CASE WESTERN RESERVE UNIVERSITY
SCHOOL OF LAW

INTRODUCTION TO INTERNATIONAL CRIMINAL LAW

MOOC taught by Professor Michael P. Scharf

Module #3:

Terrorism and Piracy

International Criminal Law
Module #3
Terrorism and Piracy

Before watching the video for this session, please read through the simulation and the material below:

Simulation:

For three decades, the United Nations has been trying to negotiate a consensus definition of terrorism. Assume that the United Nations has convened a Diplomatic Conference to adopt a universal definition of terrorism, and you are a delegate to the Diplomatic Conference. The working draft provides:

"Terrorism is the intentional use of, or threat to use violence against civilians or against civilian targets, in order to attain political aims."

You are invited to provide a short on-line submission that critique this definition and proposes alternative language to improve it from the perspective of your assigned country as set forth below.

Group A will represent States that have been the target of international terrorism: The United States, the United Kingdom, France, Russia, India, Japan, and Israel. Pick any state from this list.

Group B will represent States that are known to have terrorist groups active within their territory, or which have been accused of supporting terrorists: Afghanistan (al Qaeda), Pakistan (al Qaeda), Yemen (al Qaeda), Lebanon (Hizballah) Somalia (al Shabab), Spain (ETA), Columbia (FARC), Turkey (PKK), Iran (State sponsor of Islamic terrorist groups), Syria (State sponsor of Islamic terrorist groups). Pick any state from this list.

In order to complete the optional on-line simulations for this course, students must go to the Navigation Bar on the left panel. Under the Exercises section, you will find a button for "on-line simulations." The simulations for each session are available under this button. Written work can be submitted directly or through file upload. Students who post five or more on-line submissions of over 200 words in length during the course (simulations and discussions) will be awarded a Statement of Accomplishment with Distinction for the course.

Readings

(1) Making sense of the U.N. Terrorism Resolutions

In a landmark resolution adopted in 1991 (whose language has been repeated in several subsequent resolutions), the United Nations General Assembly stated that it "unequivocally condemns, as criminal and unjustifiable, all acts, methods and practices of terrorism wherever and by whoever committed." Rather than attempt to define terrorism, the resolution simply listed in its preamble the "existing international conventions relating to various aspects of the problem of international terrorism." The referenced international conventions require States Parties to criminalize specified conduct, to either initiate prosecution of or to extradite the transgressors, and to cooperate with other States for effective implementation. The conventions prohibit the following: aircraft hijacking, aircraft sabotage, attacks against ships and fixed platforms in the ocean, attacks at airports, violence against officials and diplomats, hostage-taking, theft of nuclear material, use of unmarked plastic explosives, bombings against civilian targets, and attacks against UN Peacekeepers. Would resort to other forms of terror-violence not covered by those conventions such as attacking a school bus with a machine gun for political purposes and with an intent to produce a terror outcome fit within the resolution's unequivocal condemnation of terrorism?

The last paragraph of the U.N. resolution provides that "noting in the present resolution could in any way prejudice the right to self-determination …, particularly peoples under colonial and racist regimes or other forms of alien domination, or the right of these peoples to struggle legitimately to this end." Some have argued that this language preserves the right of peoples struggling against alien or colonial domination to resort to acts of "terrorism"? Others believe the phrase "the right of these peoples to struggle *legitimately* to this end" means that resort to terrorism can never be justified since "terrorism" is not a legitimate means? Read together with the preamble, this would mean that acts specifically prohibited by the anti-terrorism conventions

are unacceptable under any circumstances, but that other acts of terrorism may sometimes be permissible.

Paragraph 3 of the 1991 resolution states that it is a violation of international law for states to organize, instigate, assist or participate in terrorist acts in other States, or acquiesce in or encourage activities within their territory directed towards the commission of such acts. Under this paragraph, which of the following acts do you think would violate international law: (1) Provision of financial assistance to a terrorist organization? (2) Provision of logistical support such as passports and weapons? (3) Permitting a terrorist organization to maintain a headquarters or training facility in a State's territory? In answering these questions, consider the International Court of Justice's opinion in *the Case of Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America*). In that case, the ICJ held that, by arming, training, and directing the Contras, the United States violated the customary international law principle of the non use of force by "organizing or encouraging the organization of irregular forces or armed bands...for incursion into the territory of another State." The Court stressed, however, that neither Nicaragua's provision of arms to the opposition in El Salvador nor the United States' provision of funds to the Contras in Nicaragua, by themselves, amounted to a prohibited use of force, justifying force in self-defense.

