

**"Walking the Plank" of Universal Jurisdiction:  
Extending Universal Jurisdiction to the "New Piracy" of  
Terrorist Financing<sup>1</sup>**

*They are no members of the common throng;  
They are all noble men who have gone wrong.*  
- Gilbert, *The Pirates of Penzance*, 1879

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## Introduction

Are terrorist financiers today's pirates? The intersection of piracy and universal jurisdiction bears important consequences for the prosecution and prevention of terrorist financing in international law. While the application of universal jurisdiction in modern international law is highly politicized, it nonetheless plays an important role in international law enforcement. However, universal jurisdiction has never been extended as a basis to prescribe, adjudicate, or enforce laws against terrorism. Instead, international conventions allow a state to exercise nationality, territorial, or passive personality jurisdiction over terrorists or terrorists acts upon a showing of some nexus between the attack and the state. Terrorism and terrorist acts continue to threaten the international community, despite whose better efforts the crime of terrorist financing continues.<sup>2</sup> Although international and domestic courts have applied universal jurisdiction as a basis for prosecuting crimes against humanity only since the end of World War II,<sup>3</sup> courts and publicists have long recognized universal jurisdiction as a traditional basis for piracy.<sup>4</sup>

This Comment will address the current international law on terrorist financing and argue that the international community should revise the Terrorist Financing Convention to include a universal jurisdiction provision because terrorist financing is the "new piracy." Terrorist financing embodies many of the same elements of piracy, which has served as the traditional basis to prescribe, adjudicate, and enforce laws against individual actors in international law for crimes so heinous that all states are required to respond to them. Part I of this paper introduces the concept of universal jurisdiction to prescribe laws against piracy and crimes against humanity through conventional and customary international law. Part II

traces the background of the counter-terrorism conventions and the world of terrorist financing, to be considered the aiding and abetting of terrorism, and discusses the actors, methods, and efforts to combat it. Part III weaves together the background on universal jurisdiction and terrorist financing through the elements of the piracy in the Law of the Sea conventions to argue that terrorist financing, as the aiding and abetting of terrorism, is the "new piracy," and as a crime of the greatest international interest should be subject to universal jurisdiction. Part IV concludes by addressing critics of universal jurisdiction and the weaknesses of the current anti-terrorist financing instruments.

#### **I. Universal Jurisdiction: Prescribing Domestic Laws Against the Worst Crimes**

Universal jurisdiction is defined as the jurisdiction of a state to prescribe, adjudicate, and enforce its domestic laws against an individual who commits heinous and widely condemned offenses, because every state is obligated to take action to prosecute them.<sup>5</sup> Universality, however, is mainly limited to prescriptive jurisdiction, as states are limited in their adjudicative and enforcement powers against other states or foreign individuals. While international law jurisdiction is traditionally reserved for state actors *qua* states, and not individuals, universal jurisdiction is the exception to the general rule. Universal jurisdiction is distinguishable from other bases of prescriptive jurisdiction because universality requires no nexus between the activity in question and the host state. The exercise of universal jurisdiction requires a state to criminalize an act in its own domestic code. This causes problems when a particular act is criminalized by one state and not another. However, most states criminalize certain heinous acts that affect the entire international community, such as piracy and crimes against humanity.

##### *A. Piracy: The Traditional Basis of Universal Jurisdiction*

Traditionally a crime on the high seas against the commercial and transportation interests of all states, piracy is the basis for universal jurisdiction at international law.<sup>6</sup> Hugo Grotius declined to define the individual "pirate" but instead described a "piratical" society as one where individuals are "banded together for wrongdoing" without the protection of a state.<sup>7</sup> The rationale for allowing the universal prosecution of piracy is that piracy threatens the safety of every state's commercial interests and civilian transportation on the high seas. Pirates were first classified as *hostis humani generis*, or enemies of all mankind, in 1644 by an English court.<sup>8</sup> English piracy trials focused not on a defendant's conduct at sea but upon his nationality and the nature of his commission by a sovereign. If the defendant violated his commission, he was convicted and hanged.<sup>9</sup> Early courts also looked to the level of property destruction, whether the property was seized by force and arms, and the pirate's intention, namely whether they acted for their own private ends or for a state interest.<sup>10</sup>

Although piracy occurred by definition on the high seas, outside the territorial jurisdiction of any state, universal jurisdiction applied because piracy was classified as a violation of the law of nations, or *jus gentium*.<sup>11</sup> The 1705 Scottish trial of Thomas Green, who sailed to the East Indies under the mandate of King William III, applied this principle. Green, an English citizen, was arrested in Scotland for pirating a Scottish vessel near Calicut, India. Although the Scottish court could have claimed passive personality jurisdiction over Green for his acts against a Scottish vessel and citizens, the court instead convicted him for piracy *jure gentium*, or committing piracy in violation of the law of nations.<sup>12</sup>

This view of piracy defines its function as filling a *lacuna*, or "gap," in the international legal order.<sup>13</sup> The goal of prosecuting piracy was to "render punishable as outlaws those who operated outside the [international law] system and whose actions were inconsistent with this law within the

system."<sup>14</sup> The American legal system adopted this British gap-filling approach of piracy *jure gentium*. The Statute of April 30, 1790, defined piracy as any murder, robbery, seizure, violence toward a commander, revolt within a ship, or any other act punishable by death under United States law that was "commit[ted] upon the high seas, ... out of the jurisdiction of any particular state."<sup>15</sup> Interpreting this statute, the U.S. Supreme Court consistently held that offenders would be brought to justice whether or not their actions affected American citizens or territory.<sup>16</sup> Piracy, then, was subject to prosecution by any state at any time, to put pirates on notice that they were a danger to any port of call.<sup>17</sup>

Five centuries after its Golden Age, piracy still flourishes around the world today.<sup>18</sup> The International Maritime Bureau's Piracy Reporting Centre issues annual reports on pirate attacks around the world.<sup>19</sup> Although attacks decreased after the December 2004 Indian Ocean tsunami, incidents have increased since then, spiking fourteen percent in the first nine months of 2007.<sup>20</sup> The two areas most susceptible to current piracy threats are the Straits of Malacca between Singapore, Indonesia and Malaysia, through which thirty percent of the world's traded goods pass,<sup>21</sup> and the Indian Ocean coast off Somalia, a terrorist haven as the only state in the world lacking a central government.<sup>22</sup> Terrorist groups like al-Qaeda, Jemaah Islamiyah, Abu Sayaff, and the Moro Islamic Liberation Front have been linked to pirate attacks in these areas.<sup>23</sup>

Modern pirates, like their ancient counterparts, act for either political or economic reasons. In October 1985, four members of the Palestinian Liberation Front hijacked the *Achille Lauro*, an Italian cruise ship, as it sailed in the Mediterranean Sea and commandeered the vessel toward Syria to demand the release of Palestinians detained in Israeli prisons. The pirate-hijackers shot and killed a Jewish American passenger in a wheelchair.<sup>24</sup> In November 2005, an attack against the American cruise ship

*Seabourn Spirit* as it sailed in the South Ocean near Australia caused no injuries but terrorized passengers who watched the pirates aim grenade launchers at them. In November 2007, the U.S. Navy succeeded in pressuring two pirate boats off the coast of Somalia into releasing the two South Korean vessels held hostage for five months.<sup>25</sup> These recent incidents prove that no vessel is completely safe, whether it carries unsuspecting passengers or valuable cargo.

Article 15 of the Convention on the High Seas first codified the what, why, and where of piracy, as derived from centuries of customary international law.<sup>26</sup> Piracy is defined as

Any illegal acts of violence, detention, or any act of depredation, committed for private ends by the crew or passengers of a private ship or a private aircraft, and directed

- (a) On the high seas, against another ship or aircraft, or against persons and property on board such ship or aircraft;
- (b) Against a ship, aircraft, persons, or property in a place outside the jurisdiction of any State.<sup>27</sup>

This definition of piracy emerged from the 1932 Harvard Law School Preliminary Drafts of Conventions that were written in anticipation of future conferences on the codification of international law. The 1932 Harvard Research combed case law and the works of numerous publicists to determine the scope of piracy, noting in particular that piratical acts may take many forms, including homicide, robbery, or burning.<sup>28</sup> The 343rd Meeting of the United Nations General Assembly in 1956 further clarified the scope of the piracy definition. Members commented that piracy could be prompted by feelings of hatred or revenge, and not require an intention to rob.<sup>29</sup> Members also agreed that piracy could occur on the high seas, on private aircraft, or anywhere outside the territorial jurisdiction of any state.<sup>30</sup>

Article 19 of the Convention on the High Seas accords jurisdiction to every state to seize a ship under the control of pirates to arrest the persons, seize the property on board, and use its courts to decide the resultant action and penalties imposed.<sup>31</sup> The state may take action in this

way over a ship on the high seas, or in any other place outside the jurisdiction of any state. This jurisdictional provision evolved from article II of the 1932 Harvard draft piracy convention, which declared, "Piracy is an offense which affects the interests of all states. Every state has jurisdiction to prevent piracies ..."<sup>32</sup> This jurisdictional language, along with the definition of piracy, was implemented identically in the United Nations Convention on the Law of the Sea nearly a quarter century later.<sup>33</sup>

Using piracy as a basis for universal jurisdiction, the development of international humanitarian law codified universal jurisdiction for the commission of crimes against humanity.

#### *B. Crimes Against Humanity*

A crime against humanity is a crime "derived from the laws of humanity," that is committed on a large scale against groups of civilians, impacting mankind as a whole.<sup>34</sup> The presumption of state-centered disputes changed with the prosecution of crimes against humanity after the heinous acts committed during World War II and the Holocaust. The evolution of conventional international law to protect *jus cogens* norms against murder, genocide, and torture solidified universal jurisdiction over crimes against humanity.

The international community has recognized universal jurisdiction for crimes against humanity in other conventions. The United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment included an "extradite or prosecute" provision and required States Parties to enact domestic legislation criminalizing acts of torture as defined in article 1.<sup>35</sup> The Convention on the Prevention and Punishment of the Crime of Genocide allows charged persons to be tried in the territory in which the act was committed, "or by such international penal tribunal as may have jurisdiction" between the Parties who have accepted its jurisdiction.<sup>36</sup>

##### *i. Prosecution by International Military Tribunals*

At the end of World War II, universal jurisdiction emerged as a basis for prosecuting crimes against humanity committed against innocent civilians during the war. Universal jurisdiction was applied to crimes in this manner with the understanding that every state had an interest in prosecuting the perpetrators of such heinous and widely condemned acts that terrorized the masses during the war. The Charter of the International Military Tribunal at Nuremberg authorized the trial of individuals for crimes against peace, war crimes, and crimes against humanity.<sup>37</sup> Crimes against humanity in this context included "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, ... or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal."<sup>38</sup> These crimes could be prosecuted anywhere regardless of whether they violated the domestic law of the country where the crimes were perpetrated. The International Military Tribunal for the Far East at Tokyo mirrored this jurisdiction provision.<sup>39</sup>

Crimes against humanity and war crimes have always bore a special relationship. In 1949, the Four Geneva Conventions codified universal jurisdiction for all violations of the law of war against certain groups of protected persons during armed conflict.<sup>40</sup> Whereas crimes against humanity are committed on a large scale against civilians, war crimes are more narrowly defined to "violations of the laws or customs of war," including murder, ill-treatment or deportation to slave labor of civilians or prisoners of war, killing of hostages, plunder of public or private property, or wanton destruction of illegitimate targets if not justified by military necessity.<sup>41</sup>

*ii. Prosecution by Domestic and International Courts*

Domestic and international courts have relied on these conventions to apply their own laws against war criminals for heinous and widely condemned acts. Courts in Belgium,<sup>42</sup> Canada,<sup>43</sup> the United Kingdom,<sup>44</sup> and Israel<sup>45</sup> have prosecuted genocide, murder, and torture that occurred outside their borders.

