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Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety

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*By Malvina Halberstam**

INTRODUCTION

On October 7, 1985, the *Achille Lauro*, an Italian-flag cruise ship, was seized while sailing from Alexandria to Port Said.[1] The hijackers, members of the Palestine Liberation Front (PLF), a faction of the Palestine Liberation Organization (PLO),[2] had boarded the ship in Genoa, posing as tourists. They held the ship's crew and passengers hostage, and threatened to kill the passengers[3] unless Israel released 50 Palestinian prisoners.[4] They also threatened to blow up the ship if a rescue mission was attempted.[5] When their demands had not been met by the following afternoon, the hijackers shot Leon Klinghoffer, a Jew of U.S. nationality who was partly paralyzed and in a wheelchair, and threw his body and wheelchair overboard.[6] The

Editorial Note: The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation was adopted on March 10, 1988 at a Diplomatic Conference in Rome and was signed by 23 states, including the United States, on that date. This article went to press before the Diplomatic Conference began and the discussion is based on the draft Convention agreed upon by the *Ad Hoc* Preparatory Committee. Although there were no major changes in the draft Convention, some additions and deletions were made, which will be noted in a subsequent issue.

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[1] It was not clear from the newspaper reports whether the initial seizure was on the high seas or within the territorial waters of Egypt. *Compare* N.Y. Times, Oct. 8, 1985, at A1, col. 6, *with id.*, Oct. 13, 1985, §1, at 22, col. 6. However, there is no doubt that the ship was on the high seas while being held by the hijackers.

[2] For a discussion of the relationship between the PLO and the PLF and a suggestion that the initial raid was endorsed by the PLO, which officially denied involvement, see McGinley, *The Achille Lauro Affair—Implications for International Law*, 52 TENN. L. REV. 691, 699 (1985). *See also* N.Y. Times, Oct. 17, 1985, at A12, col. 2; TIME, Oct. 28, 1985, at 32–33.

[3] The hijackers segregated the Americans and Jews on board and threatened to kill them if their demands were not met. *See* N.Y. Times, Oct. 13, 1985, §1, at 24, col. 5.

[4] N.Y. Times, Oct. 10, 1985, at A11, col. 1; *id.*, Oct. 8, 1985, at A1, col. 6; Documents Concerning the *Achille Lauro* Affair, 24 ILM 1509, 1556 (1985). Among those whose release from prison in Israel was demanded was Samar al-Qantari who had murdered a 5-year-old girl in Nahariya by dashing her head against a rock. N.Y. Times, Oct. 9, 1985, at A18, col. 6.

[5] N.Y. Times, Oct. 8, 1985, at A1, col. 6.

[6] Smith, *The Voyage of the* Achille Lauro, TIME, Oct. 21, 1985, at 30–31.

United States characterized the seizure as piracy,[7] a position that has been supported by some commentators and opposed by others.[8]

Part I of this article examines the customary international law on piracy and the piracy provisions of the 1958 Geneva Convention on the High Seas and the 1982 United Nations Convention on the Law of the Sea to determine whether acts such as the seizure of the *Achille Lauro* constitute piracy under customary international law and/or under these Conventions.

The seizure of the *Achille Lauro* also provided the impetus for the drafting of a convention on maritime terrorism.[9] In November 1986, the International Maritime Organization (IMO) established an *Ad Hoc* Preparatory Committee, open to all states, to consider a Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, based on a draft submitted by Austria, Egypt and Italy. The committee agreed upon a draft Convention at a meeting in Rome in May 1987. A diplomatic conference, at which the Convention is to be adopted, is scheduled for March 1988.

Part II of this article focuses on the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation. It summarizes the key provisions and analyzes the arguments for and against those that

[7] The seizure was characterized as piracy by the President, 24 ILM at 1515; N.Y. Times, Oct. 12, 1985, at A6, cols. 1–6; and by the Legal Adviser, *id.*, Dec. 30, 1985, at A1, col. 5; and the Justice Department obtained arrest warrants charging the hijackers with hostage taking, conspiracy and "piracy on the high seas," 24 ILM at 1554–57.

[8] *Compare* Gooding, *Fighting Terrorism in the 1980's: The Interception of the* Achille Lauro *Hijackers,* 12 YALE J. INT'L L. 158, 159 (1987) ("While it may be contended that the taking of the *Achille Lauro* is not included within [the 1958 Geneva Convention on the High Seas] definition [of piracy] because there was no second vessel involved or because the hijackers did not act for 'private ends,' customary international law and the history of the enforcement of the norm against piracy indicate that such a position is unfounded"), and McGinley, *supra* note 2, at 700 ("Thus it is evident that the seizure of the *Achille Lauro* was piracy *jure gentium*"), *with* Note, *Towards a New Definition of Piracy: The* Achille Lauro *Incident,* 26 VA. J. INT'L L. 723, 748 (1986) ("The Palestinians' actions, however, do not qualify as piracy under international law . . . ").

[9] Although there are several conventions dealing with specific aspects of terrorism, such as hijacking of airplanes (Hague Convention on Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 UST 1641, TIAS No. 7192, 860 UNTS 105), sabotage of airplanes (Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 UST 564, TIAS No. 7570) [hereinafter Montreal Convention], hostage taking (Convention Against the Taking of Hostages, Dec. 17, 1979, *reprinted in* 18 ILM 1456 (1979)), and assault on internationally protected persons (Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 UST 1975, TIAS No. 8532), there is at present no convention on maritime terrorism.

There is no generally accepted definition of terrorism, the meaning of which is, of course, very controversial, and no attempt to define it will be made here. The *Restatement (Third) of U.S. Foreign Relations Law* notes that though there "has been wide condemnation of terrorism," international agreements to define and punish it have not yet been widely ratified because of inability to agree on its definition. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §404 comment *a* (1988) [hereinafter RESTATEMENT (THIRD)]. For a discussion of various attempts to define terrorism, see Levitt, *Is Terrorism Worth Defining?,* 13 OHIO N.U.L. REV. 97 (1986).

have been or are likely to be controversial. Some of these were specifically reserved for resolution by the Diplomatic Conference; others, though agreed upon by the Preparatory Committee, may nevertheless be reconsidered by the Diplomatic Conference.

While the Convention will be an important step in the development of the international law against terrorism, it will not completely supersede the customary international law or the provisions on piracy under the Geneva and UN Conventions. First, the Convention will, of course, only apply among states that ratify it.[10] Second, there are matters dealt with by customary law and/or by the Geneva and UN Conventions not addressed by this

[10] The question arises whether the Convention, *infra* note 11, applies to an offender who is a national of a state that has not ratified the Convention but is found in the jurisdiction of a state party, and, if so, whether such application is consistent with generally recognized principles of international law. Article 3, defining the offenses, states, "any person commits an offence . . ." (*see* "Defining the Offenses" in pt. II *infra*). Article 10 provides that a state party "in the territory of which the offender or alleged offender is found shall, . . . if it does not extradite him, be obliged, *without exception whatsoever and whether or not the offence was committed in its territory*," to submit the case to its authorities. Similar provisions are contained in the conventions dealing with airplane sabotage and hijacking, hostage taking and attacks on internationally protected persons. *See infra* note 101.

At least one commentator questions the theoretical justification for the application of a convention proscribing terrorism, or a particular aspect of terrorism, to nationals of a state that has not ratified it. *See* Paust, *Extradition of the* Achille Lauro *Hostage-Takers: Navigating the Hazards*, 20 VAND. J. TRANSNAT'L L. 235, 254 (1987) ("Universal jurisdiction under the Hostages Convention . . . is highly suspect with regard to defendants who are not nationals of a signatory to the Hostages Convention"). Since terrorist acts are often committed by nationals of states that encourage or condone terrorism, limiting the application of antiterrorist treaties to nationals of state parties would significantly undermine their effectiveness. It would mean that the community of states is essentially helpless to take legal measures against terrorists who are nationals of states that do not ratify the conventions.

A fairly strong argument can be made for applying the conventions to a national of a nonparty if the offense occurred in the territory of a state party. Clearly, the state in whose territory the act occurred (and for ships, the flag state) has jurisdiction under international law. There is no question that a state can regulate conduct in its territory, making certain conduct criminal and providing for the apprehension, trial and punishment of those who engage in it. There is no reason why such a state cannot enter into a treaty with other states—just as the state of nationality of the offender can—authorizing those states to apprehend, try and punish the offender. This would, of course, not resolve the problem of a terrorist act committed by a national of a state that is not a party to the convention in the territory of a state that is not a party.

The simplest argument for applying the conventions in the latter situation is that terrorism is subject to universal jurisdiction under existing customary international law. Alternatively, one might argue that once the respective conventions are ratified by a large number of states, as is true of the airplane hijacking and sabotage conventions (*see infra* text at note 128), they create customary international law. *See* RESTATEMENT (THIRD), *supra* note 9, §§404, 423. *See also* Paust, *supra*, at 250 (who holds that terrorism involves a violation of fundamental human rights recognized by customary international law). As for the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, if one takes the position that terrorist acts on the high seas constitute piracy, there is no problem, as universal jurisdiction is generally accepted.

Finally, even if one questions whether a customary rule of law subjecting terrorism to universal jurisdiction has emerged, it seems fairly clear that the underlying conduct involved in most acts of terrorism, e.g., hijacking, hostage taking, attacks on diplomats, is generally considered an offense under the laws of most states and by the international community. If so, the

Convention.[10a] Matters not regulated by this Convention continue to be governed by the rules and principles of general international law, as the Convention makes clear in the Preamble.[11] Thus, the application of the customary law on piracy and of the Geneva and UN provisions on piracy to terrorist acts on the high seas continues to be of practical as well as scholarly significance.

I. PIRACY

Customary International Law

Although piracy is the oldest and perhaps only crime over which universal jurisdiction was generally recognized under customary international law,[12] there was no authoritative definition of piracy under customary law.[13] It was not settled, for example, whether *animus furandi*, an intent to rob, was a necessary element, whether acts by insurgents seeking to overthrow their government should be exempt, as were acts by state vessels and by recog-

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state in which the offender is found is not applying its laws to criminalize conduct by a non-national that was not otherwise criminal, but is only applying its laws on jurisdiction to a non-national found in its territory. It is arguable that by coming into the state, the perpetrator is subjecting himself to that state's jurisdiction, even if it would not have jurisdiction without his presence. Presence has long been a basis for jurisdiction in civil matters. *See, e.g.*, Pennoyer v. Neff, 95 U.S. 714 (1877). The question has not come up in criminal matters because a state generally will not apply the penal laws of another state, but it would not be unreasonable to make it a basis of jurisdiction in such matters, where holding the offender criminally responsible for the act comports with fundamental fairness, particularly if there is no other forum with a stronger claim to jurisdiction willing and able to try him.

[10a] For example, the Convention does not address who may free a ship being held by terrorists. Under customary law, any state may seize a pirate ship; under the Geneva Convention, states having an opportunity to do so may have an obligation to act against a pirate ship. *See* notes 59–60 *infra* and accompanying text. Therefore, whether a ship under the control of terrorists constitutes a pirate ship may be of great practical significance. For the position that a ship seized by terrorists and converted by them to their own use may constitute a pirate ship under customary law, see note 67 *infra* and accompanying text.

[11] The Preamble states: "AFFIRMING FURTHER that matters not regulated by this Convention continue to be governed by the rules and principles of general international law . . . ." *See* Draft Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, IMO Doc. PCUA 2/5, Ann. 1, at 2 (June 2, 1987) [hereinafter Convention].

[12] "[P]iracy by the law of nations, in its jurisdictional aspects, is *sui generis*." S.S. Lotus, 1927 PCIJ (ser. A) No. 10 (Sept. 7), 2 M. HUDSON, WORLD COURT REPORTS 20, 70 (Moore, J., dissenting). The Draft Convention on Jurisdiction with Respect to Crime, prepared by the Harvard Research in International Law, 29 AJIL Supp. 435 (1935), provided for two categories of universal jurisdiction. However, only jurisdiction over piracy was absolute, or unconditional. Universal jurisdiction for other offenses depended on specified conditions, e.g., that the crime was "committed in a place not subject to the authority of any State." *Id.* at 440–41.

[13] The discussion in this section deals with the customary law of piracy as it had developed prior to the adoption of the Geneva Convention on the High Seas. Although the customary law of piracy was not superseded by the Convention since not all states ratified it and it may not cover all aspects of piracy, with respect to those issues addressed by the Geneva Convention, its adoption focused attention on its provisions and substantially stopped the further development of customary law. *See, e.g.*, the discussion of the *Santa María* seizure *infra*. Although the seizure occurred before the Geneva Convention came into effect (but after it was adopted), several of the commentators discussed it with respect to the provisions of the Convention.

nized belligerents, and whether the act had to be by one ship against another or could be on the same ship. Brierly stated: "There is no authoritative definition of international piracy, but it is of the essence of a piratical act to be an act of violence, committed at sea or at any rate closely connected with the sea, by persons not acting under proper authority."[14]

Courts in the United States and Britain and a number of prominent publicists took the position that any unauthorized act of violence committed on the high seas is piracy. Thus, Oppenheim's *International Law,* edited by Sir Hersch Lauterpacht, stated:

> Piracy, in its original and strict meaning, is every unauthorised act of violence committed by a private vessel on the open sea against another vessel with intent to plunder (*animo furandi*). The majority of writers confine piracy to such acts, which indeed are the normal cases of piracy. But there are cases possible which are not covered by this narrow definition, and yet they are treated in practice as though they were cases of piracy. Thus, if the members of the crew revolt and convert the ship, and the goods thereon, to their own use, they are considered to be pirates, although they have not committed an act of violence against another ship. Again, if unauthorised acts of violence, such as murder of persons on board the attacked vessel, or destruction of goods thereon, are committed on the open sea without intent to plunder, such acts are in practice considered to be piratical. Therefore several writers, correctly, it is believed, oppose the usual definition of piracy as an act of violence committed by a private vessel against another with intent to plunder. However, no unanimity exists among them concerning a fit definition of piracy, and the matter is therefore very controversial. If a definition is desired which really covers all such acts as are in practice treated as piratical, piracy must be defined as *every unauthorised act of violence against persons or goods committed on the open sea either by a private vessel against another vessel or by the mutinous crew or passengers against their own vessel.*[15]

In a landmark English decision, *In re Piracy Jure Gentium,* the court endorsed as the "nearest to accuracy" Kenny's definition "where he says piracy is *any armed violence at sea which is not a lawful act of war.*"[16]

Although piracy was frequently defined as "robbery at sea,"[17] both U.S. and English courts have held that actual robbery is not an essential element. More than a century ago, Justice Story wrote:

> A pirate is deemed, and properly deemed, *hostis humani generis.* But why is he so deemed? Because he commits hostilities upon the subjects

[14] J. BRIERLY, THE LAW OF NATIONS 154 (1928), *quoted in* Harvard Research in International Law, Comment to the Draft Convention on Piracy, 26 AJIL Supp. 749, 750 (1932) [hereinafter Harvard Research, Piracy]. For the text of the draft Convention, see *id.* at 743. The Comment includes a comprehensive review of, and extensive quotations from, various authorities.