The day after the September 11, 2001 terrorist attacks, the United States informed the U.N. Security Council that it had been the victim of an armed attack and declared its intent to respond under Article 51 of the U.N. Charter. The Security Council then adopted Resolution 1368, which condemned the 9/11 attacks and "recognized the inherent right of individual or collective self-defense in accordance with the Charter." This action was not a Chapter VII authorization to use force, but rather a confirmation that the United States could invoke its right to respond with force under Article 51 of the U.N. Charter, despite the fact that al Qaeda was a non-state actor. Consistent with that right, on October 7, 2001, the United States informed the Council that it had launched Operation Enduring Freedom. Air strikes were directed at camps allegedly belonging to al Qaeda and other Taliban military targets throughout Afghanistan. There was no international protest or condemnation of the operation; rather through word and actions, a long list of States expressed support for the operation.

The Obama Administration's State Department Legal Adviser, Harold Koh, delivered a major policy speech at the Annual Meeting of the American Society of International Law on March 25, 2010, in which he provided the legal justification for the Administration's use of drones to fight terrorist groups around the world. Koh began by stressing that the attacks of 9/11 triggered the U.S. right of self-defense against al-Qaeda and other terrorist organizations. Koh asserted "as a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law."

2. The quest for a general definition of terrorism

Michael P. Scharf, Symposium: "Terrorism on Trial": Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems and Prospects, 36 Case W. Res. J. Int'l L. 359 (2004)(footnotes omitted).

In 1987, the United Nations General Assembly adopted Resolution 42/159, recognizing that the effectiveness of the struggle against terrorism could be enhanced by the establishment of a generally agreed definition of international terrorism. The issue was initially assigned to the U.N. Sixth (Legal) Committee, which had over the years drafted a number of conventions addressing specific crimes committed by terrorists, although none of these conventions ever used the word "terrorism" let alone provided a definition of the term. When the Sixth Committee failed to make progress in reaching a consensus definition of terrorism, the General Assembly in 1996 established an ad hoc committee to develop a comprehensive framework for dealing with international terrorism.

Foremost among its accomplishments, the ad hoc committee developed the International Convention for the Suppression of the Financing of Terrorism, which defined terrorism as (1) any activity covered by the twelve anti-terrorism treaties; and (2) "any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act." 129 States have so far ratified this multilateral treaty. This was as close as the international community has ever come to adopting a widely accepted general definition of terrorism.

Immediately after the events of September 11, 2001, the General Assembly established a working group to develop a comprehensive convention on international terrorism. In the spirit of cooperation that marked the early days after the September 11 attacks, the members of the working group nearly reached consensus on the following definition of terrorism:

> [Terrorism is an act] intended to cause death or serious bodily injury to any person; or serious damage to a State or government facility, a public transportation system, communication system or infrastructure facility . . . when the purpose of such act, by its

> nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing an act.

The effort hit a snag, however, when Malaysia, on behalf of the 56-member Organization of the Islamic Conference (OIC), proposed the addition of the following language:

> Peoples' struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law shall not be considered a terrorist crime.

According to Nicholas Rostow, General Counsel to the U.S. Mission to the United Nations, the OIC's proposal intended to exempt acts against Israel over the occupied territories and acts against India over Kashmir from the definition of terrorism, and to brand violations of the laws of war by State military forces such as the Israel Defense Forces as terrorist acts. When neither side was willing to compromise on this issue, the project was shelved indefinitely. With work on a general definition of terrorism once again stalled in the General Assembly, the U.N. Security Council stepped in to the fray. Acting under Chapter VII of the U.N. Charter, the Council adopted Resolution 1373, which in essence transformed the Terrorism Financing Convention into an obligation of all U.N. member States, requiring them to prohibit financial support for persons and organizations engaged in terrorism. The Council missed an opportunity, however, to adopt a universal definition of terrorism when it decided not to include the Terrorism Financing Convention's definition of terrorism in Resolution 1373, but rather to leave the term undefined and to allow each State to ascertain its own definition of terrorism. Further, the Council created a committee (The Counter-Terrorism Committee) to oversee the implementation of the resolution, but it did not give the Committee the mandate to promulgate a list of terrorists or terrorist organizations to whom financial assistance would be prohibited under the resolution.

