Terrorism on the High Seas
Subsuming Certain Acts of Maritime Terrorism under Piracy *Jure Gentium*

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I. INTRODUCTION

The widely held view that piracy is a relic of the past is a misconception. Contrary to common belief, piracy still exists, albeit not publicized, and continues to be a major threat to the safety of maritime navigation. The crime of piracy *jure gentium*,[1] as codified in the 1958 Geneva Convention on the High Seas[2] and reiterated in the 1982 United Nations Convention on

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1. *See*, People v. Lol-lo and Saraw, 34 Phil. 19 (1922). It provides:

> Piracy is robbery or forcible depredation on the high seas, without lawful authority and done *animo furandi*, and in the spirit and intention of universal hostility. It cannot be contended with any degree of force as was done in the lover court and as is again done in this court, that the Court of First Instance was without jurisdiction of the case. Pirates are in law *hostis humani generis*. Piracy is a crime not against any particular state but against all mankind. It may be punished in the competent tribunal of any country where the offender may be found or into which he may be carried. The jurisdiction of piracy unlike all other crimes has no territorial limits. As it is against all so may it be punished by all. Nor does it matter that the crime was committed within the jurisdictional 3-mile limit of a foreign state, 'for those limits, though neutral to war, are not neutral to crimes.'

United States v. Furlong, 5 Wheat. 184 (1820); *In Re* Piracy Jure Gentium, 1934 APP. CAS. 586, 589, *reprinted in* 3 BRIT. INT'L CASES 836, 842 (1965).

2. 1958 Geneva Convention on the High Seas, Apr. 27, 1958, art. 15, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 83 [hereinafter Convention on the High Seas].

the Law of the Sea (UNCLOS),[3] has traditionally been characterized by the following elements: (1) the acts complained against must be crimes of violence such as robbery, murder, assault, or rape; (2) committed on the high seas beyond the land territory or territorial sea, or other territorial jurisdiction, of any State; (3) by a private ship, or a public ship which, through mutiny or otherwise, is no longer under the discipline and effective control of the State which owns it; (4) for private ends; and (5) from one ship to another so that at least two ships are involved.[4]

Nevertheless, since the seizure of the Italian cruise ship Achille Lauro by some members of the Palestinian Liberation Front (PLF) in 1985,[5] the customary definition of piracy *jure gentium* has been challenged by international law experts as being too narrow and inadequate to cope with the many acts of violence currently perpetrated at sea.[6] Nonetheless, the greatest challenge to the customary definition of piracy *jure gentium* remains the private ends requirement. Both the UNCLOS and Convention on the High Seas require that the act be for private ends[7] but, strictly construed, this would necessarily preclude acts of maritime terrorism[8] done for political ends from falling within the ambit of piracy *jure gentium*.[9] Prescinding from a pragmatic point of view, such a construction would be most foolhardy, considering that only three years ago, the International Maritime Bureau (IMB) reported the emergence of a "new brand of piracy" and recent attacks have been consistent with the theory that terrorists have shifted strategies to

3. United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 101, U.N. Doc. A/CONF.62/122 [hereinafter UNCLOS].

4. Zou Keyuan, *Enforcing the Law of Piracy in the South China Sea*, 31 J. MAR. L. & COM. 107, 110 (2000).

5. Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 A.J.I.L. 269, 273-74 (1988) [hereinafter Halberstam, *Terrorism on the High Seas*].

6. Tullio Treves, *The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 2 SING. J. INT'L & COMP. L. 541, 542 (1998) [hereinafter Treves] (The United States declared the "terrorists" pirates and condemned the attack as "piracy." This categorization did not meet with universal acceptance, as not all the elements of piracy *jure gentium* were met. The attack, for one, was not on the high seas and was the result of an internal seizure. Furthermore, it was arguable that the perpetrators were motivated by political rather than private ends.).

7. UNCLOS, art. 101; Convention on the High Seas, art. 15.

8. Justin Mellor, *Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism*, 18 AM. U. INT'L L. REV. 341, 342 (2002) [hereinafter Mellor].

9. Halberstam, *Terrorism on the High Seas*, *supra* note 5, at 274.

encompass economic, political, and military targets.[10] Since the events on 11 September 2001, or what is popularly known as the *9/11* attack, there have been indications that Southeast Asian terrorist groups may have begun to look at the maritime domain as a new avenue for attacks.[11] The most definitive statement that local terrorist groups have been setting their sights on commercial shipping came from Indonesia's National Intelligence Agency, which revealed that detained members of Southeast Asian Islamic terror group Jemaah Islamiah (JI), which is linked to Al Qaeda, admitted that shipping in the Malacca Strait had been a possible target.[12] The discovery of plans detailing vulnerabilities in United States naval fleets on Al Qaeda linked terrorist suspect Babar Ahmad also puts beyond a shadow of doubt that Al Qaeda terrorist groups have been looking at the maritime domain as a possible mode of attack.[13]

The past years have seen an unprecedented increase in the conflation of piracy and maritime terrorism. While considered as two distinct phenomena, the former being motivated by private ends and the latter, political ends, both activities share many parallelisms, particularly in the tactics of ship seizures and hijackings.[14]

There is no doubt that the conflation between these two activities is serious cause for concern, but even more pressing is the possibility of a lacuna or a void in the law, considering that these types of activities seem to

10. Erik Barrios, *Casting a Wider Net: Addressing the Maritime Piracy Problem in Southeast Asia*, 28 B.C. INT'L & COMP. L. REV. 149, 151 (2005) [hereinafter Barrios].

11. *See*, Joshua Ho, *Maritime Counter Terrorism: A Singapore Perspective*, at 3-4, *at* http://72.14.253.104/search?q=cache:MTfY-g5oVaMJ:www.observerindia.com/reports/maritime/psingapore.pdf+joshua+ho+maritime+counter+terrorism&hl=en&ct=clnk&cd=1&gl=ph (last accessed Mar. 10, 2007). It was noted that:

> The destruction that can be caused by such floating bombs is severe, as the detonation of a tanker carrying 600 tons of liquefied petroleum gas would cause a fireball of 1,200 meters in diameter destroying almost everything physical and living within this range. Beyond this range, a large number of fatalities and casualties would occur.

12. *Id.* (citing *Malacca Strait is Terror Target Admit Militants*, LLOYD'S LIST, Aug. 26, 2004).

13. *Id.* (citing *Terror on the High Seas*, ASIA TIMES, Oct. 21, 2004).

14. Adam J. Young & Mark J. Valencia, *Conflation of Piracy and Terrorism in Southeast Asia: Rectitude and Utility*, Contemporary Southeast Asia, August 2003, *available at* http://community.middlebury.edu/~scs/docs/Young+Valencia,%20Conflation%20of%20Piracy%20and%20Terrorism.htm (last accessed Mar. 10, 2007) [hereinafter Young & Valencia].

defy classification as either piracy *jure gentium* or maritime terrorism. Secondly, even if one were to assume *arguendo* that these activities were to be considered acts of maritime terrorism, there is at present no convention expressly defining the same. Instead, what is available is the act specific approach provided in the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention),[15] but its terms and provisions are neither customary[16] nor binding upon non-signatories.[17]

It must be recalled that piracy is defined as "any illegal act of violence, detention, depredation, committed for private ends by the crew or the passengers of a private ship and directed on the high seas or in a place outside the jurisdiction of any State, against another ship or against persons or property on board such ship."[18] Unfortunately, there has yet to be a universally agreed upon definition of maritime terrorism. Until such time, the following working definition will have to suffice: "any illegal act directed against ships, their passengers, cargo or crew, or against sea ports with the intent of directly or indirectly influencing a government or group of individuals."[19] Juxtaposing such definitions, it becomes immediately apparent that the intent of the international legal community is to treat both activities as two distinct phenomena. Based on the latter's definition, maritime terrorism encompasses a broader range of activities not limited to an attack on ships, passengers, and cargo, characteristic of piracy. Furthermore, the phrase "with the intent of directly or indirectly influencing a government or

15. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Mar. 10, 1988, art. 4, 1678 U.N.T.S. 222 [hereinafter SUA Convention].

16. *See*, Barrios, *supra* note 10, at 155; Tina Garmon, *International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11*, 27 TUL. MAR. L.J. 257, 271 (2002) [hereinafter Garmon].

17. Vienna Convention on the Law of Treaties, May 23, 1969, art. 34, 155 U.N.T.S. 311 [hereinafter VCLT] ("A treaty does not create either obligations or rights for a third State without its consent."); Advisory Opinion on Nationality Decrees in Morocco and Tunis (U.K. v. Fr.), 1923 P.C.I.J. (ser. B) No. 4, 7, 27 (Feb. 7); The Forests of Central Rhodope (Greece v. Bulg.), 3 U.N.R.I.A.A., 1405-17 (1933); Island of Palmas (Neth. v. U.S.), 2 U.N.R.I.A.A. 829 (1928); Fitzmaurice, *Fifth Report on the Law of Treaties*, [1960] 2 Y.B. INT'L L. COMM'N 72, 84-85, U.N. Doc. No. A/CN.4/130; *Draft Convention on the Law of Treaties, Research in International Law on Treaties*, art. 18, 29 A.J.I.L. SUPP. 653, 918-93 (1935); MCNAIR, LAW OF TREATIES 309 (1961).

18. UNCLOS, art. 101; Convention on the High Seas, art. 15.

19. Samuel Pyeatt Menefee, *Terrorism at Sea: The Historical Development of an International Legal Response*, *in* VIOLENCE AT SEA 192 (Brian A.H. Parritt ed., 1986).

group of individuals" is simply a more elaborate rewording of the political ends requirement. Proceeding from this approach, it comes as no surprise that the fulcrum of classification for both activities is the private versus political ends requirement: "Piracy is motivated by private gains, while terrorism is motivated by political objectives."[20] This approach at categorization would have been ideal had there been no overlaps, but sadly, as demonstrated by the developments related above, reconciliation is imminent in order to fill in the gaps ignored by international law.

One solution would be to subsume certain acts of maritime terrorism under piracy *jure gentium*, and it is the submission of the author that this is possible if one were to adjust his perspective and appreciate the phenomena of piracy and maritime terrorism, not as two separate or even concentric circles, as originally thought, but as two overlapping circles sharing a common "gray area." This gray area is characterized by an amalgamation of private and political ends and under this classification would fall acts of piracy committed by terrorist groups such as the Abu Sayyaf Group (ASG) in the Philippines.[21] Would piracy's private ends requirement, however, be able to accommodate such acts of violence fueled by mixed motivations? It is the author's submission that the answer lies in the positive given the contemporary customary interpretation of piracy's private ends requirement.

There are some scholars who insist that the private ends requirement is an imprecise codification of custom,[22] but the presence of several treaties adopting the UNCLOS and Convention on the High Seas definition seriously weigh against this.[23] Rather than redefining piracy *jure gentium*, as

20. *See*, Tammy Sittnick, *State Responsibility and Maritime Terrorism in the Strait of Malacca: Persuading Indonesia and Malaysia to Take Additional Steps to Secure the Strait*, 14 PAC. RIM L. & POL'Y J. 743, 751 (2005) [hereinafter Sittnick]. *See also*, Young & Valencia, *supra* note 14.

21. Like the GAM, the Abu Sayyaf Group has also been known to finance its activities through piracy.

22. *See*, Barrios, *supra* note 10, at 162.

23. *See, e.g.*, IMO Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery Against Ships, Nov. 29, 2001, 2.1, Resolution A.922(22); Draft Model National Law on Maritime Criminal Acts, Comite Maritime International, *available at* http://72.14.253.104/search?q=cache:NiWwFNM1tQsJ:www.cmi2006capetown.info/pdf/9_%2520c%2520-%2520Piracy%2520Model%2520National%2520Law%2520-%25201st%2520Redraft%252019-1-06.pdf+Draft+Model+National+Law+on+Maritime+Criminal+Acts&hl=en&ct=clnk&cd=1&gl=ph (last accessed Mar. 10, 2007); Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia, Apr. 28, 2005, art. 1(1), 44 I.L.M. 829 [hereinafter ReCAAP].

has been suggested by many commentators, the more practical approach would be to work within the definition.

Piracy *jure gentium* is committed for private ends, this much is settled. What still remains largely uncharted territory is the extent and scope of the private ends requirement and, correlatively, the extent and scope of the political ends exception. This can only be determined by state practice, but the lack of international court decisions interpreting piracy's private ends requirement is a hindrance.[24] There is a way to hurdle this obstacle and it is the humble submission of the author that a fairly reliable gauge of the international consensus surrounding the private ends requirement is the increasing depoliticization and restriction of the political offense exception in the realm of extradition and treaty law.[25] As a result of this process of elimination, only a handful of purely political offenses remain.[26] Interestingly, analysis of this steady trend towards depoliticization demonstrates that the exception shares an inversely proportional relationship with piracy's private ends requirement and a directly proportional relationship with its political ends exception. The determinative test then of whether an act constitutes piracy *jure gentium* or maritime terrorism is not solely the presence of *animo furandi* or an "intent to rob," as previously restricted,[27] but a broad conception of the private ends requirement, such that the slightest hint of the act's being motivated "for private ends" removes it from the categorization of maritime terrorism and criminalizes it as piracy *jure gentium*.

24. Piracy *jure gentium* has not figured prominently in any international court decision. In one rare instance, it received some discussion in Judge Moore's dissenting opinion in the *S.S. Lotus case*, but most unfortunately, the discussion revolved around the concept of universal jurisdiction rather than an elaboration of the private ends requirement.

25. *See generally*, John Patrick Groarke, *Revolutionaries Beware: The Erosion of the Political Offense Exception under the 1986 United States – United Kingdom Supplementary Extradition Treaty*, 136 U. PA. L. REV. 1515 (1988).

26. *See*, Nancy Green, *In the Matter of the Extradition of Atta: Limiting the Scope of the Political Offense Exception*, 17 BROOK. J. INT'L L. 447, 454 (1991) [hereinafter Green].

27. *See*, H. LAUTERPACHT, 1 OPPENHEIM'S INTERNATIONAL LAW 608-09 (8d ed. 1955) [hereinafter 1 OPPENHEIM'S INTERNATIONAL LAW] (observing that "Piracy, in its original and strict meaning, is every unauthorised act of violence committed by a private vessel on the open sea against another vessel with intent to plunder (*animo furandi*). The majority of writers confine piracy to such acts, which indeed are the normal cases of piracy.").

II. THE MODERN FACE OF PIRACY

A. Piracy Today: Statistics and Trends

Worldwide, acts of piracy have substantially increased over the years. Since the early 1990s, the number of pirate attacks has markedly increased along the local waters and ports of developing countries.[28] According to the Piracy Reporting Center (PRC) of the International Maritime Bureau (IMB),[29] in 2003, there were 445 reported attacks against ships, a significant increase from the 370 reported attacks in 2002.[30] This number decreased to 329 reported attacks in 2003,[31] and further decreased to 276 reported in attacks in 2005,[32] presumably due in large part to the increased awareness and anti-piracy watches conducted by masters in risk prone areas, increase in law enforcement patrols, and international pressure on some governments to act.[33] Despite these encouraging results, it is still too soon for the international community to rejoice. The same year also registered 23 incidents of hijacking, the highest number since 2002.[34] There was likewise a significant increase in the number of hostage taking of crew members to 440, the highest since the records were compiled by the PRC in 1982.[35]

The frequency of these attacks on commercial vessels can hamper international trade and cause severe economic loss.[36] Since shipping constitutes well over 90% of world trade or commerce,[37] protecting shipping

28. Ethan C. Stiles, *Reforming Current International Law to Combat Modern Sea Piracy*, 27 SUFFOLK TRANSNAT'L L. REV. 299-300 (2004) [hereinafter Stiles].

29. The IMB is a bureau of the International Chamber of Commerce's Commercial Crimes Division. In response to the growing piracy problem, the IMB created the Piracy Reporting Centre in 1992, to compile data on pirate attacks, assist victimized ship owners, issue bulletins on suspected pirate ships, and recover stolen ships and cargo.

30. ICC International Maritime Bureau Piracy and Armed Robbery against Ships Annual Report (2005), at 5, *available at* http://www.icc-ccs.org (last accessed Feb. 24, 2007) [hereinafter IMB 2005 Annual Report].

31. *Id.*

32. *Id.*

33. *Id.* at 16.

