Terrorism in Violation of the Law of Nations

Juliet Sorensen
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INTRODUCTION

Few scholars disagree with the premise that terrorism must be prevented and prosecuted, but many disagree with how to achieve this end. Successful prevention and prosecution of terrorism requires not only the strategic use of criminal laws and the laws of war to the best advantage, but also the accurate identification and utilization of applicable law.

Too many policymakers on this issue have ignored its complexities in favor of political expediency. The George W. Bush administration adopted the term “War on Terror” and promised “victory over the enemy,” to the point where this language has become part of America’s lexicon.¹ As for how to confront terrorism under the law, Bush administration lawyers took the position that the law of war was inapplicable.² By contrast, critics of the administration argued that the 1949 Geneva Conventions precluded the fight against terrorism from being treated as an international armed conflict.³

In most scenarios, international terrorism is not considered international armed conflict under the law of war, which is based in the Geneva Conventions and defines it as arising between “two or more of the High Contracting Parties,” or states.⁴ While President Bush declared the tragedy of

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³ See, e.g., HELEN DUFFY, THE “WAR ON TERROR” AND THE FRAMEWORK OF INTERNATIONAL LAW 17–70, 250–55 (2005) (arguing that the conflict with al-Qaeda cannot be characterized as an international or non-international armed conflict); Silvia Borelli, Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the “War on Terror”, 87 INT’L REV. RED CROSS 39, 46 (2005) (arguing that outside of Afghanistan and Iraq, the “war on terror” should not be considered an armed conflict, but rather as law enforcement on an international scale); Mark A. Drumbl, Judging the 11 September Terrorist Attack, 24 HUM. RTS. Q. 323, 323 (2002) (arguing that the September 11th attack should be treated as a criminal attack and be addressed by international criminal law and process).

September 11, 2001, to be an act of war and individuals detained in the wake of those attacks to be unlawful combatants; there exists little precedent for the application of that label to non-state actors like al-Qaeda.

The Obama administration has debated about how to treat terrorists in its custody—are they prisoners of war, or are they criminal defendants?—and has attempted to embrace both designations. Two days after his inauguration, President Obama signed executive orders ending Central Intelligence Agency (CIA) “rendition,” or interrogation in prisons overseas, directing the closing of the detention facility at Guantanamo Bay, and ending the military commissions instituted by President Bush for prosecuting detainees. After two years of challenges to the implementation of these orders, however, Obama reversed the earlier order halting new military charges and permitted military trials to resume with new procedures. The administration says that it remains committed to closing Guantanamo and to charging some suspects in civilian criminal courts. But its efforts to increase the number of civilian criminal proceedings for individuals detained at the U.S. naval base in Guantanamo Bay, Cuba, continue to be blocked by Congress. Congress has advanced its own legislation that would require the government to place into military custody any suspected member of al-Qaeda or an affiliate, including individuals arrested on American soil. The Obama administration opposes


5 See Exec. Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001) (characterizing the events of September 11th as an attack “on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces” (emphasis added)). Id. § 1(a).

6 Apart from the United States, Israel is the only other country to have consistently characterized its actions against terrorist groups outside its borders as armed conflict. See Balendra, supra note 4, at 2471 (citation omitted).


9 The new procedures guarantee detainees access to legal counsel and to a broader range of classified information. See id.

the legislation, citing the 2011 guilty plea by Umar Farouk Abdulmutallab (the “Underwear Bomber”) and recent charges of an Iranian plot to assassinate the Saudi ambassador to the United States as examples of success in civilian prosecutions of terrorists.\textsuperscript{11}

Regardless of shifting political winds, and in spite of rulings by the Supreme Court related to the detention facility at Guantanamo,\textsuperscript{12} basic questions still lack definitive answers. The international law of war fails to provide the right to try a detainee in a military tribunal if that person was not detained in the course of armed conflict.\textsuperscript{13} Therefore, under the law of war, many alleged international terrorists must be criminally tried—but in which courts and on which charges?\textsuperscript{14}

