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Hostis Humani Generi: Piracy, Terrorism and a New International Law

Douglas R. Burgess Jr.

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HOSTIS HUMANI GENERI: PIRACY, TERRORISM AND A NEW INTERNATIONAL LAW

*Douglas R. Burgess, Jr. **

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Dedication

On July 31, 2002, a terrorist attack at the University of Jerusalem took the life of my best and dearest friend, David Gritz. He had arrived at the university just the week before, to begin studies in Hebraic scholarship through a grant from the Hartzmann Institute. David was a true scholar, the finest I have ever known. He left for Jerusalem against the repeated protestations of his parents and his friends, including my own. But for David, intellectual curiosity triumphed over all. I once told him that he would quite willingly hang upside-down on Mt. Fuji if he felt he could learn something from it, and he playfully reminded me of that comment when we last spoke on the phone, just hours before his plane left Paris. David's death robbed the world of one who might, through his intelligence, compassion and perseverance, have transformed it.

I dedicate this article as I have dedicated my life, to the memory of my friend David Gritz, and the promise that his will be among the last sacrifices to the barbaric maw of terrorism.

Introduction

This article will examine the existing state of international law regarding terrorists and terrorism. The article's purpose is to recommend a

* B.A., McGill University, 1999; J.D., Cornell University, 2002; L.L.M., University of British Columbia, 2003; M.A., Brown University, 2004. Currently completing a Ph.D., Brown University. His first book, "Seize the Trident," is available from McGraw-Hill; also recently featured in The New York Times, Legal Affairs Magazine, The Guardian, and the American Bar Association National Security Law Report. He can be reached at douglas_burgess@brown.edu.

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

International law is largely predicated on the assumption that all parties to a given conflict are states.¹ Furthermore, statehood is understood as a distinct and recognizable category, determined principally by established territorial boundaries, an acting government, and international recognition.² Many centuries of history have reinforced the view that only states may make war upon each other, form treaties, or act in general as principals on the international stage.³ Consequently, the current body of international law remains rooted in traditional concepts of statehood and aggression. These concepts have existed, virtually unchanged, since the very genesis of diplomacy.⁴

Yet recent events have demonstrated how perilously arcane these concepts have become. The presumption of state versus state conflict fails to consider the threat of non-state actors that possess enormous financial and human resources and thus pose a comparable threat to established states. These include multinational terrorist organizations. While international law does not ignore their existence, declarations, conventions and covenants reflect a conception of terrorism as either an isolated act perpetrated by individuals, or as a state-sponsored activity sharing many similarities with

¹ While it is impossible to demonstrate this statement with a single reference, a brief perusal of U.N. Conventions, available online at www.un.org/events/conferences.htm, evidences its validity.

² See 1 OPPENHEIM'S INTERNATIONAL LAW 120-123, 330-331 (9th ed. 1992) (hereinafter OPPENHEIM).

³ See Jacob W.F. Sundberg, *Piracy: Air and Sea*, 20 DEPAUL L. REV. 337, 362-363 (1971).

⁴ See generally Michael Rosetti, Note, *Terrorism as a Violation of the Law of Nations After Kadic v. Karadzic*, 12 ST. JOHN'S J. LEGAL COMMENT. 565 (1997) (discussing how federal courts lacked jurisdiction over claims against private individuals accused of violating international law until the Second Circuit Court of Appeals' 1996 decision in *Kadic v. Karadzic*; and, how the lack of an international consensus on a definition of terrorism has inhibited application of international law to terrorists).

genocide or other proscribed state conduct.⁵ Neither definition confronts the reality of international terrorism: highly organized, well-funded and potent organizations whose strength is derived from the very properties that distinguish them from states. Such properties include the lack of territorial boundaries, lack of recognized government, and lack of international recognition.⁶ A single perpetrator of a terrorist act may be brought to justice, but the organization itself remains beyond the law. There is currently no recognition in international law of the crime of terrorism *per se*: that is, the crime of belonging to a terrorist organization without necessarily committing acts of violence.⁷ The crucial problem facing international jurists is to formulate a working definition of terrorist and terrorism that recognizes the uniqueness of the threat they pose, while placing them within the parameters of established international law.⁸

Events have conspired to make this an even more daunting task. The world after September 11, 2001, is in a state of profound flux, as the United States pursues its “war on terrorism.” President George W. Bush has pithily summed up its policy with the phrase, “You are either with us or with the terrorists.”⁹ Yet, the lines of demarcation are often difficult to place. In the aftermath of the second Iraqi war, the President himself often conflates the “war on terror” with American involvement in Iraq, despite the tenuous—perhaps even nonexistent—linkage between the two conflicts.¹⁰ On June 2, 2004, President Bush declared that “like the Second World War,

⁵ See, e.g., the Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 860 U.N.T.S. 105; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 974 U.N.T.S. 177; International Convention against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 205; International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 37 I.L.M. 249 (1998); International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 39 I.L.M. 270 (2000).

⁶ Brian Jenkins, *International Terrorism: A New Mode of Conflict*, in INTERNATIONAL TERRORISM AND WORLD SECURITY 21 (David Carlton & Carlo Schaerf eds., 1975).

⁷ See Yonah Alexander, *Terrorism: A Definitional Focus*, in TERRORISM AND THE LAW 3 (Yonah Alexander & Edgar H. Brenner eds., 2001).

⁸ See generally Alfred Rubin, *Legal Response to Terror: An International Criminal Court?*, 43 HARV. INT’L L.J. 65 (Winter 2002) (critiquing the International Criminal Court as an arena to try terrorists).

⁹ D.T. Max, *The Making of the Speech*, N.Y. TIMES, October 7, 2001, § 6, at 32.

¹⁰ Douglas Jehl, *Pentagon Reportedly Skewed C.I.A.’s View of Qaeda Tie*, N.Y. TIMES, October 22, 2004, at A10.

our present conflict began with a ruthless surprise attack on the United States,” which evinces a desire to equate the present “war on terror” with traditional pre-existing concepts of state versus state conflict.¹¹ He followed this statement with another, even more entrenched in archaic conceptions of warfare: “We will not forget that treachery and we will accept nothing less than victory over the enemy.”¹² It is not always clear which enemy the President has in mind, or to which conflict he refers. What, for example, constitutes ultimate “victory” against an enemy which lacks territorial boundaries and governmental structures?

International law, as articulated by the United Nations, is also struggling—and failing—to keep pace with this new form of conflict. Despite recent efforts, there remains no formal definition of the crime of organized terrorism, but rather a hodgepodge of covenants addressing such individual elements as aerial hijacking and hostage taking.¹³ The necessity for an international law on terrorism is doubly immediate, for at this moment, both the United States and its terrorist nemeses pursue each other across a vast chessboard of states with no international covenants governing their actions. The United States has held several hundred persons captive without charge at Guantanamo Bay, Cuba, and has engaged the full weight of its secret services in a covert and silent manhunt.¹⁴ The terrorists, meanwhile, continue to plan and execute their crimes beyond the jurisdiction of the International Criminal Court (ICC) or like international judicial bodies.¹⁵ The current state of international law falls well behind in

¹¹ *Bush compares Iraq, terror wars to World War II*, CNN.com, June 3, 2004 at <http://cnnstudentnews.cnn.com/2004/ALLPOLITICS/06/02/bush.speech/> (last accessed February 19, 2005).

¹² *Id.* These comments are also available at <http://www.whitehouse.gov/news/releases/2004/06/print/20040602.html>.

¹³ See generally EDWARD MCWHINNEY, *AERIAL PIRACY AND INTERNATIONAL LAW* (1971); JAMES A. AREY, *THE SKY PIRATES* (1972), (discussing the events of several aerial hijackings and the international community's difficulties in addressing the problem). An enumerated list of U.N. Conventions is available online at http://www.unodc.org/unodc/en/terrorism_conventions.html.

¹⁴ Paisley Dodds, Associated Press, *3 years in operation, Guantanamo remains*, BOSTON GLOBE, Jan. 10, 2005, at http://www.boston.com/news/nation/articles/2005/01/10/3_years_in_operation_guantanamo_remains?pg=full.

¹⁵ Todd M. Sailer, Comment, *The International Criminal Court: An Argument to Extend Its Jurisdiction to Terrorism and a Dismissal of U.S. Objections*, 13 TEMP. INT'L & COMP. L.J. 311, 321 (Fall 1999).

addressing this new reality, written instead for a world where terrorism existed only on the lunatic fringe of international society, and the greatest enemy to the nation state came from another state.¹⁶ Thus, the 21st century “war on terrorism” is being conducted—by both states and non-states—in a relative vacuum of international law.

Recent efforts to formulate a comprehensive international law on terrorism and place it within the jurisdiction of the newly-formed ICC are noteworthy, but fruitless.¹⁷ As with earlier attempts concerning the crime of aggressive war, the debate has deadlocked over a workable definition for the crime of “terrorism.”¹⁸ The hackneyed adage that “one man’s terrorist is another man’s freedom fighter”¹⁹ renders any attempt at definition virtually impossible, dividing states on ideological lines and convoluting the situation all the more. Yet it also presupposes a conception of terrorism starkly different from the reality. Terrorists rarely fit the semi-romantic imagery of ragtag revolutionaries; today they are organized, well-funded and multinational bodies that have more in common with international corporations than freedom fighters.²⁰

Romantic imagery aside, there is an easily recognized legal entity with which these new terrorists have remarkable similarities: pirates. This article will demonstrate that piracy is, in fact, the legal genesis of modern

¹⁶ See generally *id.* (arguing that the jurisdiction of the International Criminal Court should be extended to include jurisdiction over transnational terrorists).

¹⁷ I would draw the reader’s attention to the efforts of the U.N. Working Group on Terrorism, Harvard’s Long-Term Legal Response to Terrorism, and the dedicated scholarship of a small number of academics, including Samuel Menefee, Alfred Rubin, Todd Sailer and James Fry. Mr. Fry has advanced a novel argument for the inclusion of terrorist crimes in the ICC under the umbrella jurisdiction of either Crimes Against Humanity or Genocide. See, e.g., James D. Fry, Comment, *Terrorism as a Crime Against Humanity and Genocide: The Backdoor to Universal Jurisdiction*, 7 UCLA J. INT’L L. & FOREIGN AFF. 169 (2002). While I applaud Mr. Fry’s efforts, I believe that the attempt to pack and stuff terrorism into an existing crime is rather like fitting the Ugly Sister’s foot into Cinderella’s slipper. It needs its own definition and its own category, but, paradoxically, both must be grounded in existing law or risk lacking legitimacy; hence, as I will argue, the solution of piracy.

¹⁸ Alexander, *supra* note 7, at 7.

¹⁹ See, e.g., Stanley Fish, *Don’t Blame Relativism*, 12 THE RESPONSIVE COMMUNITY 27, 30 (2002) (noting that Reuters News Service did not want to use the word “terrorism” in a news story for that reason).

²⁰ See Jennifer Trahan, *Terrorism Conventions: Existing Gaps and Different Approaches*, 8 NEW ENG. INT’L & COMP. L. ANN, 215, 228 (2002).

organized terrorism. The commonalities between the two are profound, from their aims, methods, and motivations on the one hand, and the deleterious effects on and legal responses of the victimized state on the other.²¹ I will argue that the best and easiest course for formulating a new international law on terrorism is to root it in the existing customary and statutory law of piracy. This will serve two purposes: first, it will make terrorism a crime of international universal jurisdiction, proscribing offences and determining punishment; second, conversely, it will check the impunity of the state's actions in pursuing, capturing and prosecuting terrorists, placing these actions within the regulatory matrix of international law.

To equate pirates with terrorists is a radical departure from existing legal theory and requires some explication at the outset. Though organized international terrorism may be a creature of the late twentieth century,²² it has one significant precedent: the concept of state versus non-state conflict, otherwise unique, has a long and colorful history in the law of piracy.²³ The legal recognition of piracy as a crime against all humanity, and of the pirate himself as an enemy of the human race, emerges from centuries of intermittent conflict and cooperation between states and pirates.²⁴ The idea of pirates as *hostis humani generi* (enemies of the human race) may be two thousand years old,²⁵ but it has taken almost all of that time for that conception to gain ultimate acceptance in international law. Until the Declaration of Paris in 1856, the legal geopolitical conception fluctuated between criminality and barbarity on the one hand, to an essential adjunct of the state's armed services (and useful tool of political coercion) on the other.²⁶ The idea of piracy as a universal crime was the ultimate result of

²¹ See Samuel Menefee, *The Achille Lauro and Similar Acts as Piracy: Two Arguments*, in PIRACY AT SEA 179-180 (Eric Ellen ed., 1989).

²² See J. Henk Leurlijk, *Summary of Proceedings: Our Violent Future*, in INTERNATIONAL TERRORISM AND WORLD SECURITY, *supra* note 6, at 3.