34. *Id.*

35. *Id.*

36. Barrios, *supra* note 10, at 150.

37. Zou Keyuan, *Piracy, Ship Hijacking and Armed Robbery in the Straits*, 3 SING. J. INT'L & COMP. L. 524, 525 (1999) [hereinafter Keyuan, *Piracy, Ship Hijacking and Armed Robbery in the Straits*].

lanes is of paramount concern.[38] This concern is most dire in Southeast Asia where roughly 45 percent of the world's commercial shipping moves through the region's waters, and the frequent attacks on commercial vessels passing through the region have caused an estimated $16 billion in economic loss over the past five years.[39]

B. Political Maritime Violence: Maritime Terrorism or Piracy?

More recently, in 2003, the International Chamber of Commerce (ICC) reported the emergence of a new brand of piracy, dubbed "political piracy," after receiving reports of gangs of heavily armed pirates using fishing and speed boats to target small oil tankers in the Malacca Strait.[40] On one such occasion, the Malaysian registered tanker Penrider was carrying 1,000 tonnes of fuel oil aboard when she was attacked some 12 miles from Port Klang, Malaysia. Apparently, the ship was en route from Singapore to Penang when a fishing boat containing 14 pirates armed with AK-47 and M-16 assault rifles intercepted the ship, took hostages, and later released them unharmed after successful negotiations.[41] These attacks followed a pattern which had been set by Indonesian Aceh rebels. The similarity of the *modus operandi* have led Malaysian authorities to attribute these acts to a group of Aceh rebels thought to have been responsible for many other attacks along the Strait of Malacca.[42]

While violent dissident groups have existed in Southeast Asia for many centuries, the *9/11* attacks and the subsequent war on terror have spawned fears of the possible links between Al Qaeda and dissident groups in such countries as the Philippines, Malaysia, Indonesia, Singapore, and Thailand.[43] Because of its political instability and numerous Muslim separatist groups, Southeast Asia has been considered the "second front" in the U.S. led global

38. Leticia Diaz & Barry H. Dubner, *On the Problem of Utilizing Unilateral Action to Prevent Acts of Sea Piracy and Terrorism: A Proactive Approach to the Evolution of International Law*, 32 SYRACUSE J. INT'L L. & COM. 1, 4 (2004).

39. Barrios, *supra* note 10, at 150.

40. International Chamber of Commerce, *New Brand of Piracy Threatens Oil Tankers in Malacca Straits,* Sep. 2, 2003, *at* http://www.iccwbo.org/iccdfid/index.html (last accessed Mar. 10, 2007).

41. *Id.*

42. *Id.*

43. *See*, Richard Halloran, *What if Asia's Pirates and Terrorists Joined Hands?,* SOUTH CHINA MORNING POST (Hong Kong), May 17, 2003, *available at* http://www.uscib.org/index.asp?documentID=2636 (last accessed Feb. 24, 2007).

campaign against terrorism.[44] Since nations have strengthened security at political, diplomatic, and military facilities, terrorists have turned toward attacking *soft* economic targets,[45] which include shipping channels such as the Strait of Malacca.[46]

One of the real dangers is that organized pirates may decide to leak tips to terrorists with information necessary to destroy tankers and other ships carrying toxic material while in ports or in more densely populated areas.[47] While it has been reported that the attacks on ships carrying chemicals in Southeast Asia were accomplished by pirates and not terrorists,[48] reports of pirates allegedly forging links with terrorists continue to be a serious source of concern.[49] These fears are not unfounded. Officials express concern over the ease with which large vessels, such as oil tankers, could be hijacked and used as weapons to block commercial waterways or to attack one of Southeast Asia's numerous busy harbors.[50] In addition to direct attacks, terrorists may also exploit the region's maritime shipping activity to facilitate their operations in other parts of the world.[51]

The frequency of piracy in Southeast Asia has made it an attractive cover for maritime terrorism.[52] As attacks on vessels increase in number and

44. Manyin, et al., Congressional Research Service, Terrorism in Southeast Asia (updated Aug. 13, 2004), at 2-4, *available at* http://www.fpc.state.gov/documents/organization/35795.pdf (last accessed Mar. 10, 2007) [hereinafter CRS Terrorism Report Southeast Asia].

45. Ambassador Francis X. Taylor, Assistant Secretary for Diplomatic Security, Address before the Energy Security Council (Apr. 5, 2004), *available at* http://www.state.gov/m/ds/rls/rm/31917.htm (last accessed Mar. 10, 2007) [hereinafter Taylor Speech] (Ambassador Taylor notes that terrorists have shifted toward attacking soft targets, like economic or capitalist targets, such as the bombings of the Bali night club and an Indonesian JW Marriot hotel in 2003.).

46. Sittnick, *supra* note 20, at 749.

47. Keith Bradsher, *Warnings From Al Qaeda Stir Fear That Terrorists May Attack Oil Tankers*, N.Y. Times, Dec. 12, 2002, at A20.

48. Keith Bradsher, *Attacks on Chemical Ships in Southeast Asia Seem to Be Piracy, Not Terror*, N.Y. Times, Mar. 27, 2003, at A11.

49. Editorial, *Piracy and Terrorism*, N.Y. Times, Apr. 10, 2004, at A14 [hereinafter Piracy and Terrorism].

50. Barrios, *supra* note 10, at 151.

51. *Is Terrorism Heading for the High Seas?*, Yomiuri Shimbun / Daily Yomiuri, Oct. 6, 2003, *available at* http://www.yomiuri.co.jp/ (last accessed Feb. 24, 2007) (noting authorities suspect that terrorist groups have been using container ships to smuggle weapons, supplies, and even the terrorists themselves.).

52. Rommel Banlaoi, *Maritime Terrorism in Southeast Asia, The Abu Sayyaf Threat*, 58 NAVAL WAR COLLEGE REV. 63, 64 (2005) [hereinafter Banlaoi].

violence, security experts warn that terrorists may resort to pirate-style tactics, or work in concert with pirates, to perpetuate acts of maritime terrorism.[53] This sinister linking of terrorists and pirates has made the region a focal point of maritime fear,[54] prompting Singapore's Home Affairs Minister Wong Kang Seng to declare that pirates and terrorists roaming the waters of Southeast Asia should be treated alike.[55]

The minister's pragmatic approach to addressing piracy and maritime terrorism merits some consideration. Nevertheless, certain legal obstacles must be hurdled. Piracy *jure gentium* is defined and codified in article 101 of the 1982 UNCLOS and article 15 of the Convention on the High Seas as "any illegal act of violence, detention, depredation, committed for private ends by the crew or the passengers of a private ship and directed on the high seas or in a place outside the jurisdiction of any State, against another ship or against persons or property on board such ship."[56] The requirement that the act be "for private ends" has been interpreted to exclude terrorist acts at sea, which are generally believed to be politically motivated.[57] It is the author's submission that such a restrictive interpretation might have been the case then, but it certainly is not the case now and this legal obstacle can very well be hurdled through a broad interpretation of the private ends requirement as will be established in the latter part of this note. In order to truly appreciate such a conclusion, some essentials need to be met and there can be no better foundation for this proposition than an in-depth discussion of the legal history of the universal crime of piracy *jure gentium*.

53. Efthimios Mitropoulos, Secretary-General of the IMO, Address at the Fifth Regional Seapower Symposium for the Mediterranean and Black Sea Navies (Oct. 13, 2004), *available at* http://www.imo.org/newsroommainframe.asp?topic_id=847&doc_id=4364 (last accessed Feb. 18, 2007).

54. Richard Halloran, *Link Between Terrorists, Pirates in Southeast Asia a Growing Concern*, Honolulu Advertiser, Mar. 7, 2004, *at* http://www.thehonoluluadvertiser.com/article/2004/Mar/07 (last accessed Feb. 24, 2007).

55. Banlaoi, *supra* note 52, at 66. (In an interview, Wong argued: "Although we talk about piracy or anti-piracy, if there's a crime conducted at sea sometimes we do not know whether it's pirates or terrorists who occupy the ship so we have to treat them all alike.").

56. UNCLOS, art. 101; Convention on the High Seas, art. 15.

57. *See*, Halberstam, *Terrorism on the High Seas*, *supra* note 5, at 276 ("Thus, while there was no authoritative definition of piracy, it may fairly be concluded that under the prevailing view of piracy in customary international law, terrorist acts such as the seizure of the Achille Lauro and the murder of one of its passengers would not have been exempt.").

III. LEGAL HISTORY OF PIRACY *JURE GENTIUM*: CUSTOMARY AND TREATY DEFINITIONS

A. Hostis Humani Generis and the Principle of Universal Jurisdiction

It was the Roman Republic that first gave definition to piracy.[58] Marcus Tullius Cicero defined pirates in Roman law as *hostis humani generis*, "enemies of the human race,"[59] and, therefore, piracy was not a mere action against individuals but against the nation as a whole.[60]

Aware that piracy was utilized as a tool of hostile governments, the Romans gave the offense a common jurisdiction exceeding traditional legal boundaries.[61] 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*.[62] This combination of 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 municipal jurisdictional competence of any nation; (2) the pirate is, consequently, an enemy of no individual State but the entire human race; and (3) the pirate must and should be prosecuted under municipal law, but the right to prosecute is common to all nations and singular to none.[63] These precepts form the bedrock of all international thought on piracy up to the present,[64] most particularly, the principle of universal jurisdiction,[65] the central element of international criminal law.[66] For hundreds of years, universal jurisdiction only applied to the crime of

58. ALFRED P. RUBIN, THE LAW OF PIRACY 2 (1998 ed.) [hereinafter RUBIN].

59. *Id.* at 17.

60. *Id.* at 18.

61. *Id.*

62. *See*, Jacob W. F. Sundberg, *Piracy: Air and Sea*, 20 DEPAUL L. REV. 337, 363 (1971) (The quote translates as "piracy is not a crime directed against a definite number of persons, but rather aggression against the community as a whole.").

63. BARRY DUBNER, THE LAW OF INTERNATIONAL SEA PIRACY 42 (1980) [hereinafter DUBNER].

64. RUBIN, *supra* note 58, at 2.

65. *See*, Anthony J. Colangelo, *The New Universal Jurisdiction: In Absentia Signaling over Clearly Defined Crimes*, 36 GEO. J. INT'L L. 539 (2005) [hereinafter Colangelo] (This principle holds that international law considers certain acts to be so egregious that the nature of the crime itself engenders jurisdiction by any state irrespective of territorial or national links.).

66. RUBIN, *supra* note 58, at 118.

piracy.[67] Today, serious crimes under international law that are subject to universal jurisdiction[68] include genocide,[69] slavery,[70] torture,[71] crimes against humanity,[72] war crimes,[73] and, perhaps, terrorism.[74]

Historically, the first crime of universal jurisdiction was piracy.[75] Because of this, it was used as a framework for all other international crimes[76] and has

67. *See*, United States v. Layton, 509 F. Supp. 212, 223 (N.D. Cal. 1981) (According to this case, universal jurisdiction had its origins in the special problems and characteristics of piracy. It is only in recent times that nations have begun to extend this type of jurisdiction to other crimes. In the Restatement (Second) of Foreign Relations Law (1965), piracy was listed as the only universally cognizable offense. The Restatement (Third) of Foreign Relations added several other universal crimes, such as war crimes and apartheid.).

68. Colangelo, *supra* note 65, at 539.

69. Rome Statute of the International Criminal Court, July 17, 1998, art. 6, UN Doc. A/CONF.183/9, 37 I.L.M. 999, 1004 [hereinafter ICC Statute].

70. ICC Statute, art. 7 (2) (c).

71. ICC Statute, art. 7 (2) (e). *See also*, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Feb. 4, 1984, art. 5, 1465 U.N.T.S. 85 (The Torture Convention provides a universal jurisdictional base that obliges states to prosecute or extradite torturers found within that state's jurisdiction.).

72. Article 7 of the ICC Statute broadly defines crimes against humanity as acts "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."

73. *See*, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

74. *See*, United States v. Yousef, 327 F.3d 56, 107-08 n.42 (2d Cir. 2003). It was noted that:

> A controversy arises with respect to terrorism from the difficulty in arriving at a comprehensive and workable definition of the crime. Because of its lingering definitional uncertainty it is still premature to flatly categorize 'terrorism' as a universal crime. Nonetheless, this does not mean that there are not certain well-defined acts of terrorism that are excluded from the universal crime category.

75. M. Cherif Bassiouni, *The History of Universal Jurisdiction*, *in* UNIVERSAL JURISDICTION 40 (Stephen Macedo ed., 2004).

been described to be "crucial to the origins of universal jurisdiction."[77] The universal nature of the crime of piracy developed out of two basic necessities. One was the necessity to provide for forums to prosecute crimes committed in an area outside the territorial jurisdiction of any State — the high seas.[78] The other necessity was to combat an offense that indiscriminately attacked all States but for which no State could be held

76. *See, e.g.*, MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 325 (2003) ("The universality principle is perhaps best illustrated by the jurisdiction that every state traditionally has over pirates."); Princeton University Program in Law and Public Affairs, The Princeton Principles on Universal Jurisdiction 40 (2001), *available at* http://www.princeton.edu/~lapa/unive_jur.pdf (last accessed Mar. 10, 2007) [hereinafter Princeton Principles on Universal Jurisdiction] (describing piracy as the "paradigmatic" universal jurisdiction crime); Louis Sohn, Introduction to BENJAMIN B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE (1980) ("The first breakthrough for punishing 'international crime' occurred when international law accepted the concepts that pirates are 'enemies of mankind' and once this concept of an international crime was developed in one area, it was soon applied by analogy in other fields."); M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 108 (2001) ("Piracy is deemed the basis of universal criminal jurisdiction."); Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala*, 22 HARV. INT'L. L. J. 53, 60-63 (1981) (arguing that NUJ builds on a doctrine that had previously been applied primarily to piracy but could logically extend to any offense widely recognized for its depravity.); Kenneth C. Randall, *Universal Jurisdiction under International Law*, 66 TEX. L. REV. 785, 798 (1988) ("The concept of universal jurisdiction over piracy has had enduring value ... by supporting the extension of universal jurisdiction to certain modern offenses somewhat resembling piracy."); Susan Waltz, *Prosecuting Dictators: International Law and the Pinochet Case*, WORLD POL'Y J.101, 105 (2001) ("Piracy on the high seas is sometimes presented as the classic inspiration for the concept of universal jurisdiction."); Quincy Wright, *War Criminals*, 39 AM. J. INT'L. L. 257, 280, 283 (1945) (suggesting that while piracy is the "classic illustration of offenses against universal law" and the concept can be extended to "other offenses ... inherent in the conception of a world community," such as the Nazi war crimes.); Michael Kirby, Criminal Law, Speech Before the International Society for Reform of Criminal Law Conference (Aug. 27, 2001) *available at* http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_crimlaw.htm#_ftn1 (last accessed Mar. 10, 2007) ("The international legal principles of universal jurisdiction ... can be traced to the early responses of the law of nations to piracy.").