This article posits that the criminal justice system can serve as an effective means of investigating and prosecuting some terrorists and that this effectiveness is enhanced by the increasing ability to assert universal jurisdiction over terrorists based on the compelling precedent of piracy law. First, I discuss the definitions of the crimes of piracy and terrorism and how those definitions have evolved over time. Second, I isolate and compare the elements of each crime, noting similarities that are apparent and also those that are less obvious. I cite aircraft piracy and hostage taking as examples of the legal intersection of piracy and terrorism over which there is universal jurisdiction and \textit{United States v. Moussaoui}\textsuperscript{15} as a recent example of a criminal prosecution for both crimes. Finally, I compare the extent to which universal jurisdiction exists over each crime and argue that recent \textit{Alien Tort Claims Act} (ATCA) jurisprudence supports the principle that terrorism is a violation of the law of nations, as do the \textit{Offences Clause} of the U.S. Constitution and the United Nations (U.N.) Charter. I conclude that the increasing treatment of terrorism as a crime in violation of the law of nations, as reflected by the

\footnotesize{Lindsey] Graham said. ‘I believe our military should be deeply involved in fighting these guys at home or abroad.’”


\textsuperscript{13} \textit{See} \textit{Hamdan}, 548 U.S. at 591, 612 (authority to establish military tribunals derived solely “from the powers granted jointly to the President and Congress in time of war”; the “most basic precondition” for the establishment of military tribunals is “military necessity”) (citations omitted). The Bush administration asserted that because these detainees were not members of a legitimate national armed force, the Geneva Convention protections did not apply to them; the \textit{Hamdan} Court rejected this assertion. \textit{See id.} at 628–29

\textsuperscript{14} \textit{See} Balendra, supra note 4, at 2473 (summarizing articles in which some commentators argue that laws against terrorism should be enforced criminally, whereas others assert that the conflict with al-Qaeda is an armed conflict under international law) (citations omitted).

\textsuperscript{15} 382 F.3d 453 (4th Cir. 2004).
expanding jurisdictional reach of terrorism statutes and based on the antecedent of piracy, enables the criminal prosecution of many international terrorists.

I. DISCUSSION

a. Pirates to Terrorists: More Cousins than Forefathers

i. The Definitions of Piracy and Terrorism

At first blush, the crime of terrorism is unique. The traditional definition contemplates perpetrators who are non-state actors committing acts of violence against a state in an international setting. In strongholds like the Tora Bora region of Afghanistan, they may be “too . . . geographically remote to be countered by traditional law enforcement.” Universal jurisdiction over certain acts of terrorism means that the perpetrators lack the protection of jurisdictional limitations that citizens of a nation-state enjoy as well as the sovereign immunity enjoyed by states, placing them in what appears to be a “legally distinct category of international criminals.” Thus, it would seem that legal analogies to the crime of terrorism are scant.

Enter the pirates. Considered by many to be the contemporary definition of piracy, Article 15 of the Geneva Convention on the High Seas defines the crime as “any illegal acts of violence, detention or depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed on the high seas, against another ship or aircraft . . . outside the jurisdiction of any State.” While the Geneva Convention on the High Seas was enacted in 1958 and incorporates both air and sea piracy, the crime itself is age-old. More than two thousand years ago, pirates were defined in Roman law as hostis humani generis, enemies of the human race. Daniel Defoe, the prolific eighteenth-century author, described pirates as stateless persons at “war against all the world.” Rampant piracy in the

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16 See Douglas R. Burgess Jr., The Dread Pirate Bin Laden, LEGAL AFF. (July/Aug. 2005), available at http://www.legalaffairs.org/issues/July-August-2005/feature_burgess_julaug05.msp. Terrorism’s transnational aspect distinguishes the crime from local or national crimes of violence against a state, such as treason.
17 Glazier, supra note 2, at 972.
18 Burgess, supra note 16.
20 See Douglas R. Burgess, Jr., Hostis Humani Generi: Piracy, Terrorism and a New International Law, 13 U. MIA MI INT’L & COMP. L. REV. 293, 298 (2006). Alberico Gentili, a legal scholar of the Italian Renaissance, explains that: [p]irates are common enemies, and they are attacked with impunity by all, because they are without the pale of the law. They are scorners of the law of nations; hence they can find no protection in that law. They ought to be crushed by us . . . and by all men. This is warfare shared by all nations.
nineteenth century resulted in the Paris Declaration Respecting Maritime Law in 1856, signed by England, France, Spain, and most other European nations, which abolished use of piracy for state purposes.\textsuperscript{22}