²³ See ALFRED P. RUBIN, THE LAW OF PIRACY 1 (2nd ed. 1998) (one historical meaning of "piracy" involves action by "unrecognized states or recognized states whose governments are not considered to be empowered at international law to authorize the sorts of public activity that is questioned, like the Barbary States of about 1600-1830").

²⁴ Philip Buhler, *New Struggle with an Old Menace: Towards a Revised Definition of Maritime Piracy*, 8 CURRENTS: INT'L TRADE L.J. 61, 63 (1999).

²⁵ RUBIN, *supra* note 23, at 17.

²⁶ See generally M.J. Peterson, *An Historical Perspective on the Incidence of Piracy*, in PIRACY AT SEA, *supra* note 21, at 41-60 (discussing the conditions that favor piracy).

this conflict, as states determined that piracy was too heinous to be a legitimate tool of political persuasion.²⁷ Hence, piracy gained its current status as an international crime: a crime not against one state, nor even all states, but against humanity itself. By the same logic, pirates could no longer take refuge behind the protection of sponsor states; their status as international criminals subjected them to universal jurisdiction. In effect, the categorization of pirates as *hostis humani generi* created a third legal category in international law halfway between states and individuals; pirates were deemed at 'war' with civilization itself, and thus granted neither the protections of citizenship nor the sovereignty of states.²⁸ Pirates were akin to a virus in the international body politic, sharing some of the qualities of a living organism, but limited in function to the destruction of the body and thus not meriting the dignity granted to a living being.

In the ultimate legal definition of pirates as *hostis humani generi*, the battle for defining terrorism has already been waged and concluded. Terrorism may adopt piracy's legal history if it can be shown that the proposed "crime" of terrorism, as defined by its acts, motivations, perpetrators and effects, is tantamount in all respects to the crime of piracy. In other words, the crime of piracy will serve as a valid legal precedent for terrorism, as well as a basis for its law. First, as indicated above, it will provide a working definition for organized terrorism as an international crime outside of and in addition to individual terrorist acts which already have recognition in international or domestic law, and will likewise offer a definition of 'terrorist' that meshes neatly within existing international customary and statutory law. Second, it will delineate the legitimate actions states may take in the pursuit, capture and trial of terrorists. The United States' "war on terror" need not be legal *terra nova*: history is replete with examples of states employing their armed forces to root out piracy.²⁹ Equating terrorists with pirates has the efficacious affect of recognizing their level of organization and potential threat, without granting them the

²⁷ See RUBIN, *supra* note 23, at 203 n.255 (signatories of the Paris Declaration agreed that "[p]rivateering is, and remains, abolished").

²⁸ For examples of this definition in contemporary common law, see *In re Piracy Jure Gentium*, 1934 A.C. 586, 589 (PC); *H.M. Advocate v. Cameron*, 1971 S.L.T. 202, 206 (H.C.J.). See also BARRY DUBNER, *THE LAW OF INTERNATIONAL SEA PIRACY* (1980) (an excellent overview of the history and evolution of piracy law).

²⁹ Including, perhaps most notably, President Jefferson's use of the fledgling American Navy to rout the Barbary corsairs in 1804.

legitimacy reserved for states.³⁰ Furthermore, the crime of piracy is far from arcane in contemporary international law: it remains, alongside genocide and a select few others, a crime of universal jurisdiction. Thus, by equating terrorists with pirates, the problem of capture in a recalcitrant or openly hostile state is neatly avoided. A pirate may be captured wherever he is found, provided that capture is undertaken within the boundaries of international law. If the same rule were extended to terrorists, states might enter and retrieve them within the borders of other states without risking impingement on that state's sovereignty. By the same logic, states would have no legal standing to offer protection to terrorists within their borders.

Tracing the history of piracy and government response throughout the ages reveals the birth and evolution of modern terrorism. Granted, this is terrorism in its earliest larval form; nevertheless, it shares many of the political and methodological components of its twenty-first century descendant. This train of logic leads inexorably to an even more momentous concept: that terrorism, in its current form, *is* a form of piracy. It may seem that terrorism is solely a by-product of twentieth century wars and empires, de-colonization and the Cold War.³¹ While these may explain the existence of certain terrorist groups, they do not in themselves account for the greater question of how terror became a political tool in the first place. The criminality of the act itself, not the circumstances motivating a particular act, is the central consideration for any code of law. Thus, we do not inquire *why* a despot commits genocide,³² but rather whether genocide itself is a crime that must be punished, and how to manufacture a law to do so. The questions of "what is terrorism?" and "how can we approach it in the legal context?" can only be answered in one way: by understanding its historical foundation in the law of piracy.

This article is divided into three sections. Part I examines the cultural parallels between terrorism and piracy in world history, arguing that they are in fact two species of the same overall political genus. Part II considers the developing legal history of piracy as a possible precedent for

³⁰ Terrorists, like pirates, will be termed "enemies of the human race." This terminology effectively removes terrorists from the protections of citizenship through the commission of international criminal acts and membership in a terrorist organization which has committed or plans to commit such acts.

³¹ See Brian M. Jenkins, *Future Trends in International Terrorism*, in VIOLENCE AT SEA: A REVIEW OF TERRORISM, ACTS OF WAR AND PIRACY, AND COUNTERMEASURES TO PREVENT TERRORISM 41-42 (Brian A.H. Parritt ed., 1986).

³² If we do, it is confined to the evidentiary phase in determining the breadth of the crime and the despot's individual culpability.

contemporary terrorist legislation. Part III draws these arguments together, proposing a model international law on organized terrorism culled from the existing law of piracy, including legal definitions and suggested jurisdiction.

I. The Historical Linkages Between Piracy and Terrorism

Piracy has flourished on the high seas for as long as maritime commerce has existed between states.³³ While incidents and methods vary from one region to another, both the practice and its practitioners bear universal similarities. Piracy is an act of depredation on the high seas: including torture, homicide, seizure of goods, and destruction of property. Any of these acts, committed independently, is still regarded as piracy.³⁴ Pirates, likewise, may be shortly defined as persons existing beyond the natural scope of society—both its actual and juridical borders—whose activities are directed against the persons or commerce of that society.³⁵

It was the Roman Republic that first gave definition to piracy,³⁶ and much of its law still holds true today. First and foremost is Cicero's famous definition of pirates as *hostis humani generi*,³⁷; but, of nearly equal importance were the attendant laws furnished by Cicero and the Roman Senate which first construed piracy not as a mere action against individuals

³³ See HENRY A. ORMEROD, *PIRACY IN THE ANCIENT WORLD: AN ESSAY IN MEDITERRANEAN HISTORY* 13 (1997).

³⁴ The idea that piracy is merely an act of theft at sea has been outdated for several centuries, despite common belief to the contrary. This point will be raised in some detail later, but it is worth mentioning here. Professor Brierly, in his famous treatise published in 1928, does not even mention the pecuniary aspect of piracy, writing instead:

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

J. L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 240-41 (5th ed. 1955)(1928). The sixth edition of this work has the language rewritten to reflect the definition of piracy in the 1958 Convention, which I discuss in this article .

³⁵ This principle is articulated concisely in the famous piracy case of *United States v. Smith*, 18 U.S. 153, 161 (1820), finding that a pirate, under the law of nations, is an enemy of the human race; being an enemy of all, he is liable to be punished by all.

³⁶ RUBIN, *supra* note 23, at 2.

³⁷ *Id.* at 17 n.61.

but against the nation as a whole.³⁸ The Romans, already mindful of the efficacy of piracy as a tool of hostile governments, gave the offence a common jurisdiction exceeding traditional legal boundaries, thus, in effect creating a very early example of international law.³⁹ 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*.⁴⁰ The twin concepts of *hostis humani generis* and the law of nations led to the following conclusions in Roman law: "(a) all... crimes which constitute 'piracy' [must] occur in areas outside the municipal jurisdictional competence of any nation; (b) "the 'pirate' is... [, consequently,] an enemy of [no individual state but] the [entire] human race; (c) the pirate [must and] should be prosecuted under municipal law... after capture," but the right to prosecute is common to all nations and singular to none.⁴¹ These early precepts form the basis of all international thought regarding piracy up to and including the present.⁴² Most particularly, the Romans must be credited with introducing the central element of international criminal law: universal jurisdiction.⁴³ It is interesting to note that piracy is not merely one of the crimes for which such jurisdiction is applied (the others being slavery, genocide and crimes of aggression) but the *first* such crime.⁴⁴ The idea that pirates may be seized anywhere they are found and prosecuted by any country that captures them, is of critical importance when considering the possibility of a linkage between piracy law and organized terrorism.

Jumping ahead some years to the late sixteenth century, one finds quite a different definition at work. Queen Elizabeth viewed pirates as an essential adjunct to the Royal Navy, and was lavish in granting them letters of mark against Spanish trade.⁴⁵ In the last uneasy years of peace between the two nations, piracy was regarded by the Crown in much the same way as state-sponsored terrorism is viewed today: an ideal way to strike one's

³⁸ *Id.* at 18.

³⁹ *Id.*

⁴⁰ Sundberg, *supra* note 3, at 338 (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").

⁴¹ DUBNER, *supra* note 28, at 42.

⁴² See RUBIN, *supra* note 23, at 2.

⁴³ See *id.* at 117-118.

⁴⁴ See Fry, *supra* note 17, at 175.

⁴⁵ Peterson, *supra* note 26, at 52.

enemy and hide the blade.⁴⁶ State-sponsored piracy aided this aim in numerous ways: (1) it trained future captains by testing their skills against the Spanish before the navies could meet in force; (2) it bled Spanish resources and frustrated their governance of empire, most particularly in the New World; (3) it vastly enriched the English government, providing for the construction of the new fleet; (4) it provided a huge resource of trained and experienced seamen to man the fleet once it was ready; (5) most importantly, it provoked the Spanish into waging war before they were fully prepared, on the necessity of countering the pirate menace.⁴⁷ It is interesting to note that only one of these motivations was entirely monetary. The case for correlating English privateering and contemporary government-sponsored terrorism relies on an understanding of piracy as more than theft for private gain. In its Elizabethan form, piracy—like modern terrorism—was a means of employing force and terror to achieve political ends.⁴⁸

With the accession of James I to the throne in the first years of the seventeenth century came the end of the Spanish wars (by the Treaty of London in 1604) and, for a brief period, the return of law against the pirates.⁴⁹

The first years of James' reign were punctuated by yearly anti-piracy proclamations.⁵⁰ Ironically, his efforts achieved precisely what he most wished to avoid. The sudden illegality of privateering deprived scores of men of their professions, while the decommissioning of much of the Royal Navy left hundreds of seamen abandoned on the wharves.⁵¹ In 1604, in an act of good faith towards the Spanish, James I formally revoked all letters of mark. Though he would later offer clemency to those pirates who sought it, most of the Crown's privateers simply shifted bases and professions and became pirates in earnest.⁵² The sorry situation was best expressed by Captain John Smith:

King James, who from his infancie had reigned in peace with all Nations, had no [e]mployment for those men of warre so that those that were rich rested with what they had; those that

⁴⁶ See RUBIN, *supra* note 23, at 31.

⁴⁷ HUGH F. RANKIN, *THE GOLDEN AGE OF PIRACY* 3-5 (1969).

⁴⁸ See RUBIN, *supra* note 23, at 59.

⁴⁹ See David J. Starkey, *Pirates and Markets*, in *BANDITS AT SEA: A PIRATES READER* 111 (C.R. Pennell ed., 2001)

⁵⁰ See *id.*

⁵¹ See *id.*

⁵² RANKIN, *supra* note 47, at 5.

were poore and had nothing but from hand to mouth, turned Pirats; some, because they became sleighted of those for whom they had got much wealth; some, for that they could not get their due; some, that had lived bravely, would not abase themselves to poverty; some vainly, only to get a name; others for revenge, covetousnesse, or as ill.⁵³

As Smith alludes, the reasons for turning pirate were not always monetary. Though many pirates were little more than "sea-robbers,"⁵⁴ almost as many went to sea to work out demons within themselves: feelings of inferiority, rebelliousness against their low station in life, anarchical hatred, jealousy, revenge.⁵⁵ The pirates of this Golden Age (1688-1725) were, in the words of one historian, "a sorry lot of human trash."⁵⁶ Though often courageous, sometimes merciful, and occasionally even pious, they were on the whole the dregs of England's merchant marine.⁵⁷ Cast out from the fold, these men regarded piracy as a means of exacting personal vengeance on civilization itself.⁵⁸ A pirate ship was a kingdom unto itself, and a "pirate captain" its king. Some captains, like Edward Teach, amassed this power totally unto themselves and ruled as despots through a combination of terror, senseless barbarism, and good seamanship.⁵⁹ Teach, also known as Blackbeard, refined psychological terrorism to an art.⁶⁰ More than any other pirate before or since, Teach understood the symbiotic relationship of terrorism and piracy.⁶¹ While some pirate captains gave quarter to their captured prizes and were often deposed as weaklings by their own crews in response,⁶² Blackbeard was a terrorist *par excellence*. When boarding a prize in battle, he wove long-burning fuses into his enormous beard, wreathing his face in

⁵³ *Id.*

⁵⁴ See Marcus Rediker, *The Seaman as Pirate: Plunder and Social Banditry at Sea*, in *BANDITS AT SEA: A PIRATE READER*, *supra* note 49, at 142.