77. Princeton Principles on Universal Jurisdiction, *supra* note 76, at 45.

78. Colangelo, *supra* note 65, at 580.

responsible.[79] The crime caused often severe economic and diplomatic damage in a way that threatened all States, and its harmful nature therefore stemmed from its destabilizing effect not only on individual States but also on the international order that these States comprised.[80]

Piracy, by the law of nations, in its jurisdictional aspects, is *sui generis*.[81] This has been recognized as a good starting point for describing the crime's universal nature[82] and is best summed up by the description of piracy of the Permanent Court of International Justice (P.C.I.J.):

> Though statutes may provide for its punishment, it is an offense against the law of nations; and as the scene of the pirate's operations is the high seas, which it is not the right or duty of any nation to police, he is denied the protection of the flag which he may carry, and is treated as an outlaw, as the enemy of all mankind – *hostis humani generis* – whom any nation may in the interest of all capture and punish.[83]

As such, piracy remains punishable by all nations, wherever the perpetrators were found and without regard to where the offense occurred.[84] This principle is generally recognized under customary international law.[85]

B. Pre-Harvard Draft Definition

Although piracy is the oldest and perhaps the only crime over which universal jurisdiction was generally recognized under customary international law, there was no authoritative definition of piracy under customary law.[86]

The earliest legal reference to acts of a piratical nature arguably is found in Roman law, codified in the Digest of Justinian in the early 6th century. A party suffering theft of his property by "ship's masters or those aboard for the ship to run"[87] could bring an action either at praetorian law (criminal action)

79. *Id.*
80. *Id.*
81. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Diss. Op., Moore), 70 (SEP. 7).
82. *See*, IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 564-80 (4th ed. 1990) [hereinafter BROWNLIE].
83. *S.S. Lotus*, 1927 P.C.I.J. (ser. A) at 70.
84. ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW CASES: YEARS 1919-22 165 (Sir John Fisher Williams & H. Lauterpacht eds., 1932) [hereinafter Williams & Lauterpacht].
85. Halberstam, *Terrorism on the High Seas*, *supra* note 5, at 272.
86. *Id.*
87. The phrase "those aboard for the ship to run" refers to the crew.

or at civil law against the thief. There was no actual definition of piracy, neither is there a jurisdictional limit to the *locus* of the piracy, and in fact, theft by ships' crews and masters was part of the same law governing innkeepers and liverymen.[88]

1. English Common Law

The precursor to any multilateral conventions on piracy, was the English common law and those laws originally enforced by the English Courts of Admiralty.[89] Significantly, the earliest interpretations of common law addressing piracy in the 15th and 16th centuries found the offense punishable only in the courts of admiralty as a civil law offense.[90] In common law, Sir William Blackstone, in his *Commentaries on the Laws of England*, considered piracy to be an offense against the law of nations. The offense of piracy "consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there."[91] Blackstone goes on to list further examples of what the law considered piracy, and such acts include: any commander or seafarer betraying his trust and running away with the ship or goods; any person confining the commander or causing a revolt; trading or consorting with known pirates; outfitting a vessel to be used as a pirate ship; forcibly boarding a merchant vessel and destroying the cargo on board without seizing it.[92] The common law viewed the pirate with a singular infamy, branding the pirate *hostis humani generis*, an enemy of humanity who had declared war on mankind, and when the law caught him he received the savage penalties of treason or felony.[93]

2. American Common Law

88. 4 THE DIGEST OF JUSTINIAN 761 (Theodor Mommsen ed., 1985).
89. Phillip C. Buhler, *New Struggle with an Old Menace: Towards a Revised Definition of Maritime Piracy*, 8 CURRENTS: INT'L TRADE L.J. 61, 63 (1999) [hereinafter Buhler].
90. *See*, United States v. Smith, 18 U.S. (5 Wheat.) 153, 161, 5 L.Ed. 57 (1820).
91. *See*, 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 71 (1783).
92. *Id.* at 72.
93. *Id.* at 71 (The common law considered piracy a form of treason and the offender, if the King's subject, suffered successive punishments of half-hanging, disembowelment, beheading, and drawing and quartering. Blackstone reports that the English statutes later treated the offense as a felony, so that the law treated subject and alien alike, both suffering merciful deaths by hanging. The condemned pirate could not, however, escape death through benefit of clergy, because the statutes denied him this right.).

In the United States, piracy was first addressed at the Federal level in article I, section 8 of the United States Constitution. This section gives to Congress the power "to define and punish Piracies and Felonies committed on the high seas and offenses against the Law of Nations."[94] A year after the Constitution's ratification, the Congress enacted the first United States Piracy Act.[95] This first Act was followed by the more longstanding legislation encompassed in the Act of 3 March 1819. While this Act did not define "piracy" *per se*, section 2 of the Act authorized the public armed vessels of the United States to assist vessels of any nationality against attacks by any pirates. No jurisdictional limits were specified in the legislation, neither were there restrictions on the manner and place of such assistance.[96]

Since both Acts did not define piracy other than by accepting the definitions under customary international law or the Law of Nations,[97] it remained for the courts to provide detail to the definition and limits on the exercise of the United States' criminal jurisdiction over pirates.[98] Absent uniformity in the learned definitions, or perhaps a pronouncement by the International Court of Justice, it remained for an international convention to better define the term.[99]

94. U.S. CONST. art I, § 8.

95. An Act for the Punishment of Certain Crimes against the United States, Act of Apr. 30, 1790, 3 Stat. 112 (1790) (The Act covered "all persons, on board all vessels, which throw off their national character by cruising piratically and committing piracy on other vessels."). *See also*, Buhler, *supra* note 89, at 63 (noting that chapter 9 gave jurisdiction to the courts of the United States over murder or robbery committed on the high seas. Significantly, this Act included the provision for jurisdiction even over such activities not committed on board a vessel belonging to citizens of the United States, but included vessels with no national character and persons not lawfully sailing under the flag of any foreign nation.).

96. An Act to Protect the Commerce of the United States and Punish the Crime of Piracy, Act of Mar. 3, 1819, 3 Stat. 513, 513-14 (1819). Section 2 of the Act authorized the public armed vessels of the United States to subdue and seize:

> any armed vessel or boat, or any vessel or boat, the crew whereof shall be armed, and which shall have attempted or committed any 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.

97. *Id.* ch. CXXVII, § 5.

98. Buhler, *supra* note 89, at 64.

99. *Id.* at 65.

C. Harvard Draft Convention

In 1932, the Harvard Research in International Law Group considered every variation on the piracy theme when it created its Draft Convention on Piracy (Harvard Draft),[100] including the adoption of the ancient principle that every State has jurisdiction over a pirate ship and the right to seize pirate ships and property.[101] The Harvard Draft's definition of piracy expanded on Blackstone's, to include persons who committed any violent act on the high seas with the intent to harm another person, steal, or destroy property for private ends.[102] Article 3 of the Harvard Draft reads as follows:

> Piracy is any of the following acts, committed in a place not within the territory or jurisdiction of any State:
>
> (1) Any act of violence or depredation committed with intent to rob, rape, wound, enslave, imprison, or kill a person or with intent to steal or destroy property, for private ends without bona fide purpose of asserting a claim of right, provided that the act is connected with an attack on or from the sea or in or from the air. If the act is connected with an attack which starts from on board ship, either that ship or another ship which is involved must be a pirate ship or a ship without national character.
>
> (2) Any act of voluntary participation in the operation of a ship with knowledge of facts which make it a pirate ship.
>
> (3) Any act of instigation or of intentional facilitation of an act described in paragraph 1 or paragraph 2 of this article.[103]

The reporter of the Harvard Draft acknowledges that article 3 is the most important and difficult of the draft convention as the "traditional idea of a pirate is a bold and definite one."[104] This definition came with several problems that were eventually carried over to the Geneva Convention on the High Seas and the UNCLOS. First is the *locus* restriction. Article 3 defines piracy only as acts committed "not within the territory or jurisdiction of any State."[105] This would remove from the enforcing nation's jurisdiction any act taking place within the territorial waters of any other State. The Comment to article 3 notes, with regard to this clause, that the Report of the Sub-Committee of the League of Nations Committee of Experts found

100. DUBNER, *supra* note 63, at 37.

101. Harvard Research in International Law, Draft Convention on Piracy with Comments, 26 AM. J. INT'L L. 743 (1932) [hereinafter Harvard Draft].

102. Stiles, *supra* note 28, at 307.

103. Harvard Draft, *supra* note 101, at 769.

104. *Id.*

105. *Id.*

that piracy has its field of operations on the high seas, "where alone it can be committed."[106] This erroneous presumption, legal or factual, broadly accepted in national as well as international discussions on piracy laws at the time, may explain some of the difficulties and gaps in the modern control of piracy.[107]

Furthermore, the proponents of the Harvard Draft must have presumed the enactment by individual States of legislation governing criminal acts taking place within their territorial waters:

> The purpose of the convention is to define this extraordinary jurisdiction in general outline. Universal adoption of the draft convention would not make the piracy defined by it a legal crime or tort by force of the convention alone. Such a result would be reached under the law of a State only through the operation of that State's legal machinery. The effect of the convention would be like the effect of the traditional law of nations – the draft convention defines only the jurisdiction (the power and rights) and the duties of the several States inter se, leaving to each State the decision how and how far through its own law will it exercise its powers and rights.[108]

Although the Harvard Draft realized that piratical attacks may occur on ships of a State in another State's territorial waters, it afforded those ships limited protection.[109] The problem arises where a piratical act takes place within the jurisdiction or territorial waters of one State, but the pirates then leave that jurisdiction and can only be apprehended either upon the high seas or within the territory and jurisdiction of another State, and extradition treaties and domestic laws provide inadequate remedies.[110] This leaves the acts, which would otherwise be characterized as piratical, unpunishable.

106. *Id.* at 788. *See also*, *id.* at 765:

> The reason for the startling lack of international case authority and modern state practice is apparent, as soon as one remembers that large scale piracy disappeared long ago and that piracy of any sort on or over the high seas is sporadic except in limited areas bordered by states without the naval forces to combat it. Piracy lost its great importance in the law of the nations before the modern principles of finely discriminated state jurisdictions and freedom of the seas became thoroughly established.

107. Buhler, *supra* note 89, at 65.

108. Harvard Draft, *supra* note 101, at 760.

109. Stiles, *supra* note 28, at 307 (noting that art. 7 of the Harvard Draft prohibited ships of states from pursuing pirates in other states' territorial waters.).

110. Buhler, *supra* note 89, at 65.

Integral to the Harvard Convention is its requirement that a "pirate" commits acts for "private ends without bona fide purpose,"[111] as opposed to acts of rebellion or revolution, which States view as a public end.[112] The Comment to the Harvard Draft states:

> It may be thought advisable to exclude from the common jurisdiction certain doubtful phases of traditional piracy which can now be left satisfactorily to the ordinary jurisdiction of a State, or of two or three States, stimulated to action on occasion by diplomatic pressure. Therefore the draft convention excludes from its definition of piracy all cases of wrongful attacks on persons or property for political ends, whether they are made on behalf of States, or of recognized belligerent organizations, or of unrecognized revolutionary bands.[113]

It is arguable, however, that the Harvard Draft was not intended to exclude all acts animated by a political motive, and makes a distinction between recognized and unrecognized belligerents. The Comment to Article 16 of the Harvard Draft[114] makes mention of illegal forcible acts for political ends against foreign commerce committed on the high seas by unrecognized organizations,[115] such as establishing a blockade against foreign commerce or seizing necessary supplies from foreign ships.[116] The Comment then goes on to categorize these acts as illegal under international law if the revolutionary organization had not been recognized as a belligerent by the offended State.[117] It appears from this language that the Harvard Draft sought to exclude from the definition of piracy acts that were illegal because the revolutionary organization had not been recognized as a belligerent, but would have been legal if it had been so recognized.[118]

The Harvard Draft did not grant a State the exclusive right to fight pirates operating within its territorial waters.[119] Under the said draft, a State

111. Harvard Draft, *supra* note 101, at 769.

112. Stiles, *supra* note 28, at 307.

113. Harvard Draft, *supra* note 101, at 786.

114. Article 16 provides: "The provisions of this convention do not diminish a state's right under international law to take measures for the protection of its nationals, its ships and its commerce against interference on or over the high sea, when such measures are not based upon jurisdiction over piracy."

115. Harvard Draft, *supra* note 101, at 857.

116. *Id.*

117. *Id.*

118. Halberstam, *Terrorism on the High Seas*, *supra* note 5, at 279.

119. *See*, Harvard Draft, *supra* note 101, at 832. Article 7 of the Harvard Draft is as follows:

had no general right to pursue or seize a pirate ship in the territorial waters of another State,[120] except when the pursuit began in its own territorial waters or on the high seas.[121] While there is a divergence of professional opinion on this subject matter,[122] it is believed that the article satisfies at once the argument for emergency rights of pursuit into foreign territorial waters and the argument for protection of the littoral State's sovereignty against abusive invasions.[123]

The provision of rules and procedures for managing conflicts among States was an innovative part of the Harvard Draft,[124] requiring States "to make every expedient use of their powers to prevent piracy, separately and in cooperation."[125] This provision eventually became the inspiration for article 14 of the Geneva Convention of the High Seas and article 100 of the UNCLOS.

Despite its pioneering efforts, the Harvard Draft of 1932 was taunted as "much ballyhooed"[126] and was criticized for being essentially an unanalyzed

1. In a place within the territorial jurisdiction of another state, a state may not pursue or seize a pirate ship or ship taken by piracy and possessed by pirates; except that if pursuit of such a ship is commenced by a state within its own territorial jurisdiction or in a place not within the territorial jurisdiction of any state, the pursuit may be continued into or over the territorial sea of another state and seizure may be made there, unless prohibited by the other state.

120. *Id.*

121. *Id.*

122. *Id.*

Some writers assert that the law of nations authorized the pursuit of pirates into foreign territorial waters, at least if the littoral state has not a force at hand to make the capture and does not prohibit the pursuit. Some argue that the pursuit is legal even against the protest of the littoral state. Although in some cases war ships have pursued and captured pirates in foreign territorial waters, there is no determining precedent on the matter.

123. *Id.*

124. Stiles, *supra* note 28, at 307.

125. Harvard Draft, *supra* note 101, at 760 (Art. 18 provides: "The parties to this Convention agree to make every expedient use of their powers to prevent piracy, separately and in co-operation.").

126. Samuel Pyeatt Menefee, *The New "Jamaica Discipline:" Problems with Piracy, Maritime Terrorism and the 1982 Convention on the Law of the Sea*, 6 CONN. J. INT'L L. 127, 140 (1990) [hereinafter Menefee, *The New "Jamaica Discipline"*].

collection of cases and publicists' views.[127] The Harvard researchers proceeded to propose *de lege ferenda* a draft convention creating a crime of "piracy" for purposes of the *jus inter gentes*.[128] The draft had major flaws.[129] For this reason, it was abandoned by the researchers and no convention resulted.

D. Geneva Convention on the High Seas and the UNCLOS

1. Geneva Convention on the High Seas

After World War II, the Harvard Research Draft became the basis for work on piracy by the International Law Commission (ILC) during the 1950s,[130] and the resultant provisions on piracy contained in the Geneva Convention on the High Seas.[131] J.P.A. François, the Special Rapporteur for the International Law Commission, which drafted the Geneva Convention, stated that, in preparing the articles on piracy, he had relied heavily on the Draft Convention on Piracy prepared by the Harvard Research in International Law and the Comment to the Draft (Comment) by Professor Bingham, the reporter.[132]

The Geneva Convention on the High Seas was a post-war attempt to codify existing customary international law on piracy.[133] Among its more important provisions is its definition of piracy contained in article 15,

127. *See*, Alfred P. Rubin, *Revising the Law of "Piracy,"* 21 CAL. W. INT'L L.J. 129, 135 (1990) [hereinafter Rubin, *Revising*].

128. *Id.* at 136 (*De lege ferenda* is Latin for "what the law ought to be," as opposed to "what the law is," *lex lata*. *Jus inter genes* is Latin for "law among peoples or nations.").

129. RUBIN, *supra* note 58, at 314-17.

130. *See*, P.W. Birnie, *Piracy Past, Present and Future*, 11 MARINE POLICY 163, 170 (1987) [hereinafter Birnie]. *See also*, S.P. Menefee, *Terrorism at Sea: The Historical Development of an International Legal Response, in* VIOLENCE AT SEA: A REVIEW OF TERRORISM, ACTS OF WAR AND PIRACY, AND COUNTERMEASURES TO PREVENT TERRORISM 198 (Eric Ellen ed., 1987); RUBIN, *supra* note 58, at 319-37.

131. Rubin, *supra* note 127, at 136.

132. *Summary Records of the Seventh Session*, [1955] 1 Y.B. INT'L L. COMM'N 19, 25, U.N. Doc. A/CN.4/SER.A/1955; *Report of the International Law Commission to the General Assembly*, 2 U.N. GAOR Supp. (No. 9), U.N. Doc. A/3159 (1956), *reprinted in* [1956] 2 Y.B. INT'L L. COMM'N 253, 282, U.N. Doc. A/CN.4/SER.A/1956/Add.1.

133. *See generally*, Convention on the High Seas, arts. 13-19.

subsequently adopted as article 101 of the UNCLOS[134] and, for all its defects and inadequacies,[135] immortalized in various conventions as the quintessential definition of a piratical act.[136] According to the Convention on the High Seas, piracy consists of any of the following acts:

> (1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
>
> (a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
>
> (b) Against a ship, aircraft, persons, or property in a place outside the jurisdiction of any State;
>
> (2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
>
> (3) Any act of inciting or of intentionally facilitating an act described in sub-paragraph 1 or subparagraph 2 of this article.

This definition retained many of the elements of the Harvard Draft, particularly that the "acts be on the high seas or beyond the territorial jurisdiction of any State,"[137] and this emphasis on the venue of the acts is

134. *Compare with*, UNCLOS, art. 101.

135. *See*, Menefee, *The New "Jamaica Discipline," supra* note 126, at 141.

136. *See*, UNCLOS, art. 101; IMO Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships, 2.1 ("Piracy means unlawful acts as defined in Article 101 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS)."); Draft Model National Law on Maritime Criminal Acts, Comite Maritime International ("An act of piracy is committed when any person or persons: (a) engages in piracy as the act is defined by Art. 15 of the Geneva Convention on the High Seas; or (b) engages in piracy as the act is defined by Article 101 of the 1982 Convention on the Law of the Seas.") *available at* http://www.cmi2006capetown.info/pdf/9_%20c%20-%20Piracy%20Model%20National%20Law%20-%201st%20Redraft%2019-1-06.pdf (last accessed Mar. 10, 2007); ReCAAP, art. 1(1):

> Piracy means any of the following acts: (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate-ship or aircraft; (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

137. Convention on the High Seas, art. 15.

buttressed by a corresponding obligation among State parties to "cooperate to the fullest possible extent in their repression of piracy on the high seas or any places outside of the jurisdiction of any State"[138] beyond a State's territorial waters.