The Security Council's most recent statement on terrorism came in response to a bloody terrorist attack at an elementary school in Russia in October 2004. Upon Russia's insistence, the Security Council adopted Resolution 1566, which provides:

> criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, *which constitute offenses within the scope of and as defined in the international conventions and protocols relating to terrorism*, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious, or other similar nature, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature (emphasis added).

At first blush this clause seems to be a general definition of terrorism, similar to that contained in the Terrorist Financing Convention. But due to the inclusion of the italicized language (which was required to gain consensus), this clause actually does no more than reaffirm that there can be no justification for committing any of the acts prohibited in the twelve counter-

terrorism conventions; a sentiment that was expressed in numerous past General Assembly and Security Council resolutions.

Michael P. Scharf, Symposium: "Terrorism on Trial": Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems and Prospects, 36 Case W. Res. J. Int'l L. 359 (2004).

There are significant gaps in the regime of the anti-terrorism conventions. For example, assassinations of businessmen, engineers, journalists and educators are not covered, while similar attacks against diplomats and public officials are prohibited. Attacks or acts of sabotage by means other than explosives against a passenger train or bus, or a water supply or electric power plant, are not covered; while similar attacks against an airplane or an ocean liner would be included. Placing anthrax into an envelope would not be covered; nor would most forms of cyber-terrorism. Additionally, acts of psychological terror that do not involve physical injury are not covered, even though placing a fake bomb in a public place or sending fake anthrax through the mails can be every bit as traumatizing to a population as an actual attack.

Alex Schmid, Symposium: "Terrorism on Trial": Terrorism – The Definitional Problem, 36 Case W. Res. J. Int'l L. 375 (2004).

Alex Schmid, the Senior Crime Prevention and Criminal Justice Officer at the U.N.'s Terrorism Prevention Branch in Vienna, has suggested eight reasons why it is important to have an internationally accepted general definition of terrorism:

-- Developing an effective international strategy requires agreement on what it is we are dealing with, in other words, we need a definition of terrorism.

-- International mobilization against terrorism . . . cannot lead to operational results as long as the participants cannot agree on a definition.

-- Without a definition, it is impossible to formulate or enforce international agreements against terrorism.

-- Although many countries have signed bilateral and multilateral agreements concerning a variety of crimes, extradition for political offences is often explicitly excluded, and the background of terrorism is always political.

-- The definition of terrorism will be the basis and the operational tool for expanding the international community's ability to combat terrorism.

-- It will enable legislation and specific punishments against those perpetrating, involved in, or supporting terrorism, and will allow the formulation of a codex of laws and international conventions against terrorism, terrorist organizations, states sponsoring terrorism, and economic firms trading with them.

-- At the same time, the definition of terrorism will hamper the attempts of terrorist organizations to obtain public legitimacy, and will erode support among those segments of the population willing to assist them (as opposed to guerrilla activities).

-- Finally, the operational use of the definition of terrorism could motivate terrorist organizations, due to moral and utilitarian considerations, to shift from terrorist activities to alternate courses (such as guerrilla warfare) in order to attain their aims, thus reducing the scope of international terrorism.

An additional reason is that the absence of an internationally accepted definition of terrorism has led several U.S. courts to dismiss civil claims and criminal charges in terrorist-related cases. In the concurring opinion dismissing plaintiffs' tort actions against certain alleged terrorists responsible for an attack on a bus in Israel in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 795 (D.C. Cir. 1984), Judge Harry Edwards stated:

> 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 nations. Given this division, I do not believe that under current law terrorist attacks [outside of those prohibited by international conventions] amount to law of nations violations.