The federal statute criminalizing piracy in the U.S. Code, 18 U.S.C. § 1651,\textsuperscript{23} does not contain a definition of the crime but rather outlaws piracy in violation of the law of nations.\textsuperscript{24} However, piracy has been further defined in two international conventions since the Geneva Convention on the High Seas. The U.N. Convention on the Law of the Sea (UNCLOS), adopted in 1982, defines piracy as a violent act committed “for private ends.”\textsuperscript{25} Some scholars argue that this excludes terrorist acts, whereas others believe that this merely excludes state-sponsored piracy from the convention and does not eliminate acts committed for a political purpose by terrorists who are non-state actors.\textsuperscript{26} By contrast, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) does not contain the private aims requirement of UNCLOS, but rather criminalizes specific acts of aggression, including, \textit{inter alia}, seizing control of a ship

by force or threat thereof or any other form of intimidation; . . .

perform[ing] an act of violence against a person on board a ship

if that act is likely to endanger the safe navigation of that ship;

or . . . destroy[ing] a ship or caus[ing] damage to a ship or to its
cargo which is likely to endanger the safe navigation of that ship.\textsuperscript{27}

For reasons historical and political, a single definition of terrorism in international law is elusive.\textsuperscript{28} However, the definition provided by the U.S.

\begin{itemize}
\item \textsuperscript{22} Declaration Respecting Maritime Law, April 16, 1856 (signed in Paris).
\item \textsuperscript{23} 18 U.S.C. § 1651 (2006).
\item \textsuperscript{24} Id. Recently, U.S. courts have differed as to the different activities encompassed by the crime. In\textit{ United States v. Said}, 757 F. Supp. 2d 554 (E.D. Va. 2010), the district court found that piracy was limited to sea robbery and that the definition of the crime and had not evolved since a Supreme Court opinion on the issue in 1820. By contrast, a fellow district court judge in the Eastern District of Virginia found that the definition of “piracy” has historically included different types of conduct, not limited to the common law definition of robbery on land, and that any unauthorized armed assault of directed violent acts on the high seas is piracy. See United States v. Hasan, 747 F. Supp. 2d 599 (E.D. Va. 2010). Both cases are currently on appeal to the Fourth Circuit, which has placed its ruling on \textit{Said} in abeyance pending its ruling on \textit{Hasan}. United States v. Said, No. 10-4970 (4th Cir. 2010).
\item \textsuperscript{26} Milena Sterio, \textit{The Somali Piracy Problem: A Global Puzzle Necessitating a Global Solution}, 59 AM. U. L. REV. 1449, 1467 (2010).
\item \textsuperscript{28} Some organizations, such as the Front de Libération Nationale (FLN) of Algeria in the early 1960s, were viewed as “terrorists” by some nations and “freedom fighters” by others. See MARTHA CRENSHAW HUTCHINSON, \textit{REVOLUTIONARY TERRORISM: THE FLN IN ALGERIA}, 1954–1962, at xiv (1978).
\end{itemize}
Code is consistent with the term’s common usage in international law today. 18 U.S.C. § 2331 defines “international terrorism” as activities that:

(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;

(B) appear to be intended—
   (i) to intimidate or coerce a civilian population;
   (ii) to influence the policy of a government by intimidation or coercion; or
   (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and

(C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.\textsuperscript{29}

Based on the statute’s focus on affecting governments and populations, therefore, the ultimate intent of the perpetrators differs: terrorists commit acts of terrorism to further political aims, whereas pirates commit acts of piracy for monetary, private gains. This difference, however, has diminished over time as some modern pirates act in furtherance of political goals.\textsuperscript{30} For example, pirates operating in the 1990s in Southeast Asia’s Malacca Straits were reportedly committing acts of piracy to support the Aceh separatist movement fighting for autonomy and independence from Indonesia, including the hijacking of an oil tanker in 2003.\textsuperscript{31} In addition, “[p]irates have smuggled weapons and delivered them to terrorist groups and have financially contributed to such groups.”\textsuperscript{32} Thus, the traditional aims of piracy and terrorism have expanded and overlapped with time.