The same provision also required that the act be "for private ends,"[139] but like its predecessor, the Convention on the High Seas failed to provide a definition[140] — an omission with very serious consequences, leading to endless debates as to the actual *mens rea*[141] of the crime. It is arguable, however, that neither the Harvard Draft nor the Convention on the High Seas was intended to exclude all attacks that were animated by a political motive.[142] In the presentation of the draft of the Convention on the High Seas to the International Law Commission, Rapporteur François acknowledged that "*animus furandi* did not have to be present,"[143] and this position was explicitly adopted by the ILC in its report to the General Assembly.[144]

There is no end to the criticism. Alfred Rubin observes that some of the Commissioners had in mind legislation with political gain for various non-legal interests, more than codification.[145] As a result, key elements of the evolution of the text remained concealed in unpublished records of the ILC's "drafting committee."[146] He even goes so far as to characterize the final text as "incomprehensible," referring to acts of depredation having to be "illegal" before they could be considered piratical,[147] but not saying what

138. Convention on the High Seas, art. 14.

139. Convention on the High Seas, art. 15.

140. *Compare with*, Harvard Draft, art. 3, *supra* note 101, at 743 ("... for private ends without bona fide purpose.").

141. A crime, in municipal or international law, has three elements: the *mens rea*, the *actus reus*, and the *locus*. The *mens rea* of piracy is traditionally the desire to inflict death, destruction, or deprivation "for private ends," but a broad interpretation evidenced by customary international suggests that it is capable of accommodating relative political offenses.

142. Halberstam, *Terrorism on the High Seas*, *supra* note 5, at 277.

143. *Summary Records of the Seventh Session*, [1955] 1 Y.B. INT'L L. COMM'N 19, 41, U.N. Doc. A/CN.4/SER.A/1955.

144. *Report of the International Law Commission to the General Assembly*, 2 U.N. GAOR Supp. (No. 9), U.N. Doc. A/3159 (1956), *reprinted in* [1956] 2 Y.B. INT'L L. COMM'N 253, 282, U.N. Doc. A/CN.4/SER.A/1956/Add.1.

145. Rubin, *Revisiting*, *supra* note 127, at 136.

146. *Id.*

147. *Id.* (Article 15 states: "Piracy consists of any of the following acts: (a) any illegal acts of violence or detention." Subsentences (b) and (c) add "voluntary

legal order determined that "illegality," or, if the international legal order, precisely what the bounds of legality were in that order with regard to depredations on the high seas.[148] The 1958 Convention on the High Seas made no major changes in the ILC draft of the pertinent articles, and the 1982 UNCLOS essentially repeats the 1958 Convention's provisions verbatim.[149]

2. United Nations Convention on the Law of the Sea

The next development came in 10 December 1982, when the UNCLOS was signed in Montego Bay. Most provisions of this treaty are felt to embody customary international law,[150] especially in its attempt to codify a universal response to the crime of piracy.[151] Surprisingly, for all its pageantry and assertions that it establishes a framework within which to codify existing customary law, in part, as well as to create new principles for civilized nations,[152] the UNCLOS only entered into force in 1994,[153] oddly, some 12 years after its signing.

Unlike the Harvard Draft, the UNCLOS presents a more complex jurisdictional regime. It recognizes three major jurisdictional zones: territorial waters of a State, the exclusive economic zone, and the high seas.[154] The creation of these zones has naturally spawned new conflicts[155] as it provides for expanded coastal State jurisdiction[156] beyond its territorial waters.[157] As a

participation" and "inciting" but do not explain or supplement the adjective "illegal.").

148. *Id.*

149. *Id.*

150. *See*, J.N. Moore, *Customary Law After the Convention, in* ROBERT E. KRUEGER AND STEFAN A. RIESENFELD, THE DEVELOPING ORDER OF THE OCEANS 41 (1985).

151. *See*, Birnie, *supra* note 130, at 170; 2 D. P. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 970 (1989) [hereinafter O'CONNELL].

152. *See generally*, Bernard H. Oxman, *United States Interests in the Law of the Sea Convention*, 88 AM. J. INT'L L. 167 (1994).

153. *See*, Barrios, *supra* note 10, at 153.

154. *See*, UNCLOS, arts. 2, 33, 55, & 88 (structuring jurisdictional scheme of UNCLOS.).

155. *See generally*, Barry Hart Dubner, *The Spratly "Rocks" Dispute - a "Rockapelago" Defies Norms of International Law*, 9 TEMP. INT'L AND COMP. L.J. 2, 91 (1995) (discussing how the creation of exclusive economic zones by the 1982 Convention has contributed to the Spratly Islands dispute.).

156. UNCLOS, art. 57; UNCLOS, art. 58 providing that:

result, the high seas have been greatly reduced due to the expansion of territorial waters and the creation of exclusive economic zones.[158] This development particularly impacts on piracy as the high seas have traditionally been perceived as the venue for the crime.[159]

Compared to the Harvard Draft, the UNCLOS shows more deference to States by granting a State the exclusive right to fight pirates operating within its territorial waters.[160] Notwithstanding this recognition, the UNCLOS identically restates the definition contained in the Geneva Convention on the High Seas. Article 101 of the UNCLOS provides that piracy consists of any of the following acts:

> (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
>
> (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
>
> (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
>
> (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate-ship or aircraft;
>
> (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).[161]

all States shall enjoy the "freedoms referred to in article 87 of navigation and over flight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.

UNCLOS, art. 87 providing that:

freedom of the high seas is comprised of the following: "(a) freedom of navigation; (b) freedom of over flight; (c) freedom to lay submarine cables and pipelines, subject to Part VI; (d) freedom to construct artificial islands and other installation permitted under international law, subject to Part VI; (e) freedom of fishing, subject to the conditions laid down in section 2; (f) freedom of scientific research.

157. The territorial sea has now been expanded from 3 nautical miles to 12 nautical miles from the baseline.

158. DUBNER, *supra* note 63, at 2.

159. *See*, UNCLOS, art. 101.

160. *Id.*

161. *Id.*; *Compare with*, Convention on the High Seas, art. 15.

The aforementioned definition has been criticized as the source of much problem and controversy.[162] While piracy has been frequently defined as "robbery at sea,"[163] actual robbery is not an essential element,[164]and the better view would be to allow the definition to accommodate a variety of violent acts at sea, such as robbery, murder, assault, or rape. Nevertheless, these are not the only forms of violence at sea that has vexed States, seafarers, and the public at large. Of particular interest to this note are acts of maritime terrorism.[165] Furthermore, because of the geographical limitation that the piratical acts be committed on the high seas or places outside the jurisdiction of States,[166] it cannot cover the entire piratical situation in pirate-infested waters, including those happening in sea areas within national jurisdiction.[167] Another limitation inherent in this treaty definition is that the act must be for private ends[168] and that terrorist acts at sea for political ends are generally excluded.[169] In addition to this, the two-vessel requirement precludes any act of internal seizure within the ship[170] from being categorized as piracy *jure gentium* under the UNCLOS.[171]

162. *See generally*, Menefee, *The New "Jamaica Discipline," supra* note 126; Rubin, *Revisiting, supra* note 127; Halberstam, *Terrorism on the High Seas, supra* note 5.

163. Harvard Draft, *supra* note 101, at 786.

164. Halberstam, *Terrorism on the High Seas, supra* note 5, at 273.

165. Mellor, *supra* note 8, at 342.

166. UNCLOS, art. 101; Convention on the High Seas, art. 15.

167. *See*, International Maritime Organization, Reports on Acts of Piracy and Armed Robbery Against Ships: Annual Report 2002, MSC.4/Circ. 32, Apr. 17, 2003, *at* http://www.imo.org/includes/blastDataOnly.asp/data_id%3D7215/32-b&w.pdf (last accessed Mar. 10, 2007) [hereinafter IMO 2002 Annual Report] (according to this report, majority of maritime attacks in Southeast Asia occur within a State's territorial waters.).

168. UNCLOS, art. 101; Convention on the High Seas, art. 15.

169. *See*, Halberstam, *Terrorism on the High Seas, supra* note 5, at 276 ("Thus, while there was no authoritative definition of piracy, it may fairly be concluded that under the prevailing view of piracy in customary international law, terrorist acts such as the seizure of the Achille Lauro and the murder of one of its passengers would not have been exempt.").

170. *See*, George P. Smith, II, *From Cutlass to Cat-O'-Nine Tails: The Case for International Jurisdiction of Mutiny on the High Seas*, 10 MICH. J. INT'L L. 277, 289 (1989) ("Under this formulation, an internal seizure of a ship by passengers or crew therefore might not meet the definition of piracy under the Geneva Convention, which suggests that acts directed against another ship are required.").

171. UNCLOS, art. 101.

A few years after the UNCLOS was adopted, it became clear that its conception of piracy *jure gentium* did not cover many of the violent crimes committed on the seas.[172] These were defects and inadequacies that had been inherited from its precursors, the 1932 Harvard Draft and the 1958 Geneva Convention on the High Seas. As already mentioned, there was no change in the conventional definition of piracy from 1958 to 1982 because it was expedient to draft a definition which did not create "waves" at these two conventions.[173] This obsession with expediency naturally resulted in more questions rather than answers and "hobbled the usefulness of these conventions in combatting piracy and modern crime."[174]

Unfortunately, the definition contained in article 101 has already attained the status of custom.[175] Rather than redefine piracy *jure gentium*, the better approach would be to work with the definition to determine whether certain acts of maritime terrorism could be subsumed under it.

IV. MARITIME TERRORISM: A TALE OF TWO VESSELS AND A CONVENTION

Sometime after the adoption of the 1982 UNCLOS, it became clear that its conception of piracy did not cover many of the violent crimes committed on the seas. One such challenge involved the seizure of the Achille Lauro in 1985[176] which served as the impetus for the creation of a new convention

172. Barrios, *supra* note 10, at 154. *See also*, Garmon, *supra* note 16, at 271-72; Halberstam, *Terrorism on the High Seas, supra* note 5, at 285.

173. *See*, DUBNER, *supra* note 63, at 16.

174. *See*, Menefee, *The New "Jamaica Discipline," supra* note 126, at 141.

175. *See*, Birnie, *supra* note 130, at 170; 2 D. P. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 970 (1989) [hereinafter O'CONNELL].

176. *See generally*, S.P. Menefee, *Piracy, Terrorism, and the Insurgent Passenger: A Historical and Legal Perspective, in* MARITIME TERRORISM AND INTERNATIONAL LAW 43, 60 (N. Ronzitti ed., 1990) [hereinafter Menefee, *Piracy, Terrorism, and the Insurgent Passenger*]; S.P. Menefee, *The Achille Lauro and Similar Incidents as Piracy: Two Arguments, in* PIRACY AT SEA 179-80 (Eric Ellen ed., 1989); J.D. Simon, *The Implications of the Achille Lauro Hijacking for the Maritime Community, in* VIOLENCE AT SEA: A REVIEW OF TERRORISM, ACTS OF WAR AND PIRACY, AND COUNTERMEASURES TO PREVENT TERRORISM 17-19 (Eric Ellen ed., 1987); Birnie, *supra* note 130, at 177-78; Halberstam, *Terrorism on the High Seas, supra* note 5, at 269. *See also*, G.P. McGinley, *The Achille Lauro Affair — Implications for International Law*, 52 TENN. L. REV. 691 (1985); J.A. McCredie, *Contemporary Uses of Force Against Terrorism: The United States' Response to Achille Lauro — Questions of Jurisdiction and its Exercise*, 16 GA. J. INT'L. & COMP. L. 435 (1986); M.J. Bazyler, *Capturing Terrorists in "Wild Blue Yonder:" International Law and the Achille Lauro and Libyan Aircraft Incidents*, 8 WHITTIER L. REV. 685

called The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation or the SUA Convention[177] to address the emergence of a new phenomenon — maritime terrorism.

A. The Achille Lauro

On 7 October 1985, the Achille Lauro, an Italian-flag cruise ship, was seized while sailing from Alexandria to Port Said.[178] The hijackers, members of the Palestine Liberation Front (PLF), a faction of the Palestine Liberation Organization (PLO), had boarded the ship in Genoa, posing as tourists.[179] They held the ship's crew and passengers hostage, and threatened to kill the passengers, unless Israel released 50 Palestinian prisoners.[180] They also threatened to blow up the ship if a rescue mission was attempted.[181] When their demands had not been met by the Israeli Government the following afternoon, the hijackers shot Leon Klinghoffer, a Jew of U.S. nationality who was partly paralyzed and in a wheelchair, and threw his body and wheelchair overboard.[182] Egyptian President Hosni Mubarak persuaded the

(1986); A.L. Liput, *An Analysis of the Achille Lauro Affair: Toward an Effective and Legal Method of Bringing International Terrorist to Justice*, 9 FORDHAM INT'L J. 328 (1986); M.D. Larsen, *The Achille Lauro Incident and the Permissible Use of Force*, 9 LOY. L.A. INT'L AND COMP. L.J. 481 (1987); G.V. Gooding, *Fighting Terrorism in the 1980's: The Interception of the Achille Lauro Hijackers*, 12 YALE J. INT'L. L. 158 (1987); L.A. McCullough, *International and Domestic Criminal Issues in the Achille Lauro Incident: A Functional Analysis*, 36 NAVAL L. REV. 63 (1986); J.J. Paust, *Extradition and United States Prosecution on the Achille Lauro Hostage Takers: Navigating the Hazards*, 20 VAND. J. TRANSNAT'L L. 235 (1987); T.E. Madden, *An Analysis of the United States' Response to the Achille Lauro Hijacking*, 8 B.C. THIRD WORLD L.J. 137 (1988).

177. *See generally*, SUA Convention.

178. Halberstam, *Terrorism on the High Seas*, *supra* note 5, at 269. *See also*, Barrios, *supra* note 10, at 154 ("On October 7, 1985, four armed stowaways onboard the Italian cruise liner Achille Lauro, hijacked the ship and killed one American passenger.").

179. Halberstam, *Terrorism on the High Seas*, *supra* note 5, at 269.

180. *Id.*

181. *Id.*

182. *See*, ANTONIO CASSESE, TERRORISM, POLITICS AND LAW: THE ACHILLE LAURO AFFAIR 29 (1989) [hereinafter CASSESE]; Dennis L. Bryant, *Historical and Legal Aspects of Maritime Security*, 17 U.S.F. MAR. L.J. 1, 3 (2005) [hereinafter Bryant]; and Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 47 (2nd Cir. 1991).

> On October 7, 1985, four persons seized the Italian cruise liner Achille Lauro in the Eastern Mediterranean Sea. During the course of the incident, the hijackers murdered an elderly Jewish-American passenger, Leon Klinghoffer, by throwing him and the wheelchair in which he was confined overboard. Shortly after the incident, the hijackers surrendered in Egypt. They were then extradited to Italy, where they were charged and convicted of crimes related to the seizure.

terrorists to surrender and allowed them to board an airplane bound for Tunisia, the location of the PLF headquarters.[183] U.S. Navy fighter planes forced the aircraft to land in Sicily, Italy, where the terrorists were arrested.[184] The four Palestinians were detained by the Italian authorities and subsequently indicted and convicted in Genoa for offenses related to the hijacking of the ship and the death of the American passenger.[185] Several terrorists, however, including the leader Mohammed "Abul" Abbas,[186] managed to escape or otherwise avoid justice.[187]

Then U.S. President Reagan declared the terrorists "pirates" and branded the seizure as piracy,[188] a position that has been supported by some commentators and opposed by others.[189] This was not without reason. It must be recalled that the UNCLOS definition required that the attack be on the high seas, for private ends, and must involve two vessels. The apparent political motivations for the attack, the location of the attack in Egyptian waters, and the fact that the attack originated from the target ship rather than from a separate ship, placed the attack outside the UNCLOS definition of piracy and, presumably, beyond the purview of universal jurisdiction.[190]

B. The Santa Maria Affair

The Santa Maria Affair was another maritime incident that literally defied "convention," and, like the Achille Lauro, was the subject of much debate among scholars.[191] The Santa Maria, a Portuguese cruise ship, was seized by

183. *See*, CASSESE, *supra* note 182, at 36-37; Bryant, *supra* note 182, at 3.

184. *See*, CASSESE, *supra* note 182, at 37; Bryant, *supra* note 182, at 3.

185. *See*, CASSESE, *supra* note 182, at 43; Bryant, *supra* note 182, at 3.