[15] 1 L. OPPENHEIM, INTERNATIONAL LAW 608–09 (Lauterpacht 8th ed. 1955) (footnotes omitted) (emphasis in original). For a review and discussion of the definitions suggested by various publicists, see Harvard Research, Piracy, *supra* note 14, at 749–51, 769–80.

[16] *In re* Piracy Jure Gentium, 1934 App. Cas. 586, 598, *reprinted in* 3 BRIT. INT'L L. CASES 836, 842 (1965) (emphasis added).

[17] *See infra* text accompanying note 28.

> and property of any or all nations, without any regard to right or duty, or any pretence of public authority. *If he willfully sinks or destroys an innocent merchant ship, without any other object than to gratify his lawless appetite for mischief, it is just as much a piratical aggression, in the sense of the law of nations, and of the act of Congress, as if he did it solely and exclusively for the sake of plunder, lucri causa.* The law looks to it as an act of hostility, and being committed by a vessel not commissioned and engaged in lawful warfare, it treats it as the act of a pirate . . . .[18]

More recently, Viscount Sankey stated:

> When it is sought to be contended, as it was in this case, that armed men sailing the seas on board a vessel, without any commission from any state, could attack and kill everybody on board another vessel, sailing under a national flag, without committing the crime of piracy unless they stole, say, an article worth six-pence, their Lordships are almost tempted to say that a little common sense is a valuable quality in the interpretation of international law.[19]

One of the more controversial areas under customary law concerned the treatment of insurgents who had not achieved the status of recognized belligerents. In *The Ambrose Light,* a U.S. court, refusing to exempt insurgents, reasoned:

> [T]he liability of the vessel to seizure, as piratical, turns wholly upon the question whether the insurgents had or had not obtained any previous recognition of belligerent rights, either from their own government or from the political or executive department of any other nation; and that, in the absence of recognition by any government whatever, the tribunals of other nations must hold such expeditions as this to be technically piratical. . . . Wheaton defines piracy as "the offense of depredating on the high seas without being authorized by any sovereign state, or with commissions from different sovereigns at war with each other." Rebels who have never obtained recognition from any other power are clearly not a sovereign state in the eye of international law, and their vessels sent out to commit violence on the high seas are therefore piratical within this definition.

The court concluded that such insurgents who

> send out vessels of war are, in legal contemplation, merely combinations of private persons engaged in unlawful depredations on the high seas; that they are civilly and criminally responsible in the tribunals for all their acts of violence; that in blockading ports which all nations are entitled to enter, they attack the rights of all mankind, and menace with destruction the lives and property of all who resist their unlawful acts; that such acts are therefore piratical, and entitle the ships and tribunals of every nation whose interests are attacked or menaced, to suppress, at their discretion, such unauthorized warfare by the seizure and confiscation of the vessels engaged in it.[20]

[18] United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210, 232 (1844) (emphasis added).

[19] *In re* Piracy Jure Gentium, 3 BRIT. INT'L L. CASES at 840.

[20] United States v. The Ambrose Light, 25 Fed. 408, 412–13 (S.D.N.Y. 1885) (citations omitted). Compare the following language in The Magellan Pirates, 164 Eng. Rep. 47, 48 (1853):

Hall, on the other hand, argued that it was improper to treat insurgents fighting for political independence as pirates. Attacking the state's ships at sea was one of the ways they might gain such independence; the essence of piracy was that it was for private, as contrasted with public, ends; and insurgents attempting to overthrow their government were not a threat to all nations (*hostis humani generis*), as their attacks were limited to ships of the state from which they were seeking independence. He said:

> Most acts which become piratical through being done without due authority are acts of war when done under the authority of a state, and, as societies to which belligerent rights have been granted have equal rights with permanently established states for the purposes of war, it need scarcely be said that all acts authorized by them are done under due authority. . . . It is impossible to pretend that acts which are done for the purpose of setting up a legal state of things, and which may in fact have already succeeded in setting it up, are piratical for want of an external recognition of their validity, when the grant of that recognition is properly dependent in the main upon the existence of such a condition of affairs as can only be produced by the very acts in question. It would be absurd to require a claimant to justify his claim by doing acts for which he may be hanged. Besides, though the absence of the competent authority is the test of piracy, its essence consists in the pursuit of private as contrasted with public ends. Primarily the pirate is a man who satisfies his personal greed or his personal vengeance by robbery or murder in places beyond the jurisdiction of a state. The man who acts with a public object may do like acts to a certain extent, but his moral attitude is different, and the acts themselves will be kept within well-marked bounds. *He is not only not the enemy of the human race, but he is the enemy solely of a particular state.*[21]

Most of those who took the position that insurgents fighting for independence should be exempt from the laws of piracy stressed that the exemption applied only if the acts were directed solely against a particular state and nationals and vessels of all other states were unharmed. Hyde, for example, stated that the "United States has at various times expressed reluctance to treat as piratical the operating of insurgent vessels engaged in furthering a public end, *and when directed solely against persons and property associated with governments sought to be overthrown.*"[22] He cited as support a

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> It is true that where the subjects of one country may rebel against the ruling power, and commit divers acts of violence with regard to that ruling power, that other nations may not think fit to consider them as acts of piracy. . . . I think it does not follow that, because persons who are rebels or insurgents may commit against the ruling power of their own country acts of violence, they may not be, as well as insurgents and rebels, pirates also; pirates for other acts committed towards other persons. It does not follow that rebels or insurgents may not commit piratical acts against the subjects of other states, especially if such acts were in no degree connected with the insurrection or rebellion.

For a discussion of these and other cases on point, see Johnson, *Piracy in Modern International Law*, 43 GROTIUS SOC'Y TRANSACTIONS 63, 76–81 (1957).

[21] 3 F. WHARTON, INTERNATIONAL LAW DIGEST 471–72 (2d ed. 1887) (quoting W. HALL, INTERNATIONAL LAW 233–34 (1st ed. 1884) (emphasis added)).

[22] C. HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 774 (2d ed. 1945) (emphasis added).

memorandum from the Solicitor of the Department of State that gave as the test for determining whether a vessel is piratical "whether it confines itself to depredations against its own country or commits depredations against vessels of other countries."[23]

Thus, while there was no authoritative definition of piracy, it may fairly be concluded that under the prevailing view of piracy in customary international law, terrorist acts such as the seizure of the *Achille Lauro* and the murder of one of its passengers would not have been exempt. Even those publicists who urged, and those states that accepted, an exemption for insurgents extended it only to insurgents whose acts were directed against a particular state.

Provisions on Piracy under the Geneva and UN Conventions

Attacks with a Political Purpose: "For Private Ends." Both the 1958 Geneva Convention on the High Seas (Geneva Convention),[24] to which the United States is a party, and the 1982 United Nations Convention on the Law of the Sea (UN Convention),[25] to which the United States is not a party, have provisions on piracy. Article 15 of the former and Article 101 of the latter provide:

> Piracy consists of any of the following acts:
>
> (a) any illegal acts of violence, detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
>
> (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

[23] *Id.* at 775. The full opinion is reprinted in 2 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 697 (1941). The memorandum specifically rejected the position of *The Ambrose Light*, that the laws of piracy apply to acts by all insurgents who have not achieved the status of recognized belligerents. Wharton's position was similar to that of Hyde and the State Department: "Armed cruisers, which, though claiming to be commissioned by insurgents, prey on merchant vessels of all nationalities, indiscriminately, are to be regarded as pirates." *See* 3 F. WHARTON, *supra* note 21, at 457. In The Magellan Pirates, 164 Eng. Rep. 47 (1853), Lushington took the position that the same persons may be considered both insurgents and pirates, depending on whom they attack. *See supra* note 20.

[24] Apr. 29, 1958, 13 UST 2312, TIAS No. 5200, 450 UNTS 82. The Convention did not enter into force until Sept. 30, 1962.

[25] UN Doc. A/CONF.62/122, *opened for signature* Dec. 10, 1982, *reprinted in* UNITED NATIONS, THE LAW OF THE SEA: UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, UN Sales No. E.83.V.5 (1983). The Convention has not yet been ratified by a sufficient number of states to bring it into force. President Reagan announced on July 9, 1982, that the United States would not sign this Convention because of major problems in its seabed-mining provisions. 1982 PUB. PAPERS: RONALD REAGAN 911–12. President Reagan's Ocean Policy Statement of Mar. 10, 1983 recognized that "the convention also contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interests of all states," and declared that "the United States is prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans—such as navigation." 1983 *id.* at 378–79.

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b) of this article.

J. P. A. François, the special rapporteur for the International Law Commission, which drafted the Geneva Convention, stated that in preparing the articles on piracy, he had relied heavily on the Draft Convention on Piracy prepared by the Harvard Research in International Law and the Comment to the Draft (Comment) by Professor Bingham, the reporter.[26] Article 3 of the Harvard draft provides in part:

> Piracy is any of the following acts, committed in a place not within the territorial jurisdiction of any state:
>
> 1. Any act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, for private ends without bona fide purpose of asserting a claim of right, provided that the act is connected with an attack on or from the sea or in or from the air.[27]

The term "for private ends" is not defined in the Geneva Convention on the High Seas or in the Harvard Draft Convention on Piracy, nor can its meaning be determined unequivocally in either of these documents. It is arguable, however, on the basis of the *travaux préparatoires*, that "for private ends" was used in the Harvard draft to exclude acts by unrecognized insurgents who limited their attacks to the state from which they were seeking independence, and was used in the Geneva Convention for that purpose and also to exclude attacks by state ships, and that neither the Harvard draft nor the Geneva Convention was intended to exclude all attacks that were animated by a political motive.

It is clear that "for private ends" was not used either in the Harvard draft or in the Geneva Convention to limit piracy to acts done with an intent to rob (*animus furandi*), notwithstanding the body of opinion that such intent was a necessary element of piracy. Professsor Bingham stated in the Comment:

> Acts done with other purposes than robbery also are put under the common jurisdiction, although the typical piracy is usually defined as robbery on the high seas; for there is no good reason why one who does an act with intent to kill, wound, rape, enslave or imprison, or to steal or maliciously destroy property, which would be piracy if done to rob, should not be subjected to more probable retribution through the

[26] Summary Records of the Seventh Session, [1955] 1 Y.B. INT'L L. COMM'N 19, 25, UN Doc. A/CN.4/SER.A/1955; Report of the International Law Commission to the General Assembly, 2 UN GAOR Supp. (No. 9), UN Doc. A/3159 (1956), *reprinted in* [1956] 2 Y.B. INT'L L. COMM'N 253, 282, UN Doc. A/CN.4/SER.A/1956/Add.1. For citation to the Harvard Draft Convention on Piracy and Comment, see *supra* note 14.

[27] Harvard Research, Piracy, *supra* note 14, at 768–69.

> common jurisdiction of all states, instead of to a lesser chance of apprehension and punishment by a single state (or one of two or three states) which may not have the present force, or opportunity or interest to serve the cause of security and order in the locality.[28]

In presenting his draft to the International Law Commission, the rapporteur listed as one of the principles on which it was based "that *animus furandi* did not have to be present."[29] He supported his position by quoting the Comment to the Harvard draft and the writings of several publicists. The Commission explicitly adopted the rapporteur's position in its report to the General Assembly.[30]

What remains unclear is whether the "for private ends" proviso was intended to exclude all acts done for political purposes or only acts committed by unrecognized insurgents that would be lawful if committed by recognized belligerents. The Comment to the Harvard draft states:

> It may be thought advisable to exclude from the common jurisdiction certain doubtful phases of traditional piracy which can now be left satisfactorily to the ordinary jurisdiction of a state, or of two or three states, stimulated to action on occasion by diplomatic pressure . . . . *Therefore the draft convention excludes from its definition of piracy all cases of wrongful attacks on persons or property for political ends, whether they are made on behalf of states, or of recognized belligerent organizations, or of unrecognized revolutionary bands.*[31]

Specifically with reference to the "private ends" requirement, the Comment observes:

> Although states at times have claimed the right to treat as pirates unrecognized insurgents against a foreign government who have pretended to exercise belligerent rights on the sea against neutral commerce, or privateers whose commissions violated the announced policy of the captor, and although there is authority for subjecting some cases of these types to the common jurisdiction of all states, it seems best to confine the common jurisdiction to offenders acting for private ends only. There is authority for the view that this accords with the law of nations.[32]

The Comment then refers to Article 16,[33] where it states:

> This Article covers *inter alia* the troublesome matter of illegal forcible acts for political ends against foreign commerce, committed on the high sea by unrecognized organizations. For instance a revolutionary

[28] *Id.* at 786. *See also id.* at 790, *quoted in* [1955] 1 Y.B. INT'L L. COMM'N at 70; M. S. MCDOUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS 810 (1962).