⁵⁵ *See id.*

⁵⁶ RANKIN, *supra* note 47, at 22.

⁵⁷ *See Rediker, supra* note 55, at 140-41.

⁵⁸ *Id.* at 139-40.

⁵⁹ *See id.* at 150.

⁶⁰ *See id.*

⁶¹ SHIRLEY CARTER HUGHSON, *THE CAROLINA PIRATES AND COLONIAL COMMERCE, 1670-1740* 69-83 (Spartanburg: Reprint Company, 1992) (1894).

⁶² One such pirate, Edward England, earned such a reputation for leniency that his crew deposed and marooned him, leaving him to die a penniless beggar in Madagascar.

green sulphuric smoke and giving himself a truly satanic appearance.⁶³ Like the Vikings before him, and al-Qaeda long afterwards, Blackbeard recognized the value inherent in a reputation for unparalleled barbarism and ferocity.⁶⁴

Yet while some pirate vessels resembled dictatorships, others had the markings of a crude democracy. Pirate captains were often elected and interchangeable.⁶⁵ The level of organization on a pirate vessel could be startling. Totally removed from the laws of society, they made their own, and lived by them scrupulously. These so-called “pirate articles” were often as specific and meticulous as acts of Parliament. An excerpt from those of Captain John Phillips in 1723 provides an example of the articles’ scope and breadth:

1. Every man shall obey civil Command; the Captain shall have one full Share and a half in all prizes; the Master, Carpenter, Boatswain, and Gunner shall have one Share and a quarter.

2. If any Man shall offer to run away, or keep any Secret from the Company, he shall be maroon[e]d with one Bottle of Powder, one Bottle of Water, one small Arm, and Shot.

...

4. If at any Time we shall meet another Marrooner (that is Pyrate) that Man shall sign his Articles without the Consent of our Company, shall suffer such Punishment as the Captain and Company shall think fit.

...

8. If any man shall lose a Joint in time of an Engagement, shall have 400 Pieces of Eight; if a limb 800.

9. If at any time you meet with a prudent Woman, that Man that offers to meddle with her, without her Consent, shall suffer present Death.⁶⁶

These articles suggest that the pirates did not exist in the state of Hobbesian anarchy so often attributed to them, but were instead often as organized and

⁶³ C. R. Pennell, *Brought to Book: Reading about Pirates*, in BANDITS AT SEA: A PIRATE READER, *supra* note 49, at 10.

⁶⁴ Pennell points out that “a victim might pause for thought before resisting a man with Teach’s reputation,” *id.*

⁶⁵ Rediker, *supra* note 55, at 142-143.

⁶⁶ RANKIN, *supra* note 47, at 31.

disciplined a crew as any in the Royal Navy. Pirate captains sometimes furthered this image by mimicking the navy's practice of reading the Articles of War aloud each Sunday after prayers. While the crew stood at attention, the pirate captain recited each article and punishment with due solemnity.⁶⁷

The "pirate articles" are of particular relevance when considering the nature of piracy and its relation to organized terrorism, for they provide an early example of an organization with its own directors, codes of conduct and punishments, functioning for the sole purpose of disrupting trade and wreaking havoc. This further moves the pirate from legal definition as "sea robber" and closer to *hostis humani generis*. While some might argue that pirate acts are synonymous with, for example, rules of membership in an inner-city gang, it can be counter-argued that they indicate the legal separation and distinctiveness of a pirate crew, fostered by actual separation from any nation or rule of law.⁶⁸ Thus the pirate ship becomes a quasi-state unto itself, a legal anomaly which customary international law recognized by granting universal jurisdiction on its capture.

The most interesting element of piracy in the Golden Age, and the most crucial in establishing a nexus between piracy and terrorism, is the motivation of the pirate himself. As suggested earlier, it was frequently as much political as pecuniary. Pirates often saw themselves as rebels against the established order, meting out ferocious revenge on a society that had wronged them from birth. Much of their rage was justified.⁶⁹ The pirate captains of the late seventeenth century, unlike their gentlemanly forbears, came almost exclusively from the lowest castes of society.⁷⁰ They had been pressed into naval service at a young age, spending most of their lives as ordinary seamen.⁷¹ The rank of officer was purchased rather than earned or inherited by virtue of aristocratic title.⁷² Thus, the ordinary seaman with twenty years' experience often felt, quite rightly, that he knew more about

⁶⁷ For more examples of pirate 'democracy,' see MARCUS REDIKER, *BETWEEN THE DEVIL AND THE DEEP BLUE SEA: MERCHANT SEAMEN, PIRATES, AND THE ANGLO-AMERICAN MARITIME WORLD, 1700-1750* (1987). Professor Rediker, in his superb study, argues that the pirates saw themselves as revolutionaries against the hierarchical class system of England, a thesis which draws heavily from the "war against all the world" theme discussed *infra*.

⁶⁸ Rediker, *supra* note 55, at 142.

⁶⁹ *Id.* at 141.

⁷⁰ *Id.* at 142-43.

⁷¹ *Id.* at 140-141.

⁷² *See id.* at 143.

seamanship than his captain.⁷³ When abruptly released from service and left destitute ashore, it was hardly surprising that many such men found piracy a means not only of gaining personal wealth, but taking it as their “pound of flesh” from aristocratic society.⁷⁴

The idea of piracy as personal war against civilization is recurrent throughout the literature of the time.⁷⁵ Daniel Defoe tells of one pirate who “reduced himself afresh to the savage state of nature by declaring war against all mankind.”⁷⁶ Another contemporary account describes the pirate career of Edward Low, who after assailing his captain, fled with a small party of confreres and “took a small Vessel ... [hoisted] a Black Flag, and declare[d] War against all the World.”⁷⁷ Captain Charles Bellamy employed almost exactly the same language as he lambasted a recalcitrant merchant captain:

Damn ye, you are a sneaking puppy, and so are all those who submit to be governed by laws which rich men have made for their own security, for the cowardly whelps have not the courage otherwise to defend what they get by their own knavery ... You are a devilish conscious rascal, damn ye! *I am a free prince and have as much authority to make war on the whole world as he who has a hundred sail of ships and an army of a hundred thousand men in the field.*⁷⁸

The concept of piracy as a war against the world reflected a profound shift in governmental attitudes towards the practice. The golden age of piracy began in earnest just as two wars ended: the conflict between England and France known as King William’s War, concluded in 1697 by the Treaty of Ryswick, and yet another war between England and Spain ending with English victory in 1692.⁷⁹ With the empire in a state of uneasy peace, England, as before, abruptly revoked the licenses of its privateers.⁸⁰ Frustrated and cheated, the privateers turned on their erstwhile government sponsors and directed their activities against all trade, English or otherwise, between Europe and her

⁷³ *See id.*

⁷⁴ *See generally* REDIKER, *supra* note 68.

⁷⁵ *See* Pennell, *supra* note 64, at 4-5.

⁷⁶ RANKIN, *supra* note 47, at 22.

⁷⁷ *Id.* at 147.

⁷⁸ *Id.* at 25 (emphasis added).

⁷⁹ *See* Starkey, *supra* note 49, at 118.

⁸⁰ *Id.*

dominions.⁸¹ Thus, there came a remarkable inverse: piracy, which had for centuries been a weapon used by governments against each other, suddenly became a weapon used against them.⁸²

Corollaries between the Golden Age pirates' "war against the world" and modern terrorism are irresistible and profound. Perhaps for the first time in history we find a group of men who banded together in extra-territorial conclaves, remove themselves from the protection and jurisdiction of the nation-state, and declare a personal war against civilization itself.⁸³ As Elizabethan piracy bears many similarities to state-sponsored terrorism, so too may this later form of rebellion be seen as a precursor to modern multinational terrorist organizations. One might argue that the comparison fails on the grounds of motivation. While the pirates sought nothing more politically than to strike back at their states, most international terrorists seek by their acts to effect a political transformation.⁸⁴ Yet once again, the means outweigh the motivations. Both parties have effectively declared war against the state, a form of state versus non-state conflict that is otherwise unique. Moreover, both use the same tools—homicide, terror, wanton destruction, and disruption of trade—to achieve a common aim: gaining notice to themselves. This parallel cannot be stressed enough, for it represents the most significant nexus between terrorism and piracy yet mentioned, and in itself forms the basis for a new understanding of terrorism based on piratical antecedents. The idea of attracting attention to one's self and one's cause is the *modus vivendi* of all terrorism, whether government-sponsored, organized, or anarchical.⁸⁵ It underlies every terrorist act, from the assassinations of key political figures in the nineteenth and twentieth centuries to the hideous atrocity of the World Trade Center in the year 2001.⁸⁶ Terrorism is a means of projecting individual, extra-governmental aims onto the world's consciousness through the commission of acts so horrific as to captivate the world's attention.⁸⁷ Thus, the pivotal issue is not

⁸¹ *Id.* at 119.

⁸² See generally BANDITS AT SEA: A PIRATE READER, *supra* note 49; PIRATES AND PRIVATEERS: NEW PERSPECTIVES ON THE WAR ON TRADE IN THE EIGHTEENTH AND NINETEENTH CENTURIES (David J. Starkey et al. eds., 1997).

⁸³ See Rediker, *supra* note 55, at 139.

⁸⁴ See Leuridijk, *supra* note 22, at 3 (acts of terrorism are traditionally politically motivated).

⁸⁵ Jenkins, *supra* note 6, at 16-17.

⁸⁶ See *id.* Publicity is an important component. Jenkins notes that "[p]ublicity may sometimes exceed fear as the leading effect of a terrorist incident," *id.* at 17.

⁸⁷ *Id.* ("[t]errorism is theatre").

whether the terrorists seek by their acts to achieve a change of governmental policy, a revolution, or even (as with the nineteenth century anarchists) a collapse of all governments—it is only whether they employ terror to achieve this notice.⁸⁸

This understanding of terrorism and its relation to piracy has two prerequisites. First, the terrorists' activities must be in some way politically motivated; it is not enough merely to commit terrorism to bring notice to one's self.⁸⁹ Were that the case, there could be no distinction between ordinary homicide committed for personal fame (as in the case of John Hinckley's attempted assassination of President Reagan) and acts of terror. While this political element is essential, it may also be broadly defined. It is not necessary, for example, that the terrorist seek some specific political goal, such as the release of prisoners or the creation or the removal of American forces from the Middle East; rather, it need only be an act committed with the intention of gaining the notice of the world governments, even if it is only to arouse their ire.⁹⁰ Second, this idea of terrorism presupposes an organization of some sort, not merely an individual.⁹¹ While assassination as an act of terrorism has been mentioned, the current understanding of "organized" terrorism is distinct from the actions of individual terrorists in that it has two components: the act itself, and the

⁸⁸ Perhaps the clearest indication of the parallels between these two concepts, piracy and terrorism, occurred in the hijacking of the Italian cruise ship *Achille Lauro* by members of the Palestinian Liberation Organization, and subsequent murder of Jewish American passenger Leon Klinghoffer, on October 17, 1985. President Reagan branded the attack an act of piracy, and demanded immediate justice. See JACK A. GOTTSCHALK AND BRIAN P. FLANAGAN, *JOLLY ROGER WITH AN UZI: THE RISE AND THREAT OF MODERN PIRACY* 37 (2000). For a full account of the ramifications of the *Achille Lauro* incident for contemporary understandings of piracy, terrorism and international law, see generally George R. Constantinople, Note, *Toward a New Definition of Piracy: The Achille Lauro Incident*, 26 VA. J. INT'L L. 723 (1986); Menefee, *supra* note 21; Gerald P. McGinley, *The Achille Lauro Affair—Implications for International Law*, 52 TENN. L. REV. 691 (1985); MARITIME TERRORISM AND INTERNATIONAL LAW (Natalino Ronzitti ed., 1990) (discussing the many legal questions that arose from the *Achille Lauro* affair).

⁸⁹ Alexander, *supra* note 7, at 7.

⁹⁰ See Jenkins, *supra* note 6, at 15.

⁹¹ See *id.* at 16-19 (the main purposes of terrorism tend to further collective rather than individual goals).

conspiracy to commit the act.⁹² As a conspiracy requires the collaboration of more than one person, we must conclude that the crime of organized terrorism requires some form of organization, whether it is a small band of disgruntled misfits or, as is more often the case, a vast and intricate multinational entity.