\textit{ii. The Elements of Piracy and Terrorism}

The similarities between piracy and terrorism are heightened when the elements of each crime are isolated and compared. First, the required \textit{mens rea} of both piracy and terrorism is knowledge, with intent to cause fear or sow terror by “force or threat thereof or any other form of intimidation” to achieve their goals.\textsuperscript{33} The \textit{actus reus}, or actions that constitute each crime, goes to the earlier discussion of definitions. While actions constituting piracy under U.S.

\textsuperscript{30} \textit{See} Sterio, \textit{supra} note 26, at 1458–59.
\textsuperscript{31} \textit{See} id.
\textsuperscript{32} \textit{Id.} at 1459–60 (citations omitted).
\textsuperscript{33} SUA Convention, \textit{supra} note 27. \textit{See also} Burgess, \textit{supra} note 16.
law were originally limited to sea robbery, that definition has expanded over the years to include any unprovoked attack by sea. After the Achille Lauro attack in 1985, during which an Italian cruise liner was seized by the Palestine Liberation Organization (PLO) and a wheelchair-bound U.S. passenger was murdered for political aims, the United States declared the perpetrators to be “pirates” and demanded their extradition, even though no sea robbery had occurred. A result of this incident was the enactment in 1988 of the SUA Convention, which criminalizes “maritime terrorism.” The actus reus of aircraft piracy, pursuant to the federal statute implementing the Convention for the Suppression of Unlawful Seizure of Aircraft (“Hague Convention”), is the seizure, by force or violence, of any aircraft within the special aircraft jurisdiction of the United States. Aircraft pirates may employ several different strategies, including: interfering with flight crewmembers while aboard such aircraft; carrying concealed weapons or explosives aboard such aircraft; and committing certain crimes, including murder, manslaughter, maiming, sexual abuse, assault, and robbery, while aboard such aircraft. Pirates and terrorists also use common means of committing their crimes, including destruction of property, interference with commerce, and homicide. Thus, the modern actus reus of piracy encompasses maritime aggression and terrorism, not just sea robbery.

Finally, while the locus of the crimes appears initially to be fundamentally different—piracy occurs at sea, and terrorism does not—they are not. In fact, the locus of piracy has never been so restricted; piracy can be a “descent by sea” or the sacking of a town approached by sea. More recently, piracy’s locus has included the skies, as demonstrated by the crimes of air piracy and hijacking. Thus, the loci of the two crimes, like their respective actus reus, have intersected.

iii. Hostage Taking and Aircraft Piracy: Where Piracy and Terrorism Intersect

34 United States v. Smith, 18 U.S. 153, 154 (1820) (“Robbery . . . upon the sea . . . is piracy by the law of nations, and by the act of Congress.”).
35 For example, in the Washington Declaration of 1922, France, Italy, Japan, Great Britain, and the United States pledged to punish any unprovoked attack by sea as an “act of piracy.” See Burgess, supra note 16.
37 SUA Convention, supra note 27.
39 See id. § 46504 (interfering with flight crewmembers and attendants).
40 See id. § 46505 (carrying a weapon or explosive on an aircraft).
41 See id. § 46506 (applying certain criminal laws to acts on aircraft).
42 Burgess, supra note 16.
43 Id.
The International Convention against the Taking of Hostages treats piracy and terrorism as a hybrid. First, the location of the crime of hostage taking is not identified; the act could occur at sea, on land, or by air. Second, the goal is not circumscribed; the act of hostage taking must occur only “in order to compel a third person [namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons] . . . to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained.” This sharply contrasts with the definition of “piracy” in older Geneva Conventions, referenced above, in which the locus must be a ship or aircraft and the act must be committed “for private ends.” The U.S. legislation implementing the convention, known as the Hostage Taking Act, criminalizes hostage taking “whether inside or outside the United States.” Among other bases for jurisdiction, jurisdiction over hostage taking that occurs outside the United States is established under the Hostage Taking Act if “the offender is found in the United States.” A defendant is “found” in the United States if he is in U.S. custody, regardless of how he came to be there.