[29] [1955] 1 Y.B. INT'L L. COMM'N at 41.

[30] "The intention to rob (*animus furandi*) is not required. Acts of piracy may be prompted by feelings of hatred or revenge, and not merely by the desire for gain." [1956] 2 Y.B. INT'L L. COMM'N at 282. *See also* M. S. MCDOUGAL & W. BURKE, *supra* note 28, at 811.

[31] Harvard Research, Piracy, *supra* note 14, at 786 (emphasis added).

[32] *Id.* at 798.

[33] Article 16 provides: "The provisions of this convention do not diminish a state's right under international law to take measures for the protection of its nationals, its ships and its commerce against interference on or over the high sea, when such measures are not based upon jurisdiction over piracy." *Id.* at 857.

> organization uses an armed ship to establish a blockade against foreign commerce, or to stop and search foreign ships for contraband, or to seize necessary supplies from foreign ships. These acts are illegal under international law, *at least if the revolutionary organization has not been recognized as a belligerent by the offended state,* and in some cases the offended state has proceeded to capture or destroy the offending ship.[34]

It appears from this language that the Harvard draft sought to exclude from the definition of piracy acts that were illegal because the revolutionary organization had not been recognized as a belligerent, but would have been legal if it had been so recognized. Further, the Comment notes that "some writers assert that such illegal attacks on foreign commerce by unrecognized revolutionaries are piracies in the international law sense; and there is even judicial authority to this effect." It concludes, however, that "the better view [is] that these are not cases falling under the common jurisdiction of all states as piracy."[35] But, as noted above, and as the quotations in the Comment confirm,[36] the proponents of the position that acts by insurgents should not constitute piracy—the position that the Comment to the Harvard draft accepts as the "better view"—took that position only with respect to insurgents whose acts were directed solely against the state whose government they sought to overthrow, not those who attacked ships of all nations indiscriminately. The Comment also explains that Article 16

> leaves unaffected the right of an offended state to seize and punish the offenders in accordance with the precedents cited (and, of course, this may, at the option of the prosecuting state, include conviction and punishment for piracy under its municipal law); but it does not concede jurisdiction on the ground of piracy in the international sense to *states not offended or threatened.*[37]

Again, the reference to "states not offended or threatened" suggests that the drafters contemplated situations in which the threat or injury was directed against a particular state, not against all states. Similarly, it is arguable that the "for private ends" provision in Article 3, to which Article 16 was the counterpart, was intended to exclude only acts directed against a particular state.[38]

The International Law Commission devoted considerable discussion to the "for private ends" proviso. After quoting from the Comment to the Harvard Draft Convention on Piracy the language reproduced in part above,[39] the rapporteur stated that "following the Harvard precedent, he had defined as piracy acts of violence or depredation committed for private

[34] *Id.* (emphasis added).

[35] *Id.*

[36] *See id.* at 857–61 (quoting the Report of the Sub-Committee of the League of Nations Committee of Experts for the Progressive Codification of International Law; C. HYDE, *supra* note 22, §233 (1st ed. 1922); W. HALL, *supra* note 21, at 314–15 (8th ed. 1924); and others).

[37] *Id.* at 857 (emphasis added).

[38] Otherwise, the category of cases excluded from universal jurisdiction by the "for private ends" language of Article 3 would be greater than the category of cases for which jurisdiction by the injured state was recognized under Article 16, a result that could clearly not have been intended.

[39] *See supra* text accompanying note 32.

ends, thus leaving outside the scope of the definition all wrongful acts perpetrated for a political purpose."[40] He continued:

> Although States at times have claimed the right to treat as pirates unrecognized insurgents against a foreign government *who have pretended to exercise belligerent rights on the sea against neutral commerce,* or privateers whose commissions violated the announced policy of the captor, and although there is authority for subjecting some cases of these types to the common jurisdiction of all States, it seems best to confine the common jurisdiction to offenders acting for private ends only.[41]

He, too, was apparently interpreting "for private ends" to exclude from the application of the laws of piracy acts by "unrecognized insurgents" exercising belligerent rights without having achieved belligerent status.

The discussion thereafter focused on whether acts by state vessels can constitute piracy. The report went on to quote Oppenheim: "Private vessels only can commit piracy. A man-of-war or other public ship, so long as she remains such, is never a pirate . . . ."[42] Responding to a complaint by Poland that China's seizure of its ships constituted piracy, the rapporteur is summarized as having said that "[n]o warship . . . could be described as a pirate ship in the international sense of the word."

> The principle of common jurisdiction, according to which a pirate was treated with universal public enmity, could only exist where the political element was lacking and where the ship concerned was not the public property of a State.
>
> . . . *All that was made clear by the words "for private ends",* as used in article 23, and the Polish memorandum was in fact a challenge to that element of his definition of piracy. *He would insist on those words being retained.*[43]

Jaroslav Zourek argued in response that "[m]any authorities, including L. Oppenheim, held that state-owned vessels could also be guilty of piracy, and that notion had been further substantiated by the 1937 Nyon Arrangement."[44] Zourek was referring to an agreement concluded by nine states[45] at Nyon during the Spanish Civil War, when unidentified submarines were attacking ships in the Mediterranean. Declaring that the attacks on ships not belonging to either of the conflicting parties should be treated as "acts of piracy," the agreement provided for collective measures "against piratical acts by submarines." A supplementary agreement extended the Nyon Arrangement to attacks by surface vessels and aircraft.[46]

Responding to Zourek, Sir Gerald Fitzmaurice stressed that, since no state had admitted ownership of the submarines in question, it was reasonable to assume that they were acting "for private ends." Fitzmaurice concluded that "[i]f he was right in arguing that the Nyon Arrangement had been based on that fact, the Special Rapporteur's point that piracy was

[40] [1955] 1 Y.B. INT'L L. COMM'N at 40.
[41] *Id.* at 41.
[42] *Id.*
[43] *Id.* (emphasis added).
[44] *Id.* at 43.
[45] Great Britain, Bulgaria, Egypt, France, Greece, Romania, Turkey, the Union of Soviet Socialist Republics and Yugoslavia.
[46] *See* 2 G. HACKWORTH, *supra* note 23, at 693.

essentially a crime committed by private individuals not in the performance of a public or authorized duty was reinforced."[47] At a subsequent meeting, he repeated that "*the real basis of the agreement reached at Nyon was the assumption that the acts had been unauthorized because no government would admit responsibility;* otherwise the normal representations would have been made."[48]

Clearly, the submarines were acting for "political" or "public ends," not for "private ends" as these terms are commonly understood. Fitzmaurice, however, was equating "public" with "authorized," and acts committed for "private ends" with acts that were not authorized and for which no government was willing to assume responsibility. He interpreted the "for private ends" proviso as referring to acts that had not been authorized by a government; as such, they were subject to the laws of war and should therefore not be subject to the laws of piracy.

Nevertheless, Fitzmaurice recognized that the term "for private ends" did not convey the idea clearly, since it "did not immediately convey that an act committed by a vessel of war on the authority of its government did not constitute piracy in the ordinary sense of the term as understood in international law, though it might be an act of aggression."[49] When the Commission thereafter defeated, by 11 to 2, a Soviet motion to delete "for private ends," it did so to reject the suggestion by Communist bloc states that the laws of piracy should apply to state vessels. This was made plain by Mr. Hsu, who, speaking immediately before the vote was taken,

> observed that a government, whether recognized or not by other States, continued to exist. He feared that if State A did not recognize State B, State B would retaliate by not recognizing State A and if each treated the vessels of the other as pirates the peace of the world would be gravely endangered.[50]

Similarly, the rapporteur "urged the Commission to reflect most carefully on the consequence of allowing seizure of a warship by a State on suspicion that it had committed acts of piracy. Such a step carried far more serious implications than in the case of seizure of merchantmen."[51] It was never suggested by anyone that the "for private ends" language would exempt terrorist acts.[52]

[47] [1955] 1 Y.B. INT'L L. COMM'N at 43–44.

[48] *Id.* at 56 (emphasis added).

[49] *Id.* These statements are all the more noteworthy since François, in rejecting the Polish complaint, and Fitzmaurice, in rejecting the suggestion that the Nyon Arrangement indicated an extension of the laws of piracy to state vessels, could have relied on the private vessel requirement rather than on the "private ends" proviso, as they did. *See supra* text accompanying notes 43 and 47–48. In a paper discussing the Commission's draft, D. H. N. Johnson stated, "It is arguable that it would be better to emphasize the lack of due authority as the essence of piracy, rather than, as does the International Law Commission, the fact that piracy is a crime committed for 'private ends.' " Johnson, *supra* note 20, at 77 n.21. He does not, however, consider the two tests coextensive. *Id.*

[50] [1955] 1 Y.B. INT'L L. COMM'N at 57. [51] *Id.*

[52] Zourek even stated that "the Commission had accepted the thesis that an insurgent vessel committing acts of piracy against a third State was a pirate," though Yuen-li Liang, Secretary to the Commission, said "he had no recollection of such a decision." *Id.* at 56.

The "for private ends" proviso may be interpreted as excluding from the laws of piracy not only insurgents who direct their acts solely against the state whose government they seek to overthrow, but also all those whose acts have no personal motive, whether monetary or otherwise. This interpretation is consistent with the statements in the Comments to the Harvard draft and to the Geneva Convention that the desire for personal gain is not essential. The Harvard Comment quoted the statement by Hyde that

> as piracy does not necessarily involve the taking of property, the absence of an intent to steal is not necessarily decisive of the character of what takes place. According to Dana, "the motive may be gratuitous malice, or the purpose may be to destroy, in private revenge for real or supposed injuries done by persons or classes of persons, or by a particular national authority."[53]

Even if the proviso were so interpreted, it would not necessarily exempt the acts of the hijackers of the *Achille Lauro.* Although the hijackers were allegedly members of a terrorist organization whose avowed aim is to destroy Israel, they seized an Italian ship that had just left Egypt on its way to Israel, and killed a U.S. national, a crippled Jewish man who clearly could not have offered any resistance. The motive may well have been "gratuitous malice," or "private revenge for real or supposed injuries done by persons or classes of persons" (Jews) or by a particular "national authority" (Israel). Claims that the hijackers had intended to use the ship to attack Israel and only seized it, took the passengers hostage and killed Klinghoffer when they were discovered and their purpose frustrated, support rather than negate the position that their acts were piratical. Under this scenario, there was no political purpose at the time they killed Klinghoffer, assuming there had been one at the outset.

While the particular facts of the *Achille Lauro* incident may bring the hijackers within the definition of piracy even under this interpretation of the "private ends" provision, piracy so defined might not apply to terrorist acts in different circumstances.[54] Moreover, while the interpretation is possible, it is more likely that the intention was to exclude unrecognized insurgents acting against a foreign government and ships acting under public authority, as indicated by the Comments to the Harvard draft and the discussion by the International Law Commission quoted above.[55] Further, the rationale for exempting insurgents from the laws of piracy does not apply to random seizures of vessels and attacks on their passengers. Exclusion cannot be justified on the ground that, in the words of Hall, "it is by the

[53] Harvard Research, Piracy, *supra* note 14, at 806.

[54] Though one might take the position that the deliberate, indiscriminate murder of civilians regardless of the identity, status or nationality of the victim is always "gratuitous malice," as no political purpose can be served thereby; certainly not the destruction of the government the insurgents seek to overthrow, or recognition as belligerents, the justification urged by Hall for exempting insurgents from the laws of piracy. *See* quote in text accompanying note 21 *supra.*

[55] Significantly, the rapporteur for the International Law Commission quoted these passages concerning insurgents but did not quote the Hyde passage, text accompanying note 53 *supra. See supra* text accompanying notes 39–41.

performance of such acts that independence is established and its existence proved."[56] Nor can it be said of the terrorist, as Hall said of the insurgent whose exemption he advocated, that "his moral attitude is different, and the acts themselves will be kept within well-marked bounds. He is not only not the enemy of the human race, but he is the enemy solely of a particular state."[57]

One commentator suggested that the reason for the "private ends" proviso in the Geneva Convention, which he interpreted as a departure from customary law and a narrowing of the definition of piracy (rather than an incorporation of that law and resolution of the unsettled question concerning insurgents in favor of exclusion, as suggested by the present writer), was to impose a *duty* on states to take measures against piracy. He said, "States might have been reluctant to accept a rule which might create liability in numerous situations."[58]

Article 14 of the Geneva Convention provides: "All States shall cooperate to the fullest possible extent in the repression of piracy . . . ." The commentary to the International Law Commission's draft Article 38, which became Article 14 of the Geneva Convention, states: "Any State having an opportunity of taking measures against piracy, and neglecting to do so, would be failing in a duty laid upon it by international law."[59] Johnson interpreted this to mean that a state that failed to discharge the duty is liable for "the payment of reparation to other States whose shipping was molested by the pirates in question."[60]

It might be argued that if and to the extent that the "private ends" language is interpreted as narrowing the definition of piracy under customary international law, that narrowing only applies insofar as the Convention imposes a duty on states to exercise jurisdiction but does not preclude the exercise of jurisdiction in other situations to the extent permitted by customary international law. This result, however, does not appear to have been the intent of the authors of the Harvard draft or of the International Law Commission. The Harvard Comment makes clear that the purpose was to establish uniform rules: "The theme of this draft convention is the definition of this extraordinary basis of jurisdiction and the specification of the conditions and limitations pertaining to the exercise of jurisdiction on this

[56] *See* W. HALL, *quoted in* text accompanying note 21 *supra*.