The International Court of Justice held in 2002 that Belgium properly asserted universal jurisdiction when it issued an international arrest warrant for a Congolese minister who made statements inciting racial violence and hatred.<sup>46</sup> The Belgian statute was adopted in 1993 and authorized Belgian courts to hear cases of genocide, crimes against humanity, and war crimes, regardless of whether they had a territorial or nationality connection with Belgium, but was repealed in 2003 due to international pressure.<sup>47</sup>

International criminal courts contain similar universal jurisdiction provisions. The tribunals for crimes committed in Rwanda and the Former Republic of Yugoslavia exercise universal jurisdiction over individuals who committed atrocities during specified periods in those states.<sup>48</sup> The Special Court for Sierra Leone exercises jurisdiction over any individual alleged to have committed these crimes and also incorporates the crimes listed in Common Article 3 to the Geneva Conventions, without imposing a time period on their commission.<sup>49</sup> Although these courts' *ratione loci* is generally defined as the state in which the court sits, their prosecution of individuals charged with committing the most serious crimes against humanity constitutes universal jurisdiction.

The exception to this rule of universal jurisdiction, however, is the principle of complementarity, which gives deference to national criminal jurisdiction and national sovereignty without replacing the domestic state's own jurisdiction.<sup>50</sup> The International Criminal Court ("ICC") substitutes complementarity for universal jurisdiction by prosecuting crimes of international concern while deferring to national courts.<sup>51</sup> Some of the crimes under ICC jurisdiction are not yet classified as crimes against humanity, such as the crime of aggression.<sup>52</sup> Only when a state fails to prosecute a crime under the ICC statute may the tribunal step in and exert jurisdiction over the offense. The *travaux preparatoires* to the ICC define its jurisdictional triggering mechanisms, identifying the Court as the

"jurisdictional expression of collective action by states parties ... to promote accountability for certain international crimes."<sup>53</sup>

In this regard, universality is an accepted basis for prescriptive jurisdiction for universally condemned war crimes and crimes against humanity like murder, genocide, and torture when directed at a civilian population. Although terrorism may include murder, the political implications behind defining terrorism have prevented the international community from extending universal jurisdiction over it.

## **II. Terrorism and Terrorist Financing: The Difficulty of Prosecution**

### *A. Terrorism: A Hard Act to Define*

Part of the difficulty of assigning prescriptive jurisdiction to terrorism is the challenge of defining it.<sup>54</sup> In 1992, Alex Schmid of the United Nations Office for the Prevention of International Terrorism has defined it as "the peacetime equivalent of a war crime."<sup>55</sup> The U.S. Congress' definition is "premeditated, politically motivated violence perpetrated against noncombatant targets by sub-national groups or clandestine agents, usually intended to influence an audience."<sup>56</sup> The United Kingdom's definition "include[s] not only violent offences against persons and physical damage to property, but also acts 'designed seriously to interfere with or seriously to disrupt an electronic system.'"<sup>57</sup> Black's Law Dictionary defines it without specifying its civilian target: "the use or threat of violence to intimidate or cause panic, especially as a means of affecting political conduct."<sup>58</sup>

The debate over the terrorism definition resurfaced in the *travaux preparatoires* to the Terrorist Financing Convention. States argued for and against defining terrorism, to establish "the necessary distinction between acts of terrorism and the right of peoples to struggle for their self-determination and against domination or foreign occupation,"<sup>59</sup> or out of fear that a definition "essentially opens the way for abuses."<sup>60</sup> The failure to

define terrorism could even have a "pernicious" effect on the cooperation required under the Convention if it included offenses that were "beyond the scope of terroristic offenses" as defined in the annexed treaties.<sup>61</sup> Although the definition debate continues, the Terrorist Financing Convention is the closest conventional definition of terrorism that exists in international.<sup>62</sup>

Thus, for the purpose of this Comment, terrorism is defined simply as violence against noncombatant (civilian) targets that is committed for a political purpose.

*i. The Counter-Terrorism Conventions*

The major counter-terrorism conventions and their protocols are the most important source of law for considering the international community's prevention of and response to terrorist attacks.<sup>63</sup> For convenience, the conventions are discussed in four categories. The first category covers terrorist acts. The 1963 Aircraft Convention defined offenses on board aircraft as those against penal law or those that "may or do jeopardize" the safety of the aircraft, persons, or property on board," or which "jeopardize good order and discipline on board."<sup>64</sup> The Convention authorized an aircraft commander to impose "reasonable measures" upon a person who commits such an offense including restraint to protect the safety of the aircraft, passengers, property, maintain good order and discipline on board, or to enable delivery of or disembarkation of the unruly person.<sup>65</sup>

Seven years later, the Unlawful Seizure Convention more explicitly criminalized aircraft hijacking or accomplice to hijacking.<sup>66</sup> The Civil Aviation Convention covered acts which destroy an aircraft or endanger its in-flight capability or safety.<sup>67</sup> A 1988 Protocol to the Civil Aviation Convention extended the Convention to include terrorist acts at international airports.<sup>68</sup> Finally, the International Convention for the Suppression of Terrorist Bombings prohibits a person from delivering, placing, discharging or detonating an explosive or other lethal device in a public place with the

intent to cause death, serious injury, or property destruction resulting in major economic loss.<sup>69</sup>

The second category of terrorism conventions protects certain persons. The Diplomatic Agents Convention concerns Heads of State, Ministers of Foreign Affairs, or other state representatives (or their families) who are entitled to special protection in a foreign state, and requires parties to criminalize and punish the intentional murder, kidnapping, or other attack upon the person, their private accommodations, or means of transport.<sup>70</sup> The Hostages Convention criminalizes the seizure or detention and threat to kill, injure, or continue the detention of another person to compel a third party to do or abstain from doing any act as an explicit or implicit condition for the release of the hostages.<sup>71</sup> A third category of terrorism conventions concerns acts related to maritime navigation, prohibiting terrorist offenses against international maritime navigation and fixed platforms against the continental shelf, and the use of a vessel to further acts of terrorism or to facilitate the transport of persons or materials to be used in attacks.<sup>72</sup>

The fourth category of conventions concerns the tools of terrorism, namely plastic explosives, nuclear weapons, and money. These conventions do not by themselves prevent the commission of a terrorist attack, but rather require states to take steps to limit access to *materiel* or funds to be used in attacks. The Nuclear Materials Convention criminalizes the unlawful possession, use, transfer, or theft of nuclear material.<sup>73</sup> Following on this, the Nuclear Terrorism Convention criminalizes the possession of radioactive material with the intent to cause death, injury, or substantial damage to property.<sup>74</sup> The Plastics Explosive Convention, negotiated after the 1988 bombing of Pan Am flight 103 over Lockerbie, Scotland, controls and limits the use of unmarked and undetectable plastic explosives.<sup>75</sup> The Terrorist Financing Convention, the main focus of this paper, requires states to take steps and implement legislation to prevent and counteract the direct or

indirect financing of terrorism.<sup>76</sup> The Convention was finalized in December 1999 but only came into force on April 10, 2002. Most of the conventions include an accomplice or complicity provision to reach those who assist in commission of the crimes listed therein.<sup>77</sup>

The jurisdictional provisions of these conventions are similar and rely on the same principles. States Parties may generally take action if the offenses defined therein fall into one of several broad categories. First, states may exercise territorial jurisdiction if the offenses have an effect on the territory or are committed on the territory or on board vessels or aircraft registered to that state. Second, states may exercise nationality jurisdiction if the offenses are committed by the state's national or by a stateless person habitually residing in that state. Third, states can exercise passive personality jurisdiction over offenses that kill, injure, or otherwise threaten the state's own nationals, property, or interests, but which are committed by nationals of other states. No conventions provide for universal jurisdiction, but instead require a nexus between the act and the prosecuting state. The conventions also include an "extradite or prosecute" provision, which requires a state to apply its own laws or obligations under international law against an offensive individual in that state, or else extradite them to a state that will prosecute.

*B. Terrorist Financing: A Brief Survey of an International Problem*

Every terrorist group needs money to execute its mission. Three generalities about terrorist financing are important to this brief introduction. First, terrorists finance their crimes through a variety of creative and hard-to-trace methods, such as robbery, money laundering, drug trafficking, charities, the informal value transfer system of *hawala*, in-person couriers, wire transfers, and even honey.<sup>78</sup> Second, for law enforcement purposes, these methods are generally low-tech and very difficult for officials to monitor. Finally, terrorist attacks are very cheap to

finance. For instance, the events of September 11 are estimated to have cost no more than \$500,000, despite causing billions of dollars of damage.<sup>79</sup>

Terrorist financing is a difficult crime to prosecute because of its relatively ethereal nature. Whereas terrorists and their materials are easy to identify, arrest, and seize, terrorists finance their acts and personnel through wire transfers, computer transactions, or a simple handshake through the Islamic informal value transfer system of *hawala*.<sup>80</sup> Terrorists use informal value transfer systems, and *hawala* in particular, for their anonymity, relatively minimal documentation requirement, and because it is cheaper, swifter, more reliable, more convenient, and less bureaucratic than banks. Other sources of terrorist financing include Islamic charity (one of the five pillars of Islam, *Zakat*, is the compulsory tithe of approximately 2.5% of a Muslim's income), fundraisers through mosques and cultural centers, websites, intermediaries, facilitators, banks and other financial institutions. Non-governmental organizations ("NGOs") are occasionally linked to terrorist groups. For example, the Egyptian Human Relief Agency, established as the charity division of the Egyptian Doctor's Union, was accused of supporting the Palestinian Liberation Organization ("PLO").<sup>81</sup> Terrorist financing is discussed in greater detail in Part III, *infra*.

*i. Efforts to Combat Terrorist Financing: The 1999 Terrorist Financing Convention and UN Security Council Resolution 1373*

Given these permeable havens for terrorist financing, the international community took action. In 1998, at the behest of France, the United Nations Sixth Committee (Legal) adopted Draft Resolution I, the International Convention for the Suppression of the Financing of Terrorism, later adopted by the General Assembly.<sup>82</sup> The *travaux preparatoires* to the Terrorist Financing Convention were surprisingly silent on the jurisdictional bases for prosecution, instead relying on territorial, nationality, and passive personality jurisdiction similar to the other conventions.<sup>83</sup> The

international community has implored states to adopt their own domestic legislation to criminalize the act or support of terrorist financing. On September 28, 2001, United Nations Security Council Resolution 1373 criminalized "the willful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts."<sup>84</sup>

Turning to the other sources of international law,<sup>85</sup> there is currently no established custom or obligation *erga omnes* for the elimination of terrorist financing. Although the prohibition of terrorism is not yet a *jus cogens* norm,<sup>86</sup> there is room for the international community to recognize terrorism and terrorist financing as such, just as it treats piracy. Both the Terrorist Financing Convention and Resolution 1373 called upon states to criminalize terrorist financing, refrain from supporting terrorists or their organizations, and freeze "without delay" funds and other financial assets or economic resources of terrorists or their accomplices. States are therefore dually bound under article 7(3) of the Terrorist Financing Convention and Security Council mandate to adjust their domestic law accordingly.<sup>87</sup>

The United States implemented domestic jurisdiction provisions against terrorist financing through Title III of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act").<sup>88</sup> The PATRIOT Act asserts the jurisdiction of American courts over a number of crimes not included in other criminal statutes under Title 18 United States Code. Title III is the most important provision of the PATRIOT Act for terrorist financing, as it amends the Bank Secrecy Act, implements measures to counteract and prevent international money laundering, and requires financial institutions to monitor account ownership and activity.<sup>89</sup>

Given this general background of piracy and terrorist financing, a legal comparison of the two crimes follows to show that terrorist financing may be considered the "new piracy" and subject to universal jurisdiction.