With these two caveats in mind, let us briefly recap the parallels between seventeenth century piracy and modern organized terrorism. They can briefly be listed as follows: Both are (1) organizations composed of volunteers, which (2) have a common goal of gaining the notice of the nation states by (3) committing acts of terror, which may include destruction and seizure of state or private property, frustration of commerce, and homicide. Both (4) exist outside the territorial and jurisdictional boundaries of any state, and thus may not be properly said to be resident in any state; (5) use this extra-nationality as a means of pursuing their activities against states and, consequently; (6) may be considered not as the enemy of one particular state (even if that is the only state directly affected) but of *all* states; and, (6) are fully cognizant not only of existing outside jurisdiction, but outside of society itself, and use this also as a weapon against the states.

II. The Legal History of Piracy and Its Relation to Modern Terrorism

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

Now piracy is only a term for sea-robbery, piracy being committed within the jurisdiction of the Admiralty. If any man shall be assaulted within that jurisdiction, and his ship or goods violently taken away without legal authority, this is robbery and piracy. If the mariners of any ship shall violently dispossess the master, and afterwards carry away the ship itself of any of the good, or tackle, apparel or furniture, in any place where the Lord Admiral hath, or pretends to hath jurisdiction, this is also robbery and piracy.⁹³

⁹² See OPPENHEIM, *supra* note 2, at 401 (“although terrorist acts may be privately undertaken and motivated, they are often undertaken by organized groups... acting in pursuit of international political goals, such as the attainment of a territory’s independence or protest against a particular state’s actions”).

⁹³ C. M. SENIOR, A NATION OF PIRATES: ENGLISH PIRACY IN ITS HEYDAY 38 (1976).

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

The problems raised in Captain Kidd's trial began in 1700 with the passage of the Piracy Act, which replaced jury trials for high seas piracy with Crown-appointed commissions applying the rules of admiralty and civil law.⁹⁴ The Act was remarkably similar to that promulgated by James I half a century before, and Edward III three hundred years before that.⁹⁵ Why did the latter succeed where the former had failed? The difference lay in the popular perception of piracy in the English mind. Though sympathetic juries might still be inclined to look the other way, the vastly-increased bureaucracy resulting from the Restoration created a body of civil servants who owed allegiance neither to local burghers nor to the King *in persona*, but to government.⁹⁶ Under the aegis of the Admiralty, the Crown commissioners prosecuted pirates with the same fervor that the Navy hunted them.⁹⁷

The trial of William Kidd provided a bizarre example of both aspects of this new policy. In a fantastic twist of irony, Kidd was among those captains whom the Crown had recruited to chase down and capture the pirates.⁹⁸ The story of his transformation from pirate hunter to pirate is both fascinating and contentious, but nevertheless irrelevant to our purposes.⁹⁹ Suffice it to say that when brought before the Old Bailey on May 8, 1701, he

⁹⁴ P. Bradley Nutting, *The Madagascar Connection: Parliament and Piracy, 1690-1701*, 22 AM. J. LEGAL HIST. 202, 209 (1978).

⁹⁵ See *id.*; RUBIN, *supra* note 23, at 113.

⁹⁶ See Anne Pérotin-Dumon, *The Pirate and the Emperor: Power and the Law on the Seas, 1450-1850*, in BANDITS AT SEA: A PIRATE READER, *supra* note 49, at 41-42.

⁹⁷ For a record of this shift in Crown policy, see CALENDAR OF STATE PAPERS, COLONIAL SERIES, AMERICA AND WEST INDIES 1574-1733 (London 1862-1939). See also JOHN FRANKLIN JAMESON, PRIVATEERING AND PIRACY IN THE COLONIAL PERIOD: ILLUSTRATIVE DOCUMENTS (1923).

⁹⁸ RUBIN, *supra* note 23, at 106.

⁹⁹ Interested scholars should consult ROBERT C. RITCHIE, CAPTAIN KIDD AND THE WAR AGAINST THE PIRATES (1986). It is a splendid account of Kidd's piratical career and trial. The John Carter Brown Library at Brown University also holds an eyewitness account of the trial entitled *A Full Account of the proceedings in relation to Captain Kidd. In Two Letters*. (London 1701).

was charged with six separate offenses, including piracy against four merchant ships of foreign nationality, piracy in regard to an Armenian vessel sailing under British protection, the *Quedagh Merchant*, and the murder of crewmate William Moore, a gunner.¹⁰⁰ In their charges to the jury, the justices emphasized that piracy meant considerably more than “only a term for sea-robbery”:

I need not tell you the heinousness of this offence wherewith they [Kidd and his confreres] are charged, and of what ill consequence it is to all trading nations. Pirates are called *hostis humani generi*, the enemies to all mankind; but they are especially so to those that depend upon trade. These things that the prisoners stand charged with are the most mischievous and prejudicial to trade that can happen.¹⁰¹

A fundamental shift was occurring in the law, from the laissez-faire attitudes of Elizabethan privateering to a renaissance of *hostis humani generi*. It was Kidd's misfortune to fall exactly at the moment when this shift was taking place.¹⁰² By 1718, a pirate could, by law, be captured and executed by “any one that takes them,” with the scant provision that the captors must first attempt to bring them to “some government” to be tried.¹⁰³ As it had been in the Roman Republic, piracy was once again a crime of universal jurisdiction.

The passage of an even more draconian Piracy Act in 1721, stating that all persons who “trade[d] with any pirate, by truck, barter, or exchange,” if found guilty, would be esteemed pirates,¹⁰⁴ spelled the end of the pirates' Golden Age.¹⁰⁵ Within a few short years, the sea lanes were reopened for unimpeded trade and the greatest pirates of the age were dead, hiding, or

¹⁰⁰ See Nutting, *supra* note 96, at 213.

¹⁰¹ THE TRIAL OF CAPTAIN KIDD 154 (Graham Brooks ed. 1930).

¹⁰² See generally RITCHIE, *supra* note 101.

¹⁰³ *The Trial of Major Stede Bonnet and thirty three others at the Court of Vice Admiralty, Charlestown, South Carolina, for Piracy, 5 George I. A.D. 1718*, 15 Howell's St. Tr. 1231, 1235 (1816), *quoted in* Lee A. Casey, David B. Rivkin, Jr. & Darin R. Bartram, *An Assessment of the Recommendations of the American Bar Association Regarding the Use of Military Commissions in the War on Terror*, at 18, *at*

<http://www.fed-soc.org/Publications/Terrorism/ABAResponse.PDF>

¹⁰⁴ Piracy Act, 1721, 8 Geo. 1, c. 24, § 1 (Eng.).

¹⁰⁵ See Starkey, *supra* note 49, at 121.

respectable.¹⁰⁶ Nevertheless, piracy did not disappear. Spanish privateers continued to harass the Americas, while the Barbary corsairs profited from the sudden lack of competition and entrenched themselves as a permanent menace to Mediterranean trade.¹⁰⁷ In fact, the greatest consequence of English law was to remove piracy's domain from the center of imperial affairs to its periphery. The pirates of the eighteenth and nineteenth centuries were no longer the flotsam of Europe's mercantile labor force, but tightly-woven bands of Eastern corsairs, succeeding generations of piratical clans sharing familial, tribal, ethnic, religious, or political identities.¹⁰⁸ Their continued survival was assured by the Great Powers themselves, as Britain and France actively encouraged the corsairs to disrupt the other's trade.¹⁰⁹

This sort of government sponsorship seems, at first glance, like the old Elizabethan policy writ large, but there was a crucial difference. The combined influences of English law, burgeoning empires, and the Enlightenment affected a profound shift in the western conception of piracy.¹¹⁰ It became, in effect, an act of savagery. When committed by an Englishman, Frenchman, or anyone belonging to the fraternity of states which comprised "civilization," piracy was treason, tantamount to declaring one's self at war with the nation state.¹¹¹ But if committed by "savages" it was not only permissible, but politically useful. In the same way as England and France employed First Nation tribes as proxies in North America, so too did each fund and outfit their "own" corsairs to bedevil each others' trade.¹¹²

By terming piracy an act of barbarity, the law was thus able to meld the competing doctrines of political utility and *hostis humani generis*. A pirate, in this latest incarnation, was a ruthless savage whose existence was not only in conflict with the nation's laws, but with civilization itself.¹¹³ This led to a paradoxical situation, for the more the imperial powers employed pirates against each other, the more their laws responded by driving the definition of piracy further toward *hostis humani generis*, until it finally achieved its modern definition as a crime so heinous and barbaric that all who committed it were not only criminals, but enemies of humanity.¹¹⁴

¹⁰⁶ See Rediker, *supra* note 55, at 154.

¹⁰⁷ See PETER EARLE, *CORSAIRS OF MALTA AND BARBARY* 266 (1970).

¹⁰⁸ *Id.* at 23, 42.

¹⁰⁹ *Id.* at 265-66.

¹¹⁰ See RUBIN, *supra* note 23, at 93.

¹¹¹ See *id.* at 94.

¹¹² EARLE, *supra* note 108, at 265-66.

¹¹³ See generally BANDITS AT SEA, *supra* note 49.

¹¹⁴ See EARLE, *supra* note 108, at 267.

The eighteenth century's bizarre double standard for piracy came back upon itself early in the nineteenth century, when the European governments realized they had created a beast they could no longer control. The corsairs continued their attacks on trade long after peace was concluded, a source of prolonged embarrassment and a serious economic threat to the Great Powers. It was a pattern repeated throughout the history of government-sponsored piracy, from the Hanseatic League to the Enlightenment. Now, however, the perceived "barbarity" of the pirates gave western nations an added impetus for declaring it an act of *hostis humani generis* once and for all. In the period of conflict between 1790 and 1820, there were numerous treaties between states pledging not to employ or encourage privateers unless actually at war.¹¹⁵ The fledgling United States Navy scored its first major victory in an engagement against the Barbary pirates in 1804, signaling a new perception of pirates as an international menace and providing an early example of the United States as "world policeman."¹¹⁶ But the most significant development did not occur until 1856, when the Declaration of Paris—signed by nearly all the imperial powers—abolished all forms of piracy, privateering and government sponsorship.¹¹⁷ Pirates would thenceforth be *hostis humani generis*, subject to capture and trial wherever they were found.¹¹⁸ This chain of events leading to our modern understanding of piracy bears chilling similarity to the rise of organized terrorism in the Middle East. Just as England and France created the renewed menace of piracy through their sponsorship of the corsairs, so too is the United States credited for manufacturing its own enemy by training, funding and outfitting terrorist groups in the Middle East during the Cold War. Indeed, criticism that the United States is responsible for the very threat it now seeks to eliminate has been a formidable stumbling block against the creation of any new international law on terrorism. But the lesson to be drawn here is not merely one of history repeating itself, nor even a reaffirmation of the close historical linkages between the problems of piracy and terrorism. Here, the history of piracy law not only provides a precedent to our current dilemma, but also the solution. The 1856 Declaration of Paris is, on one level, recognition of shared guilt and a promise that the behavior of states which produced the problem will not be

¹¹⁵ See EARLE, *supra* note 108, at 266-67.

¹¹⁶ See Buhler, *supra* note 24, at 64.

¹¹⁷ Pérotin-Dumon, *supra* note 97, at 45.

¹¹⁸ P.W. Birnie, *Piracy Past, Present and Future*, in PIRACY AT SEA, *supra* note 21, at 132.

repeated.¹¹⁹ On another level, it represents the first recognition of piracy as a crime in and of itself, separate from state sponsorship.¹²⁰ The central premise of *hostis humani generi* is that a pirate is not an enemy of the state, but of humankind itself. He exists like a malevolent satellite to the law of nations, waging war upon them not only through his acts, but through his identity. Until 1856, international law recognized only two legal entities: persons and states. Persons were subject to the laws of their own governments; states were subject to the laws made between them. The Declaration of Paris and subsequent legislation created a third entity: persons who lacked both the individual liberties and protections of law to be citizens, and the legitimacy and sovereignty of states. The creation of this third legal entity—pirates—was recognition by the states that: 1) piracy as a political tool was beyond the pale of legitimate state behavior; and, 2) pirates themselves forfeited the right to the protections of citizenship. In order to create a just and lasting body of law on organized terrorism, states must apply a similar understanding of their own behavior and of the crime itself.

In sum, four points are of particular note in establishing the historical and legal linkages between piracy and terrorism. First, since its earliest manifestation, the directed use of terror has been an integral part of piracy. One finds it throughout the history of piracy, from the Vikings to Sir Francis Drake and Edward Teach. Each understood the political, as well as personal, benefits of terror. Terror inspired fear in the breast of the victim before the first shot was fired, an invaluable reputation which facilitated many bloodless captures.¹²¹ Each also understood that piracy, unlike its tame counterpart, privateering, did not obey gentlemen's rules.¹²² Ferocity and barbarism were essential components to the trade. Thus, piracy represents the first use of terror as a means of coercion by a non-state actor against the flag and trade of the nation-state itself.¹²³

Second, the history of piracy as a political tool of governments negates its popular image as mere "sea-robbery," a definition which bears little similarity to terrorism. Piracy must properly be understood as being as much a political as a commercial enterprise. From the time of Republican Rome until the Declaration of 1856, governments employed pirates as privateers to hinder an enemy's trade, distract its navy, frustrate its relations

¹¹⁹ See Pérotin-Dumon, *supra* note 97, at 45.