Similarly, the air piracy statute, or Antihijacking Act, “provides for criminal punishment of persons who hijack aircraft operating wholly outside the ‘special aircraft jurisdiction’ of the United States, provided that the hijacker is later ‘found in the United States.’” The Antihijacking Act was enacted in 1974 to implement the Hague Convention, which requires signatory nations to extradite or punish hijackers “present in” their territory. U.S. courts have interpreted this language to allow for personal jurisdiction over defendants whenever they are present before the court, irrespective of how that presence was achieved.

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47 Convention on the High Seas, supra note 19; UNCLOS, supra note 25.
50 See Yunis, 924 F.2d at 1089–90. The FBI lured Yunis into international waters and then placed him under arrest. See also United States v. Rezaq, 134 F.3d 1121, 1121, 1132 (D.C. Cir. 1998) (affirming conviction for aircraft piracy) (“'[F]ound' means only that the hijacker must be physically located in the United States, not that he must be first detected here.”). Cf. United States v. Alvarez-Machain, 504 U.S. 655 (1992) (holding that personal jurisdiction exists over defendant found in United States despite his presence having been acquired by forcible abduction from Mexico).
51 Yunis, 924 F.2d at 1092 (citing 49 U.S.C. App. § 1472(n)).
53 See, e.g., Yunis, 924 F.2d at 1092 (“This [language] suggests that Congress intended the statutory term 'found in the United States' to parallel the Hague Convention's 'present in [a
Moussaoui is an example of a terrorist charged under U.S. criminal law for, *inter alia*, acts of piracy. On December 11, 2001, Zacarias Moussaoui was indicted by a grand jury in the Eastern District of Virginia on six felony charges: conspiracy to commit acts of terrorism transcending national boundaries, conspiracy to commit aircraft piracy, conspiracy to destroy aircraft, conspiracy to use weapons of mass destruction, conspiracy to murder U.S. employees, and conspiracy to destroy property. The indictment alleged an agreement to carry out a coordinated air attack. The count of conspiracy to commit aircraft piracy charged that Moussaoui “agreed to commit aircraft piracy, by seizing and exercising control of aircraft in the special aircraft jurisdiction of the United States by force, violence, threat of force and violence, and intimidation, and with wrongful intent, with the result that thousands of people died on September 11, 2001.”

On April 22, 2005, Moussaoui pled guilty to all counts in the indictment. The Moussaoui case demonstrates that terrorism has enough in common with piracy, including the trend towards universal jurisdiction, that there is no obvious bar to pattern its legal treatment after that of piracy.

b. The Justification for Universal Jurisdiction Over Piracy and Terrorism

i. Piracy

Universal jurisdiction is a doctrine by which States can assert jurisdiction over certain crimes that occur outside their territory without any relationship to the nationality of the victim or the defendant. As implied by the Geneva Convention’s references to attacks occurring on the “high seas” or contracting state’s] territory’ . . . . Moreover, Congress interpreted the Hague Convention as requiring the United States to extradite or prosecute ‘offenders in its custody,’ evidencing no concern as to how alleged hijackers came within U.S. territory.” (citations omitted).

54 United States v. Moussaoui, 382 F.3d 453 (4th Cir. 2004). While conspiracy is one of the most popular charges in a prosecutor’s arsenal, four justices in *Hamdan* who joined in the majority holding also found that conspiracy, one of the charges levied by the military commission against Hamdan, is not a violation of the laws of war. A sampling of recent prominent federal criminal prosecutions of terrorism show that conspiracy was charged on each occasion. See, e.g., *Moussaoui*, 382 F.3d 453; United States v. Marzook, 435 F. Supp. 2d 708 (N.D. Ill. 2006) (RICO conspiracy); United States v. Rahman, 189 F.3d 88 (2d Cir. 1999) (discussing seditious conspiracy, bombing conspiracy, conspiracy to murder Mubarak).