[57] *Id.* at 234.

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

[59] [1956] 2 Y.B. INT'L L. COMM'N at 282. The Harvard draft, *supra* note 14, similarly provided, "The parties to this Convention agree to make every expedient use of their powers to prevent piracy, separately and in co-operation." Art. 18. However, the Comment specifically rejected any implication that this might impose a duty on states to act. The introduction states, "the draft convention does not assert a definite duty of signatories to seize or prosecute all pirates. It imposes on them by Article 18 only a general discretionary obligation to discourage piracy by exercising their rights of prevention and punishment as far as is expedient." Harvard Research, Piracy, *supra* note 14, at 760.

[60] Johnson, *supra* note 20, at 65.

ground."[61] And the Comment to the piracy provisions of the Geneva Convention states:

> The questions arising in connexion with acts committed by warships in the service of rival Governments engaged in civil war are too complex to make it seem necessary for the safeguarding of order and security on the high seas that all States should have a general right, let alone an obligation, to repress as piracy acts perpetrated by the warships of the parties in question.[62]

This assertion seems to indicate that the article was intended to limit the right, as well as the obligation, to act. It also indicates, as stated earlier, that the Commission's primary concern was to exclude from the laws of piracy ships of belligerents engaged in hostilities.

It was mentioned above that the UN Convention on the Law of the Sea reiterated the piracy provisions of the Geneva Convention. I have found no recorded discussion of these provisions at any of the conferences preceding the adoption of the Convention and several of the participants have assured me that there was no such discussion. Although commentators on the subject urged that the definition of piracy be modified to make clear that terrorist acts on the high seas were piratical,[63] the importance and controversial nature of other matters apparently precluded consideration of piracy.

Attacks Against Another Ship. The question whether an act on board a ship, such as the murder of one passenger or crew member by another passenger or crew member, or the seizure of the ship by members of the crew, constitutes piracy was not settled under customary international law. The consensus, however, seemed to be that it depended on whether it was appropriate in the circumstances of the particular case to hold the flag state responsible for the acts. If the vessel retained its national character and remained subject to the authority of the flag state, it was not a pirate ship and only that state had jurisdiction. Where the ship did not submit to the authority of any state and no state could be held responsible for its acts, it became subject to the jurisdiction of all states.[64] Thus, Hall stated:

> Piracy includes acts differing much from each other in kind and in moral value; but one thing they all have in common: they are done under conditions which render it impossible or unfair to hold any state responsible for their commission. A pirate either belongs to no state or organised political society, or by the nature of his act he has shown his intention and his power to reject the authority of that to which he is properly subject. . . . If a commissioned vessel of war indulges in illegal acts, recourse can be had to its government for redress; if a sailor commits a murder on board a vessel the authority of the state to which it belongs is not displaced, and its laws are able to assert themselves; but

[61] Harvard Research, Piracy, *supra* note 14, at 768.

[62] [1956] 2 Y.B. INT'L L. COMM'N at 282.

[63] *See* B. DUBNER, THE LAW OF INTERNATIONAL SEA PIRACY 50–51, 54–55, 59 (1980); Crockett, *supra* note 58.

[64] See generally authorities quoted in Harvard Research, Piracy, *supra* note 14, at 809–20.

> if a body of men of uncertain origin seize upon a vessel and scour the ocean for plunder, no one nation has more right of control over them, or more responsibility for their doings, than another, and if the crew of a ship takes possession of it after confining or murdering the captain, legitimate authority has disappeared for the moment, and it is uncertain for how long it may be kept out.[65]

The Convention's requirement that the act be committed by the crew or passengers of one ship "against another ship" was apparently intended to codify this customary law. In presenting this element of the definition of piracy to the International Law Commission, Rapporteur François quoted the Harvard Comment:

> Some definitions of piracy are broad enough to include robberies and other acts of violence or depredation committed on board a merchant ship on the high sea by a passenger or a member of the crew who is not in control of the ship. Mutiny on the high seas has sometimes been included. The great weight of professional opinion, however, does not sanction an extension of the common jurisdiction of all States to cover such offences committed entirely on board a ship which by international law is under the exclusive jurisdiction of a State whose flag it flies. Even though a mutiny succeeds, the common jurisdiction would not attach. *It should attach, however, if the successful mutineers then set out to devote the ship to the accomplishment of further acts of violence or depredation* (of the sort specified in Article 3, 1) on the high sea or in foreign territory.[66]

After quoting what he termed the dissenting view of Lawrence, the rapporteur invoked Oppenheim, who, he said, "summed up better the consensus of legal opinion on that issue," as follows:

> [A] simple act of violence on the part of crew or passengers does not constitute in itself the crime of piracy, not at least as far as international law is concerned. If, for instance, the crew were to murder the master on account of his cruelty, and afterwards carried on the voyage, they would be murderers, but not pirates. *They are pirates only when the revolt is directed, not merely against the master, but also against the vessel, for the purpose of converting her and her goods to their own use.*[67]

[65] W. HALL, *supra* note 36, at 310–11, *quoted in id.* at 817–18. *See also id.* at 819 (quoting Wheaton: "But, if such a vessel passes into the control of the robbers or murderers on board, and the lawful authority is in fact displaced, and she becomes an outlaw, any nation may seize the vessel and try the criminals"; H. WHEATON, ELEMENTS OF INTERNATIONAL LAW, note by Dana to §124 (8th ed. Dana 1866)).

[66] [1955] 1 Y.B. INT'L L. COMM'N at 42–43 (quoting Harvard Research, Piracy, *supra* note 14, at 809–10 (emphasis added)).

[67] *Id.* at 42 (emphasis added). The Commentary to Article 39 states: "(vi) Acts committed on board a ship by the crew or passengers and directed against the ship itself, or against persons or property on the ship, cannot be regarded as acts of piracy." It goes on to state, however: "*The view adopted by the Commission in regard to point (vi) tallies with the opinion of most writers.* Even where the purpose of the mutineers is to seize the ship, their acts do not constitute acts of piracy." [1956] 2 Y.B. INT'L L. COMM'N at 282 (emphasis added). As the passages quoted in the text indicate, the rapporteur made clear that in his view the consensus was best summed up by Oppenheim, i.e., that the seizure does constitute piracy where it is directed not only against the

The Santa María *Incident*

The *Santa María,* a Portuguese cruise ship, was seized by Captain Galvão, a well-known political opponent of the Salazar Government, and a number of persons who had either boarded in the guise of passengers or were members of the original crew.[68] One crew member was killed and eight others were wounded in the process. Galvão declared the seizure to be "the first step aimed at overthrowing the Dictator Salazar of Portugal."[69] In a broadcast to the outside world, he said that he had captured the *Santa María* "in the name of the Independent Junta of Liberation led by General Humberto Delgado, the legally elected President of the Portuguese Republic who has been fraudulently deprived of his rights by the Salazar Administration."[70]

Portugal asked U.S., Dutch and British vessels to search for and capture the vessel "in accordance with the well defined terms of international law governing piracy and insurrection on board ship."[71] The *Santa María* was eventually sighted in international waters by British and U.S. naval vessels and boarded by the commander of a U.S. destroyer. Galvão agreed to surrender the ship, provided he received assurances that he would be treated as an insurgent.[72] After the ship was securely anchored in Brazil, the State Department announced that the United States "had acted under the international laws against piracy."[73]

Commentators disagreed on whether the seizure constituted piracy. Fenwick, apparently applying customary international law, took the position that it was piracy. He wrote:

> [Galvão] said he was an insurgent, . . . that he was taking the first step in a revolt against the dictator . . . . Well, international law does recognize the status of insurgents.
>
> . . . But here third states have . . . [required] something equivalent to a "status of insurgency"; and even then the alleged insurgents might not seize the property of the third state or inflict injury upon its nationals. . . .

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master but also against the vessel for the purpose of converting her and her goods to the perpetrators' use. This, of course, was exactly the case of those who seized the *Achille Lauro.* After taking the ship, the hijackers killed one of the passengers, held the others hostage and apparently planned to use the ship to attack Israel.

[68] The facts are summarized in B. DUBNER, *supra* note 63, at 148–49; and N. JOYNER, AERIAL HIJACKING AS AN INTERNATIONAL CRIME 109–11 (1974).

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

[70] N. JOYNER, *supra* note 68, at 109.

[71] *Id.* at 110 (quoting KEESING'S CONTEMPORARY ARCHIVES, Feb. 24–Mar. 4, 1961, at 17,951).

[72] *Id.* at 111.

[73] *Id.* Galvão was given political asylum by Brazil. *Id.* Joyner states that "had Great Britain and the United States not been sympathetic towards the revolution which Galvao and his followers proposed, [they] would have delivered [the *Santa María*] directly to the Portuguese government in Lisbon." *Id.* n.119.

> . . . The law of insurgency applies to armed conflicts between the group in rebellion and the government against which it is rebelling; *it cannot justify attacks upon civilian lives and property.*[74]

Whiteman took the position that the seizure was not piracy under the Geneva Convention, though she apparently viewed it as being for "private ends," notwithstanding its political motive. After reciting the facts, including Galvão's opposition to Salazar and his support for Delgado, she concluded: "Since the ship was taken over by certain of its own passengers (apparently for private ends), and not by another ship, as at first reported, it was considered that for this, if for no other reason, article 15 of the 1958 Convention was inapplicable."[75]

Green argued that the seizure did not constitute piracy under customary law "since it was in no way directed against any non-Portuguese interest." It would not constitute piracy under the Geneva Convention because it did not satisfy the requirement that "the illegal act must be directed 'against another ship' " and because "the treatment of the ship once she had been seized, together with the statements made by Captain Galvão and General Delgado, made it perfectly clear that this seizure was not made 'for private ends.' "[76]

Franck, while noting that it was "not clear just what 'public' objective the rebels hoped to achieve," was willing to assume that it was for public, rather than private, ends and was therefore not piratical, but he used the case to argue the absurdity of the "two ship" requirement.[77]

The seizure of the *Santa María* differed from that of the *Achille Lauro* in several important respects. The ship was Portuguese and was seized by a well-known opponent of the existing Government of Portugal. He gave repeated assurances that he did not want to harm any interests or nationals of other countries. The seizure was carried out by insurgents fighting for political independence whose acts were directed against the government they sought to overthrow. It therefore arguably met the conditions for exemption of insurgents under customary international law.[78] Those who seized the *Achille Lauro,* on the other hand, did not limit their target to a particular state. They seized an Italian ship, deliberately killed a U.S. national, and held hostage and threatened persons of diverse nationalities—clearly not satisfying the conditions for exemption of insurgents under customary law. Both incidents, however, involved the seizure and endangered the lives of nationals of third states.

* * * *

The customary law of piracy can perhaps be best understood as an attempt to balance the need for universal jurisdiction against the reluctance of

[74] Fenwick, *"Piracy" in the Caribbean,* 55 AJIL 426, 426–27 (1961) (emphasis added).

[75] 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 666 (1965).

[76] Green, *supra* note 69, at 503.

[77] Franck, *"To Define and Punish Piracies"—The Lesson of the Santa Maria: A Comment,* 36 N.Y.U. L. REV. 839, 840 (1961).

[78] *See supra* notes 20–22 and accompanying text.

states to permit encroachment on their exclusive jurisdiction. States accepted universal jurisdiction over piracy because pirates (1) attacked the ships of all states indiscriminately and were thus a threat to all states, and (2) were not subject to the authority of any state, and therefore no state could be held responsible for their acts. This both created the practical need and provided the theoretical justification for the exercise of universal jurisdiction. Universal jurisdiction was justified theoretically on the ground that pirates are *hostis humani generis,* the enemies of all mankind; it was necessary pragmatically because no state could be held responsible for their acts under international law.[79] Where the actor was not potentially a threat to all states or the act was done under the authority of a state, universal jurisdiction was denied. Thus, acts by state vessels, by recognized belligerents or by those on board a ship that continued to accept the authority of the flag state were not piratical.

Insurgents who had not achieved the status of recognized belligerents presented a problem. However, to the extent that they confined their attacks to the ships and property of a particular state, they were not *hostis humani generis.* Some publicists urged,[80] and some states, including the United States,[81] agreed, that such insurgents should also be exempt from the laws of piracy.[82] Insurgents who did not confine their attacks to ships and property of the government they sought to overthrow (and to measures to prevent neutral ships from assisting such governments) were considered pirates.[83]

The Comment makes clear that the purpose of the piracy provisions in the Harvard Draft Convention on Piracy was to provide for universal jurisdiction over acts that were potentially a threat to all states and to exclude from such jurisdiction acts that were directed against a single state. It states:

> [*N*]*o such offence which by its nature raises an apprehension on the part of all states concerning the safety of their nationals or their property or commerce should be left outside the scope of the salutary common jurisdiction* . . . .
>
> Nevertheless, the opposition to bringing under the common jurisdiction offences against the interests of a single state, and the insistence on some international factual element in the definition of piracy, are strong enough to make it expedient to exclude from the definition of piracy offences which involve only ships and territory under the ordinary jurisdiction of one state and which are not incidents of an enterprise with purposes of wider scope. . . . *In all these cases of piracy, then, there is an element which engages the interest of the international community, and this should satisfy at once the theoretical and the practical insistence on a factual offence against international interests.*[84]

[79] *See* Hall's arguments, *supra* at text accompanying notes 21 and 65, and Sir Gerald Fitzmaurice's explanation of the Nyon Agreement, *supra* at text accompanying notes 47–49.

[80] *See supra* text accompanying note 21.

