U.S. fail to secure extradition. Thus the ICC will not be a competitor or drain on individual state jurisdiction, but rather a role-model and—more importantly—complementary judicial body for cases which would be otherwise non-judicable. Domestic and international courts will be working in tandem, prosecuting a far greater number of cases than either could achieve by itself. Overall, the recognition of terrorists as *hostis humani generis* by domestic and international law will give notice to terrorists and the states that harbor them that there is no safe haven for them anywhere on earth. Wherever they go, wherever they may hide or seek shelter, they remain fugitives not only from the nations they have attacked but from the world entire.

III. The Law in Action: September 11 and the Future of International Terrorism.

The immediate necessity for an international terrorist law post-September 11 lends urgency to the debate surrounding that law, removing it from abstract academic inquiry. Thus it is not enough to merely demonstrate the close relationship between

piracy and terrorism as a basis for new law; it must also be shown how that law will aid the international community in the crises ahead. The problem facing jurists is a formidable one; the rapid pace of events forestalls the dispassionate inquiry necessary for creating a just law in favor of swift action, yet swift action without the foundation of law may ultimately worsen the threat of terrorism rather than abate it. Hence, the argument for creating a new law of terrorism from the existing law of piracy must not only have academic merit, but practical merit as well. It must facilitate the capture and prosecution of terrorists under the law, while still providing the parameters by which states may engage in these activities.

It is for this reason that I have chosen to examine the events of September 11, 2001, in light of both existing piracy law and the recommended law of terrorism-as-piracy. It is not my intention, however, to base the entire legitimacy of this legal argument on its applicability to the specific circumstances of September 11. As I mentioned earlier, other scholars have made this mistake in their attempt to relate September 11 to crimes against humanity and genocide. They have done so by arguing that certain elements of those attacks—such as Bin Laden's genocidal *fatwa* or the sheer number of people killed—have requisite commonalities with crimes under ICC jurisdiction. This may be true. But it is not enough to prove that the events of September 11 render it definable as an act of genocide to argue that *all* terrorist attacks may be termed thus. The focus should not be on the singularities of September 11, but on the universal elements which it shares with all international terrorist attacks.

The first of these is the piratical concept of 'descent by sea.' This provision has both singular and universal applicability to September 11. Singularly, one could argue

that the fact that the terrorists flew airliners into a port city means that the attack was analogous to the sacking of a coastal port by pirates emerging from their pirate vessel: the only difference being that the former descended from the air, while the latter descended from the sea itself. International recognition of aerial piracy negates the significance of this distinction; it has long been understood that pirate attacks may occur in the air as from the sea, on the principle that both are outside the jurisdiction of the state.

The circumstances that make September 11 an act of 'descent by sea' have a universal element as well. While not all terrorist attacks occur on commercial aircraft, or against port cities, the idea of international terrorism presupposes that the terrorist arrives by some means from a country other than the victim state, with the express purpose of committing a terrorist act against that state. This is equally true in cases where the terrorist attack is not against the state itself but its outlying military bases, embassies, warships, or anywhere around the world where the flag of that state is flying. In all these circumstances—but most particularly those involving attacks within the state itself—the idea of 'descent by sea' may be inferred to mean any person—not a citizen—who arrives in the state from overseas with terrorist intentions. The reasons for this inference are provided in Chapter 2. As September 11 contains an actual descent by sea—by way of commercial aircraft—it may also be termed a legal descent by sea in that the terrorists entered the United States from abroad for the express purpose of committing an act of destruction and homicide. While the former circumstances apply to only a limited number of attacks, the latter is nearly universal.

Second, the concept of destruction and homicide—absent any intention of taking—is present in September 11, nearly all acts of terrorism, and the law of piracy. The attack

on the World Trade Center accomplished three objectives: it terrorized Americans, killed a significant number of them, and disrupted trade. In each of these intentions it was analogous to the pirates' "war against the world," as well as to the legal elements of the crime of piracy as wanton destruction, depredation, and homicide, with or without pecuniary gain. While the scale of September 11 may be greater, these elements are present in nearly all terrorist attacks, either singly or in combination.