57 United States v. Moussaoui, 591 F.3d 263, 266 (4th Cir. 2010).

58 See Miriam Cohen, *The Analogy Between Piracy and Human Trafficking: A Theoretical Framework for the Application of Universal Jurisdiction*, 16 BUFF. HUM. RTS. L. REV. 201, 201 (2010); see also *Restatement (Third) of Foreign Relations Law of the United States § 404 (1987)* (“A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction indicated in § 402 is present.”).
“in a place outside the jurisdiction of any state,”\(^{59}\) pirates have long been held to be international criminals subject to universal jurisdiction, such that any country may arrest and prosecute them, wherever they are found. For example, U.S. law criminalizes “who[m]ever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States.”\(^{60}\) This sharply contrasts with other crimes that take place at sea: crimes committed on board a ship generally come under the jurisdiction of the state whose flag the ship flies, as ships have traditionally been considered a “floating part” of that state’s territory.\(^{61}\) Pirate ships, however, fly the flag of no nation.\(^{62}\) The universal jurisdiction doctrine applies to piracy on the high seas based on the rationale that piracy impacts international navigation and commerce and therefore threatens the international community of nations. The SUA Convention authorizes any nation to pursue an attacking vessel, as long as it is in international transit, and to prosecute the offender.\(^{63}\) The location of the crime, on the high seas or in the air, as well as its nature, also support the consensus that universal jurisdiction should apply. The prohibition of piracy has risen to the level of \textit{jus cogens} in customary international law, meaning that it is one of the few crimes—along with genocide, slavery, torture, crimes against humanity, and recently, as this paper argues, terrorism—that violate customary international law and to which universal jurisdiction applies.\(^{64}\)

\(^{59}\) Convention on the High Seas, \textit{supra} note 19.


\(^{61}\) Exceptions to this rule exist in both statute and case law. See, e.g., Marijuana on the High Seas Act, Pub. L. No. 96–350, 94 Stat. 1159 (1980), \textit{repealed by} Maritime Drug Law Enforcement Act (MDLEA), 46 U.S.C. §§ 70501–70507 (2006 & Supp. 2008) (criminalizing possession with intent to distribute any controlled substance on board any vessel, including a foreign vessel subject to treaty or other arrangement between a foreign government and the United States, enabling U.S. authorities to enforce upon such vessel the laws of the United States); United States v. Roberts, 1 F. Supp. 2d 601 (E.D. La. 1998) (denying defendant’s motion to dismiss indictment of sexual abuse of a minor on board a vessel flying the flag of Liberia because of lack of jurisdiction, given that ship was not an American vessel in light of objective territorial and passive personality principles).

\(^{62}\) Cf. Rose George, Op-Ed, \textit{Flying the Flag. Fleeing the State}, \textit{N.Y. Times}, April 25, 2011, at A25 ("Ships used to fly the flags of their nation. They were floating pieces of their home country . . . but in the early 20th century, this began to change. Panama, seeking to attract American ships avoiding Prohibition laws, allowed non-Panamanians to fly its flag, for a fee. Liberia and other countries followed suit. [Today.] [T]hanks to a system of ship registration called ‘flags of convenience,’ it is all too easy for unscrupulous ship owners to get away with criminal behavior.").

\(^{63}\) See SUA Convention, \textit{supra} note 27, art. 4, 7.

ii. Terrorism

Jurisdiction over acts of international terrorism, while not universal, is growing broader. 18 U.S.C. § 2332b provides expansive jurisdictional bases for the United States to prosecute international acts of terrorism, including the use of any facility of interstate or foreign commerce; the victim’s relationship to the United States (not limited to U.S. citizens); the target of the attack owned, possessed, or leased by the United States; if the offense is committed in the territorial sea of the United States; and if the offense is committed within the special maritime and territorial jurisdiction of the United States. In addition, the statute expressly authorizes extraterritorial jurisdiction over the crime.