[81] *See supra* text accompanying notes 22–23.

[82] Organized insurgents have been recognized as having belligerent rights and limited governmental rights in other contexts as well. *See* L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW: CASES AND MATERIALS 190–91 (2d ed. 1987).

[83] *See supra* note 23.

[84] Harvard Research, Piracy, *supra* note 14, at 807–08 (emphasis added).

A strong argument can be made for the application of the customary law of piracy to terrorist acts on the high seas. Both the theoretical justification and the pragmatic necessity for universal jurisdiction apply to such acts. Terrorists today, like pirates of old, are a threat to all states and no state is willing to assume responsibility for their acts. Since they do not confine their attacks to the vessels of a particular state, but attack vessels and nationals of many states indiscriminately, they are *hostis humani generis* in the truest sense. Since no state has accepted responsibility for their acts, there is no state against which claims for redress can be made.

In the past, pirates used one ship to attack another and the motive was material gain. Today, terrorists such as the hijackers of the *Achille Lauro* seize a ship, threaten its passengers and kill them without regard to the flag it flies or the nationality of the victims. That they do so by boarding the ship disguised as crew or passengers, rather than by attacking it from another ship, or that they are motivated by hate, revenge or a desire to call attention to a political cause rather than by a desire for material gain, does not affect the two essential elements that have justified assertion of universal jurisdiction in the past: that they are a threat to all states, and that no state can be held responsible for their acts.

While there was no authoritative definition of piracy under customary international law, there is substantial support in the writings of scholars that such acts would constitute piracy under customary international law. Thus, Oppenheim concludes: "There is substance in the view that, by continuous usage, the notion of piracy has been extended from its original meaning of predatory acts committed on the high seas by private persons and that *it now covers generally ruthless acts of lawlessness on the high seas by whomsoever committed.*"[85]

Moreover, customary international law is not static; it is constantly evolving. "International law has not become a crystallized code . . . but is a living and expanding branch of the law."[86] This evolution is exemplified by the customary law of piracy itself. At one stage, piracy was defined as robbery on the high seas and material gain was a necessary element; at a later stage, *animus furandi* was no longer required. Just as Viscount Sankey and Justice Story held that actual robbery was not an essential element of piracy,[87] so a judge today might reasonably conclude that the laws of piracy should apply to terrorist attacks even though the motive was something other than personal gain.[88] The exemption for insurgents would not exclude present-day terrorists, since it applied only to insurgents who confined their attacks to a particular state.

[85] 1 L. OPPENHEIM, *supra* note 15, at 613–14 (emphasis added); *see also supra* note 15 and accompanying text.

[86] *In re* Piracy Jure Gentium, 3 BRIT. INT'L L. CASES at 839.

[87] *See supra* notes 18–19 and accompanying text.

[88] The suggestion was made by Sir Hersch Lauterpacht some time ago. He said:

> As the notion of piracy *jure gentium* has never been rigidly confined to one type of unlawful action and as the kind of lawlessness with which it was in the beginning predominantly connected is now becoming a historical survival, it would not seem improper to describe and treat as piratical such acts of violence on the high seas which by their

It is also arguable that the definitions of piracy in the Geneva Convention on the High Seas and the UN Convention on the Law of the Sea were not intended to exclude indiscriminate attacks by terrorists. Both Conventions define piracy as an act committed "for private ends" by "one ship against another." Although "for private ends" can certainly be interpreted as excluding any acts that have a political purpose and there is language in the *travaux préparatoires* contrasting "private ends" with "political ends," it appears fairly clear that the term "political ends" was used to refer to acts by a "revolutionary organization that had not been recognized as a belligerent by the offended state."[89] Thus, one may reasonably take the position, based on an analysis of the *travaux préparatoires,* that "for private ends" was only intended to exclude acts by insurgents who had not yet achieved the status of belligerents (but whose acts would be lawful if done by belligerents),[90] and acts by state vessels that had been authorized by a state and for which that state assumed responsibility.[91]

The two-ship requirement is more problematic. On its face, the provision clearly excludes acts perpetrated by "passengers" on the same ship. Nevertheless, it is arguable that at least in the Harvard Draft Convention on Piracy, the language was intended to exclude from universal jurisdiction criminal acts by one passenger or crew member against another, or mutiny against the captain, where the ship continued to accept the authority of the flag state, and not to exclude an attack directed "against the vessel, for the purpose of converting her . . . to [the attackers'] own use."[92] Certainly, there is no indication in the Comment to the Harvard draft, in the statement by the rapporteur for the International Law Commission or in the report by the Commission to the General Assembly that the authors either of the Harvard draft or of the Geneva Convention ever considered, let alone decided, that terrorist acts at sea not limited to a specific state whose government the attackers were seeking to overthrow should be exempt from the universal jurisdiction applicable to piracy.[93]

However, even if the piracy provisions of the Geneva and UN Conventions were not intended to exempt indiscriminate attacks on the high seas from universal jurisdiction, the definition of piracy in these Conventions

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ruthlessness and disregard of the sanctity of human life invite exemplary punishment and suppression.

H. LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 307–08 (1948).

[89] *See supra* text accompanying note 34.

[90] *See supra* text accompanying notes 31–41.

[91] *See supra* text accompanying notes 42–49.

[92] *See supra* text accompanying note 67.

[93] There is no reference to terrorist acts in the Harvard Draft Convention on Piracy or in the voluminous Comment to it. The Comment to the Draft Convention on Jurisdiction with Respect to Crime, *supra* note 12, which was published three years later, in 1935, following the Marseilles assassinations in 1934, cites a resolution by the Council of the League of Nations that referred to "terrorist activity with a political purpose" and to "crimes committed with a political and terrorist purpose." 29 AJIL Supp. at 554. *See also infra* text accompanying note 163.

lends itself to that interpretation. An interpretation of those provisions as encompassing such acts requires resort to the *travaux préparatoires.*[94] Moreover, the *travaux préparatoires* are not unequivocal.[95] As the comments on the seizures of the *Santa María* and the *Achille Lauro* demonstrate, there is considerable difference of opinion among scholars over whether the seizure of a ship on the high seas for a "political cause" constitutes piracy under the Geneva Convention.[96] Thus, even if one finds sufficient historical and/or teleological justification for concluding that the piracy provisions of the Geneva and UN Conventions are applicable to maritime terrorism, it would be preferable to adopt a convention dealing with maritime terrorism specifically, as has been done with airplane hijacking and sabotage, hostage taking and attacks on diplomats, the other terrorist acts that have begun to plague the international community.

II. THE DRAFT CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF MARITIME NAVIGATION

Following the seizure of the *Achille Lauro,* Italy, on the initiative of Professor Ferrari Bravo, its Legal Adviser, joined by Austria and Egypt, proposed a convention against maritime terrorism. A draft, modeled on existing conventions, particularly the Hague and Montreal Conventions against airplane hijacking and sabotage, and the Hostage Convention,[97] was submitted to the IMO. At its meeting in November 1986, the Council agreed unanimously that the matter was appropriate for consideration by the IMO and that it required urgent attention.[98] To avoid the possible delays that might result from its submission to the overburdened Legal Committee, which would normally have considered the Convention, the Council de-

[94] Whether resort to the *travaux préparatoires* is appropriate is also debatable. Under Article 31 of the Vienna Convention, "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The article permits a "special meaning" to be given to a term "if it is established that the parties so intended." Article 32, "Supplementary means of interpretation," provides:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable.

Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, UNTS Regis. No. 18,232, UN Doc. A/CONF.39/27 (1969). While it is arguable that the meaning of "for private ends" is "ambiguous or obscure," it would be difficult to make that argument with respect to the two-ship requirement (though it may perhaps be argued that it leads to a result that is manifestly absurd or unreasonable). *See* Franck, *supra* note 77.

[95] *See supra* text accompanying notes 40–41.

[96] *See supra* text accompanying notes 8, 68–78.

[97] For these three Conventions, see *supra* note 9.

[98] *See* IMO Doc. C 57/25 (Oct. 1, 1986).

cided to establish an *Ad Hoc* Preparatory Committee open to all states, with "the mandate to prepare, on a priority basis, a Draft Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation," using the draft submitted by Austria, Egypt and Italy as a basis.[99]

The Preparatory Committee met for a week in March 1987 in London, and for a week in May 1987 in Rome, to consider the proposed Convention. At the conclusion of the Rome meeting, the committee agreed on a draft Convention, though several important issues, considered to be of a political nature, were left for resolution by a diplomatic conference, to be held in Rome in March 1988, at which the Convention was to be adopted.

Although it is entitled Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, its operative provisions deal not so much with the suppression of such acts, as with the apprehension, conviction and punishment of those who commit them. Only one provision addresses the problem of prevention or suppression directly. Article 13 requires states to cooperate in the prevention of offenses by:

> (a) taking all practicable measures to prevent preparation in their respective territories for the commission of those offences within or outside their territories;
>
> (b) exchanging information in accordance with their national law, and co-ordinating administrative and other measures as appropriate to prevent the commission of offences set forth in article 3.[100]

The heart of this Convention, as of the other antiterrorist conventions, is the "extradite or prosecute" requirement—the obligation of each state party to the Convention in which an alleged offender is found either to extradite the offender to one of the states that has jurisdiction under the Convention or to submit the case to its authorities for prosecution.[101] The Convention further provides that "the offences set forth [in the Convention] shall be treated, for the purposes of extradition between States Parties, as if they had been committed not only in the place in which they occurred

[99] *See* IMO Doc. C 57/WP.1, para. 25(a)(2) (Nov. 12, 1986). The explanatory note by the cosponsors stated that while there are three conventions dealing with the safety of air navigation, "the safety of maritime navigation is not covered by any similar instrument." IMO Doc. C 57/25, Annex, at 2 (Oct. 1, 1986).

[100] Convention, *supra* note 11, Art. 13(1)(a) and (b).

[101] *Id.*, Art. 10(1), which reads:

> The State Party in the territory of which the offender or the alleged offender is found shall, in cases to which article 7 applies, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a grave nature under the law of that State.

There are identical or substantially similar provisions in the Hague Convention (Art. 7), the Montreal Convention (Art. 7), the Hostage Convention (Art. 8) and the Internationally Protected Persons Convention (Art. 7), all *supra* note 9.

but also in a place within the jurisdiction of the State Party requesting extradition."[102]

The following summary and analysis of the main provisions of the Convention notes in particular the problems that arose in the course of the negotiations, the manner in which they were resolved and the issues that were reserved for resolution by the Diplomatic Conference.

Defining the Offenses

Article 3 provides:

> 1. Any person commits an offence if that person unlawfully and intentionally:
>
> (a) by force or threat thereof or any other form of intimidation seizes or exercises control over a ship; or
> (b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of the ship; or
> (c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of the ship; or
> (d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of the ship; or
> (e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of ships; or
> (f) communicates information which he knows to be false, thereby endangering the safe navigation of ships; or
> (g) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).
>
> 2. Any person also commits an offence if that person:
>
> (a) attempts to commit any of the offences set forth in paragraph 1 if that attempt is likely to endanger the safe navigation of the ship; or
> (b) abets the commission of any such offence perpetrated by any person or is otherwise an accomplice of a person who commits such an offence; or
> (c) threatens to commit any of the offences set forth in paragraph 1, subparagraphs (b) and (c), if that threat is likely to endanger the safe navigation of the ship.

An early version of the draft did not include a provision (now paragraph 1(g)) making it an offense to injure or kill someone in connection with the commission or the attempted commission of the offense. Although such a provision was included in the draft submitted to the IMO by the cosponsors, several states urged its deletion or modification when the draft was considered by the Preparatory Committee.[103] Their comments were of three

[102] Convention, *supra* note 11, Art. 11(4).

[103] *See Ad Hoc* Preparatory Committee on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Report of the First Session, IMO Doc. PCUA 1/4, para. 30 (Mar. 16, 1987).

types: that the provision should be deleted entirely; that injuring or killing a person should be an aggravating circumstance but not a separate crime; and that the language originally used—"during the commission" of the offense —might be interpreted to apply to a murder that was not connected with the terrorist attack. Those states that took the first two positions argued that the Convention was intended to suppress acts against the safety of maritime navigation, and that the killing of a passenger on a seized ship that did not endanger maritime navigation should not be included, while one that caused such endangerment would already be covered under paragraph 1(b). Other states, however, maintained that since the deliberate killing of a person on board a ship by the terrorists who seized it is a distinct crime, it should be a separate offense, not merely an aggravating circumstance.

The provision was retained in the draft Convention adopted by the Preparatory Committee, with some drafting modifications designed to avoid its being interpreted as applicable to murders that were committed during a terrorist attack but unconnected with it. While making murder a separate offense was not one of the questions left for resolution by the Diplomatic Conference, it may be raised again when the Convention is considered at the Diplomatic Conference.

Except for the Convention on Internationally Protected Persons, none of the antiterrorist Conventions make it an offense to injure or kill a person. For example, the Hague Convention makes it an offense for terrorists to seize an airplane, but not to kill a passenger after the seizure, as happened in the TWA hijacking in 1985; and the Hostage Convention makes it an offense to seize or detain and threaten to kill or injure a person, but not to murder the person seized. The failure to include murder as a separate offense is a major gap in the other antiterrorist conventions that should not be repeated in this Convention.