The third universal aspect of piracy and terrorism reflected in September 11 is the idea of an 'international' crime committed by foreign nationals. Although pirates might be considered to be 'at war' with their own state, the legal definition of pirates removes them from the legal protection of that state and renders them, in effect, stateless criminals. This is the practical meaning of *hostis humani generis*. Terrorists as *hostis humani generis* are similarly defined as 'international' criminals, and the crime of terrorism presupposes an attack on the state by outsiders, not citizens under the aegis of its laws. Accordingly, the definition of terrorism provided above contains the requirement that the terrorists not be citizens of the affected state. The reason for this, as I have discussed, is to distinguish between acts of legitimate rebellion or individual criminality from the crime of terrorism. Was the Oklahoma City bombing a terrorist act? Under this definition, no. The political motives and even the actions of Timothy McVeigh may mirror those of a terrorist organization, but the fact that he was a citizen of the United States must distinguish his crime—however heinous—from actual terrorism. Were it otherwise, domestic courts would have the dubious task of distinguishing homicide from acts of terrorism, which would place an intolerable burden on the legal system. This raises the difficult question, however, of terrorist acts committed on behalf of an

international terrorist organization by citizens of the affected state. While these would not, strictly speaking, be crimes of international terrorism, the nexus between the criminal and the organization—if proved—should be sufficient to make an exception in jurisdiction and allow the prosecution for crimes of terrorism to proceed. The justification for this lies in the fact that terrorists are *hostis humani generis*, and consequently those citizens allying themselves with international terrorist organizations remove themselves from the protection of their state. Conversely, not every act of homicide or destruction committed by a foreign national may be termed terrorist. As evidenced by the definition above, the crime of terrorism contains a *mens rea* of deliberation to inflict terror or bring attention to a cause. This must be distinguished from other motivations for homicide, and while the distinction may not always be entirely clear, it is not beyond the abilities of justices to determine whether a suspect acted for private motives or in furtherance of a terrorist agenda.

Whereas the ‘descent by sea’ and international components of September 11 provide the basis for a correlation between piracy and terrorism for attacks against the state on its own territory, the hijacking element has applicability to acts committed not against the state *per se* but against its property and citizens around the world. September 11, in fact, is almost unique in combining both these aspects—seizure of an aircraft and attack on the state—into a single act of terrorism. Yet the seizure of a commercial aircraft in itself is an act of piracy, defined as taking by force of a commercial vessel while in transit and holding her passengers and crew captive. The menace of aerial piracy—first addressed in the 1932 Harvard Convention--has been the subject of considerable scholarly debate and is recognized as a form of terrorism in the 1963 U.N. Convention on Offences and

Certain Other Acts Committed on Board Aircraft, the 1970 U.N. Convention for the Suppression of Unlawful Seizure of Aircraft, and the 1971 U.N. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. It is also closely allied to that other great menace to civilian transit, maritime terrorism. This relationship is underscored by the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, which came in the wake of the 1985 *Achille Lauro* affair. Thus September 11 can be regarded as the most recent of a series of piratical attacks against the vessels of the United States and other countries, and the passengers aboard such vessels. Recalling the definition of piracy as an act of depredation, destruction or homicide against a civilian vessel, it is unquestionable that the seizure of four civilian aircraft and the deliberate murder of their crew and passengers qualify as piracy under the law.

September 11 may, in fact, be considered as two distinct but interrelated acts of piracy. First is the seizure of said aircraft, which is a piratical taking under both international convention and international customary law of piracy. Second is the deliberate use of these aircraft as the means of destroying United States property and attacking United States territory. The link between them is the passengers, whose death may be considered both in furtherance of the piratical seizure and of the attack against the World Trade Center. In either view, the applicability of piracy law to the events of September 11 has profound implications for applying that same law to the crime of terrorism itself.