186. *See*, *Klinghoffer*, 937 F.2d at 47 (stating that "According to some reports, the seizure was undertaken at the behest of Abdul Abbas, who is reportedly a member of the PLO.").

187. *See*, CASSESE, *supra* note 182, at 43; Bryant, *supra* note 182, at 3.

188. *See*, Douglas Burgess, Jr., *The Dread Pirate Bin Laden*, 2005-AUG LEGAL AFF. 32, 35 (2005). *See also*, Documents Concerning the Achille Lauro Affair, 24 I.L.M. 1509, 1515 (1985).

189. Halberstam, *Terrorism on the High Seas*, *supra* note 5, at 270.

190. *See*, UNCLOS, art. 101.

191. Although the seizure occurred before the Geneva Convention came into effect (but after it was adopted), several of the commentators discussed it with respect to the provisions of the Convention.

Captain Galvao, a well-known political opponent of the Salazar Government, and a number of persons who had either boarded in the guise of passengers or were members of the original crew.[192] Galvao declared the seizure to be "the first step aimed at overthrowing the Dictator Salazar of Portugal."[193] Portugal enlisted the aid of U.S., Dutch, and British vessels to search for and capture the vessel "in accordance with the well defined terms of international law governing piracy and insurrection on board ship."[194] The Santa Maria was eventually sighted in international waters by British and U.S. naval vessels and boarded by the commander of a U.S. destroyer. Galvao agreed to surrender the ship, provided he received assurances that he would be treated as an insurgent.[195] After the ship was securely anchored in Brazil, the State Department announced that the United States "had acted under the international laws against piracy."[196] The rebels finally surrendered on 2 February 1961, and were granted political asylum in Brazil.[197]

Commentators have disagreed and continued to disagree on whether to categorize the seizure as piracy. Fenwick, applying customary international law, opined that the act constituted piracy and the fact that the attack was upon civilian lives and property dispelled any notion that Galvao and his men were insurgents.[198] Viewing the seizure as an act for private ends despite its political motivations and harping on the twin vessel requirement, Whiteman concluded that the seizure was not piracy under the Geneva Convention on the High Seas: "Since the ship was taken over by certain of its own passengers (apparently for private ends), and not by another ship, as

192. DUBNER, *supra* note 63, at 148-49; Halberstam, *Terrorism on the High Seas*, *supra* note 5, at 286.

193. L.C. Green, *The Santa Maria: Rebels or Pirates*, 37 BRIT. Y. B. INT'L. L. 496 (1961).

194. N. D. JOYNER, AERIAL HIJACKING AS AN INTERNATIONAL CRIME 110 (1974).

195. *Id.* at 111.

196. *Id.*

197. Bryant, *supra* note 182, at 1-2; BETH DAY, PASSAGE PERILOUS – THE STORMY SAGA OF THE SANTA MARIA 168 (1962).

198. *See*, C.G. Fenwick, *"Piracy" in the Caribbean*, 55 AJIL 426, 426-27 (1961).

> Galvao said he was an insurgent ... that he was taking the first step in a revolt against the dictator... Well, international law does recognize the status of insurgents... But here third states have... [required] something equivalent to a "status of insurgency;" and even then the alleged insurgents might not seize the property of the third state or inflict injury upon its nationals... The law of insurgency applies to armed conflicts between the group in rebellion and the government against which it is rebelling; it cannot justify attacks upon civilian lives and property.

first reported, it was considered that for this, if for no other reason, Article 15 of the 1958 Convention was inapplicable."[199]

Some scholars allege that the adoption of the Convention on the High Seas and the 1982 UNCLOS focused attention on their provisions and away from further development of customary law. In their haste to be expedient, both treaties limited piracy to acts done purely with an intent to rob or *animus furandi*.[200] When no universal consensus could be reached regarding the nature of the seizure, the international community decided to address the situation by creating a new convention. Thus, the emergence of The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, more commonly known as the SUA Convention,[201] created to combat acts of maritime terrorism.

C. The SUA Convention

The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) was adopted on 10 March 1988. The drafters designed the SUA Convention to combat terrorist acts on the seas and "all unlawful acts against the safety of maritime navigation."[202] The Convention likewise established a legal basis for prosecuting maritime violence that did not fall within the UNCLOS piracy framework.[203] At least one commentator believes that the SUA Convention contains the most complete and specific definition of piracy in any treaty.[204] Nonetheless, the

199. 4 MARJORIE WHITEMAN, DIGEST OF INTERNATIONAL LAW 666 (1965).

200. Halberstam, *Terrorism on the High Seas*, *supra* note 5, at 277.

201. *See generally*, SUA Convention.

202. SUA Convention preamble provides:

> DEEPLY CONCERNED about the world-wide escalation of acts of terrorism in all its forms, which endanger or take innocent human lives, jeopardize fundamental freedoms and seriously impair the dignity of human beings ... . CONSIDERING that unlawful acts against the safety of maritime navigation jeopardize the safety of persons and property, seriously affect the operation of maritime services, and undermine the confidence of the peoples of the world in the safety of maritime navigation...

203. Barrios, *supra* note 10, at 154.

204. Buhler, *supra* note 89, at 67.

> The most complete and specific definition of piracy in any treaty appears in the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (the Rome Convention), which entered into force in 1992. Article 3 of the Rome Convention contains a definition of piracy as an offense where a person unlawfully and intentionally seizes or exercises control over a ship, performs an act

SUA Convention makes no mention of piracy.[205] Neither does it even attempt to define it, choosing instead to enumerate acts of violence that would be considered offenses punishable under the Convention:

> 1. Any person commits an offense if that person unlawfully and intentionally:
>
> (a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
>
> (b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or
>
> (c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or
>
> (d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or
>
> (e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or
>
> (f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or
>
> (g) injures or kills any person, in connection with the commission or the attempted commission of any of the offenses set forth in subparagraphs (a) to (f).[206]

The SUA Convention made it unlawful to seize or take control of a ship by force or the threat of force, to perform an act of violence against a person on board a ship if it is likely to endanger safe navigation of that ship, to destroy or damage a ship or its cargo if it is likely to endanger safe navigation, to place devices or substances on a ship that are likely to destroy that ship, to knowingly communicate false information to a ship that would endanger safe navigation, and to injure or kill any person in connection with any of the above acts.[207] Attempting or abetting the commission of these offenses or being otherwise an accomplice of a person committing them is also an offense under the Convention, as is the act of a person who threatens to commit the offenses set forth in paragraphs (b), (c), and (e) above, "with

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of violence against a person on board a ship, destroys a ship or causes damage to a ship or to its cargo, also including destruction or damage to navigational facilities, or threatens to do so.

205. *See generally*, SUA Convention.

206. SUA Convention, art. 3.

207. Barrios, *supra* note 10, at 154.

or without a condition, as provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act," provided the threat is likely to endanger the safe navigation of the ship in question.[208]

These acts need not necessarily be accompanied by a "terrorist intent."[209] Rather, the enumerated offenses seem to belong to the wider category of "common crimes."[210] They include most acts of violence at sea, provided there is an international interest in their suppression, in offenses that are likely to endanger the safe navigation of a ship.[211]

Unlike the UNCLOS definition of piracy,[212] the SUA Convention does not contain the private ends or two-ship requirements, neither does it include the requirement that an act occur on the high seas.[213] For this reason it is considered a complementary legal instrument to the UNCLOS[214] and, according to the IMO, "a relevant treaty" for the suppression of piracy.[215] The SUA Convention applies to all maritime terrorist acts, whether private or political, thereby filling a loophole left by the UNCLOS in its definition of piracy.[216] In this context,[217] piracy is also subject to the convention.[218]

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208. SUA Convention, art. 3.

209. *See*, SUA Convention, art. 3. (none of the offenses require that they be committed with a "terrorist intent.").

210. Treves, *supra* note 6, at 544.

211. *Id.* at 545. Treves notes:

> While this requirement is not explicitly mentioned in the description of the first offense listed (article 3, paragraph 1 (a)), all the other offenses must be 'likely to endanger the safe navigation of the ship.' The reason for this difference seems to be that the offense of seizing or exercising control over a ship by force or threat thereof constitutes by its very essence a danger to the safe navigation of the ship. While such act was not already considered as an offense in most domestic legal systems, the remaining offenses envisaged are normally considered as such in domestic criminal law.

212. UNCLOS, art. 101.

213. SUA Convention, art. 3.

214. *See*, Keyuan, *Piracy, Ship Hijacking and Armed Robbery in the Straits*, *supra* note 37, at 532.

215. MARTINUS NIJHOFF, 3 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY 185 (Satya N. Nandan & Shabtai Rosenne eds., 1995).

216. Keyuan, *Piracy, Ship Hijacking and Armed Robbery in the Straits*, *supra* note 37, at 532.

217. The phrase "in this context" is a significant qualifier because the SUA Convention does not provide for a definition of piracy. It merely enumerates a

This eliminates the possibility of "negative jurisdiction."[219] So-called "political piracies" alleged not to be within the scope of the UNCLOS become punishable under the SUA Convention.

To date, Indonesia and Malaysia, the States with the largest maritime presence and with the greatest potential to be affected by incidents of maritime violence covered by the SUA Convention, have neither ratified nor even signed it.[220] Unlike UNCLOS, there is no assumption that non-signatories would be bound by the terms of the SUA Convention; it is clearly not a codification of customary international law on piracy, but rather a relatively recent departure from it.[221] Furthermore, in comparison with the UNCLOS, the SUA Convention can only be a supplementary rather than a master convention with regard to piracy.[222]

D. Conflation and Confusion: Piracy and Maritime Terrorism

The SUA Convention was designed to combat terrorist acts on the seas and "all unlawful acts against the safety of maritime navigation."[223] Interestingly enough, the convention does not define maritime terrorism. In fact, the word "terrorism" only appears three times, all of which are in the preamble.[224] To fill this void, maritime terrorism has been analogized as "political piracy." This, of course, is an oxymoron. Maritime terrorism is motivated by political goals beyond the immediate act of attacking or

number of violent acts that are punishable under the Convention. *See*, SUA Convention, art. 3 (providing for an enumeration of these violent acts).

218. Keyuan, *Piracy, Ship Hijacking and Armed Robbery in the Straits*, *supra* note 37, at 532.

219. *See*, Halberstam, *Terrorism on the High Seas*, *supra* note 5, at 296 (elaborating on negative jurisdiction to be a situation "where no state will prosecute the offenders.").

220. *See*, Barrios, *supra* note 10, at 155; International Maritime Organization, Status of Conventions, *at* http://www.imo.org/includes/blastDataOnly.asp/data_id%3D8068/status.xls (last accessed Feb. 24, 2007) [hereinafter Status of SUA Convention] (The SUA Convention entered into force on Mar. 1, 1992, and currently has 136 signatories, the Philippines among them.).

221. *See*, Barrios, *supra* note 10, at 155; Garmon, *supra* note 16, at 271.

222. *See*, Keyuan, *Piracy, Ship Hijacking and Armed Robbery in the Straits*, *supra* note 37, at 533.

223. SUA Convention, preamble.

224. *See*, SUA Convention, preamble.

hijacking a maritime target.[225] Piracy contemplates acts of violence committed for "private ends."[226]

The bulk of opinion considers maritime terrorism and piracy as two distinct phenomena. This distinction, however, is blurred in certain cases, due to operational similarities in tactics such as ship seizures and hijackings.[227] This is the situation in Southeast Asia where the region's vitality to international commerce is only matched by the rampancy of piratical attacks occurring within its waters.

V. RECONCILING MARITIME TERRORISM WITH PIRACY

There are some authors who believe that maritime terrorism does not fall comfortably within the legal meaning of piracy.[228] Mellor suggests that to continue to define terrorism as piracy is to create a new legal fiction,[229] and it would be best to confine the common jurisdiction to offenders acting for private ends only.[230] Some have even reduced the distinction into an oversimplification: "Piracy is motivated by private gains, while terrorism is motivated by political objectives."[231] This black-and-white approach to categorization, however, overlooks a range of activities that are motivated by political and private gain, such as the ransom kidnappings of crewmembers in the waters of Aceh, Indonesia by members of the Free Aceh Movement (GAM).[232]

In the Philippines, piracy incidents over the past decade were centered mainly in the southern Philippines, specifically in the migratory routes of yellow-fin tuna in the Moro Gulf, Davao Gulf, Sarangani Bay, Sulu Sea, the Basilan Strait, and the waters and coastlines of Zamboanga, Davao, Sulu, Basilan, Tawi-Tawi, South Cotabato-Sarangani-General Santos (SOCSARGEN) areas, and Sultan Kudarat.[233] This problem is exacerbated

225. Young & Valencia, *supra* note 14.

226. UNCLOS, art. 101.

227. Young & Valencia, *supra* note 14.

228. Mellor, *supra* note 8, at 377. *See also*, Young & Valencia, *supra* note 14.

229. Mellor, *supra* note 8, at 377.

230. *Id.* at 379.

231. *See*, Sittnick, *supra* note 20, at 751. *See also*, Young & Valencia, *supra* note 14.

232. International Chamber of Commerce, *Murder of Four Sailors Marks Violent Start to Shipping Year 2004*, Feb. 13, 2004, *at* http://www.iccwbo.org/home/news_archives/2004/aceh.asp (last accessed Mar. 10, 2007).

233. Vice Adm. Eduardo Santos (Ret.), *Anti-Piracy Operations in the Philippines*, 3rd OTW Anti-Piracy Forum International, Oct. 24, 2000, *available at*

by the persistent involvement in the Southern Philippines of terrorist groups,[234] notably the Moro Islamic Liberation Front (MILF)[235] and the Abu Sayyaf Group (ASG).[236] While both groups engage in piracy basically to generate funds or resources for their logistical requirements, both have the capability to use piracy as a tool to promote and further their cause,[237] as in the Sipadan and Dos Palmas incidents. On 23 April 2000, members of the ASG kidnapped 21 tourists at a resort in Sipadan, Malaysia.[238] This ordeal ended only in 2001, when the ASG reportedly received US$ 15,000,000 in ransom from the Philippine government.[239] This incident was the start of a kidnap for ransom spree that included the September 2000 kidnapping of three Malaysians at Pasir Beach Resort, Sabah and the 27 May 2001 abductions at the Dos Palmas resort, Palawan.[240] In April 2004, some two months after the Super Ferry 14 incident, the ASG kidnapped two Malaysians and an Indonesian in a sailing craft.[241] This enmeshing of commercial and political ends is not limited to kidnap for ransom activities. In 26 May 2001, suspected Abu Sayyaf guerillas hijacked an inter-island ferry

http://www.okazaki-inst.jp./doc/santos(1).doc (last accessed Mar. 10, 2007) [hereinafter Anti-Piracy Operations in the Philippines].

234. *Id.*

235. CRS Terrorism Report Southeast Asia, *supra* note 44, at 18. (Moro Islamic Liberation Front (MILF) operates primarily in the southern Philippines. The main political objective of MILF has been separation and independence for the Muslim region of the southern Philippines. MILF was linked to the Feb. 24, 2000 explosion of two buses aboard a ferry in the Philippines, which killed at least 45 passengers and injured many others. It is suspected that JI terrorists have trained at MILF camps in the Philippines.).

236. *See generally*, Larry Niksh, Congressional Research Service, Abu Sayyaf: Target of Philippine-U.S. Anti-Terrorism Cooperation (Jan. 25, 2002) [hereinafter CRS Terrorism Report Abu Sayyaf], *available at* http://www.fas.org/irp/crs/RL31265.pdf (last accessed Mar. 10, 2007) (Abu Sayyaf (ASG), which operates in the Philippines, emerged in 1990 as a splinter group composed of former Moro National Liberation Front fighters and Filipinos who had fought against the Soviets in Afghanistan. ASG is responsible for numerous attacks against Filipino and American targets, including the Feb. 2004 bombing of Super Ferry 14, a Philippine passenger ship, which killed 100 people, the May 2000 kidnapping of three Americans, two of whom were killed, and an Oct. 2002 explosion, which killed a U.S. soldier in Mindanao.).

237. Anti-Piracy Operations in the Philippines, *supra* note 233.

238. Banlaoi, *supra* note 52, at 69.

239. *Id.* at 72.

240. *Id.*

241. *Id.* at 73.

in the Philippines after boarding it from several power-boats.[242] After being robbed, the 38 passengers were released.[243]

Issues of taxonomy aside, these activities are serious cause for concern. If one were to use the criteria propounded by some scholars, it would seem that the above-cited activities would be beyond the scope of either piracy or maritime terrorism. This approach spawns serious consequences because, in this instance, the label given to the crime determines the permissible scope of jurisdiction that States may assert.[244] Thus, reconciling notions of piracy and maritime terrorism under the UNCLOS is inevitable, especially the contentious private ends requirement and the political ends exception.