First, as several states argued, the deliberate killing of one or more persons aboard a ship by terrorists who seize it is a heinous act that should be a separate offense, not merely an aggravating circumstance. Second, the failure to include this provision in the Convention would make it difficult to prosecute the offenders for such a killing. While it would presumably be an offense under the law of the flag state even if not included as a separate offense under the Convention, the flag state would not be entitled to extradition of the offender for murder under the Convention. The extradite or prosecute provision of the Convention applies to "offenses" under the Convention. The inclusion of murder as an aggravating circumstance, rather than as an "offense," would therefore not provide a basis for extradition for murder. Furthermore, if the offender were extradited to the flag state for other offenses under the Convention, that state would not have jurisdiction to try him for the murder, since under the laws of extradition a state may generally not try a person for any offenses other than those for which he was extradited.[104]

[104] *See, e.g.*, 1 J. B. MOORE, TREATISE ON EXTRADITION AND INTERSTATE RENDITION 217 (1891) ("Among writers on international law there is almost uniform concurrence in the

While the argument that the killing of a passenger after the ship has been seized does not endanger maritime safety and therefore should not be an offense has superficial logic, the reason for protecting the safety of maritime navigation *is* to protect those who use it. The impetus for this Convention was the seizure of the *Achille Lauro* and the deliberate murder of a crippled, wheelchair-bound passenger by the perpetrators. It riveted the attention of the world and shocked and outraged people everywhere.[105] Both the UN General Assembly and the Security Council passed resolutions condemning terrorism,[106] and the General Assembly invited the IMO "to study the problem of terrorism aboard or against ships with a view to making recommendations on appropriate measures."[107] It would be ironic, indeed, if the Convention that was drafted in response to that resolution and the act that triggered it did not make that murder an offense.

Jurisdiction

States Obligated or Authorized to Establish Jurisdiction. The draft Convention establishes two types of jurisdiction: obligatory and discretionary. Article 7 provides that each state party "shall take such measures as may be necessary to establish its jurisdiction" when the offense is committed "(a) against or on board a ship flying the flag of the State at the time the offence is committed; or (b) in the territory of that State, or inside the outer or lateral limits of its territorial sea; or (c) by a national of that State." It further provides that a state party "may also establish its jurisdiction" over any such offense when:

> (a) it is committed by a stateless person whose habitual residence is in that State;
> (b) during its commission a national of that State is seized, threatened, injured or killed;
> (c) it is committed in an attempt to compel that State to do or abstain from doing any act; or
> (d) the demise-charterer in possession of the ship concerned in the offence [is a national of that State and] has its principal place of business in that State.[108]

Thus, the draft Convention provides that the state of nationality of the offender, the flag state and, when the offense is committed in the territory

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opinion that a person surrendered for one offence should not be tried for another until he shall have been replaced within the jurisdiction of the surrendering state or had an opportunity to return thereto"); 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 728 (1968).

[105] The seizure of the *Achille Lauro* and murder of Klinghoffer were reported extensively, including front-page stories in the *New York Times* for seven consecutive days and cover stories in both *Newsweek* and *Time* magazines.

[106] GA Res. 40/61 (Dec. 9, 1985); SC Res. 579 (XXXX) (Dec. 18, 1985); *reprinted in* 80 AJIL 435 and 437, respectively (1986).

[107] GA Res. 40/61, *supra* note 106, para. 13.

[108] Convention, *supra* note 11, Art. 7(1) and (2). The brackets are in the draft Convention. The precise scope of this provision was left open by the Preparatory Committee. *See infra* note 160.

or territorial sea of a state, the latter state are required to establish jurisdiction. The state of habitual residence of a stateless person, the state of nationality of the victim, the state whose conduct the terrorists seek to affect by the attack (hereinafter target state) and the state (of nationality or principal place of business) of a demise charterer in possession of the ship may establish jurisdiction. Even though jurisdiction under each of the latter categories is permissive, not obligatory, there was some opposition to each of these provisions, with particularly strong opposition to jurisdiction by the state of nationality of the victim and by the target state. Nevertheless, indicative votes called for by the chairman showed overwhelming support—32 in favor, 4 against and 3 abstentions—for jurisdiction by the state of nationality of the victim[109] and substantial, though lesser, support—16 in favor, 8 against and 14 abstentions—for jurisdiction by the target state.[110] As a result, both were included in the draft adopted by the Preparatory Committee.

The states that objected to jurisdiction by the state of nationality of the victim and/or by the state whose conduct the terrorists seek to compel took the position (1) that nationality and territoriality are the generally accepted bases of jurisdiction and should not be expanded, and (2) that jurisdiction based on nationality of the victim may vest jurisdiction in a number of states and may result in conflicts of jurisdiction. It was also argued that a provision for target state jurisdiction is unnecessary, as that state will be the flag state or the state whose nationals are seized and threatened. Other states, however, stressed the strong interests of these states and argued that since the purpose of the Convention is to ensure that certain acts will not go unpunished, it is more important to eliminate the possibility of "negative jurisdiction," i.e., that no state will prosecute the offenders, than to eliminate the possibility of conflicts of jurisdiction.

Textbooks on international law generally list five bases of jurisdiction: nationality, territoriality, passive personality, the protective principle and universality.[111] The most widely accepted bases of jurisdiction under inter-

[109] *See* IMO Doc. PCUA 2/5, at 18, para. 89 (June 2, 1987).

[110] *Id.*, para. 94.

[111] The Comment to the Draft Convention on Jurisdiction with Respect to Crime, *supra* note 12, states:

> An analysis of modern national codes of penal law and penal procedure, checked against the conclusions of reliable writers and the resolutions of international conferences or learned societies, and supplemented by some exploration of the jurisprudence of national courts, discloses five general principles on which a more or less extensive penal jurisdiction is claimed by States at the present time. These five general principles are: first, the territorial principle, determining jurisdiction by reference to the place where the offence is committed; second, the nationality principle, determining jurisdiction by reference to the nationality or national character of the person committing the offence; third, the protective principle, determining jurisdiction by reference to the national interest injured by the offence; fourth, the universality principle, determining jurisdiction by reference to the custody of the person committing the offence; and fifth, the passive personality principle, determining jurisdiction by reference to the nationality or national character of the person injured by the offence.

29 AJIL Supp. at 445.

national law are nationality and territoriality, and with respect to ships, the flag state.[112] However, if jurisdiction is limited to the state of nationality of the offender and to the flag state in case of terrorist attacks on the high seas, a serious gap may result. The state of nationality of the offender may not wish to prosecute—indeed, it may applaud the act rather than condemn it—and the flag state, for economic or political reasons, may not be in a position to prosecute, particularly if it is a small state that serves as a flag of convenience.

Nor is the problem eliminated by the extradite or prosecute provision in Article 10. Although that article requires any state party in whose territory the offender is found, if it does not extradite him, to submit the case to its competent authorities for prosecution "without any exception whatsoever and whether or not the offence was committed in its territory," some states apparently interpret it to mean that the state in which the offender is found has an obligation to prosecute only if a request for extradition is received.[113] In addition, some states have indicated that under their domestic law they *cannot* prosecute without a request for extradition. Thus, if jurisdiction is limited to the state of nationality and to the flag state, and these states do not request extradition, the offender may escape punishment, even if found in a state that would like to see him brought to justice.

While jurisdiction based on the nationality of the victim, the so-called passive personality principle, is not as widely accepted as jurisdiction on grounds of nationality or territoriality, some states do assert jurisdiction on that basis. For example, French law provides that an alien who commits a crime outside the territory of the Republic may be prosecuted and judged pursuant to French law, when the victim is of French nationality.[114] And the United States has recently enacted legislation establishing extraterritorial jurisdiction over terrorist acts abroad against U.S. nationals.[115] Jurisdiction based on nationality of the victim is also provided for by other multilateral conventions.[116]

[112] *See* UN Convention on the Law of the Sea, *supra* note 25, Arts. 91 and 92; Geneva Convention on the High Seas, *supra* note 24, Arts. 5 and 6. Flag state jurisdiction has been viewed as an application of the territoriality principle, as an application of the nationality principle and as *sui generis*. *See* RESTATEMENT (THIRD), *supra* note 9, §402 Reporters' Note 4.

[113] This interpretation appears to be inconsistent with the legislative history. Proposals so to provide were made and rejected in the course of the negotiations both on the Hostage Convention and on the Internationally Protected Persons Convention. A commentator states, "[T]his legislative history leaves no doubt that the obligation to submit to competent authorities is in no way dependent on a request for extradition." Rosenstock, *International Convention Against the Taking of Hostages: Another Community Step Against Terrorism*, 9 DEN. J. INT'L L. & POL'Y 169, 181 (1980).

[114] Law No. 75-624, July 11, 1975, J.O. July 13, 1975, *cited in* 102 JOURNAL DU DROIT INTERNATIONAL 962 (1975), *quoted in* L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW: CASES AND MATERIALS 53 (1980). The Comment to the Draft Convention on Jurisdiction with Respect to Crime, *supra* note 12, lists some 28 states that provide for penal jurisdiction based on nationality of the victim. 29 AJIL Supp. at 578–79.

[115] *See* Omnibus Diplomatic Security and Antiterrorism Act of 1986, §1202, Pub. L. No. 99-399, 100 Stat. 895, 896 (1986) (18 U.S.C.A. §2331 (Supp. 1987)).

[116] *See* Hostage Convention, *supra* note 9, Art. 5(d); Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment, GA Res. 39/46, Art. 5(1)(c)

In commenting on the passive personality principle, the *Restatement (Third) of Foreign Relations Law of the United States* (hereinafter *Restatement (Third)*) states: "The principle has not been generally accepted for ordinary torts or crimes, but it is increasingly accepted as applied to terrorist and other organized attacks on a state's nationals by reason of their nationality, or to assassination of a state's diplomatic representatives or other officials."[117]

These provisions can also be justified under the "protective principle," which has long been accepted as a basis of jurisdiction under international law.[118] Traditionally, the protective principle has been applied to permit a state to prosecute non-nationals for such acts as swearing falsely to the state's consul or counterfeiting the state's money. However, the rationale of the protective principle, that a state has a concern and a right to prosecute those who threaten its governmental functions, regardless of the nationality of the offender and regardless of where the act was committed, applies equally to terrorist acts committed in an attempt to coerce the will of a state or when its nationals are targeted for terrorist attack simply because they are its nationals.

The Comment to the Draft Convention on Jurisdiction with Respect to Crime, prepared by the Harvard Research in International Law, states:

> There is justification for the enactment of penal legislation based upon the protective principle in the inadequacy of most national legislation punishing offences committed within the territory against the security, integrity and independence of foreign States. So long as the State within whose territory such offences are committed fails to take adequate measures, *competence must be conceded to the State whose fundamental interests are threatened.*[119]

It notes that some states provide, under this principle, "for the punishment of anyone who, by unauthorized hostile acts, exposes the State to a declaration of war *or its citizens to reprisals.*"[120]

The *Restatement (Third)* provides that, under international law, a state may exercise jurisdiction to prescribe and apply its law with respect to "certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state

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(Dec. 17, 1984). *See also* Convention for the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *supra* note 9, Art. 3(1)(c) ("when the crime is committed against an internationally protected person . . . who enjoys his status as such by virtue of functions which he exercises on behalf of that State"); Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1969, 20 UST 2941, TIAS No. 6768, 704 UNTS 219, Art. 4(b).

[117] RESTATEMENT (THIRD), *supra* note 9, §402 comment *g*.

[118] The Comment to the Draft Convention on Jurisdiction with Respect to Crime, *supra* note 12, states that "[i]n addition to the evidence of almost universal approval of the protective principle" in municipal legislation, it "has also been supported by various resolutions of international organizations, by conferences on penal law, and to a limited extent in treaties." 29 AJIL Supp. at 551.

[119] *Id.* at 552 (emphasis added).

[120] *Id.* (emphasis added).

interests."[121] A comment indicates that this subsection restates the "protective principle of jurisdiction."[122]

Finally, jurisdiction over terrorist acts may also be justified under the universality principle. Unlike the other bases of jurisdiction, which depend on the existence of a link between the state asserting jurisdiction and either the offense, the offender or the victim, the universality principle permits all states to assert jurisdiction with respect to certain offenses—offenses that because of their nature are of concern to all states. Piracy has long been an example of such an offense, as discussed earlier. It seems indubitable that today terrorist attacks should be in this category.[123] In the last few decades, there have been hundreds of terrorist attacks in and against the citizens of various states, of differing political persuasions, in which innocent men, women and children have been brutally murdered. Such attacks are no less—and perhaps are more—of a threat to states today than was piracy centuries ago.

The Draft Convention on Jurisdiction with Respect to Crime includes under the universality principle jurisdiction by a state with respect to "any crime committed outside its territory by an alien," if the crime was committed "to the injury of the State asserting jurisdiction or of one of its nationals" in a place not subject to the authority of any state.[124] The drafters

[121] RESTATEMENT (THIRD), *supra* note 9, §402(3).

[122] *Id.* §402 comment *f.*

[123] In discussing the universality principle, the *Restatement (Third)* states that, under this principle, a state "has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern," *id.* §404, even though it has "no links of territory . . . or of nationality with the offender (or even the victim)," *id.* comment *a.* In this category, the *Restatement* includes "piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism," *id.* §404.