### **III. Analysis**

This section will argue that because the elements of the traditional piracy definition apply to terrorist financing, states may properly assert universal jurisdiction over acts of terrorist financing in the same way they assert universal jurisdiction over piracy. The definition of piracy, as codified in the Law of the Sea conventions, includes three elements:

- **The "what" of piracy = Violence, detention, or depredation.**
- **The "why" = Committed for private ends.**
- **The "where" = "directed a) on the high seas, against another ship or aircraft, or against persons or property on board, or b) against a ship, aircraft, persons, or property in a place outside the jurisdiction of any state."**

It is through these three categories that the act of terrorist financing may be analyzed, to determine whether terrorist financing, as the aiding and abetting of terrorism, is the "new piracy" and thus subject to universal jurisdiction.

*A. Terrorist financing is the aiding and abetting of terrorism's violence, detention, or depredation.*

Taking the *actus reus* of piracy first, the first element of the conventional definition of piracy is the commission of violence, detention, or depredation.<sup>90</sup> Terrorist financing, though not in itself violent, is the proximate cause of terrorist violence as it provides the means through which terrorists take action. Without financing, terrorists would not be able to pay their agents, provide support and comfort for the families of terrorists who embark on suicide missions, or pay for bomb-making materials, pilot lessons, transportation, or propaganda materials that are essential to

carrying out the terrorist mission.<sup>91</sup> The aspects of terrorist financing that prove a nexus with violence are the mental and elements of terrorist financing as set out in the Terrorist Financing Convention, the tools of terrorist financing that facilitate the fast, untraceable transfer of terrorist funds, and the links between terrorist financing and other illegal acts like drug smuggling and money laundering.

*i. Aiding and abetting terrorism through terrorist financing is equal to terrorism for law enforcement purposes.*

One gap to fill early in this analysis is the notion that terrorist financing is not terrorism itself, but rather the material support or "aiding and abetting" of terrorism. Monarchs who commissioned their pirates or other material supporters of pirates have never been prosecuted for the aiding and abetting of piracy. Although the traditional notion of aiding and abetting typically requires a completed act in which a non-principal actor assisted or conspired, the Terrorist Financing Convention does not require that the terrorist act to be financed actually occurred or was attempted.<sup>92</sup> However, this section will show that aiding and abetting terrorism through financing should be prosecuted as the commission of terrorism itself.

Aiding and abetting is a relatively new concept at international law. The Nuremberg and Tokyo Tribunals criminalized only "participation in a common plan or conspiracy" for crimes against peace.<sup>93</sup> In this case, requiring a conspiracy is inappropriate for the prosecution of terrorist financing because just one person can finance an operation. International criminal tribunals introduced to international law the concept of "aiding and abetting" to ensure the individual criminal responsibility of those who may have assisted in committing crimes against humanity or war crimes, in other words those who "aided and abetted in the planning, preparation, or execution of a crime" as defined in the statutes.<sup>94</sup> Applying this definition, terrorist financiers could be said to have aided and abetted in the planning,

preparation, or execution of terrorism even if the act did not occur. Aiding and abetting should therefore apply to terrorist financing as a central element of terrorism as a "crime against peace", rather than just the peripheral planning or preparing to commit terrorism. Without their funds, terrorists could not survive or plan attacks. Additionally, most of the counter-terrorism conventions, including the Terrorist Financing Convention, criminalize complicity in the acts defined therein,<sup>95</sup> so expanding the definition of terrorism to include aiding and abetting is not unreasonable.

The International Criminal Court Statute takes the most expansive approach to aiding and abetting. Persons are responsible for "aiding and abetting" if they assist in a crime's commission or attempted commission, including providing the means for its commission, or with the aim of furthering the criminal activity or purpose of the group.<sup>96</sup> This would seem to reach terrorist financiers, except the ICC specifically omitted terrorism from its *ratione materiae*. The drafters discussed its inclusion as a "treaty crime," a serious crime of international concern denoted in certain treaties, to be distinguished from "core crimes" like genocide, aggression, violation of the laws of war, and crimes against humanity.<sup>97</sup> The ICC would only exercise jurisdiction over a crime once a suitable definition was adopted.<sup>98</sup> India, Sri Lanka, Algeria, and Turkey proposed including a definition of terrorism within crimes against humanity, but their proposal failed.<sup>99</sup> The issue was finally deemed too political to be settled, and was tabled for a future Review Conference.<sup>100</sup> The fact that the terrorism debate was not completely rejected is promising, and indicates that a terrorism definition could be added to the Statute during its review in 2009. Combining the ICC's aiding and abetting language of furthering a group's criminal activity or purpose, along with the extension from the international criminal tribunals that terrorist financing can be considered a central element to a crime

against peace, the act of terrorist financing can be considered aiding and abetting of terrorism, and should be prosecuted fully along with terrorism.

*ii. The material and mental elements of terrorist financing parallel those of piracy*

The first way terrorist financing parallels the violence, detention, and depredation of piracy is through the mental and material elements of terrorist financing, which are listed in the Terrorist Financing Convention.<sup>101</sup> The act of terrorist financing requires 1) financing, or "providing or collecting funds;" 2) terrorist acts (as defined in article 2 of the Convention, or in any of the conventions cited in the Annex); and must be done 3) willfully; and 4) with the knowledge or intention that funds are used to finance terrorist acts.<sup>102</sup>

Breaking this down further, the material elements of financing a terrorist act, namely the "providing or collecting funds" and the commission of a terrorist act, are analogous to the violence, robbery, detention, and depredation traditionally associated with piracy where individuals boarded vessels to rape, pillage, plunder, steal, and wreak havoc on the victim ship.<sup>103</sup> Terrorism itself may be analogous to the internationalized crime of piracy,<sup>104</sup> but terrorist financing is more difficult to analogize due to the absence of actual violence. Cash and Bearer Bonds do not alone create a terrorist attack. But without funds to purchase fertilizer or gasoline for bombs, pilot lessons, airplane tickets, or the materials to make anthrax or sarin gas, the terrorist attacks would not occur. Nor are these attacks expensive or complicated to execute. The four September 11 attacks cost less than \$500,000 to execute, \$270,000 of which was spent in the United States.<sup>105</sup> By comparison, the 1998 bombings of the American embassies in Kenya and Tanzania cost around \$10,000, and the October 2002 bombings of the Bali nightclub cost approximately \$20,000.<sup>106</sup>

The Terrorist Financing Convention specifies the *mens rea* of terrorist financing as willful and with the knowledge that the funds are used to finance terrorist acts. Cases of traditional piracy required similar intent. The 1932 Harvard Research distinguished casual pirates from those who devote themselves to "piratical enterprise," with the goal of prosecuting the most egregious violations of piracy *jure gentium*.<sup>107</sup> Similarly, the international community was concerned with prosecuting individuals under the Terrorist Financing Convention who donated funds to charities or other organizations with no knowledge of their destination. The fundamental criminal intent of modern pirates does not depend on their likeness to the traditional stereotype of Captain Hook, "complete with cutlass and flintlock."<sup>108</sup> The same is true of terrorist financiers. Whether the terrorist's financial weapon is a handshake with a *hawaladar*, a delivery by personal courier, or a sophisticated online banking scheme, the mental element of terrorist financing still meets the criminal intent requirement under the traditional piracy definition.

*iii. The tools of terrorist financing easily translate into violence*

A second way in which terrorist financing parallels the violence, detention, and depredation of piracy is that its tools easily translate into violence. The weapons of terrorist financing and piracy can be simple or sophisticated. For instance, today's pirates in the Straits of Malacca and off the coast of Somalia use sophisticated tools like satellite phones, rocket-propelled grenade launchers, and AK-47 assault rifles.<sup>109</sup> Pirates might even own smaller vessels that ride along side larger ships to board them with grappling hooks and hijack them.<sup>110</sup>

Just as the tools of piracy are easy to parlay into violence and depredation, the common, often simplistic tools of terrorist financing are easy to liquefy into money or other precious commodities on the black market,

but hard for law enforcement to trace. Terrorism is financed through a variety of creative and not entirely unlawful means. One calculation estimates that the illegal drug trade constitutes 30-35% of all terrorist financing; donations or tribute payments by governments, wealthy individuals or religious groups make up 25-30%; classic criminal activities such as extortion through blackmail or kidnapping constitute 10-15%; illegal diamond trading provides 10-15%; and additional unknown sources, both legal and illegal, make up 5-25%.<sup>111</sup>

Terrorist financiers divert the attention of law enforcement officials in many ways. To prevent their money from crossing jurisdictions and triggering international alerts, terrorists transfer their money through offshore transactions and secretive financial systems.<sup>112</sup> Financiers often use anonymous physical financial instruments like cash, Bearer Bonds, and diamonds and precious gems.<sup>113</sup> Drug and tobacco smuggling is also popular. The Irish Protestant Loyalists were known to smuggle cigarettes for resale on the black market.<sup>114</sup> Islamic terrorist groups have also used honey, a "dual use capacity" commodity that safely secures cash, weapons, and drugs because authorities refuse to search it due to its strong smell and thick, sticky consistency.<sup>115</sup> In November 2001 U.S. authorities blacklisted Yemeni companies Al-Nur Honey and Al-Shifa Honey for providing honey to terrorist groups to conceal cash and weapons in this way.<sup>116</sup>

Some terrorist groups rely heavily on traditional criminal operations such as money laundering through legitimate businesses, to seize and transfer money, as journalist Nick Kochan uncovered. The Provisional Irish Republican Army ("PIRA") owns approximately twenty pubs in Northern Ireland, which serve as money laundering fronts to conceal the PIRA's illegal operations.<sup>117</sup> Similarly, the Partiya Karkeren Kurdistan, or Kurdistan Workers' Party ("PKK"), set up in opposition to the Turkish government in Lebanon's Syrian-controlled Bek'a, operates a number of nightclubs, drinking dens, and

restaurants in London.<sup>118</sup> The PIRA earns around £4 million annually through extortion, and in 2004 a group linked to Sinn Fein, the Irish political party linked to the PIRA, stole £26.5 million from a Northern Ireland bank.<sup>119</sup> The Liberation Tigers of Tamil Eelam, or Sri Lankan Tamil Tigers ("LTTE"), employ legitimate businesses like jewelry, hardwood, videos, restaurants, fruit canning, gasoline, and travel as terrorist fronts throughout the United Kingdom, Spain, and Canada.<sup>120</sup> Perhaps the most famous terrorist financier of all, al-Qaeda's Osama bin Laden, was involved with numerous businesses like the billion-dollar Saudi bin Laden Construction Group, the Tanzanite King Mining Company (mining the precious stone tanzanite), and the Gum Arabic Company, which supplied gum Arabic, a substance found in soft drinks, chewing gum, paint, and cosmetics.<sup>121</sup>

Despite reports of Osama bin Laden's vast wealth supporting al-Qaeda and other fringe terrorist networks, intelligence reports have shown that is not the case. The United States 9/11 Terrorist Financing Monograph suggests that al-Qaeda depended not on bin Laden but on a "core of financial facilitators," and that the organization survived largely "hand to mouth" in the years before the attack.<sup>122</sup> Before September 11, al-Qaeda gave approximately \$10 to 20 million per year to the Taliban in Afghanistan, and funded military training operations, salaried personnel, logistical support for attacks and organization management, and propaganda. After the attacks, although al-Qaeda no longer officially funds the Taliban, the organization still supports its operatives and families and provides funds to other organizations.<sup>123</sup> The government of Saudi Arabia has long been considered the "epicenter" of terrorist financing and an accomplice to al-Qaeda, although no strong evidence exists.<sup>124</sup>