A. Piracy's Private Ends Requirement

Integral to a piratical act is that it be "for private ends."[245] What remains unsettled is the scope of the private ends requirement and conversely, what is meant by public or political ends. This is due in large part to the provision's failure to provide for a definition of the phrase.

As was already mentioned, article 101 of the UNCLOS is a reiteration of article 15 of the Convention on the High Seas. Sadly, there is no recorded discussion of these provisions at any of the conferences preceding the adoption contained in the UNCLOS,[246] and so one must rely on the records of the researchers of the Harvard Draft and the *travaux preparatoires* of the Convention on the High Seas to unlock the "legislative intent" behind the private ends requirement.[247] In its earliest incarnation in the Harvard Draft, the phrase referred to an activity undertaken "for private ends without *bona fide* purpose."[248] The same phrase reappears in the Convention on the High Seas. Based on the *travaux preparatoires*, it is arguable that "for private ends" was not used either in the Harvard Draft or in the Geneva Convention to

242. Maritime Risk Context Statement, Attachment C, at 14, Australian Office of Transport Security, [Australian] Department of Transport and Regional Services (Dec. 2003), *available at* http://www.dotars.gov.au/transport/security/maritime/doc/Final_Maritime_Risk_Context_Statement.doc (last accessed Mar. 10, 2007).

243. *Id.*

244. *See*, Halberstam, *Terrorism on the High Seas*, *supra* note 5, at 272; Garmon, *supra* note 16, at 259.

245. UNCLOS, art. 101.

246. *See*, Halberstam, *Terrorism on the High Seas*, *supra* note 5, at 284.

247. *See generally*, DUBNER, *supra* note 63, at 1.

248. Harvard Draft, *supra* note 101, at 769.

limit piracy to acts done with an intent to rob or *animus furandi*.[249] This position is supported by the view of Professor Bingham who, in the Comment to the Harvard Draft, stated that, "[w]hile piracy is robbery on the high seas, there is no good reason why one who does an act with intent to kill, wound, rape, enslave or imprison, or to steal or maliciously destroy property, which would be piracy if done to rob, should be subject to the common jurisdiction of all States."[250]

Curiously, while the Comment to the Harvard Draft recognizes phases of traditional piracy such as acts committed by belligerents or unrecognized insurgents, it decided to exclude these cases of wrongful attacks on persons or property for political ends:

> Although States at times have claimed the right to treat as pirates unrecognized insurgents against a foreign government who have pretended to exercise belligerent rights on the sea against neutral commerce, or privateers whose commissions violated the announced policy of the captor, and although there is authority for subjecting some cases of these types to the common jurisdiction of all States, it seems best to confine the common jurisdiction to offenders acting for private ends only. There is authority for the view that this accords with the law of nations.[251]

The same position was resurrected in the Convention on the High Seas and, eventually, the 1982 UNCLOS. The decision then made sense. First, States were concerned with piracy only insofar as it interfered with commercial shipping and transportation.[252] As concern lay with commercial interference, little attention was paid to the possibility of piracy being used to further political interests. Second, the Harvard Draft emerged in the aftermath of World War II, an era when colonial empires were being dismantled and the United Nations was establishing Permanent Mandates.[253] The exclusion of political acts of violence during such a transitional time narrowed the scope of consideration for piratical acts, necessarily narrowing potential application of the law resulting from signatories' obligations to enforce the law of the sea.[254] Because States were obligated to repress piracy

249. *See*, Halberstam, *Terrorism on the High Seas*, *supra* note 5, at 277.

250. Harvard Draft, *supra* note 101, at 786.

251. *Id.* at 798.

252. *Id.* at 743.

253. MARTIN IRA GLASNER, POLITICAL GEOGRAPHY 261-62 (2d ed. 1996).

254. Garmon, *supra* note 16, at 263.

under international law,[255] States might have been reluctant to accept a rule which might create liability in numerous situations.[256]

B. Meaning of Political Ends

The restriction of piracy to acts "for private ends" has been interpreted to exclude acts committed for public or political ends. As a consequence, terrorist acts are generally excluded and chalked up to maritime violence.[257] But what exactly are public or political ends? According to Halberstam, the phrase is restricted to activities of insurgents fighting for political independence.[258] While noting the objection of the researchers of the Harvard Draft to include illegal attacks on foreign commerce by unrecognized revolutionaries as piracies in the international law sense,[259] she asserts that this position is only with respect to insurgents whose acts were directed solely against the State whose government they sought to overthrow, not those who attacked ships of all nations indiscriminately.[260] Under this theory, the latter could be considered pirates[261] and, therefore, not subject to the political ends exception.

There is, however, some hesitation on the part of the author in accepting this conclusion. A favorable interpretation of the treaty provision based on the Harvard Draft does not necessarily translate into custom. To determine the actual scope of the political ends exception, a better approach would be to understand it in relation to the political offense doctrine and the international law on extradition. Generally, the political offense exception is a defense against extradition in order to protect revolutionaries from being returned to their home countries to face prosecution for crimes committed

255. *See*, UNCLOS, art. 100; Convention on the High Seas, art. 14. *See also*, Report of the International Law Commission to the General Assembly, *supra* note 132, at 282 (The commentary to the International Law Commission's draft article 38, which became article 14 of the Geneva Convention, states: "Any State having an opportunity of taking measures against piracy, and neglecting to do so, would be failing in a duty laid upon it by international law.").

256. Clyde Crockett, *Toward a Revision of the International Law of Piracy*, 26 DE PAUL L. REV. 78, 97 (1976).

257. *See*, Garmon, *supra* note 16, at 259.

258. *See*, Halberstam, *Terrorism on the High Seas*, *supra* note 5, at 278-80.

259. Harvard Draft, *supra* note 101, at 857.

260. Halberstam, *Terrorism on the High Seas*, *supra* note 5, at 280.

261. *Id.* at 279.

against their governments.[262] Today, the exception has evolved to encompass a greater range of actors from asylum seekers to terrorists. In response to criticism that terrorists use the exception as a loophole to avoid extradition, most extradition treaties have now excluded terrorist activity from categories of crimes considered to be political offenses.[263] This would be better evidence of state practice on the scope of the political ends exception.

VI. THE POLITICAL OFFENSE EXCEPTION

A. The Concept of a Political Offense

The political offense exception is a reservation of a State's right to refuse to extradite for certain crimes,[264] but like piracy's political ends exception, there has yet to be a statute or treaty that would positively define the term. Recently, the trend has been to adopt a "negative definitional approach" to avoid defining explicitly what constitutes a political offense and, instead, to specify particular acts that would automatically be excluded from the political offense exception.[265] The same approach has been adopted in some bilateral extradition treaties that eliminate the political offense exception for serious, violent crimes.[266]

B. Pure Political Offenses

There are two distinct categories of political offenses: pure and relative political offenses.[267] Pure political offenses are acts perpetrated directly against the government, which do not involve the commission of common

262. Aimee J. Buckland, *Offending Officials: Former Government Actors and the Political Offense Exception to Extradition*, 94 CAL. L. REV. 423, 423-24 (2006) [hereinafter Buckland].

263. *Id.*

264. CHRISTINE VAN DEN WIJNGAERT, THE POLITICAL OFFENSE EXCEPTION TO EXTRADITION: THE DELICATE PROBLEM OF BALANCING THE RIGHTS OF THE INDIVIDUAL AND THE INTERNATIONAL PUBLIC ORDER 45 (1980) [hereinafter VAN DEN WIJNGAERT].

265. *See*, Miriam E. Sapiro, *Extradition in an Era of Terrorism: The Need to Abolish the Political Offense Exception*, 61 N.Y.U. L. REV. 654, 681-82 (1986) [hereinafter Sapiro].

266. *See, e.g.*, Supplementary Extradition Treaty, Jun. 25, 1985, U.S.-U. K., S. TREATY DOC. 8, 99th Cong., 1st. Sess. (1985), *reprinted in* 24 I.L.M. 1104 (1985) [hereinafter US-UK Supplementary Extradition Treaty].

267. *See*, Buckland, *supra* note 262, at 439; Sapiro, *supra* note 265, at 660.

crimes or injury to private individuals.[268] The classic examples are treason, sedition, and espionage.[269] It is presumed that these offenses lack the essential motivating elements of a common crime — malice or personal gain and injury to a private right[270] and are generally recognized as non-extraditable, even if they are not expressly excluded from extradition by the applicable treaty.[271]

C. Relative Political Offenses

In contrast, a relative political offense is a common crime pursued with a political purpose,[272] or are "so connected with a political act that the entire offense is regarded as political."[273] Relative political offenses can be broken into two sub-categories, *délit complexe* and *délit connexe*.[274] *Délit complexe* is a crime that is political in terms of motive because it is directed against the political order, but it also consists of the commission of a common crime in that a private right is violated.[275] For instance, a terrorist bombing of a police station which injured a civilian could be considered a *délit complexe*.[276] *Délit connexe*, on the other hand, is not directed specifically at the political order, but is a common crime that is closely connected with another act that is directed against the political order.[277] An example of a *délit connexe* would be the theft of guns in order to arm a guerrilla group opposed to the State or robbing a bank in order to provide funds for subversive political activities.[278] Thus, most terrorist acts may be classified as relative political offenses,

268. Buckland, *supra* note 262, at 439.

269. Sapiro, *supra* note 265, at 660.

270. *See*, *In Re* Ockert, 7 Ann.Dig. 369 (Tribunal Fédérale, Switzerland 1933) ("In brief, what distinguishes the political crime from the common crime is the fact that the former only affects the political organization of the state and or the proper rights of the state, while the latter exclusively affects rights other than those of the state.").

271. *See*, Manuel R. García-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226, 1234 (1962) [hereinafter García-Mora].

272. Buckland, *supra* note 262, at 441.

273. García-Mora, *supra* note 271, at 1230-31.

274. *See*, GEOFF GILBERT, ASPECTS OF EXTRADITION LAW 119 (1991) [hereinafter GILBERT].

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

because they typically involve a combination of common crimes and purportedly political motives.[279]

VII. CONTEMPORARY TRENDS: DEPOLITICIZATION OF TERRORIST ACTS AND THE NARROWING OF THE POLITICAL OFFENSE EXCEPTION

Although the political offense exception was created to protect individuals from unjust persecution for political beliefs and acts, it can be used by perpetrators of common crimes with political overtones to avoid extradition, and, thus, subsequent prosecution or punishment.[280] Indeed, in recent years, offenders accused of terrorist acts have successfully invoked the political offense exception to avoid extradition.[281] As a result, the exception has been characterized as a "double-edged sword" because "while protecting the requested person against a retaliatory trial by his political adversaries, it is detrimental to international public order because it offers shelter and immunity from criminal liability to persons who may have committed very serious offenses."[282]

While some scholars consider "terrorism" too nebulous a term to use as a *de jure* basis for denying the application of the political offense exception,[283] it has a *de facto* application because state practice shows that actions which endanger the lives of innocent bystanders are often deemed not sufficiently "political."[284] This finds support in the case of *In re Giovanni Gatti*.[285] Distinguishing between common and political crimes, the French Court of Appeals ratiocinated:

> In brief, what distinguishes the political crime from the common crime is the fact that the former only affects the political organization of the State, the proper rights of the State, while the latter exclusively affects rights other than those of the State. The fact that the reasons of sentiment which

279. *See*, Nicholas Kittrie, *A New Look at Political Offenses and Terrorism*, *in* INTERNATIONAL TERRORISM IN THE CONTEMPORARY WORLD 363-69 (M. Livingston ed., 1978).

280. Sapiro, *supra* note 265, at 656.

281. *Id.*

282. *See*, VAN DEN WIJNGAERT, *supra* note 264, at IX.

283. *See generally*, J. Dugard, *Towards a Definition of International Terrorism*, 67 AM. SOC'Y INT'L L. PROC. 94. 94-100 (1973).

284. VAN DEN WIJNGAERT, *supra* note 264, at 155-59.

285. *In Re* Giovanni Gatti, S. Jur. II 44 (Cours d'appeal, Grenoble 1947), 14 Ann. Dig. 145 (Ct. App. Grenoble, Fr. 1947) (In this 1947 case, France granted the extradition request of the Republic of San Marino for one of its nationals who tried to kill a member of a communist cell.).

> prompted the offender to commit the offense belong to the realm of politics does not itself create a political offense.[286]

A. United Nations General Assembly and Security Council Resolutions on Terrorism

Increased depoliticization and criminalization of terrorist acts characterize the United Nations' contemporary position on terrorism. In 1993, the General Assembly adopted a resolution entitled Human Rights and Terrorism. This resolution signaled a turning point, because while it stated that it "unequivocally condemns all acts, methods and practices of terrorism in all its forms and manifestations, wherever and by whomever committed," it did not, unlike its predecessors, contain a paragraph reaffirming the right to self-determination.[287] This shift in attitude was further cemented by the adoption of the Declaration on Measures to Eliminate International Terrorism[288] in 1994. Aside from reaffirming the U.N.'s unequivocal condemnation of terrorism, said Declaration refers to "criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes"[289] and provides that such acts are "in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them."[290] Resolutions subsequently adopted reiterate the Declaration repeat the aforementioned language condemning terrorism and urge States to take various actions to combat terrorism.[291]

286. *Id.* at 45. *See also*, GILBERT, *supra* note 274, at 700.

> This is a very strict interpretation of the exception, only conferring asylum on those offenders whose crimes affected the State alone and in no way harmed individuals — espionage, sedition or lèse majesté would fall within the test, but not murder of the Head of State with the aim of seizing power.

287. *See*, G.A. Res. 48/122, U.N. GAOR, 48th Sess., Supp. No. 49, at 241, U.N. Doc. A/RES/48/122 (1993). *See also*, G.A. Res. 49/185, U.N. GAOR, 49th Sess., Supp. No. 49, at 203, U.N. Doc. A/RES/49/185 (1994).

288. G.A. Res. 49/60, U.N. GAOR, 49th Sess., Supp. No. 49, at 303, U.N. Doc. A/RES/49/60 (1994) (Dec. 9, 1994 Annex).

289. *Id.* at ¶ 2.

290. *Id.* at ¶ 3.

291. *See*, G.A. Res. 50/53, U.N. GAOR, 50th Sess., Supp. No. 49, at 319, U.N. Doc. A/RES/50/53 (1995); G.A. Res. 51/210, U.N. GAOR, 51st Sess., Supp. No. 49, at 346, U.N. Doc. A/RES/51/210 (1996); G.A. Res. 52/165, U.N. GAOR, 52d Sess., Supp. No. 49, at 394, U.N. Doc. A/RES/52/165 (1997); G.A. Res. 53/108, U.N. GAOR, 53rd Sess., Supp. No. 49, at 364, U.N. Doc.

Neither the Declaration on Measures to Eliminate International Terrorism nor any of the subsequent resolutions include language reaffirming the right to self-determination.[292] The omission of any such reference in the later resolutions and the broad language condemning terrorism "wherever and by whomever" committed constitute a clear rejection of that position.[293]

The same disposition is paralleled in the various resolutions adopted by the U.N. Security Council condemning terrorism.[294] Security Council Resolution 1269, adopted in 1999, for instance, condemns all acts of terrorism regardless of their underlying motivations:

> The Security Council unequivocally condemns all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed and calls upon all States to take appropriate steps to deny those who plan, finance or commit terrorist acts safe havens.[295]

The trend towards criminalization is underscored by the adoption of Security Council Resolution 1373 on 28 September 2001, following the attacks on the World Trade Center and the Pentagon. Because the U.N.

A/RES/53/108 (1999); G.A. Res. 55/158, U.N. GAOR, 55th Sess., Supp. No. 49, U.N. Doc. A/RES/55/158 (2001).

292. Malvina Halberstam, *The Evolution of the United Nations Position on Terrorism: From Exempting National Liberation Movements to Criminalizing Wherever and by Whomever Committed*, 41 COLUM. J. TRANSNAT'L L. 573, 577 (2003) [hereinafter Halberstam, *Evolution of the United Nations Position on Terrorism*].