Conclusion:

Just as events determine when a law is most needed, those same events will eventually determine what form that law will take. It is impossible to speculate on the future of international terrorist law absent the events of September 11, 2001. Likewise it is not the intention of this thesis to transform the law merely because of those attacks, but rather to amend it so it may respond fairly and adequately to the new reality which they engendered. That reality, shortly stated, is war. The war on terrorism may lack the traditional components of state vs. state conflict, but it must not be mistaken for anything else. Two regimes have already fallen in its wake; more may do so. Yet the war is not truly waged against these sponsor states, but against the terrorist cells which exist in every nation, including our own. Terrorists may be of any nationality, and may be found anywhere on earth. Thus this new war is not merely between the state and its enemies, but the state and itself. It presents problems of definition and jurisdiction which have never been faced, and lie well beyond the existing parameters of domestic and international law.

The problems posed by a war on terrorism exist not only among states, but within them as well. Nations have two sets of laws: one for times of peace, another for war. Under the latter, peacetime liberties are curtailed, external restraints are imposed upon social commerce, and some freedoms temporarily suspended. Such measures are deemed necessary to serve the greater good of protecting the nation from infiltration by its enemies, both within and without. Yet never in its history has America faced a situation such as it finds itself in today. Unlike the experiences of the European states, whose histories are replete with Hundred Years' Wars, nor those of the Middle East and Africa, where local conflict spans millennia, armed conflict for the United States has

always come in sporadic bursts. Its wars begin and end on definite dates, and it is entirely unacquainted with the idea of perpetual war. Today, however, America is in a state of *quasi-bellum*, or half-war, wherein the threat and the casualties are undeniable, yet the course of the conflict and even the enemy remain nebulous. We cannot know when the war on terrorism will end because we cannot use our successes and failures as a yardstick of its progress. Thus, a universal definition of the crime of terrorism is as crucial for domestic law and policy as it is for international relations.

The task before all states, but most particularly America, is to formulate a new law to govern the pattern of this new and nebulous conflict. The pervasive, ubiquitous nature of international terrorism mandates that this law not only address problems affect inter-state relations, but intra-state criminal matters as well. To do so, terrorist law must effect a combination unique in our history: a melding of traditional concepts of individual criminality with traditional concepts of international conflict. The key problem centers on a class of international criminals whose actions and allegiances raise them above the status of mere criminals, yet who lack the legitimacy given to hostile states. If terrorist law does not take into account this unique hybrid status—half-way between criminal and revolutionary—then it will certainly fail to address the reality of 21st century terrorism.

Historically, there has been only one class of private, non-state oriented international criminals, and that is pirates. Thus it is not merely advantageous to base the definition of a terrorist on that of a pirate; it is essential. Classification of terrorism as a crime against humanity or genocide may address the horrendous nature of the *act*, but it fails to account for the singular status of the *actor*. Both crimes, as with all international crimes excepting piracy, presume that only states or their agents can be held responsible.

Hence international criminal law, and the ICC itself, are extensions of the historical presumption that just as conflict can only exist within or between states, international crimes can only occur during and in furtherance of these conflicts. The war on terrorism stands in stark contrast to this presumption, requiring an entirely new perspective not only on the nature of international relations but of international law as well. The transformation of the former has already begun, and will emerge by natural process as the United States continues its pursuit of terrorists across the globe. But the transformation of the latter must be effected by a positive act; it cannot rely on events to bring it to fruition, for the law emerges not from events but in response to them, and is thus a profoundly artificial and man-made creation. Recall that More spoke of "man's laws, not God's" keeping order against the Devil's wind. That is the task of terrorism law: to effect a bulwark against the anarchy inherent in a conflict without territorial boundaries, obvious contestants, or legal parameters. And it is a task that can only be met by giving terrorists their correct legal status as *hostis humani generis* under the law.