One tool that easily facilitates the violence, detention, and depredation of terrorism is *hawala*, which is an enormous component of the Islamic banking world. The process works when a customer delivers money for

transmittal to a *hawaladar*, or banking official, who then contacts another *hawaladar* to pay the intended recipient out of his own pocket, with the expectation that the debt will be repaid eventually.<sup>125</sup> Due to the high volume of transactions between *hawaladars* in a particular region and their links with others around the world, it is possible that no actual money ever leaves the state while values change and payments are made.<sup>126</sup> This requires a high amount of trust in the system, which is often augmented by relations through familial or clan or long-standing business partnerships. The success of *hawala* depends upon this trust between *hawaladars*. *Hawala* is attractive to those who wish to keep a low profile while transferring money because of its low emphasis on record keeping, the low commission rates, and the instantaneous transactions relative ease with which terrorists transfer their funds through *hawala* makes it very attractive to senders and recipients of large amounts of cash. In Pakistan alone, an estimated \$7 billion enters the country through *hawala*,<sup>127</sup> and eighty percent of all banking activity transfers occur with the use of *hawala*.<sup>128</sup> According to U.S. intelligence reports, Osama bin Laden reportedly used the services of twelve close *hawaladars* who were familiar with his background and purpose of jihad. However, the *hawaladar* network that was involved in financing the September 11 attacks was much larger than this group, and quite possibly included a number of unwitting accomplices through other *hawala* networks and Islamic charities.<sup>129</sup>

Not all *hawala*, however, is attributed to terrorist causes. *Hawala* only deserves special attention here because of its unique characteristics as an informal value transfer system, which make it easy to quickly transfer large amounts of money long distances without formal record keeping. Furthermore, small-time *hawaladars* are much less attractive to international criminal authorities than high-profile terrorist financiers like al-Qaeda's Khalid Sheikh Mohammed, who transported \$120,000 to Dubai where it traveled by wire to the September 11 hijackers in the United States. Although its

presence after 9/11 has decreased due to the efforts of the Financial Action Task Force and states, *hawala* is still a major concern of the international community in fighting terrorist financing for the difficulties in tracking and prosecuting the informal transfers. Although the possibility of a *hawaladar* knowingly transferring illicit funds between customers is relatively rare given the requirements of confidentiality and identification,<sup>130</sup> the fact remains that *hawala* is more informal than banks or other financial institutions who require a substantial amount of information to open an account. States have made some efforts to stop terrorist financing through *hawala*, by enacting domestic legislation to regulate *hawaladars*,<sup>131</sup> and working through international organizations like the IMF and World Bank to draw global attention to the issue.<sup>132</sup>

Because these methods of terrorist financing are relatively ubiquitous and often hard to trace, the Terrorist Financing Convention should be revised to allow states to prosecute any tracings of terrorist finance on the basis of universal jurisdiction, regardless of whether the acts come in contact with the state or its interests.

*iv. Terrorist financing is strongly linked to violence through other crimes*

Another way in which terrorist financing parallels the violence, detention, and depredation of piracy is its link to other illegal acts like drug smuggling, theft and transport of gold and precious gems, and money laundering.<sup>133</sup> Whereas today's pirates might lure unsuspecting ships to the guise of rescue by firing warning flares,<sup>134</sup> terrorist financiers lure in unsuspecting donors through both legitimate and illegitimate operations. Legitimate sources of funding include charities, *zakat* (the Islamic 2.5% income tax tithe), *hawala* or other informal value transfer systems, couriers who carry cash or travelers checks across borders and within states, or otherwise lawful businesses that commingle terrorist funds with legitimate

money. Illegitimate sources, on the other hand, include "shell" companies, money laundering fronts, personal cash troves, travelers checks, and illegitimate charities.

These illegitimate sources were targeted aggressively after the September 11 terrorist attacks. In December 2001, the U.S. government froze the assets of the Holy Land Foundation for Relief and Development, in Richardson, Texas, and the Chicago-based Benevolence International Foundation and the Global Relief Foundation, identifying them as covers for terrorist organizations pursuant to their international responsibilities and domestic implementing legislation under the USA PATRIOT Act and Executive Order 13,224.<sup>135</sup>

Finally, universal jurisdiction scholar Kenneth Randall has proposed that "those who commit hijacking, hostage taking, crimes against internationally protected persons, apartheid, and torture are today's *hostis humani generis*."<sup>136</sup> Terrorists and terrorist financiers fit squarely in this category because their acts, either violent or involving the transfer of money to support violence, are enemies of all mankind because they target their violence indiscriminately without regard for whether their victims are civilians. The reasons for this indiscriminate targeting are addressed in the next section.

*B. Terrorist financing is committed for private ends*

Assessing next the "why" or motivational component of the piracy definition, both piracy and terrorist financing are committed for private ends rather than for any official state purpose. Even if a state sanctioned piracy, for instance, the individual pirate-privateer remained culpable for his actions in violation of international law.<sup>137</sup> The 1932 Harvard Research determined that only private vessels can commit piracy.<sup>138</sup> Pirates were traditionally known as privateers who were at war with the world (*hostes humani generis*) and sought personal fame and fortune on the high seas.<sup>139</sup> A

privateer is defined as a privately owned armored vessel belonging to one or more private individuals, commissioned either by their own or by a foreign government to capture and to bring into a prize court either enemy vessels with their cargoes or neutral vessels for unneutral conduct.<sup>140</sup>

In the case of terrorist finance, many who participate in terrorist financing do so for self-serving reasons. For instance, PIRA members in Northern Ireland engage in robbery and money laundering for personal benefit instead of supporting the organization.<sup>141</sup> Additionally, individuals might siphon funds from the distribution of counterfeit goods such as cigarettes, clothing, CDs, DVDs, and computer software, which according to INTERPOL have been used as funding sources by terrorist groups in Northern Ireland, the UN-administered province of Kosovo, Chechen separatists in Russia, North African radical fundamentalists terrorists in Europe, al-Qaeda, and Hizbullah.<sup>142</sup> While terrorist financing is closely linked with criminal activity, like money laundering, from which individuals stand to benefit financially, the private ends of terrorist financing are not limited to lining individual pockets but also include personal religious and political goals.

*i. Terrorist financiers, even if they are "Freedom Fighters," are privateers who seek personal edification*

The motivations of modern terrorist financiers parallel the ruthlessness of traditional pirates in two ways. First, terrorism today involves groups of individuals who are committed to a cause or end-goal, such as to attain religious or political goals. For instance, the 1996 declaration of Osama bin Laden declaring a *fatwa*, or religious declaration of war, against the United States, Israel and Western civilization is said to define the mission of al-Qaeda.<sup>143</sup> Other groups work toward state sovereignty. The PKK strives to create an independent socialist Kurdish state in southeastern Turkey near the borders of Iraq and Syria. The Chechens seek their own state in southern Russia, a country which has now resisted the

rise-up in two armed conflicts with the separatist state and tried to link its terrorist problems to the American-led global war on terror after September 11.<sup>144</sup> The Tamil Tigers have fought the Sri Lankan government since the 1970s to get their own state in northeastern Sri Lanka.

Even the United States has dealt with internal, home-grown attacks from religious and political fanatics where individuals perpetrated violence for personal satisfaction, such as the Unabomber (Theodore Kaczynski, an opponent to industrial society and modern technology), the 1995 Oklahoma City bomber (Timothy McVeigh, who claimed the bombing was revenge for the U.S. government's actions during the 1993 Waco, Texas standoff with the Branch Davidian religious cult and the 1992 standoff at Ruby Ridge), and the 1996 Olympic Park bomber (Eric Rudolph, an anti-abortion and anti-gay rights activist).<sup>145</sup> These types of groups and individuals were well within the contemplation of the 1932 Harvard Research, which noted that wrongful attacks and the occasional pirate should be excluded from a conventional definition of piracy because the true pirates were those that "devote themselves to piratical enterprise."<sup>146</sup>

Second, terrorist financiers and pirates attacked their subjects without regard for their status as civilians. Within this issue of indiscriminate status, however, is the difficulty of defining terrorism itself and the mantra that "one man's terrorist is another man's freedom fighter."<sup>147</sup> In 1983, American President Ronald Reagan famously referred to the Afghan *mujahideen* as "freedom fighters" in their struggle against the 1979 Soviet invasion.<sup>148</sup> One of those *mujahideen* groups, however, later became the Taliban who oppressively ruled Afghanistan and was associated with al-Qaeda. Similarly, those *mujahideen* and al-Qaeda operatives could be seen as freedom fighters who resist the oppression of the United States and Western society. The difficulty then becomes one of fairly prosecuting terrorists

without offending their "freedom fighter" interests as they struggle for political or religious goals.

In 2002, an international debate before the UN Sixth Committee (Legal) deplored acts of terrorism while respecting the duality of the terrorism definition. The Sixth Committee considered drafting an omnibus counter-terrorism convention that would envelop the others already in force, encouraging a "universal" definition of terrorism that affects the international legal community as a whole.<sup>149</sup> The state representatives who spoke before the Sixth Committee urged differentiating terrorism from "legitimate struggles of peoples" for self-determination and national liberation.<sup>150</sup> Representatives of countries most deeply affected by terrorism discussed the need to address underlying grievances of minority groups at a political level, "to remove the seeds of political discontent that led to conflicts within States."<sup>151</sup> Even the etymology of designating terrorists as such could be considered terrorism, as Korea deplored the categorization of states as "good" or "evil" based on another state's interests.<sup>152</sup>

Additionally, the international community's responses to terrorism through its regional and multilateral instruments criminalizes terrorism while respecting the terrorist-freedom fighter distinction. Although none of the counter-terrorism conventions explicitly defines terrorism, the regional terrorism conventions refer back to them to specify acts of terrorism.<sup>153</sup> The regional conventions' definitions of terrorism generally criminalize terrorist acts regardless of their political purpose or motive.<sup>154</sup> The Convention of the Organization of the Islamic Conference on Combating Terrorism even recognizes in its preamble the "legitimacy of the right of peoples to struggle against foreign occupation and colonialist and racist regimes by all means, including armed struggle to liberate their territories and attain their rights to self-determination and independence" in compliance with the UN Charter and Resolutions.<sup>155</sup> Such language in the preamble gives

meaning to the treaty's purpose.<sup>156</sup> The expansive definition of terrorism as recognized in these regional European, Arab, African, American, and Asian conventions respects the motives of freedom fighters while criminalizing the act of terrorism.

Therefore, despite the terrorist-freedom fighter dichotomy, the international community continues to criminalize terrorism and its indiscriminate targeting of civilians. Terrorists and terrorist financiers, through their support for terrorist activities, are punishable through the multilateral and regional conventions even if they are "freedom fighters," because they seek personal edification at the cost of targeting innocent civilians.

*ii. State-sponsored terrorism can be committed for private ends*

Regarding state-sponsored terrorism and its analogies to piracy, piracy and terrorism may be considered privateering even if a state sponsors and sanctions the actions. During the age of piracy, monarchs issued "letters of marque and reprisal" ordering pirate-privateers to seize goods or harass the commercial trade interests of the enemy.<sup>157</sup> History remembers as pirates Sir Francis Drake, who sailed under the English flag to enrich the monarchy and harass Spanish commercial and imperial interests, and Henry Morgan, who exceeded his Jamaican commission each time he attacked Spain pursuant to that commission.<sup>158</sup> In determining state responsibility for piracy and other acts in violation of the laws of nations, the 1932 Harvard Research commented that so long as acts of violence are done under the authority of the State, or in such way as not to involve its supersession, the state is responsible, and it alone exercises jurisdiction.<sup>159</sup>

With regard to terrorist financing, the relationship between the state and the terrorist financier is much more muted. Although there will always exist "some kind" of relationship between states and terrorists,<sup>160</sup> states rarely openly support terrorist activity without drawing some criticism from

the international community. As Douglas Burgess points out, states like Libya, Iran, Iraq, Yemen, Afghanistan, and even the United States had similar motives to monarchs during the piracy era in sponsoring terrorist organizations: "harass the enemy, deplete its resources, terrify its citizens, frustrate its government, and remain above the fray."<sup>161</sup> Since state-sponsored terrorist organizations and their members act in an individual capacity just like their pirate predecessors because they neither wear the uniforms of a state military, nor campaign in the state's name, nor bear outward marks of the state such as flying its flag or referring to its state officials. For these reasons, state-sponsored terrorists can be held to act in an individual capacity, as "privateers" under the traditional piracy definition.