293. *See, id.*

294. *See*, S.C. Res. 1373, U.N. SCOR, 4385th mtg., U.N. Doc. S/RES/1373 (2001); S.C. Res. 1368, U.N. SCOR, 4370th mtg., U.N. Doc. S/RES/1368 (2001); S.C. Res. 1363, U.N. SCOR, 4352d mtg., U.N. Doc. S/RES/1363 (2001); S.C. Res. 1333, U.N. SCOR, 4251st mtg., U.N. Doc. S/RES/1333 (2000); S.C. Res. 1269, U.N. SCOR, 4053d mtg., U.N. Doc. S/RES/1269 (1999); S.C. Res. 1267, U.N. SCOR, 4051st mtg., U.N. Doc. S/RES/1267 (1999); S.C. Res. 1214, U.N. SCOR, 3952d mtg., U.N. Doc. S/RES/1214 (1998); S.C. Res. 1189, U.N. SCOR, 3915th mtg., U.N. Doc. S/RES/1189 (1998); S.C. Res. 1054, U.N. SCOR, 3660th mtg., U.N. Doc. S/RES/1054 (1996); S.C. Res. 1044, U.N. SCOR, 3627th mtg., U.N. Doc. S/RES/1044 (1996); S.C. Res. 748, U.N. SCOR, 3063d mtg., U.N. Doc. S/RES/748 (1992); S.C. Res. 731, U.N. SCOR, 3033d mtg., U.N. Doc. S/RES/731 (1992); S.C. Res. 687, U.N. SCOR, 2981st mtg., U.N. Doc. S/RES/687 (1991); S.C. Res. 635, U.N. SCOR, 2869th mtg., U.N. Doc. S/RES/635 (1989); S.C. Res. 579, U.N. SCOR, 2637th mtg., U.N. Doc. S/RES/579 (1985).

295. S.C. Res. 1269, U.N. SCOR, 4053d mtg., U.N. Doc. S/RES/1269 (1999).

Security Council acted under chapter VII of the U.N. Charter,[296] this resolution is mandatory,[297] thereby obligating States to bring these terrorists to justice and "to ensure that such terrorist acts are established as serious criminal offenses in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts."[298]

B. Treaties and Conventions

The structure of the political offense exception remained constant until 1986 when the United States and the United Kingdom entered into a supplementary treaty that dramatically changed the character and the make-up of the political offense exception.[299] As was evident in the cases of McMullen,[300] Mackin,[301] and Doherty,[302] Irish Republican Army (IRA) terrorists were evading prosecution in the United Kingdom by fleeing to the United States where they could count on support from Irish immigrants and where the political offense exception sheltered them from extradition.[303] Article 1 of the Supplementary Extradition Treaty excludes the following crimes from being considered political offenses:

> (a) an offense for which both Contracting Parties have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit his case to their competent authorities for decision as to prosecution;

296. U.N. CHARTER, ch. VII, arts. 39-51.

297. *See*, Halberstam, *Evolution of the United Nations Position on Terrorism*, *supra* note 292, at 578 n. 38 (Resolutions of the General Assembly are recommendations. The U.N. Charter does not give the General Assembly authority to adopt binding resolutions. Resolution of the Security Council may be hortatory or obligatory. Those adopted under the Security Council's chapter VII powers are obligatory.).

298. S.C. Res. 1373, U.N. SCOR, 4385th mtg., U.N. Doc. S/RES/1373 (2001).

299. *See generally*, US-UK Supplementary Extradition Treaty, arts. 1-7.

300. McMullen v. I.N.S., 788 F.2d 591 (9th Cir.1986) (Here, the court applied the political offense exception in ruling under the incidence test that McMullen's membership in the Provisional IRA and his repeated bombings of British barracks had to be seen in the context of a political uprising.).

301. United States v. Mackin, 668 F.2d 122 (2d Cir.1981) (Mackin was charged with the murder of a British soldier but was granted political offender status.).

302. Doherty v. United States, 599 F.Supp. 270 (S.D.N.Y. 1984) (Doherty had actually been convicted of murdering a British soldier but had managed to flee to the United States. He was also granted political offender status.).

303. Antje C. Petersen, *Extradition and the Political Offense Exception in the Suppression of Terrorism*, 67 IND. L.J. 767, 779 (1992) [hereinafter Petersen].

(b) murder, voluntary manslaughter, and assault causing grievous bodily harm;

(c) kidnapping, abduction, or serious unlawful detention, including taking a hostage;

(d) an offense involving the use of a bomb, grenade, rocket, firearm, letter or parcel bomb, or any incendiary device if this use endangers any person; and

(e) an attempt to commit any of the foregoing offenses or participation as an accomplice of a person who commits or attempts to commit such an offense.[304]

This enumeration essentially abolishes the concept of the relative political offense with regard to certain violent crimes and has a potentially dramatic impact on the ability of terrorists to claim immunity from extradition under a political offense exception.[305] Under the provisions of the Supplementary Extradition Treaty, crime and politics are uncoupled; aircraft hijackers and hostage takers will be subject to extradition on the same terms as armed robbers and burglars.[306] By reformulating the political offense exception, the Supplementary Extradition Treaty attempted to retain the principle of protected political activity for which extradition would be denied and, at the same time, to close the loophole through which terrorists had escaped prosecution.[307]

The movement towards restricting the political offense exception contained in this provision subsequently found resonance in various U.N. conventions[308] and regional treaties.[309]

304. US-UK Supplementary Extradition Treaty, art. 1.

305. *See*, Petersen, *supra* note 303, at 779.

306. Steven Lubet, *Extradition Unbound: A Reply to Professors Blakesley and Bassiouni*, 24 TEX. INT'L L.J. 47, 48 (1989).

307. Petersen, *supra* note 303, at 781. But *cf.* Christopher Blakesley, *The Evisceration of the Political Offense Exception to Extradition*, 15 DEN. J. INT'L L. & POL'Y 109 (1986) (Professor Christopher Blakesley argues that the treaty "eviscerates" both the political offense exception and the separation of powers doctrine.); and M. Cherif Bassiouni, *The "Political Offense Exception" Revisited: Extradition Between the U.S. and the U.K. — A Choice Between Friendly Cooperation Among Allies and Sound Law and Policy*, 15 DEN. J. INT'L L. & POL'Y 255, 280-82 (1987) (Bassiouni contends that the treaty is damaging to the execution of United States foreign policy.).

308. *See, e.g.,* Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 860 U.N.T.S. 106; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 974 U.N.T.S. 178; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 1035 U.N.T.S. 168; International Convention Against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 206; Convention on the Physical Protection of Nuclear Material, Mar. 3, 1980, 1456 U.N.T.S. 1987; Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, 1589 U.N.T.S. 474; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 222; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 1678 U.N.T.S. 304; International Convention for the Suppression of Terrorist Bombings, opened for signature Jan. 12, 1998, 37 I.L.M. 248; International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 54/109, U.N. GAOR, 54th Sess., 76th mtg., U.N. Doc. A/RES/54/109 (2000).

309. *See, e.g.*, Inter-American Convention Against Terrorism, June 3, 2002, AG/RES. 1840 (XXXII-O/02), OAS Doc. OEA/Ser.P/AG/doc. 4143/02 [hereinafter Inter-American Convention Against Terrorism]; Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism, June 4, 1999, *available at* http://untreaty.un.org/English/Terrorism/csi_e.pdf (last accessed Mar. 10, 2007); Convention of the Organization of the Islamic Conference on Combating International Terrorism, July 1, 1999 (entered into force Nov. 7, 2002), *available at* http://www.oic-un.org/26icfm/c.html (last accessed Mar. 10, 2007); Organization of African Unity Convention on the Prevention and Combating of Terrorism, Jul.14, 1999 (entered into force Dec. 6, 2002), *available at* http://untreaty.un.org/English/Terrorism/oau_e.pdf (last accessed Mar. 10, 2007); South Asian Association for Regional Cooperation Regional Convention on the Suppression of Terrorism, Nov. 4, 1987 (entered into force Aug. 22, 1998), *available at* http://untreaty.un.org/English/Terrorism/Conv18.pdf (last accessed Mar. 10, 2007).

310. *See, e.g.*, In the Matter of the Extradition of Atta, 706 F.Supp. 1032 (E.D.N.Y. 1989); *In Re* Extradition of Singh, 170 F. Supp. 2d 982 (E.D. Cal. 2001); *In Re* Gomez Ces, Corte di Cassazione, in Gius. Pen. II at 394; *See In Re* Van Anraat, Judgment of Jan. 23, 1990, Corte di Cassazione, Sez. I Penale, Sentence No. 3329 at 1.

C. Municipal Decisions

The same trend towards depoliticization is reflected in various municipal decisions,[310] most particularly, in the case of *In Re Extradition of Khaled Mohammed El Jassem* ("In re Al-Jawary" or "Al-Jawary"). In said case, the Italian Supreme Court of Cassation addressed the issue of whether Khaled Mohammed El Jassem, an Iraqi terrorist accused of placing three bombs in New York City in 1973 and subsequently arrested in Rome in 1991, could

be extradited to the United States.[311] After Al-Jawary's arrest by the Italian border police, subsequent investigations linked the Iraqi national to an individual being sought by U.S. authorities for a bombing campaign in New York in 1973.[312]

Upon hearing of his arrest, the American government requested for Al-Jawary's extradition pursuant to the U.S.-Italian Extradition Treaty.[313] At the extradition proceedings, the Court of Appeals decided to grant the request for extradition.[314] Al-Jawary appealed the decision to the Italian Supreme Court of Cassation.[315] The Italian Supreme Court held that his acts did not constitute a political offense, affirmed the decision of the Court of Appeals,[316] and thereafter ordered his extradition to the United States.

The significance of this case should not be underestimated. Here, the Italian Supreme Court applied a new interpretation of the political offense doctrine that appeared to be in direct contravention with the provisions of its Constitution and Penal Code, which would have sanctioned Al-Jawary's actions under the political offense exception.[317] The Supreme Court concluded that Al-Jawary's crime did not constitute a political offense and justified as the basis for its decision the prevailing tendency under international law to diffuse the political offense doctrine.[318] Thus, rather than

311. *In Re* Extradition of Khaled Mohammed El Jassem, Judgment of Feb. 17, 1992, Corte di Cassazione, Sez. Penale I/a, Sentence No. 767 at 1.

312. Santo F. Russo, *In Re Extradition of Khaled Mohammed El Jassem: The Demise of the Political Offense Provision in U.S.-Italian Relations*, 16 FORDHAM INT'L L.J. 1253, 1294 (1993).

313. *See*, Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Italy, U.S.-Italy, Oct. 13, 1983, T.I.A.S. No. 10837, *reprinted in* 24 I.L.M. 1527.

314. *In Re* Extradition of Khaled Mohammed El Jassem, Judgment of May 21, 1991, Corte di appello di Roma, Sez. Pen. IV, Sentence No. 1/91 at 19.

315. *Id.*

316. *Id.* at 17.

317. *In Re* Extradition of Khaled Mohammed El Jassem, Corte di Cassazione at 14-18.

318. This tendency is reflected in the: (1) Belgian *attentat* clause of article 3, ¶ 3 of the European Convention on Extradition; the European Convention on the Suppression of Terrorism; (2) the Hague Convention for the Suppression of Unlawful Seizure of Aircraft; (3) and the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation. Though the court dismissed the U.S. Government's contention that the Montreal Convention was applicable in the present case, the court agreed that the Convention was evidence of an international consensus to limit the political offense exception.

upholding Italian domestic law and the traditional approach to the political offense doctrine, the Court of Cassation applied a new interpretation of political offenses in view of prevailing international legislation: *"[A]i fini estradizionali, occorre muovere ... dall'evoluzione della normativa internazionale (trattati bilaterali e convenzioni plurilaterali) in materia."*[319]

D. Depoliticization of Terrorist Acts Corresponds to a Narrowing of the Scope of Political Offenses

The instances of state practice as recounted and discussed above reflect a trend towards deactivating political considerations resulting in the treatment of terrorists as common criminals.[320] As demonstrated, pure political offenders are the primary targets that the political offense exception seeks to protect.[321] Typical of these pure political crimes include treason, sedition, conspiracy to overthrow the government, and espionage.[322] Such offenses are meant to be vehicles for carrying out the expression of political ideas, they generally do not incite violence, and, thus, lack the elements of common crimes.[323] As demonstrated by various extradition treaties, pure political offenders are the primary targets that the political offense exception seeks to protect.[324] In addition to this, the majority of cases dissecting the applicability of the political offense exception concern relative political offenses which are actions motivated by political reasons and carried out

319. Santo F. Russo, *In Re Extradition of Khaled Mohammed El Jassem: The Demise of the Political Offense Provision in U.S.-Italian Relations*, 16 FORDHAM INT'L L.J. 1253, 1258 n. 20 (1993) (translated, this means: "With regards to extradition, it is necessary to proceed ... with [an analysis of] the evolution of international norms [bilateral treaties and multilateral conventions] on the subject.").

320. Jan Klabbers, *Rebel with a Cause? Terrorists and Humanitarian Law*, 14 EUR. J. INT'L L. 299, 306 (2003).

321. *See*, Green, *supra* note 26, at 454 (1991). *See also*, Valerie Epps, *The Validity of the Political Offender Exception in Extradition Treaties in Anglo-American Jurisprudence*, 20 HARV. INT'L L.J. 61, 63 (1979) [hereinafter Epps].

322. *See*, Banoff & Pyle, *To Surrender Political Offenders: The Political Offense Exception to Extradition in United States Law*, 16 N.Y.U. J. INT'L L. & POL. 169, 178 (1984); R. Stuart Phillips, *The Political Offense Exception and Terrorism: Its Place in the Current Extradition Scheme and Proposals for its Future*, 15 DICK. J. INT'L L. 337, 342 (1997).

323. M. Cherif Bassiouni, *Ideologically Motivated Offenses and the Political Offenses Exception in Extradition — A Proposed Judicial Standard for an Unruly Problem*, 19 DE PAUL L.REV. 217, 245-258 (1969) [hereinafter Bassiouni, *Ideologically Motivated Offenses*].

324. Epps, *supra* note 321, at 63.

through common crimes.[325] Acts of terrorists are generally indiscriminate forms of violence that do not immediately affect governmental structure.[326] Thus, terrorism falls under the definition of relative political offenses rather than that of pure political offenses. The shift in attitude towards the treatment of terrorist acts as relative political offenses is significant because it reinforces the author's proposition that these are no longer to be considered within the ambit of the political offense exception.

VIII. CONCLUSION

A. Effect of Depoliticization on Piracy Jure Gentium: Broader Interpretation of Acts Committed for Private Ends

Consequently, the near-demise of the relative political offense exception as evidenced by customary international law indicates that there are only a handful of pure political offenses: treason, sedition, conspiracy to overthrow the government, and espionage.[327] With the exception of these, there can be no other political offenses, unless otherwise provided for in treaties.[328] In the context of piracy *jure gentium*, this trend towards depoliticization births corollaries, allowing a broader interpretation of acts being for private ends and a narrower construction of those alleged to be for political ends. This means that present customary interpretation of piracy's private ends requirement is broad enough to include acts of mixed motivation and certain acts of maritime terrorism, particularly the boarding of a vessel on the high seas, committing acts of depredation or violence in the process in order to further a maritime terrorist's cause, can be subsumed under piracy and are to be properly appreciated as such.

B. The Case of Castle John and Nederlandse Stichting Sirus v. N.V. Parfin: A Broad Interpretation of Piracy's Private Ends Requirement

The Belgian action against Greenpeace, *Castle John and Nederlandse Stichting Sirus v. N.V. Parfin*,[329] holds the distinction of being the only seminal case which has apparently been brought under the piracy provisions of the Convention on the High Seas and the UNCLOS. On 26 April 1985, Greenpeace began an extensive campaign against NL Chemicals of Ghent

325. Bassiouni, *Ideologically Motivated Offenses*, *supra* note 323, at 248.

326. Green, *supra* note 26, at 454.

327. *Id.*

328. This contrary stipulation is highly unlikely, considering that many modern treaties no longer contain the political offense exception.

329. Castle John and Nederlandse Stichting Sirius v. N.V. Marjlo and N.V. Parfin, 77 INT'L L.R. 537 (1986).

and Bayer of Antwerp, who were freshly licensed by the Belgian government to dump titanium dioxide waste in the North Sea. Greenpeace activists boarded the NL Chemicals dump ship Falco on two occasions, and the Sirius was later used to blockade the passage of Bayer's dump ship, the Wadsy Tanker, in Antwerp harbour.[330] As a result, Bayer claimed damages against Greenpeace, and the Belgian authorities confiscated the Sirius at the beginning of May.[331]

The court records state that during an 11-day period (25 April to 5 May 1985), dinghies from the Sirius accosted the M.S. Falco and Wadsy Tanker in Antwerp harbor and on the open sea in the Scheldt.[332] Activists from the dinghies dived in front of the bows or in the immediate vicinity of the dumping vessels, attached themselves to the ships' discharge pipes, painted over the windows on the bridge, and threatened to drop the anchors.[333] Additionally the Sirius itself impeded the passage of the Wadsy Tanker from the Van Cauwelaertslvis dock in Antwerp.[334] Taken together, these activities had the cumulative effect of preventing the Falco and Wadsy Tanker from proceeding to fully discharge their cargos.[335] Because of these activities, the Falco and the Wadsy Tanker were prevented from fully discharging their cargo.[336] Eventually, a legal action involving "boarding, occupying and causing damage to the two vessels" was filed in the Belgian Court of First Instance which was resolved against Green Peace.[337] On appeal, the Belgian

330. Samuel Pyeatt Menefee, *The Case of Castle John or Greenbeard the Pirate?: Environmentalism, Piracy and the Development of International Law*, 24 CAL. W. INT'L L.J. 1, 10-11 (1993) [hereinafter Menefee, *The Case of Castle John*].