¹²⁰ *See id.*

¹²¹ See Pennell, *supra* note 64, at 10.

¹²² See Rediker, *supra* note 55, at 155.

¹²³ *See id.*

with its empire, deplete its coffers, and sometimes drive it toward open warfare.¹²⁴ The extra-legal aspect of government-sponsored piracy provided a means of wounding a hostile state while continuing to maintain diplomatic relations.¹²⁵ As such, it bears remarkable similarity in both execution and purpose to modern government-sponsored terrorism. In both instances, the pirate/terrorist acts as a private individual (or organization) acting beyond the nominal purview of the sponsor state, yet whose actions are directed toward a coercive political aim of that state.

Third, when employed not as an agent of governments but as a weapon against them, as in the so-called pirate Golden Age, the motivations of piracy have strong resonance with contemporary terrorism. The pirates' "war against the world" provides the earliest historical example of non-state versus state conflict, the same sort of "war" which al-Qaeda wages today. This form of conflict must be distinguished from revolutions and civil wars, which also might be termed state versus non-state, in that here, the aggressors detach themselves both politically and (more importantly) physically from the nation-state—leading the revolt from without rather than within. The argument that international terrorists are revolutionaries falls apart on these grounds, for revolutions are defined as uprisings within a state to change its government.¹²⁶ A terrorist organization, by becoming international and therefore extra-legal in character, divorces itself from such terminology. Likewise, the methods of the contemporary terrorist have much in common with their piratical forbears; the terrorist, like the pirate, appears suddenly, attacks his target, and disappears. The amorphous, extraterritorial composition of modern terrorist organizations provides much the same function as the Atlantic did for their predecessors. The al-Qaeda and their kin move covertly through the world like ships across a vast ocean, surfacing without warning, wreaking havoc, and retreating into an obscure mist of anonymity.

Finally, once we have established that the means and motivations of piracy and terrorism are analogous, there remains only to demonstrate that their legal definitions should be so as well. The case is already a strong one: pirates and terrorists have been shown to share the same means, the same motivations, and the same extraterritorial identity. It is a small but crucial step to make the final link that terrorists share the legal definition of pirates

¹²⁴ See RUBIN, *supra* note 23, at 31.

¹²⁵ See *id.*

¹²⁶ See J. Bowyer Bell, *Revolutionary Organizations: Special Cases and Imperfect Models*, in INTERNATIONAL TERRORISM AND WORLD SECURITY, *supra* note 6, at 78.

as *hostis humani generis*, enemies of all humankind. As with the Declaration of 1856, this would involve recognizing: first, that terrorism, like piracy, is not a legitimate political tool; second, that states, therefore, may not use it as a means of political coercion; third, that *all* instances of terrorism,—as defined by international covenant,—are equally unlawful, whether state-sponsored or not; fourth, that terrorism, like piracy, is therefore an international crime *sui generis*, not to be confused with the recognized right of peoples to change their forms of government; fifth, that this crime is by nature international in scope, and consequently falls under the jurisdiction of the International Criminal Court; and sixth, that terrorists, as *hostis humani generis*, are likewise subject to universal jurisdiction. But historical and legal linkages, however persuasive, do not alone provide the basis for defining terrorists as *hostis humani generis* under international law. For that argument to be made, we must also consider the current state of international law on piracy.

Burdick Brittin, in advocating a political definition of piracy, begins with a quote from Alberico Gentile's *De jure belli* which is particularly appropriate here:

Pirates are common enemies, and they are attacked with impunity by all, because they are without the pale of the law. They are scorers of the law of nations; hence they find no protection in that law. They ought to be crushed by us... and by all men. This is a warfare shared by all nations.¹²⁷

A quick comparison between Gentile and Hedges, mentioned earlier, indicates the central conflict between two constructions of the crime of piracy. Legal advocates of the narrow definition of 'sea robbery' regard the crime from the perspective of the act itself; while those who, like Gentile and Brittin, advocate a broader political definition regard it from the perspective of the actor. The resulting definitions are not only divergent, but contradictory. If piracy is merely robbery at sea, as the former would argue, then the logical extent of jurisdiction should be a state's territorial borders,¹²⁸ and the need for an international law on piracy is thus obviated. Pirates under this definition are not *hostis humani generis*, but petty miscreants

¹²⁷ Burdick H Brittin, *The Law of Piracy: Does It Meet the Present and Potential Challenges?*, in *PIRACY AT SEA*, *supra* note 21, at 159.

¹²⁸ However, in cases occurring on the high seas, jurisdiction would rest either with the state registry of the victimized vessel or the citizenship of the pirates.

whose actions are distinguished from local felonies only by their maritime locus. If, however, one views the crime of piracy not from its acts but its effects, the discourse becomes markedly different. It is now possible to consider the pirate himself, as distinct from his land-bound cousin the highwayman or common felon, as a threat to the nation-state.

The trend of piracy law has moved inexorably from an early understanding of "sea robbery" to a modern and more politicized conception of "maritime terrorism."¹²⁹ This is reflected in the municipal laws of England and the United States,¹³⁰ the work of many twentieth century scholars,¹³¹ and even in the mangled machinations which produced the 1958 Convention on the High Seas and the 1982 Conventions on the Law of the Sea.¹³² As the nature of piracy itself evolved, the nature of its legal definition proceeded apace. By the early twentieth century, piracy for

¹²⁹ This term was coined by the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, March 10, 1988, 1678 U.N.T.S. 221, 27 I.L.M. 668, in which it was listed alongside other crimes including hijacking, assassination and the taking of hostages. The Convention appeared in the aftermath of the *Achille Lauro* incident, at the instigation of a guilt-ridden Italian government (the Italians had previously refused to extradite the *Lauro* hijackers to the United States, citing their abhorrence of capital punishment, and subsequently endured the full wrath of international outrage). Interestingly, the American case for extradition cited two crimes: hostage taking, under the Comprehensive Crime Control Act of 1984, and piracy, under 18 U.S.C. § 1651. See also MARITIME TERRORISM AND INTERNATIONAL LAW, *supra* note 89.

¹³⁰ See *The Malek Adhel*, 43 U.S. 210 (1844) (defining piracy as an action on the high seas motivated by "hatred, abuse of power, or a spirit of mischief"). This case was reaffirmed in 33 U.S.C. §382 (2004).

¹³¹ Samuel Menefee, P.W. Birnie and Burdock Brittin have all recommended an extension of the piracy definition to include acts of maritime terrorism. Brittin writes that "[b]roadening the criteria for piracy would include such acts of terrorism thereby making them an international crime. As such the international effort to contain and meet the challenge of terrorism would be facilitated," *supra* note 128, at 164.

¹³² Convention on the High Seas, Apr. 29, 1958, arts. 14-19, 450 U.N.T.S. 82; U.N. Convention on the Law of the Sea, Montego Bay, 10 December 1982, arts. 100-107, 111, 1833 U.N.T.S. 397. The U.N. Conventions specifically exclude political acts as acts of piracy, retaining the 'private ends' language which had been specifically included in the 1958 Draft to quash Soviet claims of "piracy" when their vessels were searched at sea. Yet this language obviously defines "political" as "state-sponsored," written long before "political" acts could be conceived as being committed by non-state actors—that is, terrorists.

monetary ends was a peripheral problem, well within the jurisdictional and legislative purview of individual states.¹³³ But piracy as an act of political coercion was coming into its own. As the number of unquestionably 'piratical' acts receded, states began on their own initiative to stretch the definition to include newer forms of menace.¹³⁴

This so-called 'politicization' of piracy has divided jurists into two distinct and opposite camps. One position, briefly stated, would expand the definition of piracy to include virtually any act of armed violence at sea.¹³⁵ This would probably exclude warships, but would most certainly include rebel vessels or those of revolutionary governments. The second position, also oversimplified, states that any inquiry into the political dimensions of piracy necessarily produces a maelstrom of vagaries between political and private acts.¹³⁶ Piracy, therefore, must be wholly divorced from such debates

¹³³ See RUBIN, *supra* note 23, at 334.

¹³⁴ See, e.g., The Treaty relating to the Use of Submarines and Noxious Gases in Warfare, Washington, Feb. 6, 1922, 25 L.N.T.S. 202, concluded between France, Italy, Japan, Britain and the United States declaring unrestricted submarine warfare 'an act of piracy'; The Nyon Agreement of 1937, 181 L.N.T.S. 137 (entered into force Sept. 14, 1937), concluded between Britain, France, Belgium, Turkey, Romania, Greece, Egypt and the USSR, extending universal jurisdiction to unidentified vessels and aircraft attacking merchant shipping "which should justly be treated as acts of piracy." The International Maritime Bureau, in 1987, defined piracy as "an act of boarding any vessel with the intent to commit theft or any other crime and with the intent or capability to use force in the furtherance of that act," Buhler, *supra* note 24, at 68; the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, *supra* note 130; section 1655 of Title 18 of the United States Code, including acts undertaken for political purposes within its definition of piracy.

¹³⁵ See generally Menefee, Birnie, Brittin, *supra*.

¹³⁶ A useful summary of this position occurs in the comments of Sir Gerald Fitzmaurice during the drafting of the 1958 Geneva Convention on the High Seas. Fitzmaurice and others were rightly concerned that political acts, if included in the definition, would result in charges leveled by one state against another concerning acts which were not piratical, but acts of war. In the commentaries to the Convention, it is remarked that "[i]n view of the immunity from interference by other ships which warships are entitled to claim, the seizure of such ships on suspicion of piracy might involve the gravest consequences. Hence the Commission feels that to assimilate unlawful acts committed by warships to acts of piracy would be prejudicial to the interests of the international community," *Report of the International Law Commission to the General Assembly*, U.N. Doc. A/3159 (1956), reprinted in [1956] 2 Y.B. Int'l. Comm'n 282, U.N. Doc.

and limited exclusively to acts committed for private (i.e. pecuniary) gain. The middle ground between these two definitions is, appropriately, the specter of maritime terrorism. Though both the 1958 and 1982 Conventions expressly exclude political piracy, they limit their definition of 'political' to a conventional idea of state versus state or, alternately, civil war.¹³⁷ This is consistent with recorded history to that time, where the pattern of conflict had been exclusively between states or within states. The situation envisioned by the drafters was one in which states or revolutionary organizations employed piracy against their enemies; or, alternately, claimed that attacks on their shipping by enemy vessels were not legitimate sea warfare, but piratical.¹³⁸ Yet this political exemption is not, most emphatically, applicable to the current 'war on terrorism.' Organized terrorism presents a third, hitherto unknown form of conflict: state versus non-state. Unlike the others, it is not waged *within* a given territory or *over* that territory. Instead, contemporary terrorism, like piracy, is waged all over the world against a multitude of states.¹³⁹ These states, the terrorists' "enemies," share no necessary commonalities among themselves except loss of life and property.¹⁴⁰ As the aims of terrorist organizations vary widely between quasi-legitimate governmental objectives—such as the establishment of territorial boundaries and the enfranchisement of minorities—to seemingly apolitical, cultural, or religious ambitions, so too do the terrorists' motivations vary in determining their "enemies."¹⁴¹ A state may have only peripheral contact with the issue in dispute (as in former colonial nations), a past history of diplomatic involvement in the disputed

A/CN.4/SER.A/1956/Add.1. Contrast this with the Soviet delegate Mr. Zourek, who said that he considered, in particular, that "acts of violence and depredation referred to in [article 14 of the 1956 draft]... constitute[d] acts of piracy" even when committed: (a) for political ends; (b) by warships or military aircraft; (c) by aircraft or seaplanes against foreign aircraft or seaplanes, *Summary Records of the 292nd Meeting*, [1955] 1 Y.B. Int'l Comm'n 52, U.N. Doc. A/CN.4/SER.A/1955. One can only wonder if Sir Gerald's objections would have been as forceful had Mr. Zourek left out parts b) and c).

¹³⁷ See *supra* note 133.

¹³⁸ See Natalino Ronzitti, *The Law of the Sea and the Use of Force Against Terrorist Activities*, in MARITIME TERRORISM AND INTERNATIONAL LAW, *supra* note 89, at 2.

¹³⁹ See Giorgio Gaja, *Measures Against Terrorist Acts Under International Law*, in MARITIME TERRORISM AND INTERNATIONAL LAW, *supra* note 89, at 20.

¹⁴⁰ See Jenkins, *supra* note 6, at 19.