*C. Terrorist Financing Occurs Outside the Jurisdiction of any State, or in Multiple Jurisdictions*

Finally considering the "where" of piracy, traditional piracy was limited to the high seas or outside the jurisdiction of any state.<sup>162</sup> The 1932 Harvard Research noted that the mark of a piratical act is its occurrence "outside the territorial jurisdiction of any civilized state. Piracy must always be connected with the sea, but it may be committed by descent from the sea as well as actually upon it."<sup>163</sup>

Unlike piracy, however, the act of terrorist financing occurs in a variety of places: in-person transfers, across borders, and in the virtual world of computer transactions, telephone conversations, and wire transfers. The requirement of a *ratione loci* on the high seas does not negate the link between terrorist financing and piracy here for several reasons. First, the notion of limiting the *ratione loci* of piracy to the high seas or other place "outside the jurisdiction of any state" could not possibly contemplate all pirate acts. As United Nations member state representatives argued while drafting the Convention on the High Seas, it would be difficult for a

convention to cover all the possible contingencies where the act of piracy would occur.<sup>164</sup> Piracy was not intended to be limited to the high seas, but would be enforced in the "territory outside the jurisdiction of any state."<sup>165</sup> Similarly, the Terrorist Financing Convention could not possibly contemplate all the places where terrorist financing could occur, as technology continues to develop and terrorist financiers rely on more sophisticated, harder-to-trace methods to transfer funds.

The second way the requirement of the high seas does not negate the link between terrorist financing and piracy is that the occurrence of terrorist financing crimes is not limited to any specific location. Terrorist financing occurs through computer transactions over the Internet, wire transfers between banks, purchases or transfers through debit and credit cards, or through in-person transfers of large amounts of cash.<sup>166</sup> This method of aiding and abetting terrorism is distinguishable from the other acts of terrorism in the international conventions because terrorist financing can occur in the territory of a state or in cyberspace through computer transactions and wire transfers. All the other conventions contemplate an actual terrorist attack on board a plane, vessel, or territory of a state.<sup>167</sup> States simply cannot track terrorist financing in the same way that they can monitor the transport and use of large quantities of fertilizer, dynamite, nuclear materials, or airplane lessons, because money is fungible and easily changes hands without leaving much of a trace.

Terrorist financing also satisfies the other peripheral elements of the piracy definition. Terrorist financiers are recruited voluntarily or volunteer themselves to the cause in the same way pirates joined their cause for a life of excitement and wealth on the seas.<sup>168</sup> Regarding incitement or intentionally facilitating the act, terrorist financiers participate in inciting and facilitating acts of terrorism by making their funds available for the terrorist attacks.<sup>169</sup>

Therefore, given the links as proven above between the traditional definition of piracy and the elements of terrorist financing, that they both involve violence, detention, and depredation, committed for private ends, in any jurisdiction, this Comment argues that the Terrorist Financing Convention should be revised from its territorial, passive personality, and nationality bases of prescriptive jurisdiction<sup>170</sup> to include a universality basis because terrorist financing is the "new piracy."

#### **IV. Addressing Criticisms of Universal Jurisdiction and the Current Terrorist Financing Regime**

The concept of universal jurisdiction is not without its opponents. This Comment argues that limiting the Terrorist Financing Convention to passive personality, nationality and territorial jurisdiction will neither combat terrorist financing nor allow states to prosecute unlawful action through bank account transfers, *hawala*, or in-person money exchanges that affect the international community even if the action lacks a nexus with the state. Although the international community has not yet recognized the prevention and prosecution of terrorism as an obligation *erga omnes*, States Parties to the Terrorist Financing Convention should seize the opportunity to clarify the law on terrorist financing, take action to limit the spread of terrorist funds by freezing bank accounts and prosecuting terrorist financiers under universal jurisdiction, and prevent the loss of more innocent lives to terrorism. This section will respond to critics of universal jurisdiction and explain why the current regime criminalizing terrorist financing is insufficient to meet the problem.

##### *A. Addressing critics of universal jurisdiction*

Critics of universal jurisdiction discredit the concept of universal jurisdiction and its applicability to international law. Henry Kissinger, for one, argues that allowing states to exercise universal jurisdiction over individuals for their crimes violates the principle of state sovereignty and

sets a "dangerous precedent" such as that set by the House of Lords in the *Pinochet* case because it allows domestic courts to place themselves in the midst of an international dispute.<sup>171</sup> A similar criticism of universal jurisdiction that is more specifically related to piracy is that allowing states to prescribe their laws against any actor in any place is impractical when "each sovereign jealously guards its own authority in its claimed territory (including territorial seas and ships or aircraft flying its flag) and over its nationals abroad."<sup>172</sup>

However, the concept of universal jurisdiction, as grounded in centuries of law against piracy, merely complements state sovereignty by allowing able bodies of jurisprudence to step up to the plate and prosecute crimes which offend a universal sense. In addition to complementing domestic jurisdiction, universal jurisdiction would deter criminal conduct. Just like criminalizing piracy put pirates on notice that they were not safe in any port around the world, mandating the prosecution of terrorist financing in all countries would put terrorists and their accomplices on notice that their crimes have no safe haven anywhere.<sup>173</sup> Although the prosecution of terrorist financing discussed here is more *lege ferenda* than *lex lata*, imposing universal jurisdiction on states to indiscriminately apply their laws against terrorist financing would require universal compliance with the obligations of the Terrorist Financing Convention and UN Security Council Resolution 1373 regardless of a state's sovereign interests.

Related to the state sovereignty argument against universal jurisdiction, one student Note takes a comity-based position that piracy should no longer be subject to universal jurisdiction because of the "potential to cause international tension" and violations of due process for those charged under piracy laws.<sup>174</sup> The issue is raised as to whether one state will have an interest in prosecuting belligerents who threaten not its own interests but another state's.<sup>175</sup> The same may be said of terrorist

financing. Why would France want to prosecute a financier in Dubai who knowingly transfers money using Swiss bank accounts to al-Qaeda cells in the United States? Or why would Japan investigate and bring to justice allegations of money laundering by the PIRA in Northern Ireland? The response is because the application of universal jurisdiction to terrorist financing would create an obligation *erga omnes* for the prevention, prosecution, and elimination of all terrorist financing, and every state would have legal responsibility under a revised Terrorist Financing Convention to prosecute terrorist financing, regardless of which states are affected, in hopes of protecting the world from terrorist attacks.

Another criticism is that universal jurisdiction is unnecessary because the Terrorist Financing Convention already includes an "extradite or prosecute" clause that allows the state to transfer the offending individual to another state that will prosecute them.<sup>176</sup> Like the other counter-terrorism conventions, the Terrorist Financing Convention includes this provision that allows states to extradite a perpetrator to another country if they choose not to try him pursuant to their domestic laws.<sup>177</sup> However, the "extradite or prosecute" provision does not include a hard enforcement mechanism, so there is no assurance that states will comply with this obligation.<sup>178</sup>

*B. The Current Instruments of Terrorist Financing Prevention Fail to Fully Address the International Problem*

As the major international tools of terrorist finance prevention, the Terrorist Financing Convention and UN Security Council Resolution 1373 attempt to prevent the transfer of funds among terrorists by requiring that states criminalize terrorist financing in their domestic law, freeze terrorist assets, and assist other states in the prosecution and prevention of terrorist finance.<sup>179</sup> However, these instruments fail because they stop short of allowing all states to prosecute all types of terrorist finance anywhere. The threat of terrorist acts and terrorist financing still exist

today and financiers continue to transfer money to support their members and their cause. Terrorist financing decreased, but did not disappear, after September 11 due to states assuming their obligations under the Terrorist Financing Convention and Resolution 1373 to criminalize terrorist financing and freeze assets.

One major shortcoming of the current legal regime on terrorist financing to consider when amending the Terrorist Financing Convention is the free-rider problem, or the expectation that other better-equipped states will shoulder the burden of prosecution. The free-rider problem still plagues piracy despite a history of universal jurisdiction for its prosecution, as states are reluctant to prosecute crimes in international waters. Some states, however, have taken action. In 2003, India convicted and sentenced fourteen Indonesian pirates to seven years of hard labor each for the 1999 hijacking of the Japanese cargo ship *Alondra Rainbow*, about 200 miles off the Indian province of Goa.<sup>180</sup> India exercised jurisdiction under article 105 of the United Nations Convention on the Law of the Sea.<sup>181</sup> Similarly, only some states have taken action by prosecuting terrorist financiers pursuant to the Terrorist Financing Convention and Resolution 1373. The weaknesses of these legal mandates are addressed briefly below.

*i. The Terrorist Financing Convention fails to adequately address the problem of terrorist financing*

The Terrorist Financing Convention only came into force on April 10, 2002, a full eight months after the September 11 attacks. Not until UN Security Council Resolution 1373 was passed at the end of September 2001 did states take action to ratify the Convention and comply with its provisions.<sup>182</sup> Despite a push after September 11 to implement measures suppressing terrorist finance, the United States ratified the Convention on June 26, 2002, six months after the Senate gave its advice and consent.<sup>183</sup> As of this writing, the Convention had just 159 parties. By comparison, 192 states are members

of the United Nations. It is possible that the remaining states have refused to ratify the Convention because they are bound to the same obligations by Resolution 1373.<sup>184</sup> Revising the Convention to allow states to apply their domestic laws against terrorist financing whether or not the crime touches the states' borders would give the Convention much-needed strength and put states and terrorist financiers on notice that the crime of terrorist financing is the most heinous type of crime that must be prosecuted everywhere.

Furthermore, the nationality, territorial, and passive personality jurisdictional bases of the Terrorist Financing Convention, are unable to fully prosecute terrorist financing. Should a terrorist financier transport or transmit funds as he travels through international air space or on the high seas,<sup>185</sup> the Terrorist Financing Convention is inadequate to address the problem unless a state exercises jurisdiction over him as a national or as the perpetrator of a crime against its own nationality. No matter how impossible the scenario, states must be prepared to respond to terrorist financing wherever it occurs, and allowing universal jurisdiction over acts of terrorist financing is the only way to fully secure the international community.

*ii. Resolution 1373 lacks sufficient enforcement mechanisms*

While perhaps offering the best hope for prosecution of terrorist financing, Resolution 1373 is not without its own weaknesses. Although it obliged states to ratify the Terrorist Financing Convention and take measures to freeze terrorist assets, states have been slow in doing so. The UN Counter-Terrorism Committee completed Preliminary Implementation Assessments for all 192 member states by mid-2007, but the levels of readiness among states varied greatly. For instance, states submitted numerous Terrorist Financing Convention ratification instruments to the UN, but have been slow to implement monitoring mechanisms and judicial procedures into their own

systems to prosecute terrorist financiers.<sup>186</sup> Using Resolution 1373 as a backdrop, then, the international community can strengthen its response to terrorist financing by revising the Terrorist Financing Convention to require states to criminalize terrorist financing in its domestic code and permit the exercise of universal jurisdiction over it.