331. MICHAEL BROWN & JOHN MAY, THE GREENPEACE STORY 120 (2d ed. 1991).

332. Menefee, *The Case of Castle John*, *supra* note 330, at 11.

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.*

337. *Id.* at 12.

> The court held itself without legal authority to the extent that actions occurred on the high seas, but declared the remaining parts of the complaint were well founded. It prohibited the defendants from engaging in any conduct hindering the free passage of the dumping vessels from their point of departure or in their navigation within Belgian territory or territorial waters, when such conduct would risk safety or lives. If Greenpeace did not honor the judgment, the defendants were to be subject to the payment of a penalty of 500,000 francs to the plaintiff or the intervenor — approximately $15,000 in current value.

Court of Appeals noted that the appellant resorted to violence committed for personal ends and in furtherance of their objectives.[338] As the nature of the actions was held to qualify, and the "private ends" test was met, the Court of Appeals found that jurisdiction conferred by the piracy provisions applied. It therefore ordered the defendants to refrain from all conduct wherever committed, hindering or obstructing the freedom of navigation or the discharge of wastes.[339]

Green Peace once again appealed, this time to the Belgian Court of Cassation. The appellant felt that its actions did not involve piracy *jure gentium*, as they were not committed "for private ends."[340] According to this argument, action which impedes, threatens, prevents, or makes more difficult the discharge at sea of waste products which are harmful for the environment, taken with a view to alerting public opinion, cannot be considered as having been committed "for private ends" merely because that aim corresponds with the objects set out in the articles of association of the appellant. The consideration that personal motives, such as hatred, the desire for vengeance, or the wish to take justice into their own hands, "are not excluded" in this case is insufficient in law to deduce the existence of "personal ends."[341] In considering and rejecting this contention, the Court of Cassation noted that:

> The applicants do not argue that the acts at issue were committed in the interest or to the detriment of a State or a State system rather than purely in support of a personal point of view concerning a particular problem, even if they reflected a political perspective. On the basis of these considerations the Court of Appeal was entitled to decide that the acts at issue were committed for personal ends within the meaning . . .of the Convention (on the High Seas). The ground of appeal is therefore unfounded in law.[342]

338. Castle John and Nederlandse Stichting Sirius v. N.V. Marjlo and N.V. Parfin, 77 INT'L L.R. 537, 538-39 (1986). *See also*, Menefee, *The Case of Castle John*, *supra* note 330, at 13.

> This consisted not only of material deeds such as boarding, painting the vessels, making threats with a knife, detaching the cable used for dumping and sawing through it, but also included moral pressure on the crews, such as threats to throw themselves across the bow, the presence of divers in the water, and threats to loose the anchors, all of which could be labeled as forms of violence.

339. *See*, M.S. Wady Tanker, M.S. Sirius N.V. Mabeco, N.V. Parfin v. 1 J. Castle 2 Ned. Stichting Sirius, *et al.*, 20 EUR. TRANS. L.J. 536, 542.

340. *Castle John*, 77 INT'L L.R. at 539.

341. *Id.*

342. *Id.* at 540.

For purposes of this note, it is important to underscore that the Belgian Court of Cassation, in setting up a private-public ends dichotomy, appeared to have taken a restrictive view of the latter concept, noting that "public ends" are "in the interest or to the detriment of a State or State system," and differentiating those cases involving "a personal point of view concerning a particular problem, even if they (the acts involved) reflected a political perspective."[343] This observation on the part of the Belgian Court shares parallelisms with acts considered pure political offenses, namely, victimless crimes such as treason, sedition, and espionage because they are committed "in the interest or to the detriment of a State or State system." In sum, this ruling exemplifies a broader interpretation accorded to piracy's private ends as reflected in customary international law.

C. Subsuming Certain Acts of Maritime Terrorism under Piracy Jure Gentium and the Private Ends Test

The preceding discussion can only lead to the inevitable conclusion that piracy's private ends requirement is broad enough to accommodate acts animated by mixed motivations and that certain acts of maritime terrorism can be subsumed under piracy *jure gentium*. More concretely, applying the scenario contemplated in the scope of this note, this means that should a maritime terrorist group hijack a vessel on the high seas, rob its passengers and crew of their belongings in order to finance their activities, they commit a *délit connexe*,[344] a relative political offense, and the act is properly appreciated as piracy *jure gentium*, not maritime terrorism.

IX. THE PRIVATE ENDS TEST: A RECOMMENDATION

The determinative test of whether an act constitutes piracy *jure gentium* or maritime terrorism is not solely the presence of *animo furandi*, or an "intent to rob," as previously restricted,[345] but a broad conception of the private ends requirement, such that the slightest hint of the act's being motivated "for private ends" removes it from the categorization of maritime terrorism and criminalizes it as piracy *jure gentium*. This test, referred to by the author as the "Private Ends Test," draws inspiration from the Belgian Court of Cassation's decision in the case of the *Castle John*,[346] which as the author observes, shares parallelisms, albeit unintentional, with the French "Injured

343. *See, id. See also*, Menefee, *The Case of Castle John*, *supra* note 330, at 14.

344. *See*, GILBERT, *supra* note 274, at 119.

345. 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 27, at 608-09.

346. Castle John and Nederlandse Stichting Sirius v. N.V. Marjlo and N.V. Parfin, 77 INT'L L.R. 537, 540 (1986).

Rights Test" in the determination of political offenses.[347] The author has also devised this test in response to terrorists invoking the political offense exception to justify what might otherwise have been considered criminal acts, where the appellation "terrorist" serves more of a benediction and an exculpation rather than a condemnation.[348]

A. Determination of Rights or Interests Injured

Once personal jurisdiction is acquired over the perpetrators of the acts contemplated within the scope of this note, and assuming all the elements of piracy *jure gentium* are present, save for the intent or motivation, it is up to the domestic courts exercising jurisdiction to determine whether the act was done for private or political ends. To do this, the court must first identify the target and determine what rights or interests have been injured. If a relative political offense is committed and, in the process, private rights are injured, then the acts are correctly appreciated as piracy *jure gentium*. If it is the State, however, that is injured, meaning a pure political offense was committed, the offense is one other than piracy *jure gentium* which if one is fortunate, is punishable under some treaty or convention.

How does one arrive at a determination as to what kinds of rights have been injured? Reference to the French "Injured Rights Test" has been enlightening, as this is, to date, most reflective of the consensus among States in favor of a restrictive political offense exception. According to the principles embodied by this test, the French courts consider an act political only if it directly affects the political organization of the State, and excludes examination of the offender's political motives.[349] As originally formulated by French courts, the political offense exception to the law was dependent upon the nature of the rights injured by the accused's actions.[350] This principle is accurately enunciated in the case of *In Re Giovanni Gatti*,[351] where as has already been discussed, the French Court of Appeals did not review Gatti's subjective motivation or the circumstances existing at the time

347. *See*, Nancy P. Kelly, *The Political Offense Exception to Extradition: Protecting the Right of Rebellion in an Era of International Political Violence*, 66 OR. L. REV. 405, 407 (1987).

348. *See*, L.F.E. Goldie, *The "Political Offense" Exception and Extradition Between Democratic States*, 13 OHIO N.U. L. REV. 53, 57 (1986).

349. Garcia-Mora, *supra* note 271, at 1249.

350. *Id. See also*, Michael R. Littenberg, *The Political Offense Exception: An Historical Analysis and a Model for the Future*, 64 TUL. L. REV. 1195, 1200 (1990) [hereinafter Littenberg].

351. *In Re* Giovanni Gatti, S. Jur. II 44 (Cours d'appeal, Grenoble 1947), 14 Ann. Dig. 145 (Ct. App. Grenoble, Fr. 1947).

of the commission of the offense, choosing instead to focus primarily on whether the requesting State had been directly injured by the offense.[352] The Court of Appeals concluded that to constitute a political offense, the act could harm only the political structure of the State. Gatti was extraditable because the crime of homicide only injured private rights.[353]

This was reiterated in subsequent French decisions. In both *In Re Piperno*[354] and *In Re Pace*,[355] Italy sought extradition of Red Brigade members accused of conspiring to kidnap and murder Aldo Moro.[356] The Paris Court of Appeals granted both extradition requests, holding that when the "assassination of a man who, although the leader of a political party, did not have the responsibility of power, the political context wanes in the face of the hideous character of the aggression,"[357] and likewise noted that intent of the French legislature was to permit extradition for every "offense the rude, wild or inexcusable character of which would shock the universal consciousness."[358] The exception was interpreted similarly in *In re Barabass*,[359] *In re Hoffman*,[360] and *In re Linaza*.[361] These cases are therefore authority for the narrowing of the political offense exception to encompass

352. *Id.* at 45.

353. *Id.*

354. *In Re* Piperno, Judgment of Oct. 17, 1979, Cour d'appel, Paris, T.A.C.P. 376.

355. *In Re* Pace, Judgment of Nov. 7, 1979, Cour d'appel, Paris, T.A.C.P. 367.

356. Littenberg, *supra* note 350, at 1204.

357. *In Re* Pace, Judgment of Nov. 7, 1979, Cour d'appel, Paris, T.A.C.P. 375; *See also In Re* Piperno, Judgment of Oct. 17, 1979, Cour d'appel, Paris, T.A.C.P. 379.

358. *See, In Re* Pace, Judgment of Nov. 7, 1979, Cour d'appel, Paris, T.A.C.P. 375.

359. *In Re* Barabass. Judgment of July 9, 1980, Cour d'appel, Paris, T.A.C.P. 353 (In *Barabass*, West Germany sought extradition of a member of the "June 2 Movement," a group dedicated to the overthrow of the social order in the Federal Republic of Germany, who was accused of kidnapping an industrialist.).

360. *In Re* Hoffman, Judgment of July 9, 1980, Cour d'appel, Paris, T.A.C.P. 358 (In *Hoffman*, a member of the "Red Army Faction" was accused of kidnapping and murder.).

361. *In Re* Linaza, Judgment of June 3, 1981, Cour d'appel, Paris (unpublished). *See also*, Carbonneau, *The Political Offense Exception as Applied in French Cases Dealing with the Extradition of Terrorists: The Quest for an Appropriate Doctrinal Analysis Revisited, in* TRANSNATIONAL ASPECTS OF CRIMINAL PROCEDURE 231 (1983). (In *Linaza*, Spain requested extradition of a Basque accused of assassinating a government official, attempting to attack a nuclear power plant, and ambushing a military convoy which resulted in the death of six soldiers. The court approved the extradition request, holding that the heinous nature of the crimes prevented examination of the offender's political motivation.).

only those considered pure political offenses. Although the French "Injured Rights Test" has been used in extradition cases to determine whether an offense is extraditable, it will be applied analogously to the situation at hand.

B. Determination of Whether Acts Constitute Pure or Relative Political Offenses

The next step is to determine whether the acts constitute pure or relative political offenses. Closer to the subject of piracy *jure gentium* is the ruling of the Belgian Court of Cassation in the case of *Castle John*. Here, as previously noted, the Court elaborated that acts for "public ends" referred to those committed "in the interest or to the detriment of a State or State system," and differentiated these from cases involving "a personal point of view concerning a particular problem, even if the acts involved reflected a political perspective."[362]

Taken side by side, the Belgian Court of Cassation's interpretation of "public or political ends" as those committed "in the interest or to the detriment of a State or State system"[363] and the French Court of Appeal's elucidation in *In Re Gatti* that political crimes "only affect the political organization of the State,"[364] indicate that piracy's political ends exception exclusively refers to acts considered pure political offenses, namely, the victimless crimes of treason, sedition, and espionage. The key then to deciphering the scope of piracy's private ends requirement lies not so much in dissecting "what it is," than "what it is not," and so the answer to the question of what constitutes an act of violence, depredation, or detention committed for private ends must necessarily be couched in the negative as "one committed other than for political ends."

Since it would be difficult or nearly impossible to pinpoint with certainty the motivations or intent behind a maritime attack, these ought to be necessarily inferred from the very acts that characterized the attack. Applying the aforementioned basis for distinction, "acts committed other than for political ends," meaning "for private ends," refer to relative political offenses while those "committed for political ends" refer exclusively to pure political offenses.

C. Application of the Private Ends Test

362. *See*, Castle John and Nederlandse Stichting Sirius v. N.V. Marjlo and N.V. Parfin, 77 INT'L L.R. 537, 540 (1986). *See also*, Menefee, *The Case of Castle John*, *supra* note 330, at 14.

363. *See*, *Castle John*, 77 INT'L L.R. at 540.

364. *In Re* Gatti, S. Jur. II 44 (Cours d'appeal, Grenoble 1947), 14 Ann. Dig. 145 (Ct. App. Grenoble, Fr. 1947).

Applying the "Private Ends Test" to the scenario contemplated in the scope of this note, should a maritime terrorist group hijack a vessel on the high seas, rob its passengers and crew of their belongings in order to finance their activities, they commit a relative political offense and the act is properly appreciated as piracy *jure gentium*, not maritime terrorism. The same conclusion would be reached even if there was no robbery, so long as there were acts of violence or detention. This is precisely because the rights or interests injured were private and did not affect the organization or structure of the State. As such, the act is considered a relative political offense from which it could be inferred that the act was "committed for private ends." This being the case, the attack is properly categorized as piracy *jure gentium*, not maritime terrorism or some other political offense, even if the perpetrators were to justify their actions as being "for political ends."

Suppose the *locus* of the attack be within a State's territorial waters, would the acts still constitute piracy *jure gentium*? The answer is obviously no, based on the definition of piracy *jure gentium* contained in the Convention on the High Seas and the 1982 UNCLOS.[365] Nevertheless, the requirement that the venue of the crime be on the high seas is only a means of establishing jurisdiction and merely serves as a procedural device to regulate the universal character of the offense.[366] Either way the prosecution of the crime is still territorial and would not preclude the application of the proposed "Private Ends Test" in case of conflation between acts of piracy and maritime terrorism.

Whenever a piratical attack occurs, the act or crime is hardly deemed "political" simply because the perpetrator so characterizes it.[367] The fulcrum of the decision should not be the mind of the "terrorist," but that of the judge weighing the facts.[368] As noted by Chief Justice Cockburn in *In Re Tivnan*: "It is not because persons assume the character of belligerents that

365. *See*, Convention on the High Seas, art. 15; UNCLOS, art. 101.

366. *See*, Harvard Draft, *supra* note 101, at 788 (The Harvard Draft limited piracy's field of operations on the high seas "where alone it can be committed," and presumed the enactment by individual States of legislation governing criminal acts, including acts of piracy occurring within their territorial waters. This limitation was carried over to the Geneva Convention on the High Seas and the 1982 UNCLOS, presumably because the drafters wanted "to avoid reopening old controversies.").

367. Menefee, *The New "Jamaica Discipline,"* *supra* note 126, at 143.

368. Menefee, *Piracy, Terrorism, and the Insurgent Passenger*, *supra* note 176, at 60.

they can protect themselves from the consequences of an act really piratical."[369]

An act may have both a political and private nature, but as Birnie points out, piracy is "clearly confined to private ends; all political seizures are ruled out unless 'private' is to be liberally interpreted in certain circumstances."[370] Perhaps the adoption of the proposed "Private Ends Test" may prove instructive in the determination of whether certain acts of maritime terrorism were done "for private ends" and may thus be subsumed under piracy *jure gentium*.

369. *In Re* Tivnan, 5 B. & S. 677, 680-81 (1864), *reprinted in* 122 E.R. 971, 984. Justice Cockburn writes:

> If persons who are not the subjects of a belligerent state take arms in its support; although by so doing they may violate the law of their own country against volunteering on foreign service, and even render themselves subject to a rigour from the opposite party happily unknown in modern times; still if the act is not done with piratical intention, but with the bona fide intent to aid one of the belligerent parties, they cannot according to any recognized law be treated as pirates. But it is not because persons assume the character of belligerents that they can protect themselves from the consequences of an act really piratical.

370. Birnie, *supra* note 130, at 171.

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