[124] Art. 10(c), 29 AJIL Supp. at 440–41. The provisions for jurisdiction based on universality under the draft Convention are:

> ARTICLE 9. UNIVERSALITY—PIRACY
>
> A State has jurisdiction with respect to any crime committed outside its territory by an alien which constitutes piracy by international law.
>
> ARTICLE 10. UNIVERSALITY—OTHER CRIMES
>
> A State has jurisdiction with respect to any crime committed outside its territory by an alien, other than the crimes mentioned in Articles 6, 7, 8 and 9, as follows:
>
> (a) When committed in a place not subject to its authority but subject to the authority of another State, if the act or omission which constitutes the crime is also an offence by the law of the place where it was committed, if surrender of the alien for prosecution has been offered to such other State or States and the offer remains unaccepted, and if prosecution is not barred by lapse of time under the law of the place where the crime was committed. The penalty imposed shall in no case be more severe than the penalty prescribed for the same act or omission by the law of the place where the crime was committed.
>
> (b) When committed in a place not subject to the authority of any State, if the act or omission which constitutes the crime is also an offence by the law of a State of which the alien is a national, if surrender of the alien for prosecution has been offered to the State or States of which he is a national and the offer remains unaccepted, and if prosecution is not barred by lapse of time under the law of a State of which the alien is a national. The penalty imposed shall in no case be more severe than the penalty prescribed for the same act or omission by the law of a State of which the alien is a national.

stressed that even jurists who otherwise rejected the passive personality principle supported this assertion of jurisdiction. Thus, the Comment quotes with approval the following statement by Wharton:

> If an American citizen is murdered or plundered abroad, it is the duty of his country to exact redress and retribution. . . . *If the crime is committed* in a barbarous or semi-barbarous land, *where a demand for extradition is not recognized, and where justice is not inflicted in accordance with civilized jurisprudence, then we have the right to execute justice ourselves,* by seizing the offenders and trying them according to our laws, in all cases in which these laws embody crimes against men, irrespective of local limitations. Ignorance of law would, indeed, avail as a defense as to offences not *mala in se.* But as to offences *mala in se,* wherever the rights of a citizen are assailed, then it is the prerogative of his state to require redress.[125]

Further, in support of including this application of the universality principle, even though it would be "rarely invoked," the Comment notes that "there will be occasions where either it must be invoked or the offender permitted to go unpunished."[126] Unfortunately, with respect to terrorist acts the offender may be permitted to go unpunished even if the act is not committed in "a place not subject to the authority of any state."

One delegation indicated that it might propose that the extradite or prosecute requirement apply only with respect to requests by states that assert jurisdiction under the mandatory provisions and that it not apply to requests by states that assert jurisdiction under the optional provisions. Such a proposal, if adopted, would effectively vitiate the provisions for optional jurisdiction, for these provisions would then not impose an obligation on a state in which the offender is found to extradite or prosecute and would not confer a right to extradition on a state with optional jurisdiction. It is difficult to discern any purpose that would be served by the provisions specifying the optional bases of jurisdiction if the extradite or prosecute requirement does not apply with respect to them. While they establish that a state may exercise jurisdiction in the circumstances specified, it is doubtful that a provision in the Convention is necessary to do that. Even if it were, paragraph 4 provides that the Convention "does not exclude any criminal jurisdiction exercised in accordance with national law."[127]

All of the existing antiterrorist conventions have in fact gone beyond the nationality and territoriality bases of jurisdiction. Each convention not only authorizes but also requires the state in which the offender is found to

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(c) When committed in a place not subject to the authority of any State, if the crime was committed to the injury of the State assuming jurisdiction, or of one of its nationals, or of a corporation or juristic person having its national character.

(d) When committed in a place not subject to the authority of any State and the alien is not a national of any State.

Id.

[125] 29 AJIL Supp. at 590 (emphasis added). [126] *Id.* at 573–74.

[127] Convention, *supra* note 11, Art. 7(4).

submit the case to its authorities for prosecution if it does not extradite him, notwithstanding that the offense was not committed in its territory or by its national. Some of these conventions have been widely ratified. For example, the Hague Convention has been ratified by 130 states, and the Montreal Convention by 131 states.[128] Thus, the international community clearly does not consider it inappropriate for a state without national or territorial links to try a person for a terrorist act. If a state that has no contacts with the offense or the offender other than the offender's presence may try him criminally for the offense, there can be no objection to trial by a state that has substantial interests, such as the state of nationality of the victim or the target state. The question, then, is whether other states should have an obligation to extradite to a state that asserts jurisdiction on one of these grounds. If the state of nationality of the offender or the flag state requests extradition, the state in which the offender is found has the option of extraditing him to one of those states. Furthermore, the state in which the offender is found always has the option of submitting the case to its own authorities for prosecution. Therefore, the only instance in which a state would be bound under the Convention to extradite to the state of nationality of the victim or to the target state is if it is unwilling to submit the case to its authorities for prosecution and no other state has requested extradition. That is, the state in which the offender is found would only be obligated to extradite to the state of nationality of the victim or to the target state if there is no other state willing to prosecute. Surely, it is preferable to have the offender tried by the state of nationality of the victim or by the target state than to have him escape prosecution altogether.

It has also been argued that it is unnecessary to have a separate provision for target state jurisdiction as that state will generally also be the flag state or the state of nationality of the victim. While that may be true in most instances, it is not always so. The *Achille Lauro* flew an Italian flag and the person killed was a U.S. national, but the demand was for Israel to release prisoners.[129] Similarly, U.S. citizens were taken hostage in Lebanon and the demand was for Kuwait to release prisoners.[130]

Finally, those who oppose target state jurisdiction argued that it was inappropriate since the offenses defined by the Convention were against persons, not states. "According to these delegations, there must be strict concordance between the cases of jurisdiction and the offences in question."[131] This argument is not supported by logic or policy. Jurisdiction is always by the state. Sometimes it is based on acts directed against the state; at others, on acts by or against individuals that have a link with the state. Taken to its logical conclusion, this argument would preclude jurisdiction based on the nationality of the offender as well. There, too, "strict con-

[128] U.S. DEP'T OF STATE, 1987 TREATIES IN FORCE.

[129] *See supra* note 4 and accompanying text.

[130] *See* Jacobsen, *A Comment*, 8 WHITTIER L. REV. 763, 764 (1986) ("The demand for my father's release, along with that of the other American Hostages, was simple: Release of seventeen prisoners held . . . in Kuwait, in exchange for the Americans").

[131] IMO Doc. PCUA 2/5, at 18, para. 93 (June 2, 1987).

cordance between the cases of jurisdiction and the offences in question is lacking." Nor are there compelling policy reasons to require strict concordance between the offenses and jurisdiction. Such concordance usually establishes a state's interest. However, as indicated above, when terrorists seek to affect the conduct of a particular state, as for example by threatening to destroy a ship they have seized unless that state releases certain prisoners, that state clearly has an interest. Its foreign relations may be seriously affected, whether it decides to succumb to the terrorist demands or not. Moreover, if the concern is truly lack of concordance, rather than opposition to jurisdiction on this basis, the problem can easily be remedied by the inclusion of a provision to the effect that "it shall be an offence to commit any of the offences set forth in article 7(1) in order to compel a state to do or abstain from doing an act."

Provisions for jurisdiction by the state of nationality of the victim and by the target state are particularly important from the U.S. perspective. The United States is unlikely to be the state of nationality of the offender and not very likely to be the flag state, but has already been and will unfortunately probably continue to be the state of nationality of the victim and one of the states whose conduct terrorists seek to affect by their attacks.[132] That is probably also true of other Western states and has already proved to be true of one Arab state.[133]

Priority Among States Having Jurisdiction. Although some states urged that the Convention provide an order of priority among states having jurisdiction, and particularly that the flag state be given priority, such proposals were strongly opposed by most states and were rejected. The draft Convention, however, does provide:

> A State Party which receives more than one request for extradition from States which have established jurisdiction in accordance with article 7 and which decides not to prosecute shall, in selecting the State to which the offender or the alleged offender is to be extradited, pay due regard to the interests and responsibilities of the State Party whose flag the ship was flying at the time of the commission of the offence.[134]

Some states objected to this provision as well, arguing that it was unnecessary, would create an undesirable precedent and would infringe on the sovereign discretion of each state. Others, however, noted that the provision did not establish a right to priority by the flag state and urged inclusion of this provision as a compromise.

While this provision clearly does not require the state in which the offender is found to give priority to the flag state, it creates unnecessary ambiguity. What does it mean for a state to "pay due regard to the interests and responsibilities" of the flag state? If all it means is that the state in which

[132] *See* N.Y. Times, Nov. 26, 1985, at A1, col. 5 ("U.S. persons and interests abroad have been the foremost target for terrorists"); Levitt, *Combatting Terrorism Under International Law,* 18 TOLEDO L. REV. 133, 134 (1986).

[133] Kuwait. *See supra* note 130 and accompanying text.

[134] Convention, *supra* note 11, Art. 11(5).

the offender is found should consider the interests of the flag state, that requirement is already present, as the flag state is one of the states entitled to request extradition, and this provision is therefore not necessary. If the provision means more than that, it is not clear what.

Application of the Convention

The draft Convention is fairly broad in scope both in its definition of "ship" and in its delineation of when the Convention applies. It defines a "ship" as "a vessel of any type whatsoever not permanently attached to the sea-bed, including dynamically supported craft, submersibles, or any other floating craft."[135] It provides that the Convention shall apply "if the ship is navigating in waters beyond the outer or lateral limits of the territorial sea of the flag State or its schedule includes navigation in those waters."[136] Moreover, even when the ship is not so navigating, the draft Convention provides that "it shall nevertheless apply," with the exception of certain articles, if the offender is found in a state other than the flag state.[137] These provisions are the result of extensive discussions and negotiations; earlier drafts were substantially narrower. For example, the draft initially submitted to the IMO by the cosponsors limited the offenses to acts committed on board or against a ship "in service."[138]

The "in service" language was based on the "in flight" language of the Hague and Montreal Conventions[139] dealing with aircraft hijacking and sabotage, respectively. However, application of the "in service" limitation to ships presented both substantive and definitional problems.[140] Is a ship

[135] *Id.*, Art. 1. A Protocol to the Convention incorporates or parallels its provisions with respect to offenses committed "on board or against fixed platforms located on the continental shelf." IMO Doc. PCUA 2/5, Ann. 2, Art. 1 (June 2, 1987).

[136] Convention, *supra* note 11, Art. 4(1). [137] *Id.*, Art. 4(2).

[138] *See* IMO Doc. C 57/25, Annex, Art. 2 (Oct. 1, 1986). Paragraph 1 states:

> 1. Any person commits an offence if that person unlawfully and intentionally:
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> a) by force or threat thereof, or by any other form of intimidation, seizes a ship *in service* or exercises control of it; or
>
> b) performs or threatens an act of violence against a person on board a ship *in service* if that act or threat is likely to endanger the safety of navigation; or
>
> c) destroys a ship *in service* or causes damage to such ship or to its cargo which renders the ship incapable of operation or which is likely to endanger its safe operation; or
>
> d) places or causes to be placed on a ship *in service* by any means whatsoever, a device or substance which is likely to destroy that ship, to cause damage to the ship or its cargo which renders the ship incapable of operation or which is likely to endanger its safe operation; or
>
> e) injures or kills any person during the commission of any of the offences defined in this article.

Id. (emphasis added).

[139] *See* Hague Convention, *supra* note 9, Arts. 1, 3; Montreal Convention, *supra* note 9, Arts. 1, 2.

[140] The draft initially submitted to the IMO Council by the cosponsors stated that a "ship is considered 'in service' from the beginning of the prepassage preparation of the ship by port personnel or by the crew for a specific passage until the completion of disembarkation or unloading." IMO Doc. C 57/25, Annex, Art. 1 (Oct. 1, 1986). The English (but apparently not

from which all passengers and crew have disembarked that is being cleaned and readied for the next trip "in service"? What about a ship temporarily in port because it is undergoing repairs? A cruise ship whose next voyage has not yet been set? A number of delegations criticized the "in service" limitation as ambiguous, difficult to apply and unnecessarily restrictive. While some delegations urged its retention, others considered such a limitation undesirable as a matter of policy and took the position that the Convention should apply unless the ship was completely withdrawn from navigation. After lengthy discussion of various definitions of "in service," the Preparatory Committee decided to omit the "in service" limitation altogether. The draft Convention adopted by the committee does provide that the Convention shall not apply to a ship "which has been withdrawn from navigation or laid up."[141]

Similarly, earlier drafts did not apply the Convention to all offenses committed on the high seas. For example, an early draft circulated by the cosponsors provided that the Convention would apply "if the place of departure or the place of arrival of the ship . . . lie[s] outside the territory of the flag state." The reason for this formulation was that some states initially opposed application of the Convention to offenses committed against or on board ships navigating between two ports of the flag state, even if a short part of the route involved navigation on the high seas. However, the proposed formulation would also have excluded application of the Convention to offenses where a major part of the route was on the high seas, e.g., a ship going from Marseilles to St. Maarten. Suggestions were made for various other formulations, including one under which application would have depended on the ratio of distance navigated on the high seas to distance navigated in territorial waters. Here, too, the difficulties of articulating a formulation that would exclude voyages involving brief passage on the high seas but include those involving substantial navigation on the high seas, and the view of various states that there was no reason to exclude even the former, resulted in the elimination of this limitation and the adoption of the provision quoted above.[142] Under this formulation, the Convention will apply not only to offenses committed on the high seas, but also to those committed in territorial waters if the ship is scheduled to navigate on the high seas. Further, a state may declare at the time of ratification that the Convention shall apply to ships navigating in straits used for international navigation in cases not covered by Article 4(1).[143] Conversely, it may also declare "that it shall not apply the Convention where the ship is navigating in internal waters and its schedule does not include navigation beyond the outer or lateral limits of the territorial sea."[144]

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the French) provided that a ship is also considered in service when temporarily in port for repairs.

[141] Convention, *supra* note 11, Art. 2(1)(b). [142] *See supra* text accompanying note 136.

[143] Convention, *supra* note 11, Art. 5(2).

[144] *Id.*, Art. 5(1). This provision was intended to permit states to exempt foreign flag ships navigating exclusively in the internal waters of another state.