### **Conclusion**

This Comment concludes by answering the introductory question in the affirmative. Terrorist financiers are the modern equivalent of pirates at international law, and they should be subjected to prosecution by all states under the principle of universal jurisdiction because they are *hostis humani generis*, or enemies of all mankind. Although universality is only recognized as a basis of prescriptive jurisdiction, a state still needs jurisdiction to adjudicate and enforce its laws against an individual. If the universality principle is ever expanded to adjudicative and enforcement jurisdiction, the international community should accordingly assign universality as a basis for all types of jurisdiction over terrorist financiers as *hostes humani generis* who threaten the world by funding terrorist acts. This Comment declines to propose model language for a universal jurisdiction provision, but identifies Title III to the PATRIOT Act as a model provision that other states should follow and implement to clot the financial lifeblood of terrorism once and for all.<sup>187</sup> Part of the difficulty of analyzing terrorist financing is that neither officials nor scholars can fully contemplate the extent of the problem or the threat it poses to the international community because terrorist financing is by definition secretive until law enforcement officials crack the case. However, the international community is best served to be put on notice to the dangers of terrorist financing and prepared to prosecute its perpetrators if—and when—they are caught.

Universal jurisdiction should apply to terrorist financiers as the new pirates at international law for both legal and policy reasons. Without an

enforceable legal mechanism in place, the international community cannot work together to prevent and prosecute the distribution of terrorist funds. Requiring states to exercise universal jurisdiction over terrorist financing While this paper has addressed the law concerning terrorist financing as more *lege ferenda* than *lex lata*, the hope is that the international community revises the Terrorist Financing Convention to include a universality provision. The free rider problem addressed above foretells the danger of states' refusal to bring terrorist financiers to justice. However, this author is optimistic that states will recognize the incentive to prosecute terrorists and their financiers. Just as every state is threatened by the scourge of piracy, all states are threatened by terrorist acts. Only by expanding the jurisdictional bases of the Terrorist Financing Convention to include universality can the international community be assured that it has the tools to treat terrorist financiers like the pirates they are, and to make them "walk the plank" and pay the price of their acts by subjecting them to the criminal laws of all states.

<sup>1</sup> The idea for this paper came from my participation in the 2007 Niagara Cup International Law Moot Court Competition, held at Case Western Reserve University Law School. One issue I argued on behalf of Canada, the Applicant, was whether the United States could apply its civil forfeiture statute to the Canadian Prime Minister's vessel after it boarded and seized the vessel while it sailed in international waters off the coast of Nova Scotia and carried the Prime Minister's half-brother's friend, a known terrorist financier. This broadly addressed the question of whether universal jurisdiction applied to terrorism and terrorist financing.

<sup>2</sup> See Financial Action Task Force (FATF) Chairman's Summary, Paris Plenary, Oct. 12, 2007, available at [www.fatf-gafi.org/dataoecd/0/23/39485130.pdf](http://www.fatf-gafi.org/dataoecd/0/23/39485130.pdf) (expressing concern over Iran's lack of anti-money laundering and terrorist financing regime and the "significant vulnerability" it represents in the international monetary system).

<sup>3</sup> See, e.g., Charter of the International Military Tribunal at Nuremberg, Aug. 8, 1945; Charter of the International Military Tribunal for the Far East at Tokyo, Jan. 19, 1946; see also Arrest Warrant of 11 April 2000 (Dem. Rep. of Congo v. Belgium), 2002 I.C.J. 121 (Feb. 14); *People v. Eichmann*, 36 I.L.R. 277 (Isr. S. Ct. 1962), available at <http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Judgment/>.

<sup>4</sup> See, e.g., MALCOLM SHAW, *INTERNATIONAL LAW* 452 (1997).

<sup>5</sup> See *id.*; LASSA OPPENHEIM, *OPPENHEIM'S INTERNATIONAL LAW* 469-70 (1992).

<sup>6</sup> See Niclas Dahlvang, *Thieves, Robbers & Terrorists: Piracy in the 21st Century*, 4 REGENT J. INT'L L. 17 (2006).

<sup>7</sup> ALFRED RUBIN, *THE LAW OF PIRACY* 37 (2d ed. 1998) (citing HUGO GROTIUS, *DE JURE BELLI AC PACIS* 630-31 (1646)).

<sup>8</sup> *Id.* at 92.

<sup>9</sup> DONALD A. PETRIE, *THE PRIZE GAME* 69-80 (1999) (recounting three trials in the United Kingdom and United States between 1693 and 1861).

<sup>10</sup> See, e.g., RUBIN, *supra* note 7, at 105 (describing the 1701 trial of William Kidd).

<sup>11</sup> *Id.* at 118-19.

<sup>12</sup> *Id.* at 103-04.

<sup>13</sup> *Id.* at 157.

<sup>14</sup> *Id.*

<sup>15</sup> 1 Stat. 112, ch. 9 § 8 (1790).

<sup>16</sup> See, e.g., *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820) (affirming the piracy convictions of a crew who sailed Argentinean-commissioned vessel seized in Venezuelan port); *United States v. Klintock*, 18 U.S. (5 Wheat.) 144, 152 (1820) (finding piracy where American citizens sailing a Danish vessel "acting in defiance of all law").

<sup>17</sup> RUBIN, *supra* note 7, at 99.

<sup>18</sup> See, e.g., Audrey Gillan, *Guns, grenades and GPS: the brutal reality of Somalia's hi-tech pirates*, THE GUARDIAN, June 12, 2007, at 23; Jorge Barberra, *Pirates: They're still roaming the oceans and seas—but today's are even more fearful than they were 200 years ago*, TORONTO SUN, May 27, 2007, at 7.

<sup>19</sup> See International Chamber of Commerce Commercial Crime Services, <http://www.icc-ccs.org/main/index.php> (last visited Oct. 21, 2007).

<sup>20</sup> *Piracy attacks up throughout world*, GRAND RAPIDS (Mich.) PRESS, Oct. 17, 2007, at A6.

<sup>21</sup> Simon Montlake, *Pirates ahead!*, CHRISTIAN SCI. MONITOR, Mar. 18, 2004, at 13 (noting the goods are usually en route to China, Japan, and South Korea).

<sup>22</sup> Brad Watts, *Pirates blast liner - Australians forced to cower as bullets and grenades fly*, DAILY TELEGRAPH (Sydney), Nov. 7, 2005, at 3.

<sup>23</sup> See Donald Urquhart, *Terror on the Seas*, BUS. TIMES SINGAPORE, Apr. 30, 2004, at Supp. 21.

<sup>24</sup> *4 Palestinians Charged with Piracy, Murder*, L.A. TIMES, Oct. 13, 1985, at 1.

<sup>25</sup> Reuters, *Pirates Release 2 Boats Off Somalia*, N.Y. TIMES, Nov. 5, 2007, at A5.

<sup>26</sup> Apr. 29, 1958, 450 U.N.T.S. 82.

<sup>27</sup> *Id.* art. 15; see also United Nations Convention on the Law of the Sea art. 101, Dec. 10, 1982, U.N. A/CONF. 62/122, 21 I.L.M. 1261 (1982).

<sup>28</sup> RESEARCH IN INTERNATIONAL LAW, HARVARD LAW SCHOOL 130 (1932) [hereinafter "1932 HARVARD RESEARCH"] (citing HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES § 232 (1922)).

<sup>29</sup> 2 YRBK. OF THE INT'L LAW COMM'N 282 (1956) (Commentary to Piracy Article 39).

<sup>30</sup> 1 *id.* at 46-48.

<sup>31</sup> Convention on the High Seas, *supra* note 26, at art. 19; Convention on the Law of the Sea, *supra* note 27, at art. 105.

<sup>32</sup> 1932 HARVARD RESEARCH, *supra* note 28, at 104.

<sup>33</sup> Convention on the Law of the Sea, *supra* note 27.

<sup>34</sup> Hague Convention on the Laws and Customs of War (IV) pmbl., Oct. 18, 1907.

<sup>35</sup> Arts. 1, 4, 5, 7, 8, Dec. 10, 1984, 23 I.L.M. 1027.

<sup>36</sup> Art. VI, Dec. 9, 1948, 78 U.N.T.S. 277.

<sup>37</sup> See Nuremberg Charter, *supra* note 3, at art. 6

<sup>38</sup> See *id.* art. 6(c).

<sup>39</sup> See Tokyo Charter, *supra* note 3, at art. 5.

<sup>40</sup> Geneva Convention Relative to the Treatment of Prisoners of War (III), Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (IV), Aug. 12, 1949, 75 U.N.T.S. 287; see also SHAW, *supra* note 4, at 452 (categorizing war crimes listed in the Geneva Conventions along with piracy as the two bases for universal jurisdiction); cf. Theodor Meron, *International Criminalization of Internal Atrocities*, 89 A.J.I.L. 554, 571 (1995) (recognizing universal jurisdiction may apply to acts that constitute "non-grave" breaches of the Geneva Conventions).

<sup>41</sup> Nuremberg Charter, *supra* note 3, at art. 6(b).

<sup>42</sup> For a description of the international and domestic legal proceedings against former Chadian president Hissène Habré, see *The Case Against Hissène Habré, an "African Pinochet"*, HUMAN RIGHTS WATCH, Aug. 5, 2006, <http://www.hrw.org/english/docs/2005/09/30/chad11786.htm>.

<sup>43</sup> R. v. Finta, [1994] 1 S.C.R. 701 (reversing a Canadian jury acquittal of Imre Finta, a member of the Hungarian Army who was a commander at an investigative unit during the Holocaust where Jewish people were terrorized pursuant to the Nazi "final solution").

<sup>44</sup> R. v. Bartle *ex parte* Pinochet, [1999] 2 All E.R. 97, [1999] 2 W.L.R. 827 (H.L.).

<sup>45</sup> People v. Eichmann, 36 I.L.R. 277 (Isr. S. Ct. 1962).

<sup>46</sup> Arrest Warrant of 11 April 2000 (Dem. Rep. of Congo v. Belgium), 2002 I.C.J. 121 (Feb. 14).

<sup>47</sup> Belgium: Amendment to Law of June 16, 1993 (English Translation) art. 27, *reprinted in* 42 I.L.M. 1258 (2003).

<sup>48</sup> See Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., arts. 1-5, U.N. Doc. S/RES/827 (1993), *reprinted in* 32 I.L.M. 1159 (1993); Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955, arts. 1-6 (1994).

<sup>49</sup> Statute of the Special Court for Sierra Leone art. 2-3, Aug. 14, 2000, available at <http://www.sc-sl.org/scsl-statute.html>.

<sup>50</sup> *Id.*

<sup>51</sup> Rome Statute of the International Criminal Court art. 12, July 17, 1998, 2187 U.N.T.S. 90, U.N. Doc. A/CONF.183/9 (1998).

<sup>52</sup> See *id.* at art. 5-8.

<sup>53</sup> 1 THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: INTRODUCTION, ANALYSIS, AND INTEGRATED TEXT 128 (2005) (listing (1) referrals by states parties based on complementarity; (2) referrals by the UN Security Council; 3) referrals by non-states parties; and (4) the ICC Prosecutor's *proprio motu* (*sua sponte*) action).

<sup>54</sup> For a concise summary of state and international tribunals' attempts to define and criminalize terrorism, see Susan Tiefenbrun, *A Semiotic Approach to a Legal Definition of Terrorism*, 9 ILSA J INT'L & COMP. L. 357 (2003).

<sup>55</sup> Alex P. Schmid, *The Response Problem as a Definition Problem*, in ALEX P. SCHMID AND RONALD D. CRELINSTEN, EDS., *WESTERN RESPONSES TO TERRORISM* 11-12 (1993).

<sup>56</sup> 22 U.S.C. § 2656f(d) (2) (2006).

<sup>57</sup> Terrorism Act of 2000, <http://www.opsi.gov.uk/Acts/acts2000/20000011.htm> (last visited Dec. 2, 2007).

<sup>58</sup> BLACK'S LAW DICTIONARY 1234 (8th ed. 2005).

<sup>59</sup> See U.N. GAOR, 54th Sess., 76th Plenary Meeting, Dec. 9, 1999, at 7.