¹⁴¹ See *id.* at 16-19.

area (as with the U.S. in Afghanistan), or cultural practices, religious observances, and governmental regimes which are anathema to the terrorists. The 'enemy' state might even have no appreciable connection to the terrorists whatsoever. This situation is markedly different from that envisioned by the drafters of the 1958 and 1982 Conventions.¹⁴² As the world has moved beyond the Cold War into a new century and new political realities, so too will piracy law adopt these realities within a new, unabashedly political, definition.

Pirates that do not confine themselves to the above-mentioned quasi-governmental limitations fall outside the "political" exemption. They become *hostis humani generis*. So too must terrorists. One might argue, in contrast, that an organization such as al-Qaeda becomes a *de facto* political entity by virtue of its size, complexity, and objectives. But this argument fails to account for the crucial difference between a revolutionary government—however disorganized—and a terrorist organization. The difference lies in the objectives and means: the revolutionaries seek to replace the existing government with their own, directing their attacks solely at that government; a terrorist organization has no such limitations on its agenda, or on the scope of its attacks. Regime change may or may not coincide with a plethora of other initiatives, and the weapon of terror may be inflicted against any state or its citizens. It is this lack of limitation which distinguishes the terrorist from the revolutionary. For a terrorist organization to represent itself as a belligerent or revolutionary organization within the definition of the law, it must: (1) confine its attacks to within the jurisdictional and/or territorial boundaries of a single state; (2) have no political objective beyond regime change; and, (3) represent itself as the alternative governmental regime. Likewise, it should be of no greater account whether the terrorist band is comprised of ten members or a hundred thousand members than it would be if a band of pirates attacked with a phalanx of ships or an inflatable life raft. The law rightly concerns itself only with determining whether this is a crime or an act of war.

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

¹⁴² See Ronzitti, *supra* note 139, at 2.

A crime, in municipal or international law, has three elements: the *mens rea*, the *actus reus*, and the *locus*. For terrorism to fall within the common definition of piracy, it must therefore be consistent in its requisite mental state, actions, and place of occurrence. The *mens rea* of piracy is the desire to inflict death, destruction or deprivation "for private ends."¹⁴³ Recognizing the difference between the political ends of a revolutionary government and those of a terrorist organization, we can now conclude that international terrorism falls outside the political exemption, and thus within the common understanding of piracy. It, too, seeks to inflict death, destruction and deprivation, for arguably identical reasons. Second, the *actus reus* of piracy, which includes acts of homicide and destruction absent actual robbery, is, as has been shown here, synonymous with the *actus reus* of most forms of modern terrorism. Third, the *locus* of piracy, while traditionally confined to the high seas or other territories outside state jurisdiction, has been expanded to include acts of piracy committed on state territory "by descent from the sea."¹⁴⁴ In the classic text *International Law*, James Hall explains this concept:

Piracy no doubt can take place independently of the sea, under the conditions at least of modern civilization; but the pirate does not so lose his piratical character by landing within state territory that piratical acts done on shore cease to be piratical.... [P]iracy may be said to consist in acts of violence done upon the ocean or unappropriated lands, *or within the territory of the state through descent from the sea, by a body of men acting independently of any politically organized society.*¹⁴⁵

Within this idea of 'descent by sea' lies an exciting possibility. The law does not specify how this descent should occur, where, or whether the pirate must begin the act of piracy immediately after landfall.¹⁴⁶ Likewise, it

¹⁴³ U.N. Conference on the Law of the Sea, Montego Bay, 10 December 1982, art. 101, 21 I.L.M. 1245.

¹⁴⁴ Harvard Draft Convention of 1932, also known as Harvard Research in International Law, *Draft Convention on Piracy, with Comment*, 26 AM. J. OF INT'L L. SUPP. 739, 775 (1932), 775.

¹⁴⁵ WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 313-314 (8th ed. 2001) (1924).

¹⁴⁶ The presumption, moreover, is that the acts of piracy need not occur immediately; descent by sea is most definitely not limited to fanciful notions of

includes the potentiality not only of oceanic but aerial attack.¹⁴⁷ Such attacks can occur anywhere, provided that, in keeping with the “descent by sea” requirement, the plane’s flight path traverse some body of water. Defined broadly, it might even apply to any foreign national with the intent to commit piratical acts arriving in a state other than his own—remembering again that the crime of piracy is one of intent, not commission.¹⁴⁸ With the *mens rea* and *actus reus* of piracy and terrorism otherwise synonymous, the locus, too, may be common to both. In sum, the “descent by sea” and aerial provisions of piracy, taken together, may apply to any terrorist landing on national soil from overseas with the intention of committing terrorist acts therein. Since piracy and terrorism share a *mens rea*, *actus reus*, and *locus*, we may conclude that they are, in effect, the same crime. They must also, accordingly, share a legal definition. Terrorists, like pirates, are *hostis humani generi* under international law.

III. A Model International Law of Terrorism

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

sending the jolly boats ashore, but is concerned rather with the *mens rea* of the potential pirate. That is, the pirate who descends upon the locus with the *intent* to commit acts of piracy is presumed to be a pirate, regardless of when (or even whether) those acts commence. Thus, by imputing this same logic to the *mens rea* element of terrorism, the terrorist must simply arrive in a foreign locale with the intention of committing terrorist acts.

¹⁴⁷ This point was stated explicitly in the Harvard Draft Convention, *supra* note 145, at 809, concluding with a remarkably insightful comment on the evolving nature of the law itself:

The pirate of tradition attacked on or from the sea. Certainly today, however, one should not deem the possibility of similar attacks in or from the air as too slight or too remote for consideration in drafting a convention on jurisdiction over piratical acts ... A codification of the jurisdiction of states under the law of nations should not be drafted to fit only cases raised by present conditions of business, the arts, and criminal operations.

¹⁴⁸ The Supreme Court made this explicit in *In re Marianna Flora*, 24 U.S. 1, 39 (1825), in which it held that the *mens rea* of committing piratical acts was sufficient for criminal liability. *See also* Buhler, *supra* note 24, at 64.

And when the law was down, and the Devil turned round on you—where will you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down—and you're just the man to do it—d'you really think you could stand upright in the winds that blow then? [Yes, I give the Devil the benefit of law—for *my own safety's sake*].¹⁴⁹

More's warning has never been more apt. As the United States and her allies pursue their war on terrorism across every continent, the international community struggles to respond to the two greatest challenges in its recent history: the unparalleled menace of organized terrorism that threatens to undermine the very foundations of established states; and, the sudden emergence of a brash, aggrieved, hegemonic world power that threatens the delicate balance of alliances in its implacable hunt for those who wronged it. Questions are suddenly being asked of institutions and principles that long went unchallenged: "What is the proper role of the United Nations, or its laws; of the ICC?; of international law itself?" The new millennium has provided us with an entirely new form of conflict: state versus non-state. Hence, military operations in Afghanistan and Iraq may one day be seen as a prelude to the actual conflict between states and terrorists. A necessary step, perhaps, as the first stage of the battle against terrorism must be to remove the aegis of state-sponsorship. Ultimately, however, these operations may serve only to clear the board for an entirely new game: a game unlike any other, for which there are no rules. The principles of international relations and international law are predicated on the premise that war is either between two nations or within one, as in revolution or civil war. This concept is already becoming obsolete in the face of the war on terrorism. Sharp breaks have appeared in the relations between the United States and her erstwhile allies, breaks that may be further exacerbated as this new form of conflict is played out. The rift between the United States and the United Nations has been termed an indication that "the gloves are off": in the face

¹⁴⁹ ROBERT BOLT, *A MAN FOR ALL SEASONS* (1962), *quoted in* JOSEPH P. LASH, *FROM THE DIARIES OF FELIX FRANKFURTER* 50 (1975). Lash remarks that at this particular scene during the performance, Justice Frankfurter of the U.S. Supreme Court whispered repeatedly in the darkened theatre, "That's the point!... [T]hat's it, that's it!"

of a very real and entirely novel threat to its security, the United States no longer feels bound to defer to international consensus on the means by which it may protect itself.

Thus, the world may be experiencing a shift in power politics as great as the collapse of the Soviet Union in 1991. In the following decade, the United States reigned as an uneasy hegemon, still feeling the aftershocks of fifty years of the Cold War, and unsure of its place on the international scene. During this time, America experienced a decade of unparalleled prosperity, security, and optimism. Under the liberal leadership of President Bill Clinton, the United States seemed determined to fulfill its destiny as the champion of international human rights, freedom, and the rule of law. In the midst of this euphoria, the International Criminal Court was finally brought into being, with the enthusiastic support, at first, of the United States.¹⁵⁰ In the ten years between 1991 and 2001, it can be argued that the United States held its position on the international scene as Caesar Augustus once did in Republican Rome: *primus inter pares*, first among equals. It was an illusion, of course—as much as it had been in Augustus' time—but it was a grand illusion all the same.

On September 11, 2001, the illusion ended. Threats which had seemed remote in Yemen and Nigeria suddenly became paramount in the American consciousness. The United States, under President George W. Bush, embarked on a campaign to root out terrorism at its source, beginning with states known or suspected to have harbored terrorists. Gaining international consensus to remove the Taliban in the wake of September 11 was not difficult. However, convincing an uneasy international community about the similar threat of Iraq one year later proved difficult. Yet, the lesson that the United States has drawn from its failure to obtain U.N. support for Operation Iraqi Freedom may not be what was intended. A majority of Americans, among them many in the leadership, now question the efficacy of requesting U.N. consent at all for actions regarding state security. International denunciation of 'American imperialism' rings like a cry of "*O tempora, O mores!*"¹⁵¹ and leads to the question of whether the United States has abandoned the pretence of the world Republic in favor of Imperial rule.

The arguments of scholars post-September 11 seem to suggest it has.¹⁵² The United States has abruptly withdrawn its support from the

¹⁵⁰ See Sailer, *supra* note 15, at 339-40.

¹⁵¹ "Oh the times, Oh the manners!" (from Cicero's First Catilinarian Oration).

¹⁵² See, e.g., Rubin, *Legal Response to Terror*, *supra* note 8.

ICC,¹⁵³ as it had with the Kyoto Agreements not long before. As it pursues its war on terrorism, the question is no longer what international guidelines it must obey, but whether it need obey them at all. Efforts to create a new international terrorist law may face their greatest obstacle, not from the terrorists, but from the state most directly affected by that law: the United States. Ironically, the United States might regard the legal vacuum surrounding terrorism as an ideal climate for its actions: without the gridiron of legal responsibility, all is permissible.¹⁵⁴

The United States is, in effect, laying the law flat to get at the devil. But, More's warning suggests the danger of this course: with law governing neither states nor terrorists, this twenty-first century conflict has the potential to degenerate into anarchy. Rule of law is more important than the threat, however great, to the nation-state. This is so because the rule of law *is* the nation-state; law is the matrix for society, and the government's source of legitimacy. International law translates this relationship from "citizen-to-government" to "state-to-state," providing a code of diplomatic conduct that ensures the continued survival of the international community from lawless war and universal destruction. Organized international terrorism strikes at the very heart of these relationships. Terrorists, like pirates, engage in a 'war against the world,' challenging both the sovereignty of the state's laws and the fundamental structure of the state itself. Domestic legal responses, such as the Patriot Act,¹⁵⁵ while an imperative first step, cannot fully address the problem. The limit of a state's criminal law extends to its borders and its citizens; it was for this reason that an international criminal law was created to deal with offenders whose crimes transcended the menace to an individual state.¹⁵⁶ In the past, only one crime was deemed so heinous as to merit this singular definition: piracy. Today, it is called terrorism.

¹⁵³ See Sailer, *supra* note 15, at 344.

¹⁵⁴ Revealingly, neither the American USA Patriot Act (2001) nor the U.N. Security Council Resolution 1373 (2001) offers a definition of the crime they propose to eradicate—that is, the crime of terrorism itself. Instead, the former focuses primarily on a list of criminal terrorist acts (discussed *infra*) and the means by which the United States may pursue and capture suspected terrorists within its borders, while the latter deals exclusively with states' obligations to deter terrorist acts, refuse sanctuary to terrorists, and withhold financial support. Yet without a working definition of who these terrorists are, both the Patriot Act and the Resolution lack gravitas.

¹⁵⁵ USA Patriot Act, Pub. L. 107-56, 2001 HR 3162, 115 Stat. 272 (2001).

¹⁵⁶ Fry, *supra* note 17, at 174.

In determining the necessity of an international terrorist law, one must consider the dual purpose of every criminal law. First, by prescribing certain conduct, it terms that conduct anathema to society and effects through punishment to deter it.¹⁵⁷ Second, by delineating the state's role in the capture, trial and punishment of offenders, it legitimizes the state as the just enforcer of universal social principles.¹⁵⁸ International terrorist law performs both functions: first, terrorism is recognized as a crime *sui generis* which is contrary to the social good; second, by ceding their impunity, the United States and its allies gain legitimacy to capture, adjudicate, and punish offenders under the law.