The USA PATRIOT Act and legislation implementing treaties on terrorist bombings and on financing terrorism also enlarged the extent of federal extraterritorial criminal jurisdiction. Congress has enacted laws proscribing various common law crimes such as murder, robbery, or sexual assaults when committed within the special maritime and territorial jurisdiction of the United States, i.e., when committed aboard an American vessel or within a federal enclave. The USA PATRIOT Act provides that the overseas establishments of federal entities and staff residences, such as embassies, consulates, and embassy and consular residences, be within the special territorial jurisdiction of the United States for purposes of crimes committed by or against U.S. nationals. Thus, the jurisdictional bases to prosecute international terrorism are far more expansive than is typical.

1. Universal Jurisdiction, Terrorism and the Alien Tort Claims Act

The argument for expanding universal criminal jurisdiction over terrorists receives some support from recent Alien Tort Claims Act (ATCA) jurisprudence. The ATCA recognizes a private cause of action for torts in violation of the law of nations. Violations of the law of nations have been held by the Supreme Court in Sosa v. Alvarez-Machain to include offenses against ambassadors, violation of safe conduct, and piracy. Sosa requires

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66 See id. § 2332b(e).
71 See id.
“any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of [those] 18th-century paradigms . . . .”\textsuperscript{73} Two recent cases, \textit{Mwani v. bin Laden}\textsuperscript{74} and \textit{Almog v. Arab Bank},\textsuperscript{75} have recognized specific acts of terrorism, including bombing an embassy and bombing civilians, as acts in violation of the law of nations. I discuss each case briefly in turn.

2. \textit{Mwani v. bin Laden}

In \textit{Mwani}, the plaintiffs contended that al-Qaeda and bin Laden bombed the U.S. embassy in Tanzania in 1998, also intending to kill diplomatic personnel inside, as an act of terrorism.\textsuperscript{76} The court cited \textit{Sosa} for the premise that the eighteenth-century paradigm of the ATCA included piracy and “assault against an ambassador,” directly applicable to the embassy bombings at issue in this case.\textsuperscript{77} Accordingly, the court found that this was a tort in violation of the laws of nations actionable under the Act: “The plaintiffs’ contention that bin Laden and al Qaeda [sic] attacked the American embassy intending, among other things, to kill American diplomatic personnel inside, would appear to fall well within those paradigms.”\textsuperscript{78}

3. \textit{Almog v. Arab Bank}

In ruling on a motion to dismiss the complaint filed in \textit{Almog}, the district court found that the ATCA provided subject matter jurisdiction over the bankrolling of random attacks on innocent civilians, or terrorist financing.\textsuperscript{79} The district court cited to the International Convention for the Suppression of Terrorist Bombings\textsuperscript{80} and the International Convention for the Suppression of the Financing of Terrorism,\textsuperscript{81} both implemented by the United States,\textsuperscript{82} which proscribed methods of attacking civilians and financing those acts, respectively. The district court further noted that under the customary law of armed conflict as reflected in the Geneva Conventions, all parties to a conflict, including non-state parties, must adhere to the prohibition against attacks on innocent civilians.\textsuperscript{83} Finally, the district court acknowledged that while there

\textsuperscript{73} Id. at 725.
\textsuperscript{74} See \textit{Mwani v. bin Laden}, 417 F.3d 1 (D.C. Cir. 2005).
\textsuperscript{76} See \textit{Mwani}, 417 F.3d 13 n. 12 (citations omitted).
\textsuperscript{77} Id. at 14 n. 14 (citation omitted).
\textsuperscript{78} Id.
\textsuperscript{79} See \textit{Almog}, 471 F. Supp. 2d, at 285.
\textsuperscript{80} Id. at 276; see generally International Convention for the Suppression of Terrorist Bombings, G.A. Res. 52/164, at 1, U.N. Doc A/RES/52/164 (Jan. 9, 1998) (condemning terrorist bombings).
\textsuperscript{83} See \textit{Almog}, 471 F. Supp. 2d at 279 (citation omitted).
may be no consensus in international law on the definition of terrorism, the suicide bombings and other acts of violence against civilians alleged in the complaint, however labeled, are universally condemned.\(^84\) Therefore, the court concluded, the universal condemnation of systematic suicide bombings and other murderous acts intended to intimidate or coerce a civilian population violates the law of nations and is a cause of action under the ATCA.\(^85\)