APPENDIX



HOME

[Economic Studies](#) | [Foreign Policy Studies](#) | [Governance Studies](#) | [Policy Centers](#) | [Executive Education](#) |

[BOOKS](#) | [SCHOLARS](#) | [POLICY BRIEFS](#) | [PRESS ROOM](#) | [CONTACT](#) | [CALENDAR](#) | [SUPPORT](#) | [SEARCH](#)


America's Response to Terrorism


**Foreign Policy
Studies**
Research
Terrorism
Scholars
Commentary
Events
About FPS
Terrorism and the Law | [home](#)
[EXECUTIVE ORDERS](#) | [CONGRESSIONAL ACTIONS](#)
[CONGRESSIONAL INQUIRY](#) | [UNITED STATES CODE](#)
[MILITARY TRIBUNALS](#) | [STATE ACTIONS](#) | [FEDERAL INDICTMENTS](#)
[U.N. CONVENTIONS ON TERRORISM](#) | [OTHER U.S. GOV SOURCES](#)
[ACTIONS TO COMBAT TERRORISM](#) | [MISCELLANEOUS](#)

Executive Orders

- [Establishing the President's Homeland Advisory Council and Senior Advisory Committees for Homeland Security \(3/19/02\)](#)
- [Citizen Preparedness in the War on Terrorism \(11/9/01\)](#)
- [Ready Reserves of Armed Forces to Active Duty \(9/14/01\)](#)
- [Declaration of National Emergency by Reason of Certain Terrorist Attacks \(9/14/01\)](#)

Executive Orders Related to Terrorism Financing

- [Executive Order 13224, Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism \(9/25/01\)](#)
- [Executive Order 13099, Prohibiting Transactions with Terrorist Who Threaten to Disrupt the Middle East Peace Process \(8/22/88\)](#)
- [Executive Order 12947, Prohibiting Transactions with Terrorists Who Threaten to Disrupt the Middle East Peace Process \(1/25/97\)](#)

Congressional Actions

- [House Joint Resolution Authorizing Use of Force Against Iraq](#)
- [Bills and Joint Resolutions Dealing with Terrorism](#)
- [Combating Terrorism Hearings](#)
- [House Subcommittee on Terrorism and Homeland Security](#)

Congressional Inquiry

- [Congressional Inquiry into Failures of the Intelligence Community Prior to September 11: FBI's Handling of Phoenix Electronic Corporation and Investigation of Zacarias Moussaoui Prior to September 11, 2001 \(9/24/02\)](#)
- [Testimony of Deputy Secretary of State Richard Armitage before the Joint Intelligence Committee \(9/19/02\)](#)
- [Prepared Testimony of Deputy Secretary of Defense Paul Wolfowitz for](#)

the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence (9/19/02)

- Testimony of Former National Security Advisor Anthony Lake before the Joint Intelligence Committee (9/19/02)
- Testimony of Former National Security Advisor Samuel Berger before the Joint Intelligence Committee (9/19/02)
- The Intelligence Community's Knowledge fo the September 11 Hijackers Prior to September 11 (9/19/02)
- Testimony of the State Department Deputy for Intelligence Policy and Coordination Christopher A. Kojm before the Joint Intelligence Committee (9/19/02)
- Testimony of an FBI Special Agent before the Select Committee on Intelligence and the House Permanent Select Committee on Intelligence (9/20/02)
- Testimony of a CIA Counterterrorist Center Senior Officer before the Select Committee on Intelligence and the House Permanent Select Committee on Intelligence (9/20/02)
- Prepared Remarks of FBI Agent Michael Rolince before the Select Committee on Intelligence and the House Permanent Select Committee on Intelligence (9/20/02)
- Joint Inquiry Staff Statement, Part I (9/18/02)
- Statement of Kristen Breitweiser, September 11 Advocates before the Select Committee on Intelligence and the House Permanent Select Committee on Intelligence (9/18/02)
- Statement of Stephen Push, Treasurer Families of September 11, Inc., before the Select Committee on Intelligence and the House Permanent Select Committee on Intelligence (9/18/02)