It is not enough for the United States to declare that terrorists are international criminals. For the threat of terrorism to be successfully countered, this *de facto* status must be accompanied with a definition *de jure*.¹⁵⁹ International terrorism law will not only govern the legal parameters of jurisdiction and capture, it will also give terrorists legal status as enemies of the human race and subject them to universal jurisdiction. Terrorists will not be enemies of *one* state but of *all* states. Thus, the United States' burden would be shared by every nation. The war on terrorism would become an international effort, transforming itself from personal vengeance and individual state security to international condemnation and the eradication of a global scourge. Only in this manner can the threat of global terrorism be successfully countered. Today, Americans question why we must give terrorists the benefit of international law. The answer is that we must do so for our own safety's sake.

This article has argued that the only effective means of addressing the problem of terrorism in international law is through the law of piracy. Piracy is the ancestor of terrorism, sharing its essential characteristics. Its history in both fact and law mirrors that of terrorism.¹⁶⁰ Piracy is terrorism's

¹⁵⁷ *See id.*

¹⁵⁸ *See id.*

¹⁵⁹ Otherwise, as will readily be appreciated, potentially hostile states that the United States insists hold terrorists may respond, with no counter-argument possible, that the U.S.'s "terrorists" are indeed revolutionaries. With no definition under international law, and no international crime of terrorism, states will reach this impasse again and again, and the "war on terror" may continue *sine die*.

¹⁶⁰ Philip Buhler has even argued that the United States' pursuit of the Barbary corsairs was "perhaps the first modern assault against the day's version of international terrorists," and thus a crucial precedent for modern terrorist legislation. He continues that this might even be seen as "a pioneering effort at the

blood brother in the law, raising the same problems of definition and political exception that have frustrated recent attempts to create an international crime of terrorism. Moreover, pirates share with terrorists the unique status of individual menaces to the international order, the only such criminals existing independent from state agency or sponsorship. Based on the arguments raised in the preceding discussion, the interrelation between piracy and terrorism cannot be doubted. The question remains, however, of how best to approach this relationship in the law. This concluding section will address the question of formulating a new international terrorist law based on the existing law of piracy. A proposal outlining this law's definition and jurisdiction will be advanced. Finally, the events of September 11, 2001, will be used as a test case. The purpose of this test will not be to merely prove that September 11 fits the definition of an act of piracy, but that all international acts of terrorism, as noted in this article, share certain commonalities with piracy sufficient to make them analogous under the law.

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

- 1) The crime of terrorism is:
 - a) any illegal acts of violence or detention, or any act of predation, destruction of property or homicide;
 - b) conspiracy to commit such acts, membership in an organization that conspires to commit these acts, and any form of active sponsorship including financial support, refuge, or withholding knowledge of such activities from the authorities;
 - c) committed by persons not acting under the color of a state, government, or revolutionary organization engaged in the replacement of an established regime within the borders of its own state;
 - d) against the citizens or property of another state; and,

extension of U.S. national jurisdiction over 'stateless' international criminals," *supra* note 24, at 64.

- e) with the purpose of inflicting terror on the citizens or government of that state or achieving international recognition for a private cause.
 - f) None of these provisions is meant to contradict or negate the existing terrorist offences currently proscribed by UN convention, covenant, treaty, agreement, or customary international law.
- 2) Terrorists do not lose their definition under the law if they are sponsored by a state, government or revolutionary organization acting in accordance with clause (1)(b):
- a) Political exemption is only to be inferred if the terrorists act as *de facto* agents of that state, government, etc., by committing their acts by its direct order and in furtherance of its policy;
 - b) In that event, criminal liability transfers from the terrorists as agents to the state as agency; and
 - c) the state is then inferred to have committed an act of war.
 - d) States that sponsor terrorist activities as outlined in clause (1)(b) are not inferred to have committed acts of war, but share criminal liability with the terrorists for any acts undertaken during their sponsorship.
- 3) The crime of piracy is defined as sharing the definition given in sections (1) and (2), specifically for crimes committed:
- a) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - b) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; or,
 - c) against persons or property within the jurisdiction of the State, where the pirates have:
 - i) descended by sea to a coastal port; or
 - ii) descended by air to any city or township.
 - d) The crime of piracy also includes acts committed for pecuniary gain.

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

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

Piracy provides the way out of this conundrum, as the definition offered above indicates. In distinguishing between political and non-political piracy, the consensus is that for the political exemption to apply, the pirate must have some direct and appreciable nexus to a recognized government. This, in short, is the difference between pirating and privateering.¹⁶¹ While both acts are offences against international law, the latter criminalizes the *government* rather than the individual. The government is perceived to have committed an act of war against the victim state. Moreover, the illegality of employing pirates as a fifth column suggests that the agent state may be subject to charges of war crimes as well. This is precisely the same approach that I suggest should be applied to the difference between private terrorism (including state sponsorship as outlined above) and terrorists as agents of the

¹⁶¹ See generally PIRATES AND PRIVATEERS, *supra* note 84.

state. We need not become mired in the difference between state sponsorship and state agency: the former assumes only that the state aids or finances the terrorist, whereas in the latter example he or she is acting on direct orders from the state, in furtherance of state policy. In both cases, the state is equally guilty, though the precise nature of the crime differs between conspiracy to commit terrorism and war crimes.

The crucial difference between them is not in the culpability of the state, but of the individual: whereas a terrorist is defined above as *hostis humani generi*, persons acting under color of the state are regarded as agents of that state, and thus not individually liable for the crime of terrorism.¹⁶² Similarly, revolutionaries acting on the orders of a revolutionary government are likewise not terrorists if their activities are in furtherance of a regime change within their own state. Some might question how to distinguish between revolutionary regimes and terrorist organizations. Whereas revolutionaries seek to replace an existing regime with their own and direct their attacks toward that end within that nation, terrorist organizations have neither these political nor geographic limitations.¹⁶³

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

This article argues that the combination of piracy and terrorism allows for domestic and international legal recognition, and indeed both are equally necessary to combat the threat which terrorism poses. The United States has criminalized most terrorist acts under its own laws,¹⁶⁴ and, in 2001, passed the USA Patriot Act, which covers a range of terrorist activities and commensurate state responses, including everything from protecting the northern border¹⁶⁵ to extending the permissible use of wire intercepts.¹⁶⁶

¹⁶² This would not, of course, exempt them from other crimes of international jurisdiction, including war crimes, genocide and crimes against humanity. In fact, the purpose of a terrorist law is to apply it to persons falling *outside* the jurisdiction of these crimes due to their 'non political' status. Additionally, they would be chargeable under applicable domestic law, including murder, assault, and robbery.

¹⁶³ See Bell, *supra* note 127, at 78.

¹⁶⁴ 18 U.S.C. § 2332b (2004).

¹⁶⁵ Tit. IV(A).

¹⁶⁶ Tit. II.

Title VIII of the Patriot Act, which is headed “Strengthening the Criminal Laws Against Terrorism,” amends the definition of “international terrorism” outlined in U.S. Code Section 2331.¹⁶⁷ The words “assassination or kidnapping” in the section have been replaced with “mass destruction, assassination, or kidnapping.”¹⁶⁸ In addition, under the new definition outlined in the Patriot Act, “domestic terrorism” is defined thus:

- (5) The term ‘domestic terrorism’ means activities that—
- (a) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
 - (b) appear to be intended—
 - (i) to intimidate or coerce a civilian population;
 - (ii) to influence the policy of a government by intimidation or coercion; or
 - (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
 - (c) occur primarily within the territorial jurisdiction of the United States.¹⁶⁹

Section 808 of the Patriot Act offers a list of proscribed terrorist activities which is striking in its inclusiveness. The Act proscribes offences ranging from the destruction of an energy facility to the manufacture or use of biological weapons.¹⁷⁰ The Patriot Act is a significant advance in domestic terrorist legislation. Yet despite its breadth, the Act does little to recognize the crime of terrorism *per se*. There is no criminality attached to belonging to a terrorist organization. The domestic definition remains largely intact, with the significant addition of “mass destruction,” but no linkage is made or even attempted with any other form of criminal activity, nor does the law draw from any stated precedent. In sum, the Patriot Act is little more than a laundry list of proscribed criminal offences, with no recognition of the larger

¹⁶⁷ 18 U.S.C. § 2331(1)(B)(iii) (2004).

¹⁶⁸ *Id.*

¹⁶⁹ 18 U.S.C. § 2331(5) (2004).

¹⁷⁰ USA Patriot Act § 808.

forces, political and multinational, which lie behind them. As such, it is a definition without *gravitas*. For the Patriot Act to gain recognition and legitimacy it must be wedded to American piracy law. Indeed, by giving terrorism the definition and precedent of piracy, the United States will in fact be complementing both laws. A melding of terrorism with the Patriot Act gives piracy a revitalizing boost of current relevance, while piracy provides this new terrorist law with both the legitimacy and definition it so desperately needs. This same function will be served on the international level, but it is vital in U.S. law. The United States is the principle actor in the war on terrorism, and hence its laws are the logical locus for the first reform to occur.

It must be emphasized, however, that this is indeed the *first* reform. This article advocates a two-stage process by which piracy and terrorism are wedded in both domestic and international law. As it will be easier—given the legislative structure of the United States—to effect this change domestically, it seems preferable to begin the process with domestic laws. A bill should be introduced before Congress providing a definition along the lines of that advanced above. This will not be in conflict with any existing American criminal law. Neither the Patriot Act nor the federal statute defining piracy¹⁷¹ contain any provisions which prohibit the marriage of piracy and terrorism; neither provides any historical precedent for the crime of terrorism at all. Moreover, there is nothing in U.S. piracy laws—in definition or practice—which would preclude its alliance with terrorism.

There is no doubt that such a reform is permissible under American law. The question, however, lies in the will of American legislatures to undertake it. Why should they effect this change, when the current status of the law allows them to pursue terrorists with relative impunity? One answer, outlined above, is that the United States has the duty to grant due process to even the worst criminals. One might also argue that democratic nations have a special responsibility to make their criminal laws explicit and their punishments just. Yet, neither of these reasons would likely be sufficient to persuade a reluctant legislature bent on extracting its pound of flesh from international terrorists. The primary reason, then, for creating a cohesive American terrorist law must be to facilitate the pursuit, capture, extradition and adjudication of terrorists. All these aims would be vastly aided by a crime of terrorism that owes its source to piracy and shares its principles of universal jurisdiction and *hostis humani generis*. Under the current law, terrorists can only be tried for the crimes enumerated under Section 808 of

¹⁷¹ 18 U.S.C. § 1651 (2004).

the Patriot Act, not for the crime of terrorism itself. Thus, terrorists must either commit these acts or conspire to commit them; in any event, the focus is on the *act*, not the *actor*. The crime of terrorism, as defined above, includes liability for mere membership in a terrorist organization. This is analogous to numerous provisions in piracy law which criminalizes membership in a pirate band, absent any overt piratical actions.¹⁷² The assumption there, as here, is that membership itself signifies a willful break from the laws and protection of society and thus classifies the culprit as an enemy of the human race.

Secondly, the classification of terrorists as enemies of the human race gives legal credence to almost any action undertaken to capture them, at home or abroad, under the doctrine of universal jurisdiction. It has already been remarked that the American courts recognize this principle in piracy law. A similar recognition for terrorism would mean, in effect, that the United States may capture suspected terrorists anywhere they may be found, and compel the extradition of such persons from hostile states on the grounds of *aut dedere aut judicare*.¹⁷³ A new terrorist law would not signify that the U.S. could do these things when previously they could not; in fact, both have been done repeatedly already. Terror suspects such as Osama bin-Laden are pursued worldwide. The United States has repeatedly demanded extradition of terrorists ranging from the *Achille Lauro* hijackers to the Lockerbie bombers.¹⁷⁴ The difference, however, is that it would now be able to do so with the foundation of universal jurisdiction beneath it. Defining terrorists as *hostis humani generis* has no adverse affect on their capture or adjudication under the law. On the contrary, such a classification would primarily serve to: 1) justify past captures and insulate them from international liability as breaches of state sovereignty; and, 2) provide a foundation of legality for similar captures undertaken in the future. It is an

¹⁷² See, e.g., 18 U.S.C. § 1657 (2004) (“Whoever consults, combines, confederates, or corresponds with any pirate or robber upon the seas, knowing him to be guilty of any piracy or robbery... Shall be fined under this title or imprisoned not more than three years, or both”).

¹⁷³ Sailer, *supra* note 15, at 325-26. See generally Michael J. Kelly, *Cheating Justice by Cheating Death: The Doctrinal Collision for Prosecuting Foreign Terrorists—Passage of Aut Dedere Aut Judicare into Customary Law & Refusal to Extradite Based on the Death Penalty*, 20 ARIZ. J. INT'L & COMP. L. 491 (2003) (discussing the conflict between duty to extradite terrorists under international law and refusal to send terrorists back to states where they would face the death penalty).