More recently, in the case of *United States v. Yousef*, 327 F.3d 56 (2003), the U.S. Court of Appeals for the Second Circuit, in dismissing extraterritorial terrorism charges based on "universal jurisdiction," concluded:

> We regrettably are no closer now than eighteen years ago to an international consensus on the definition of terrorism or even its proscription; the mere existence of the phrase "state-sponsored terrorism" proves the absence of agreement on basic terms among a large number of States that terrorism violates public international law. Moreover, there continues to be strenuous disagreement among States about what actions do or do not constitute terrorism, nor have we shaken ourselves free of the cliche that "one man's terrorist is another man's freedom fighter." We thus conclude that the statements of Judges Edwards, Bork, and Robb remain true today, and that terrorism--unlike piracy, war crimes, and crimes against humanity--does not provide a basis for universal jurisdiction.

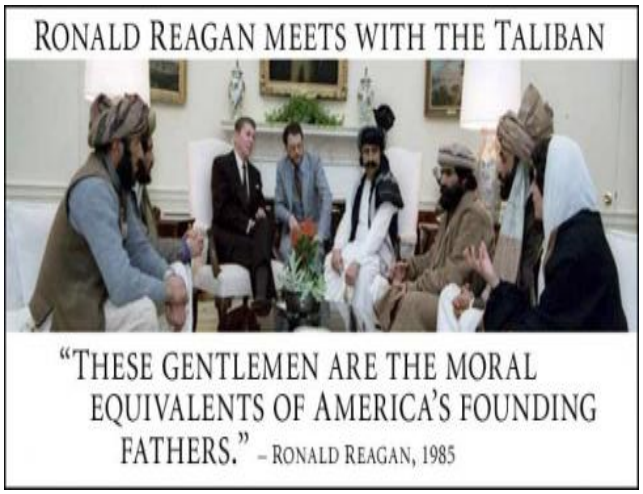
3. Some Questions to consider about developing a general definition of terrorism

#1. Should the definition of terrorism exclude acts committed by government or military personnel undertaken "in the exercise of their official duties," even if they are terroristic in purpose and effect?

#2. Should the definition of terrorism apply only to acts against civilians and non-combatants, and exclude attacks on military personnel? What about military personnel who are outside of the area of armed conflict? What about military personnel who are unarmed and off duty? What about police forces? What about Government officials? What about military installations, headquarters, vessels, aircraft, or vehicles during an armed conflict? Were the attacks on the USS Cole in 2000 in Yemen and the Pentagon in 2001 by members of al Qaeda acts of terrorism?

#3. If peacetime attacks against military personnel and installations are not considered terrorist, should the international humanitarian law "collateral damage doctrine" apply, such that loss of innocent civilian life is not considered a crime so long as the target was legitimate and reasonable steps were taken to avoid unnecessary civilian casualties? Should the international humanitarian law "obedience to superior orders defense" apply to such acts?

#4. For some, the major problem in defining terrorism has been distinguishing "terrorists" from "freedom fighters" or "revolutionaries." During the 1980s, the U.S. Government labeled the rebels in El Salvador "agents of subversion," while referring to the Afghan guerrillas as "resisters" and the Contras in Nicaragua as "freedom fighters" who in President Reagan's words were "the moral equivalent of the Founding Fathers." *Newsweek*, January 6, 1986, at 39. Do these labels reflect a double standard or are the distinctions justified?



#5. Is the word "violence," or even the phrase "politically motivated violence," too broad? Is such necessary or too limiting? Consider the case where alleged terrorists release nerve gas, a deadly chemical, or a biologic agent in a subway in order to induce terror within a sector of a city? Would the phrase "use of violence or a weapon" cover such conduct? Should the definition of terrorism include computer crimes ("cyber-terrorism") and attacks against the environment ("eco-terrorism") committed with the intention to intimidate a population or compel a government to act or refrain from acting, or to produce "terror"?

#6. Another alternative is to include with the definition of terrorism a list of exclusions, defining what "terrorism" is not. Which, if any, of the exceptions do you think make the most sense?

-- Excluding mere acts of property damage as well as acts of sabotage like interrupting the flow of an oil pipeline even when the saboteurs are engaging in acts of terrorism on other occasions.

-- Excluding attacks on military installations, aircraft, navy vessels, barracks which are guarded even when those who attack military installations or personnel are otherwise also engaging in acts of terrorism.