Other Provisions

Article 8 obligates a state in whose territory the offender is present to "take him into custody or take other measures to ensure his presence for such time as is necessary to enable any criminal or extradition proceedings to be instituted"; "to immediately notify" those states that have jurisdiction under Article 7(1) and, "if it considers it advisable," any other interested state; and immediately to make a preliminary inquiry into the facts. A person against whom such measures have been taken has the right to communicate "without delay" with a representative of his state of nationality, or if he is a stateless person, the state of which he is a habitual resident, and to be visited by a representative of that state.[145] Any person against whom proceedings are being carried out in connection with any of the offenses defined by the Convention "shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided for such proceedings by the law of the State in the territory of which he is present."[146]

Article 12 obligates states to offer one another "the greatest measure of assistance in connection with criminal proceedings . . . , including the supply of the evidence at their disposal necessary for the proceedings." In addition, Article 14 provides that any state having reason to believe that an offense will be committed must furnish any relevant information in its possession to those states that would have jurisdiction under Article 7. These provisions are either taken verbatim or are substantially similar to provisions in the Hague, Montreal and Hostage Conventions.

Other articles provide that the Convention "shall not apply to a warship or a ship owned or operated by a State when being used as a naval auxiliary or for customs or police purposes";[147] that nothing in the Convention "shall affect the immunities of warships and other Government ships operated for non-commercial purposes";[148] that each state "shall make the offences set forth in article 3 punishable by appropriate penalties which take into account the grave nature of those offences";[149] that this Convention "does not exclude any criminal jurisdiction exercised in accordance with national law";[150] and that nothing in this Convention "shall be construed as affecting in any way the existing rules of international law pertaining to the competence of states to exercise investigative or enforcement jurisdiction on board ships not flying their flag."[151]

Questions Referred to the Diplomatic Conference

Several controversial issues were considered to be of a "political nature" and were left open for resolution by the Diplomatic Conference.

Person Acting on Behalf of a Government. A proposal was introduced by Kuwait to insert the words "whether acting on his own initiative or on

[145] *Id.*, Art. 8(3).
[146] *Id.*, Art. 10(2).
[147] *Id.*, Art. 2(1)(a).
[148] *Id.*, Art. 2(2).
[149] *Id.*, Art. 6.
[150] *Id.*, Art. 7(4).
[151] *Id.*, Art. 9.

behalf of a government" following "any person" in the chapeau of Article 1, so that it would read, "Any person, *whether acting on his own initiative or on behalf of a government,* commits an offence if that person unlawfully and intentionally" commits the proscribed acts.[152] The purpose of the proposal was to make the Convention applicable to persons who commit an offense acting on behalf of a government. The Kuwaiti delegation emphasized that its proposal did not affect state responsibility and was concerned only with personal responsibility.[153]

While some delegations agreed that the Convention should apply regardless of whether the offender was acting in his own capacity or on behalf of a government, most expressed the view that the Convention already so provided by the words "any person." Some also expressed concern that inclusion of this language might create problems of interpretation with respect to other antiterrorist conventions that do not use this language. Others expressed the fear that inclusion of an express provision might make the Convention less acceptable to some states. Since the delegations remained divided over an express provision, it was agreed that this presented a political question that should be referred to the Diplomatic Conference.[154]

Offenses by Governments. The most significant question referred to the Diplomatic Conference involves a proposal by Saudi Arabia: at the first session of the Preparatory Committee in London, and again at the second session in Rome, Saudi Arabia submitted additions to the Preamble and the substantive provisions that would make the Convention applicable not only to persons but also to governments.[155] This proposal is different from the Kuwaiti proposal, discussed above. The Kuwaiti proposal would make clear that a person who engages in the proscribed conduct is not relieved of responsibility therefor because he is acting on behalf of a government. Under the Saudi proposal, the Convention would impose responsibility for the offense on the state itself.

For example, under the Saudi proposal, the chapeau of what is now Article 3, defining the offenses, would be amended to read, "Any *ordinary person or government* commits an offence . . . ." With respect to individuals who engage in the proscribed conduct, the Convention makes provision for their prosecution or extradition. These provisions have no application to states; a state cannot be prosecuted or extradited. Another article in the Saudi proposal provides that the "State whose naval forces . . . committed any of the offences shall" inform the Secretary-General of the "measures taken to put an immediate end to such offence."[156] The use of force by states is governed by an elaborate and complex body of international law, developed over many centuries and modified by the UN Charter. Whether a state's use of force is lawful or not is—and should be—determined by the application of this body of law.

[152] IMO Doc. PCUA 2/4 (May 8, 1987).
[153] *See* IMO Doc. PCUA 2/5, at 12, para. 65 (June 2, 1987).
[154] *Id.* at 13, para. 68.
[155] *See* IMO Doc. PCUA 1/3/3 (Feb. 26, 1987).
[156] *Id.*, Art. 12.

Cooperation in the Prevention of Offenses. Article 13 of the draft provides:

> States Parties shall co-operate in the prevention of the offences set forth in article 3, particularly by:
>
> (a) taking all practicable measures to prevent preparation in their respective territories for the commission of those offences within or outside their territories;
>
> (b) exchanging information in accordance with their national law, and co-ordinating administrative and other measures taken as appropriate to prevent the commission of offences set forth in article 3.

This article is based on Article 4 of the Hostage Convention. However, Article 4(a) of the Hostage Convention provides:

> States Parties shall co-operate in the prevention of the offences set forth in article 1, particularly by:
>
> (a) Taking all practicable measures to prevent preparations in their respective territories for the commission of those offences within or outside their territories, *including measures to prohibit in their territories illegal activities of persons, groups and organizations that encourage, instigate, organize or engage in the perpetration of acts of taking of hostages.*

Both the draft initially submitted by the cosponsors and the draft prepared following the London meeting included an identical provision. In the course of the discussions at Rome, one delegation noted that "to prohibit . . . illegal activities" was redundant and suggested deleting "illegal" and substituting "monitor" for "prohibit." Another delegation then suggested deleting the entire clause, arguing that it was superfluous, since any action that would come within that clause was already covered by "measures to prevent preparation." Others, however, argued that the language should be retained since it was identical to that of the Hostage Convention. Ambassador Tuerk of Austria, one of the cosponsors, noted that it corresponded to the relevant text adopted by the Stockholm Conference on Confidence Building Measures, and that any change involved a political decision that should be left to the Diplomatic Conference. There was no discussion opposing Ambassador Tuerk's proposal[157] and suggestions that the question be referred to the Diplomatic Conference were generally accepted. Although the IMO report states that "[t]he Committee agreed to the proposal on the understanding that the deletion of these words was not intended in any way to constitute a departure from the basic idea in the relevant provision of the Hostages Convention,"[158] it is likely that the question will be discussed at the Diplomatic Conference.

While most terrorist acts are carried out by individuals, they are planned, financed and otherwise supported by organizations. A specific reference to measures against "groups and organizations that encourage, instigate, organize or engage in the perpetration" of these offenses is therefore desirable, notwithstanding that such measures could be undertaken in the ab-

[157] This is based on the author's recollection of the proceedings.
[158] IMO Doc. PCUA 2/5, at 26, para. 137 (June 2, 1987).

sence of this language. While "prohibiting illegal activities" appears redundant, it may not be, since organizations that encourage, instigate, organize or engage in terrorist acts may also engage in other activities that are not, of themselves, illegal. Under some legal systems, there is at least a question whether those other activities can be prohibited.[159] Perhaps a more eloquent formulation could have been found initially, but since this language is already contained in major international instruments, it seems preferable to retain it in its present form.

ICJ Jurisdiction. Article 16 provides that if a dispute between two or more parties concerning the interpretation or application of the Convention cannot be settled through negotiation, it shall be submitted to arbitration at the request of one of the parties and if the parties are unable to agree on arbitration, any party to the dispute may submit it to the International Court of Justice. A separate paragraph provides that at the time of ratification, a state may declare itself not bound by that provision. Some delegations opposed this article. It was agreed that "the submission by States of disputes to international tribunals involved substantive political questions which could most appropriately be resolved at a political conference."[160]

* * * *

The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation has several advantages, aside from obviating, in part,[161] the need for resolving whether terrorist acts constitute piracy—a question whose legal resolution is complicated by its political overtones. The Convention clearly defines the offenses, it obligates some states and authorizes others to establish jurisdiction, and it obligates any state in which the offenders are found either to extradite them to another state or to submit the case to its authorities for prosecution.[162] As currently drafted, the Con-

[159] For example, in the United States, proposed legislation that would require closing the PLO office in Washington, D.C., S. 1203, the Anti-Terrorism Act of 1987, 100th Cong., 1st Sess., was challenged as unconstitutional by the American Civil Liberties Union and the Arab Anti-Defamation Committee. *But see* P. BAUM & M. STERN, THE ANTI-TERRORIST ACT OF 1987: A RESPONSE TO ITS CRITICS 2–4 (American Jewish Congress 1987).

[160] IMO Doc. PCUA 2/5, at 27, para. 142 (June 2, 1987). Other questions left open for the Diplomatic Conference involved jurisdiction regarding offenses committed with respect to ships chartered on a demise or bareboat charter basis, *id.*, paras. 96–101, and the obligation of states to accept alleged offenders from the master of the ship, *id.*, paras. 124–29.

[161] As stated in the introduction, the Convention will not eliminate the need to interpret and apply existing law altogether. Existing law, of course, will continue to apply with respect to states that do not ratify the Convention. Further, as is made clear in the Preamble, matters not regulated by the Convention continue to be governed by the rules and principles of general international law. For example, the Convention does not address directly who may act to free a ship being held by terrorists. Presumably, international law, including the customary law on piracy, would govern. Other rules of international law that would be relevant include the customary and treaty law on the rights of the flag state and on the rights of the territorial state (if the ship is in territorial waters), and the law on humanitarian intervention.

[162] The piracy provisions of the Geneva Convention on the High Seas and of the UN Convention on the Law of the Sea recognize universal jurisdiction but do not obligate any state

vention is sufficiently broad in its geographic application, its definition of the offenses, and its provisions for jurisdiction to permit effective legal action against those who engage in maritime terrorism.

Suggestions to limit its geographic scope, to omit acts such as murder from the definition of the offenses, or to narrow the jurisdictional provisions or the extradite or prosecute requirement, if adopted, could seriously undermine its effectiveness. If jurisdiction were limited to the flag state and the state of nationality of the offender, or if the obligation of the state in which the offender is found to extradite or prosecute were made applicable only with respect to requests by states that have jurisdiction under the mandatory provisions, the Convention would have little impact. As discussed earlier, the state of nationality of the offender and the flag state may or may not have an interest in prosecuting. If they are the only ones that have jurisdiction, or that have a right to extradition, the offender may go unpunished. The state of nationality of the victim and a state that the offenders are attempting to compel to do or abstain from doing an act will almost always have an interest in seeing the offender brought to justice. The argument that these bases of jurisdiction have not been accepted under existing rules of international law is not compelling and should certainly not be dispositive of whether such jurisdiction should be provided for by this Convention.

As seen, a strong argument can be made for jurisdiction by the target state and the state of nationality of the victim under the existing principles of jurisdiction. But whether such jurisdiction can be justified under existing principles should not determine whether it should be provided for by this Convention, specifically designed to address the problem of maritime terrorism. One of the purposes of adopting a treaty is to go beyond existing law. A multilateral convention designed to deter and punish terrorists should provide the jurisdictional bases necessary to ensure that a state whose fundamental interests are threatened by a terrorist act has the right to prosecute the perpetrators and that those who commit such acts do not escape punishment for lack of jurisdiction by an interested state.

CONCLUSION

The international law against terrorism is still in the process of developing. In 1934 the League of Nations noted that "the rules of international law concerning the repression of terrorist activity are not at present sufficiently precise to guarantee efficiently international coöperation in this matter." It established a committee of experts "to study this question with a view to drawing up a preliminary draft of an international convention to assure the repression of conspiracies or crimes committed with a political

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to try the offenders or to extradite them to another state—though, as indicated earlier (*supra* notes 58–59 and accompanying text), the Geneva Convention imposes a duty on states to cooperate in the repression of piracy.

and terrorist purpose."[163] However, the international community was apparently not ready to create effective legal measures to guarantee such cooperation. A convention adopted by the League[164] was ratified by only one state.[165]

The United Nations has not been much more effective. Although it established an *Ad Hoc* Committee on International Terrorism in 1972[166] and the committee finally issued a report and recommendations in 1979,[167] it did not produce a convention defining, let alone prohibiting, terrorism. Moreover, every resolution of the General Assembly condemning terrorism has included a paragraph reaffirming the right to self-determination,[168] as if the latter justified the former. The General Assembly and the specialized agencies, however, have been instrumental in the adoption of several conventions dealing with specific aspects of terrorism.[169] The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation is an important further step in this process.

The continued vitality of any legal system depends on its ability to deal with current problems. For international law, perhaps even more than for municipal law, its ability to adapt existing law and to create new law to deal with current problems may well determine whether its rules are accepted and applied or viewed as irrelevant and ignored. It remains to be seen to what extent states are ready to adapt, and if necessary extend, existing principles of international law, such as the law on piracy or the universality principle, to deal with terrorism, and/or to adopt and ratify conventions that are meaningful in scope, as regards both substance and jurisdiction.

[163] *See* 29 AJIL Supp. 435, 554 (1935).

[164] Convention for the Prevention and Punishment of Terrorism, 7 INTERNATIONAL LEGISLATION 862 (M. Hudson ed. 1941).

[165] India. *Id.*

[166] GA Res. 3034 (XXVII) (Dec. 18, 1972).

[167] 34 UN GAOR Supp. (No. 37), UN Doc. A/34/37 (1979).

[168] *See, e.g.*, GA Res. 32/147 (Dec. 16, 1977); GA Res. 40/61 (Dec. 9, 1985). *But see* SC Res. 579 (Dec. 18, 1985) ("*Condemn[ing] unequivocally* all acts of hostage-taking and abduction").

[169] *See supra* note 9.