Two additional sources of law bolster the argument that non-state sponsored terrorism is a violation of customary international law. First, Article I, Section 8, Clause 10 of the U.S. Constitution confers on Congress the power to “define and punish . . . [o]ffences against the Law of Nations.”\(^86\) In *Hamdan v. Rumsfeld*, the plurality opinion observes that this clause vests in Congress the “constitutional authority to ‘define and punish . . . [o]ffences against the Law of Nations.’”\(^87\) Congress has exercised this authority by outlawing both piracy and certain types of terrorism and terrorist-related behavior, such as terrorist financing.\(^88\) For example, Congress expressly exercised its authority under the Offences Clause in passing Title III of the Antiterrorism and Effective Death Penalty Act of 1996.\(^89\) Section 301(a)(2) of Title III provides:

> The Congress finds that . . . the Constitution confers upon Congress the power to punish crimes against the law of nations and to carry out the treaty obligations of the United States, and therefore Congress may by law impose penalties relating to the provision of material support to foreign organizations engaged in terrorist activity.\(^90\)

\(^{84}\) See id. at 276–80 (“In any event, in this case, there is no need to resolve any definitional disputes as to the scope of the word ‘terrorism,’ for the Conventions expressing the international norm provide their own specific descriptions of the conduct condemned.”) See also Restatement (Third) of Foreign Relations Law of the United States, supra note 58.

\(^{85}\) See Almog, 471 F. Supp. 2d at 284–85. In *Tel-Oren v. Libyan Arab Republic*, the D.C. Circuit declined to find that terrorism was a violation of the law of nations. See Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 795 (D.C. Cir. 1984), in which the D.C. Circuit opined:

> While this nation unequivocally condemns all terrorist attacks, that sentiment is not universal. Indeed, the nations of the world are so divisively split on the legitimacy of such aggression as to make it impossible to pinpoint an area of harmony or consensus. Unlike the issue of individual responsibility, which much of the world has never even reached, terrorism has evoked strident reactions and sparked strong alliances among numerous states. Given this division, I do not believe that under current law terrorist attacks amount to law of nations violations. Id.

\(^{86}\) U.S. CONST. art. I, § 8, cl. 10.


\(^{90}\) Id. § 301(a)(2) (emphasis added).
These criminal statutes reflect binding congressional definitions of violations of customary international law and thus identify conduct that may be subject to the ATCA and universal jurisdiction.

Another source of customary international law prohibiting terrorism is Chapter VII of the U.N. Charter. The U.N. Security Council has passed a number of binding resolutions pursuant to Chapter VII that recognize international terrorist acts as violations of customary international law. For example, among the “international conventions and protocols relating to terrorism” that are incorporated by reference in U.N. Security Council Resolution 1566 are the International Convention for the Suppression of Terrorist Financing and the International Convention for the Suppression of Terrorist Bombings, both cited by the Almog court, discussed above.\textsuperscript{91} As a result, terrorists committing acts in violation of U.S. law and the U.N. Charter are committing violations of customary international law that are actionable under Resolution 1566.

**CONCLUSION**

If terrorism were treated as a crime in violation of the law of nations, terrorists, like pirates, would be properly understood as enemies of all states. Universal jurisdiction is a powerful tool that can and should enhance criminal prosecutions of terrorists. As the United States gains experience and confidence criminally prosecuting international terrorists, the executive branch should choose criminal prosecution to address terrorism whenever possible, as it can be both legal and effective.

\textsuperscript{91} See *supra* notes 80–81.