United States Code

- U.S. Code, International Emergency Powers Act
- U.S. Code, The Anti-Terrorism and Effective Death Penalty Act
- U.S. Code, Criminal Code
 –Penalties

Military Tribunals

- U.S. Department of Defense, Military Commission Order No. 1 (3/21/02)
- White House, Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (11/13/01)
- Executive Order 2002 Amendments to the Manual for Courts-Martial, United States (4/12/02)
- Joint Task Force 160, U.S. Naval Base Guantanamo Bay, Cuba

State Actions

- National Conference of State Legislatures, Summary of State Legislation and Governors' Orders Addressing Terrorism
- Pending and Proposed State Legislation

Federal Indictments and Court Documents

- Usama Bin Laden Indictment
- Zacarias Moussawi Indictment

- Zacarias Moussaoui Indictment
- Notice of Intent to Seek Sentence of Death for Zacarias Moussaoui
- Plea Agreement in John Walker Lindh Trial
- John Walker Lindh Indictment
- Richard Reid Indictment
- FindLaw's Documents Related to Civil and Criminal Terror Cases

U.N. Conventions on Terrorism

- Indictment Against Six Terrorism Suspects in Oregon (10/3/02)
- Convention on Offenses and Certain Other Acts Committed on Board Aircraft (9/14/63)
- Convention for the Suppression of Unlawful Seizure of Aircraft (12/16/70)
- Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (9/23/71)
- Organization of American States (OAS) Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance (2/2/71)
- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons (12/14/73)
- European Convention on the Suppression of Terrorism (1/27/77)
- International Convention against the Taking of Hostages (12/17/79)
- Convention on the Physical Protection of Nuclear Material (3/10/80)
- South Asian Association for Regional Cooperation (SAARC) Regional Convention on the Suppression of Terrorism (11/4/87)
- Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (2/24/88)
- Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (3/10/88)
- Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (3/10/88)
- Convention on the Marking of Plastic Explosives for the Purpose of Detection (3/1/91)
- International Convention for the Suppression of Terrorist Bombings (12/15/97)
- Convention on the Organization of the Islamic Conference on Combating International Terrorism (12/15/97)
- International Convention for the Suppression of the Financing of Terrorism (7/1/99)
- U.N. International Law

Other U.S. Government Sources

- Department of State, The Rule of Law: War on Terrorism
- Congressional Research Service Report, "Military Tribunals: The Quirin Precedent" (3/26/02)
- Congressional Research Service Report, "Terrorism and the Law of War: Trying Terrorists as War Criminals Before Military Commissions" (12/11/01)
- Congressional Research Service Report, "Terrorism: Section by Section Analysis of the USA PATRIOT Act" (12/10/01)
- Domestic Preparedness Against Terrorism: How Ready are We? (2001)
- Report of the House Armed Services Committee Staff, The Investigation into the Attack on the U.S.S. Cole (May 2001)


- into the Nation on the October 2001
- U.S. Department of Justice, Civil Rights Division National Origin Working Group: Initiative to Curb the Post-9/11 Immigrant Backlash

International and Institutional Actions to Combat Terrorism

- Organization of American States, Inter-American Committee on Terrorism (CICTE)
– Inter-American Convention Against Terrorism (adopted 6/3/02)
- Organization of American States, Plan of Action on Hemispheric Cooperation to Prevent, Combat, and Eliminate Terrorism (4/26/96)
- EU's Terrorism Actions
- Canada's Actions Against Terrorism
- United Kingdom, Northern Ireland Office, Terrorism Act of 2000

Miscellaneous

- Civil Liberties in Wartime, Remarks by U.S. Supreme Court Chief Justice William Renquist (5/3/00)
- Uniform Code of Military Justice
- National Institute for Military Justice
- International Committee of the Red Cross, International Humanitarian Law
- University of Minnesota Law School, Rights of Prisoners and Detainees
- Crimes of War Project

 (top)

 top |  home | [search](#) | [site info](#) | [contact us!](#)



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