<sup>60</sup> *Id.* at 8.

<sup>61</sup> *Id.*

<sup>62</sup> Michael P. Scharf, "Terrorism on Trial": *Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems and Prospects*, 37 CASE W. RES. J. INT'L L. 359 (2005) (proposing to categorize the Terrorist Financing Convention's terrorism definition as "the peacetime equivalent of a war crime").

<sup>63</sup> See Statute of the International Court of Justice art. 38(1)(a), June 26, 1945, T.S. No. 993; Vienna Convention on the Law of Treaties art. 38, May 23, 1969, U.N. Doc. A/CONF. 39/27 (allowing the creation of customary international law as a binding force on states that do not consent to a treaty).

<sup>64</sup> Convention on Offences and Certain Other Acts Committed On Board Aircraft art. (1)(1), Sept. 14, 1963, 704 U.N.T.S. 219, 2 I.L.M. 1042 [hereinafter Aircraft Convention].

<sup>65</sup> *Id.* art. 6(1).

<sup>66</sup> Convention for the Suppression of Unlawful Seizure of Aircraft art. 1, Dec. 16, 1970, 860 U.N.T.S. 105 [hereinafter Unlawful Seizure Convention].

<sup>67</sup> Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation art. 1, Sept. 23, 1971, 974 U.N.T.S. 177.

<sup>68</sup> Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, 27 I.L.M. 627.

<sup>69</sup> Art. 2, Jan. 12, 1998, U.N. Doc. A/RES/52/164 [hereinafter Terrorist Bombing Convention].

<sup>70</sup> Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons arts. 1-2, Dec. 14, 1973, 1035 U.N.T.S. 167.

<sup>71</sup> International Convention Against the Taking of Hostages art. 1, Dec. 17, 1979, UN Doc. A/34/46, 1316 U.N.T.S. 205.

<sup>72</sup> See Convention for the suppression of unlawful acts against the safety of maritime navigation art. 3, Mar. 10, 1988, 1678 U.N.T.S. 221; 1988 Protocol for the suppression of unlawful acts against the safety of fixed platforms located on the continental shelf art. 2, Mar. 10, 1988, 1678 U.N.T.S. 304.

<sup>73</sup> Convention on the physical protection of nuclear material art. 2-4, Mar. 3, 1980, 1456 U.N.T.S. 101.

<sup>74</sup> International Convention for the Suppression of Acts of Nuclear Terrorism art. 2, Sept. 14, 2005, U.N. Doc. A/RES/59/290 (2005).

<sup>75</sup> Convention on the Marking of Plastic Explosives for the Purpose of Detection art. 2-4, Mar. 1, 1991, 30 I.L.M. 721.

<sup>76</sup> International Convention for the Suppression of the Financing of Terrorism art. 2-6, Dec. 9, 1999, U.N. Doc. A/RES/54/109 [hereinafter Terrorist Financing Convention].

<sup>77</sup> See, e.g., *id.* at art. 2(5); Terrorist Bombing Convention, *supra* note 69, at art. 2(3); Unlawful Seizure Convention, *supra* note 66, at art. 1(b).

<sup>78</sup> See *infra* Part III.A.iii.

<sup>79</sup> See THE 9/11 COMMISSION REPORT 169 (2004); NICK KOCHAN, THE WASHING MACHINE: HOW MONEY LAUNDERING AND TERRORIST FINANCING SOILS US 65 (2005); see also THE 9/11 COMMISSION REPORT, *supra*, at 327 (noting that the President set aside \$40 billion in funding to rebuild the nation after the attacks, half of that earmarked for New York City).

<sup>80</sup> See generally Int'l Monetary Fund, *Hawala, Finance & Development*, 2002 <http://www.imf.org/external/pubs/ft/fandd/2002/12/elqorchi.htm>; 9/11 Commission Terrorist Financing Monograph, [http://www.9-11commission.gov/staff\\_statements/911\\_TerrFin\\_Monograph.pdf](http://www.9-11commission.gov/staff_statements/911_TerrFin_Monograph.pdf) (last visited Oct. 21, 2007) [hereinafter Terrorist Financing Monograph]; Zachary Abruzza, National Bureau of Asian Research, NBR Analysis, *Funding Terrorism in Southeast Asia: The*

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<sup>81</sup> *Terrorist-linked Islamic Charities Responsible for Funneling More than \$1 million in Aid to Central Iraq*, Jan. 20, 2005,  
[www.globalterroralert.com/pdf/0105/iraqcharities.pdf](http://www.globalterroralert.com/pdf/0105/iraqcharities.pdf).

<sup>82</sup> See U.N. GAOR, 54th Sess., 76th Plenary Meeting, Dec. 9, 1999, at 8.

<sup>83</sup> Terrorist Financing Convention, *supra* note 76, at arts. 7-8.

<sup>84</sup> S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001). This resolution is binding on all 192 members of the United Nations. See also John P. Grant, *Symposium: "Terrorism on Trial:" Beyond the Montreal Convention*, 36 CASE W. RES. J. INT'L L. 453 (2004).

<sup>85</sup> See ICJ Statute, *supra* note 63, at art. 38(1).

<sup>86</sup> But see Sarah E. Smith, *International Law: Blaming Big Brother: Holding States Accountable for the Devastation of Terrorism*, 56 OKLA. L. REV. 735 (2003) (citing *Alejandre v. Republic of Cuba*, 996 F. Supp. 1239 (S.D. Fl. 1997)) (noting that civilian targeting by state-sponsored terrorists implicates a jus cogens peremptory norm).

<sup>87</sup> As of October 2007, only forty-five states had notified the Secretary-General of their implementing legislation. Multilateral treaties deposited with the Secretary-General: International Convention for the Suppression of the Financing of Terrorism,

<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty12.asp> (last visited Dec. 1, 2007).

<sup>88</sup> Pub. L. No. 107-56, 115 Stat. 272 (2001).

<sup>89</sup> See generally Alicia L. Rause, *USA Patriot Act: Anti-Money Laundering and Terrorist Financing Legislation in the U.S. and Europe Since September 11*, 11 U.

MIAMI INT'L & COMP. L. REV. 173 (2003).

<sup>90</sup> Convention on the High Seas, *supra* note 26, at art. 15(1); Convention on the Law of the Sea, *supra* note 27, at art. 101(a).

<sup>91</sup> Terrorist Financing Monograph, *supra* note 80, at 25.

<sup>92</sup> Terrorist Financing Convention, *supra* note 76, at art. 2(3).

<sup>93</sup> See Nuremberg Charter, *supra* note 3, at art. 6(a); Tokyo Charter, *supra* note 3, at art. 5(a)

<sup>94</sup> See ICTY Statute, *supra* note 48, at art. 7; ICTR Statute, *supra* note 48, at art. 6; Statute of the Special Court for Sierra Leone, *supra* note 49, at art. 6.

<sup>95</sup> See *supra* note 77 and accompanying text.

<sup>96</sup> ICC Statute, *supra* note 51, at art. 25(3)(c)-(d).

<sup>97</sup> Herman von Hebel & Darryl Robinson, *Crimes within the Jurisdiction of the Court*, in ROY S. LEE, ED., *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 85-87 (1999) (describing the negotiations on the exercise of ICC jurisdiction under articles 5 to 21).

<sup>98</sup> *Id.* at 79; ICC Statute, *supra* note 51, at art. 5(2).

<sup>99</sup> Von Hebel & Robinson, *supra* note 97, at 86.

<sup>100</sup> *Id.* at 86-87.

<sup>101</sup> Terrorist Financing Convention, *supra* note 76, at art. 4.

<sup>102</sup> *Id.*; see also LEGAL DEPARTMENT, INTERNATIONAL MONETARY FUND, *SUPPRESSING THE FINANCING OF TERRORISM: A HANDBOOK FOR LEGISLATIVE DRAFTING* 7 (2003), available at <https://www.internationalmonetaryfund.org/external/pubs/nft/2003/SFTH/pdf/front.pdf>

<sup>103</sup> PAUL TODD, *MARITIME FRAUD* 29 (2003)

<sup>104</sup> See Douglas R. Burgess, Jr., *Hostis Humani Generi: Piracy, Terrorism, and a New International Law*, 13 U. MIAMI INT'L & COMP. L. REV. 293 (2006) (concluding that terrorism may be linked with piracy only upon a showing that terrorism's "acts, motivations, perpetrators, and effects, is tantamount in all respects to the crime of piracy").

<sup>105</sup> THE 9/11 COMMISSION REPORT, *supra* note 79, at 14 (2004).

- <sup>106</sup> See Terrorist Financing Monograph, *supra* note 80, at 26-27.
- <sup>107</sup> 1932 HARVARD RESEARCH, *supra* note 28, at 127.
- <sup>108</sup> JACK A. GOTTSCHALK, *JOLLY ROGER WITH AN UZI: THE RISE AND THREAT OF MODERN PIRACY* xiii (2000).
- <sup>109</sup> Emily Wax, *Somali Lawlessness Spills Into the Sea*, WASH. POST, Apr. 2, 2006, at A16.
- <sup>110</sup> GOTTSCHALK, *supra* note 108, at 58-64 (describing pirate-hijacker exploits in Brazil and Southeast Asia).
- <sup>111</sup> JAE-MYONG KOH, *SUPPRESSING TERRORIST FINANCING AND MONEY LAUNDERING* 24 (2006) (citing Friedrich Schneider, *Macroeconomic: The Financial Flows of Islamic Terrorism*, in D. MASCHIANDARO, ED., *GLOBAL FINANCIAL CRIME: TERRORISM, MONEY LAUNDERING AND OFFSHORE CENTRES* 120 (2004)).
- <sup>112</sup> KOCHAN, *supra* note 79, at 66.
- <sup>113</sup> *Id.* at 66-67; KOH, *supra* note 110, at 23.
- <sup>114</sup> KOCHAN, *supra* note 79, at 90-91.
- <sup>115</sup> *Id.* at 76-78; KOH, *supra* note 110, at 23.
- <sup>116</sup> KOCHAN, *supra* note 76, at 76.
- <sup>117</sup> *Id.* at 82.
- <sup>118</sup> *Id.* at 92.
- <sup>119</sup> *Id.* at 81.
- <sup>120</sup> *Id.* at 98-99.
- <sup>121</sup> *Id.* at 68-72.
- <sup>122</sup> Terrorist Financing Monograph, *supra* note 80, at 20.
- <sup>123</sup> *Id.* at 28.
- <sup>124</sup> John D.G. Waszak, *The Obstacles to Suppressing Radical Islamic Terrorist Financing*, 37 CASE W. RES. J. INT'L L. 673, 674 (2005); see also Terrorist Financing Monograph, *supra* note 80, at 24.
- <sup>125</sup> See CFR Report, *supra* note 80, at 11.
- <sup>126</sup> See Fletcher N. Baldwin, Jr., *Organized Crime, Terrorism, and Money Laundering in the Americas*, 15 FLA. J. INT'L L. 3, 14 (2002).
- <sup>127</sup> See CFR Report, *supra* note 80, at 11.
- <sup>128</sup> See NBR Analysis, *supra* note 80, at 35.

<sup>129</sup> See Terrorist Financing Monograph, *supra* note 80, at 25.

<sup>130</sup> *Hearing before the Subcomm. on Int'l Trade and Finance of the S. Comm. on Banking, Housing, and Urban Affairs, Hawala and Underground Terrorist Financing Mechanisms*, S. Hrg. 107-660, 107th Cong. 22-25 (2001) (testimony of Mr. Rahiem Bariiek, a Northern Virginia *hawaladar* who conducts business between the Washington, D.C. area and Pakistan).

<sup>131</sup> See *id.* at 27 (statement of Professor Yousef) (describing the American anti-terrorism legislation that requires hawala businesses "to be licensed, maintain records, and report suspicious transactions").