¹⁷⁴ See McGinley, *supra* note 89, at 693; Sailer, *supra* note 15, at 327.

established principle among states that it is always better, given the choice, to act in accordance with the law rather than in absence of it. A reform of domestic law along the lines I have outlined will give the United States' war on terrorism a solid bulwark of legal legitimacy.

Domestic recognition of terrorism and piracy will aid the U.S. efforts to combat terrorism worldwide; but alone, it provides only part of the solution. Equally vital is a parallel recognition in international law and the demarcation of jurisdiction to an international court to try offenders for the crime. Thus, I advocate the creation of a separate crime of terrorism in the ICC, with the definition stated above. First and foremost, the function of international criminal law is to recognize certain forms of conduct which the international community abjures as threats to society itself.¹⁷⁵ Prosecution is only one aspect of this criminalization; equally important, if not more so, is the mere recognition of criminality, absent any mechanism for capture or enforcement. The primacy of the second purpose is evident from the law's history: whereas certain activities, including piracy, have been deemed 'crimes' against the law of nations for hundreds of years, a viable and permanent international court designated to try them is still in its infancy. The problem of enforceability redolent in nearly all international law suggests that the purpose of such law is as much symbolic as actual. Thus, while there are many practical arguments for extending ICC jurisdiction to the crime of terrorism, it is just as important to remember the symbolic significance of establishing terrorism as an international crime, and terrorists as *hostis humani generis*.

Yet the practical arguments cannot be overemphasized, either. Symbolic significance without actual enforcement has been the persistent "bugbear" of international criminal law, and is the primary reason the ICC was created.¹⁷⁶ The Court's purpose is to provide a permanent locus of jurisdiction for crimes that transcend national borders or confound national judiciaries.¹⁷⁷ International terrorism qualifies on both counts. It is, by definition, an international crime committed by persons of one state against persons of another. It is also a considerable problem for domestic courts, as previous difficulties in extradition and political disputes aptly attest.

In sum, the best course for approaching the problem of international terrorism is to effect the creation of a new terrorist law, based on the laws of piracy, for both domestic and international jurisdiction. As long as the

¹⁷⁵ See Fry, *supra* note 17, at 174.

¹⁷⁶ See *id.* at 180.

¹⁷⁷ Sailer, *supra* note 15, at 318.

United States continues to abstain itself from the ICC, that court will serve as both a guarantor of due process for accused terrorists and an alternate source of jurisdiction for suspects for whom states including the U.S. fail to secure extradition. Thus, the ICC will not be a competitor or drain on individual state jurisdiction, but rather a role-model and, more importantly, complementary judicial body for cases which would be otherwise non-judicable.¹⁷⁸ Domestic and international courts will be working in tandem, prosecuting a far greater number of cases than either could achieve by itself.¹⁷⁹ Overall, the recognition of terrorists as *hostis humani generis* by domestic and international law will give notice to terrorists and the states that harbor them that there is no safe haven for them anywhere on earth. Wherever they go, wherever they may hide or seek shelter, they remain fugitives not only from the nations they have attacked but from the world entire.

The immediate necessity for an international terrorist law post-September 11 lends urgency to the debate surrounding that law, removing it from abstract academic inquiry. It is not enough to merely demonstrate the close relationship between piracy and terrorism as a basis for new law; it must also be shown how that law will aid the international community in the crises ahead. The problem facing jurists is a formidable one. The rapid pace of events forestalls the dispassionate inquiry necessary for creating a just law in favor of swift action, yet swift action without the foundation of law may ultimately worsen the threat of terrorism rather than abate it. Hence, the argument for creating a new law of terrorism from the existing law of piracy must not only have academic merit, but practical merit as well. It must facilitate the capture and prosecution of terrorists under the law, while still providing the parameters by which states may engage in these activities.

It is for this reason that I have chosen to examine the events of September 11, 2001, in light of both existing piracy law and the recommended law of terrorism-as-piracy. It is not my intention, however, to base the entire legitimacy of this legal argument on its applicability to the specific circumstances of September 11. Other scholars have made this mistake in their attempt to relate September 11 to crimes against humanity and genocide.¹⁸⁰ They have done so by arguing that certain elements of those attacks—such as Bin Laden's genocidal *fatwa* or the sheer number of people

¹⁷⁸ See generally Sailer, Rosetti, Fry, *supra*. Each makes a similar argument on this point.

¹⁷⁹ See Rosetti, *supra* note 4, at 585.

¹⁸⁰ See, e.g., Fry, *supra* note 17, at 169.

killed—have requisite commonalities with crimes under ICC jurisdiction.¹⁸¹ This may be true. But it is not enough to prove that the events of September 11 render it definable as an act of genocide to argue that *all* terrorist attacks may be termed thus. The focus should not be on the singularities of September 11, but on the universal elements which it shares with all international terrorist attacks.

The first of these is the piratical concept of “descent by sea.” This provision has both singular and universal applicability to September 11. Singularly, one could argue that the fact that the terrorists flew airliners into a port city means that the attack was analogous to the sacking of a coastal port by pirates emerging from their pirate vessel: the only difference is that the former descended from the air, while the latter descended from the sea itself. International recognition of aerial piracy negates the significance of this distinction; it has long been understood that pirate attacks may occur in the air as from the sea, on the principle that both are outside the jurisdiction of the state.¹⁸²

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

Second, the concept of destruction and homicide—absent any intention of taking—is present in September 11, in nearly all acts of terrorism, and in the law of piracy. The attack on the World Trade Center accomplished three objectives: it terrorized Americans, killed a significant

¹⁸¹ See *id.* at 175.

¹⁸² See *supra* note 137.

number of them, and disrupted trade. In each of these intentions, it was analogous to the pirates' "war against the world," as well as to the legal elements of the crime of piracy as wanton destruction, depredation, and homicide, with or without pecuniary gain. While the scale of September 11 may have been greater, these elements are present in nearly all terrorist attacks, either singly or in combination.

The third universal aspect of piracy and terrorism reflected in September 11 is the idea of an 'international' crime committed by foreign nationals. Although pirates might be considered to be 'at war' with their own state, the legal definition of pirates removes them from the legal protection of that state and renders them, in effect, stateless criminals. This is the practical meaning of *hostis humani generis*. Terrorists as *hostis humani generis* are similarly defined as "international" criminals, and the crime of terrorism presupposes an attack on the state by outsiders, not citizens under the aegis of its laws. Accordingly, the definition of terrorism provided above contains the requirement that the terrorists not be citizens of the affected state. The reason for this, as I have discussed, is to distinguish between acts of legitimate rebellion or individual criminality from the crime of terrorism. Was the Oklahoma City bombing a terrorist act? Under this definition, it was not. The political motives and even the actions of Timothy McVeigh may mirror those of a terrorist organization, but the fact that he was a citizen of the United States must distinguish his crime, however heinous, from actual terrorism. Were it otherwise, domestic courts would have the dubious task of distinguishing homicide from acts of terrorism, which would place an intolerable burden on the legal system. This raises the difficult question, however, of terrorist acts committed on behalf of an international terrorist organization by citizens of the affected state. While these would not, strictly speaking, be crimes of international terrorism, the nexus between the criminal and the organization—if proven—should be sufficient to make an exception in jurisdiction and allow the prosecution for crimes of terrorism to proceed. The justification for this lies in the fact that terrorists are *hostis humani generis*, and consequently those citizens allying themselves with international terrorist organizations remove themselves from the protection of their state. Conversely, not every act of homicide or destruction committed by a foreign national may be termed terrorism. As evidenced by the definition above, the crime of terrorism contains a *mens rea* of deliberation to inflict terror or bring attention to a cause. This must be distinguished from other motivations for homicide, and while the distinction may not always be entirely clear, it is not beyond the abilities of justices to

determine whether a suspect acted for private motives or in furtherance of a terrorist agenda.

Whereas the 'descent by sea' and international components of September 11 provide the basis for a correlation between piracy and terrorism for attacks against the state on its own territory, the hijacking element has applicability to acts committed not against the state *per se* but against its property and citizens around the world. September 11, in fact, is almost unique in combining both these aspects—seizure of an aircraft and attack on the state—into a single act of terrorism. Yet the seizure of a commercial aircraft in itself is an act of piracy, defined as taking by force of a commercial vessel while in transit and holding her passengers and crew captive. The menace of aerial piracy—first addressed in the 1932 Harvard Convention¹⁸³—has been the subject of considerable scholarly debate and is recognized as a form of terrorism in the 1963 U.N. Convention on Offences and Certain Other Acts Committed on Board Aircraft,¹⁸⁴ the 1970 U.N. Convention for the Suppression of Unlawful Seizure of Aircraft,¹⁸⁵ and the 1971 U.N. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.¹⁸⁶ It is also closely allied to that other great menace to civilian transit, maritime terrorism. This relationship is underscored by the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation,¹⁸⁷ which came in the wake of the 1985 *Achille Lauro* affair. Thus, September 11 can be regarded as the most recent of a series of piratical attacks against the vessels of the United States and other countries, and the passengers aboard such vessels. Recalling the definition of piracy as an act of depredation, destruction, or homicide against a civilian vessel, it is unquestionable that the seizure of four civilian aircraft and the deliberate murder of their crew and passengers qualify as piracy under the law.

September 11 may, in fact, be considered as two distinct but interrelated acts of piracy: the seizure of said aircraft, which is a piratical taking under both international convention and international customary law of piracy; and the deliberate use of these aircraft as the means of destroying United States property and attacking United States territory. The link between them is the passengers, whose death may be considered in furtherance of the piratical seizure and of the attack against the World Trade

¹⁸³ See *supra* note 145.

¹⁸⁴ Dec. 6, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105.

¹⁸⁵ See *supra* note 5.

¹⁸⁶ *Id.*

¹⁸⁷ See *supra* note 130.

Center. In either view, the applicability of piracy law to the events of September 11 has profound implications for applying that same law to the crime of terrorism itself.

Conclusion

Just as events determine when a law is most needed, those same events will eventually determine what form that law will take. It is impossible to speculate on the future of international terrorist law absent the events of September 11, 2001. Likewise it is not the intention of this article to transform the law merely because of those attacks, but rather to amend it so it may respond fairly and adequately to the new reality which they engendered. That reality, shortly stated, is war. The war on terrorism may lack the traditional components of state versus state conflict, but it must not be mistaken for anything else. Two regimes have already fallen in its wake; more may do so. Yet the war is not truly waged against these sponsor states, but against the terrorist cells which exist in every nation, including our own.

Terrorists may be of any nationality, and may be found anywhere on earth. Thus, this new war is not merely between the state and its enemies, but the state and itself. It presents problems of definition and jurisdiction that have never been faced, and lie well beyond the existing parameters of domestic and international law.

The problems posed by a war on terrorism exist not only among states, but within them as well. Nations have two sets of laws: one for times of peace, another for war. Under the latter, peacetime liberties are curtailed, external restraints are imposed upon social commerce, and some freedoms temporarily suspended. Such measures are deemed necessary to serve the greater good of protecting the nation from infiltration by its enemies, both within and without. Yet never in its history has America faced a situation such as it finds itself in today. Unlike the experiences of the European states, whose histories are replete with wars, or those of the Middle East and Africa, where local conflict spans millennia, armed conflict for the United States has always come in sporadic bursts. Its wars begin and end on definite dates, and it is entirely unacquainted with the idea of perpetual war. Today, however, America is in a state of *quasi-bellum*, or half-war, wherein the threat and the casualties are undeniable, yet the course of the conflict, and even the enemy, remains nebulous. We cannot know when the war on terrorism will end because we cannot use our successes and failures as a yardstick of its progress. Thus, a universal definition of the crime of terrorism is as crucial for domestic law and policy as it is for international relations.

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

Historically, there has been only one class of private, non-state oriented international criminals, and those are the pirates. Thus it is not merely advantageous to base the definition of a terrorist on that of a pirate; it is essential. Classification of terrorism as a crime against humanity or genocide may address the horrendous nature of the *act*, but it fails to account for the singular status of the *actor*. Both crimes, as with all international crimes excepting piracy, presume that only states or their agents can be held responsible. Hence international criminal law, and the ICC itself, are extensions of the historical presumption that just as conflict can only exist within or between states, international crimes can only occur during and in furtherance of these conflicts. The war on terrorism stands in stark contrast to this presumption, requiring an entirely new perspective not only on the nature of international relations but of international law as well. The transformation of the former has already begun, and will emerge by natural process as the United States continues its pursuit of terrorists across the globe. But the transformation of the latter must be effected by a positive act; it cannot rely on events to bring it to fruition, for the law emerges not from events but in response to them, and is thus a profoundly artificial and man-made creation. Recall that More spoke of “man’s laws, not God’s” keeping order against the Devil’s wind. That is the task of terrorism law: to affect a bulwark against the anarchy inherent in a conflict without territorial boundaries, obvious contestants, or legal parameters. It is a task that can only be met by giving terrorists their correct legal status as *hostis humani generi* under the law.