<sup>132</sup> See generally International Monetary Fund, Monetary and Financial Systems Dep't, *Regulatory Frameworks for Hawala and Other Remittance Systems*, 2005, available at <http://www.imf.org/external/pubs/nft/2005/hawala/hawala.pdf> (summarizing the efforts of the IMF and World Bank working with states to host conferences highlighting the challenges of regulating hawala).

<sup>133</sup> *But see* Terrorist Financing Monograph, *supra* note 80, at 22 (noting that reports of terrorist financing through the drug trade, conflict diamonds, and state support were not confirmed).

<sup>134</sup> See Jeevan Vasagar, *Pirates hijack tsunami aid ship*, *THE GUARDIAN*, July 1, 2005, at 16.

<sup>135</sup> Montgomery E. Engel, Note, *Donating "Blood Money": Fundraising for International Terrorism by United States Charities and the Government's Efforts to Constrict the Flow*, 12 *CARDOZO J. INT'L & COMP. L.* 251 (2004).

<sup>136</sup> Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 *TEX. L. REV.* 785, 794 (1988).

<sup>137</sup> *PETRIE*, *supra* note 9, at 69.

<sup>138</sup> 1932 *HARVARD RESEARCH*, *supra* note 28, at 133 (citing *OPPENHEIM*, *INTERNATIONAL LAW* § 273 (1912)).

<sup>139</sup> *PETRIE*, *supra* note 9, at 69.

<sup>140</sup> *FRITZ GROB*, *THE RELATIVITY OF WAR AND PEACE* 40 n.7 (1949).

<sup>141</sup> *KOCHAN*, *supra* note 79, at 83.

<sup>142</sup> Testimony of Ronald K. Noble, INTERPOL Secretary General, before the U.S. H. Comm. on Int'l Relations, 108th Sess., July 16, 2003, available at <http://www.interpol.int/Public/ICPO/speeches/SG20030716.asp#>.

<sup>143</sup> See, e.g., Transcript of Osama bin Laden Interview by Peter Arnett, Mar. 1997, <http://www.anusha.com/osamaint.htm> (giving the reasons for jihad against Israel and the West, namely the United States as its "unjust and criminal acts" in support of Israel's occupation of Palestine, the incident at Qana, Lebanon, and general "arrogance and haughtiness").

<sup>144</sup> Human Rights Watch, *In the Name of Counter-Terrorism: Human Rights Abuses Worldwide*, A Human Rights Watch Briefing Paper for the 59th Session of the United Nations Commission on Human Rights, Mar. 25, 2003, at 18, available at [http://hrw.org/un/chr59/counter-terrorism-bck4.htm#P286\\_64797](http://hrw.org/un/chr59/counter-terrorism-bck4.htm#P286_64797).

<sup>145</sup> See generally LOU MICHEL & DAN HERBECK, *AMERICAN TERRORIST: TIMOTHY McVEIGH & THE OKLAHOMA CITY BOMBING* (2001) (tracing the acts and trial of the 1995 Oklahoma City bombing).

<sup>146</sup> 1932 HARVARD RESEARCH, *supra* note 28, at 127.

<sup>147</sup> Origins of this phrase may be attributed to the late Palestinian Liberation Organization Chairman Yasser Arafat's 1974 speech to the United Nations General Assembly when he declared "Today I have come bearing an olive branch and a freedom fighter's gun." Speech of Yasser Arafat before the United Nations General Assembly, Nov. 13, 1974, [http://www.mideastweb.org/arafat\\_at\\_un.htm](http://www.mideastweb.org/arafat_at_un.htm).

<sup>148</sup> Ronald Reagan, Proclamation 5034, Afghanistan Day 1983, Mar. 21, 1983, <http://www.reagan.utexas.edu/archives/speeches/1983/32183d.htm> ("The resistance of the Afghan freedom fighters is an example to all the world of the invincibility of the ideals we in this country hold most dear, the ideals of freedom and independence.").

<sup>149</sup> See discussion *supra* text accompanying notes 63-76.

<sup>150</sup> Press Release GA/L/3209, *World Community Must Speak with One Voice in Fight Against Terrorism, Assembly's Legal Committee Told*, 57th G.A., 6th Comm., 8th Meeting (PM), Feb. 10, 2002, available at <http://www.un.org/News/Press/docs/2002/GAL3209.doc.htm> (statements of Mr. Manis,

representative of Sudan, speaking for the Organization of the Islamic Conference; Mr. Kwesi Quartey, representative of Ghana; and Mr. Elmessallati, representative of Lebanon).

<sup>151</sup> *Id.* (statement of Srimanthaka Senanayake, representative of Sri Lanka); *see also id.* (statement of Mr. Hmoud, representative of Jordan).

<sup>152</sup> *Id.* (statement of Mr. Mun, representative of the Democratic People's Republic of Korea).

<sup>153</sup> *See, e.g.*, Arab Convention on the Suppression of Terrorism art. 1(3), Apr. 22, 1998, available at [http://www.ciaonet.org/cbr/cbr00/video/cbr\\_ctd/cbr\\_ctd\\_27.html](http://www.ciaonet.org/cbr/cbr00/video/cbr_ctd/cbr_ctd_27.html); Convention of the Organization of the Islamic Conference on Combating International Terrorism art. 1(2), July 1, 1999, available at <http://www.oic-un.org/26icfm/c.html> [hereinafter Islamic Conference Terrorism Convention]; European Convention on the Suppression of Terrorism art. 1, Jan. 27, 1977, 1137 U.N.T.S. 93.

<sup>154</sup> Arab Convention on the Suppression of Terrorism, *supra* note 153, at art. 1(2); Organization of American States (OAS) Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance art. 2, Feb. 2, 1971, T.I.A.S. 8413; 27 U.S.T. 3949; Organization of African Unity (OAU) Convention on the Prevention and Combating of Terrorism art. 3(2), July 14, 1999, available at [http://www.africa-union.org/Official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/Algiers\\_convention%20on%20Terrorism.pdf](http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Algiers_convention%20on%20Terrorism.pdf); South Asian Association for Regional Cooperation (SAARC) art. 1, Nov. 4, 1987, available at <http://untreaty.un.org/English/Terrorism/Conv18.pdf>; *see also* Treaty on Cooperation among States Members of the Commonwealth of Independent States in Combating Terrorism art. 4(1), June 4, 1999, available at [http://untreaty.un.org/English/Terrorism/csi\\_e.pdf](http://untreaty.un.org/English/Terrorism/csi_e.pdf) ("The Parties shall not regard the acts involved as other than criminal.).

<sup>155</sup> Islamic Conference Terrorism Convention, *supra* note 153, at pmb1.

<sup>156</sup> Vienna Convention on the Law of Treaties, *supra* note 63, at art. 31(2).

<sup>157</sup> RUBIN, *supra* note 7, at 31-32; Douglas R. Burgess, Jr., *The Dread Pirate Bin Laden: How thinking of terrorists as pirates can help win the war on terror*, LEGAL AFFAIRS (2005), at [http://www.legalaffairs.org/issues/July-August-2005/feature\\_burgess\\_julaug05.msp](http://www.legalaffairs.org/issues/July-August-2005/feature_burgess_julaug05.msp).

<sup>158</sup> See Joshua Michael Goodwin, Note, *Universal Jurisdiction and the Pirate: Time for an Old Couple to Part*, 39 VAND. J. TRANSNAT'L L. 973, 979-80 (2006) (characterizing Drake and Morgan as "patriotic" pirates).

<sup>159</sup> 1932 HARVARD RESEARCH, *supra* note 28, at 131 (citing WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW (8th ed. 1925)).

<sup>160</sup> MARIANNE VAN LEEUWEN, ED., CONFRONTING TERRORISM: EUROPEAN EXPERIENCES, THREAT PERCEPTIONS AND POLICIES 5 (2003) (observing that "terrorists cannot work in a material or geographic vacuum").

<sup>161</sup> Burgess, *supra* note 157 (describing terrorist sponsors, including the United States' Cold War-era sponsorship of terrorist groups in the Middle East, Afghanistan, and Central America).

<sup>162</sup> See Convention on the High Seas, *supra* note 26, at art. 15(1); Convention on the Law of the Sea, *supra* note 27, at art. 101(a).

<sup>163</sup> 1932 HARVARD RESEARCH, *supra* note 28, at 120.

<sup>164</sup> 1 YRBK. OF THE INT'L LAW COMM'N 46 (1956) (statement of Mr. Spiropoulos, representative of Greece).

<sup>165</sup> *Id.* (statement of Mr. Liang, representative of China).

<sup>166</sup> See, e.g., Terrorist Financing Monograph, *supra* note 80, at 133-37 (describing the financing of the September 11 hijackers in the U.S.); NBR Analysis, *supra* note 80, at 20-56 (analyzing al-Qaeda and Jemaah Islamiyah financing through sources like bags of cash, charities, banks, and *hawala*).

<sup>167</sup> See *supra* text accompanying notes 63-76.

<sup>168</sup> Convention on the High Seas, *supra* note 26, at art. 15(2); Convention on the Law of the Sea, *supra* note 27, at art. 101(b).

<sup>169</sup> Convention on the High Seas, *supra* note 26, at art. 15(3); Convention on the Law of the Sea, *supra* note 27, at art. 101(c).

<sup>170</sup> Terrorist Financing Convention, *supra* note 76, at art. 7.

<sup>171</sup> Henry A. Kissinger, *The Pitfalls of Universal Jurisdiction*, 80 FOR. AFF. 82 (2001).

<sup>172</sup> RUBIN, *supra* note 7, at 377 (citing BARRY DUBNER, *THE LAW OF INTERNATIONAL SEA PIRACY* (1980)).

<sup>173</sup> Compare *supra* text accompanying note 17.

<sup>174</sup> Goodwin, *supra* note 158, at 1002-07; see also *id.* at 994 (observing the piracy-universal jurisdiction linkage is the victim of circular reasoning due to the invective of the phrase *hostis humani generis*).

<sup>175</sup> *Id.* at 1009.

<sup>176</sup> Terrorist Financing Convention, *supra* note 76, at art. 10(1).

<sup>177</sup> *Id.* at art. 7.

<sup>178</sup> Cf. M. CHERIF BASSIOUNI, *AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* (1995) (addressing the extradition duty as a rule of *jus cogens* through the international criminal law conventions on aircraft hijacking, piracy, and torture).

<sup>179</sup> *Id.*; S.C. Res. 1373, *supra* note 84.

<sup>180</sup> Beth Jinks, *India jails Indon pirates for Alondra Rainbow hijack*, BUS. TIMES SINGAPORE, Feb. 27, 2003.

<sup>181</sup> Convention on the Law of the Sea, *supra* note 27, at art. 105.

<sup>182</sup> See Ilias Bantekas, *The International Law of Terrorist Financing*, 97 A.J.I.L. 315, 326 (2003) (noting that as of September 11, 2001, fewer than the required twenty-two parties had ratified the Convention).

<sup>183</sup> The Senate had been delayed from approving the Convention by one Senator who anonymously held up the bill. United Nations Association of the United States of America, *Implementing Legislation for Two UN Terrorism Conventions Signed into Law; US Ratification Complete*, June 26, 2002, <http://www.unausa.org/site/pp.asp?c=fvKRI8MPJpF&b=379739>.

<sup>184</sup> See Bantekas, *supra* note 182, at 326 (describing the overlapping obligations as "ironic").

<sup>185</sup> This was the scenario in the Niagara Moot Court Competition. See *supra* note 1.

<sup>186</sup> C.S.R. Murthy, *The UN Counter-Terrorism Committee: An Institutional Analysis*, FES Briefing Paper, Sept, 15, 2007, at 7, available at <http://library.fes.de/pdf-files/iez/04876.pdf>.

<sup>187</sup> See *supra* note 88 and accompanying text.