-- Excluding attacks on police stations and armed police on patrol in situations of armed conflict;

-- Excluding cases of collateral damage where the targeting of civilians was not deliberate (e.g. when an attack on a police station misfires and civilians are (also) victims.
-- Excluding cases of attacks on secular or religious symbols unless it is combined with the victimization of people (an attack on a knowingly empty church would not qualify, an attack on a full church would).
-- Excluding certain types of assassinations, e.g. when the direct victim is the only target, as opposed to de-individuated murder where the victim serves only as message generator to reach a wider audience.
-- Excluding acts of war which do not qualify as war crimes.
-- Excluding guerrilla warfare activities which are not war crimes.
-- Excluding acts of legal use of force by legitimate authorities to impose public order when acting within the boundaries of the rule of law.
-- Excluding acts of (collective) political violence which are spontaneous, as in riots, demonstrations, revolts.

#7. If it is not possible to ever reach international consensus on a general definition of terrorism, would it make sense instead to agree on an international process for identifying "terrorist organizations"? At the Club of Madrid International Summit on Democracy, Terrorism and Security, 8-11 March 2005, the Working Group on Legal Responses to Terrorism made the following proposal in paragraph 2.6 of its report: "In order to help States identify terrorist organizations to whom financial support is prohibited by the Convention on the Suppression of Terrorist Financing and Security Council Resolution 1373 (2001), the Counter Terrorism Committee (CTC) established by the Security Council should develop a core list of organizations that the CTC determines to be involved, directly or indirectly, with acts of financing of terrorism. In developing this list, the CTC should employ procedural safeguards to ensure that organizations and individuals associated with them which are not so involved are not erroneously included. States would thereafter be bound to subject organizations included in the list to the sanctions enumerated in resolution 1373 (2001). States would also remain free to impose sanctions on non-listed organizations that the State determines to be involved in terrorism.

4. The Special Tribunal for Lebanon's recent decision on the definition of terrorism.

المحكمة الخاصة بلبنان
SPECIAL TRIBUNAL FOR LEBANON
TRIBUNAL SPÉCIAL POUR LE LIBAN

INTRODUCTORY NOTE TO THE DECISION OF THE APPEALS CHAMBER OF THE SPECIAL TRIBUNAL FOR LEBANON ON THE DEFINITION OF TERRORISM AND

MODES OF PARTICIPATION, BY MICHAEL P. SCHARF, Published in International Legal Materials (2011) [Footnotes omitted for this MOOC].

The Special Tribunal for Lebanon (STL), established in 2007 by the UN Security Council to prosecute those responsible for the 2005 bombings that killed former Lebanese Prime Minister Rafiq Hariri and 22 others, is the world's first international court with jurisdiction over the crime of terrorism. On January 17, 2011, the Tribunal's Prosecutor, Daniel Bellemare, submitted a sealed indictment for the pre-trial judge to confirm. The pre-trial judge, in turn, requested that the Appeals Chamber resolve fifteen questions relating to the substantive criminal law to be applied by the STL, the modes of criminal responsibility to be applied by the STL, and whether the STL should charge crimes cumulatively or in the alternative. In response, the STL Appeals Chamber handed down a landmark ruling on February 16, 2011.

The unanimous ruling of the five Appeals Chambers judges was signed by Presiding Judge Antonio Cassese, who holds the title "Judge Rapporteur" of the STL Appeals Chamber. Judge Cassese was formerly Professor of International Law at the University of Florence and served as President of the International Criminal Tribunal for the former Yugoslavia (ICTY) during the early days of that court. The opinions he wrote for the ICTY Appeals Chamber constituted some of the most important legal developments in international humanitarian law since the adoption of the 1949 Geneva Conventions. For example, during Judge Cassese's tenure as President of the ICTY, the tribunal's Appeals Chamber held for the first time in history that individual criminal responsibility applied not just during international armed conflicts, but to war crimes committed in internal armed conflicts as well; and it developed the novel concept of joint criminal enterprise liability which has since been applied by the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and the Extraordinary Chambers in the Courts of Cambodia. As the STL Appeals Chamber's Presiding Judge, Cassese once again took advantage of a historic opportunity to boldly push forward the development of international criminal law.

Of the several issues on which the Appeals Chamber issued guidance, by far the most important concerned the definition of terrorism to be applied by the STL. Although the STL's Statute stipulates that the court is to apply the crime of terrorism as defined by Lebanese law, the Appeals Chamber held that the STL is authorized to construe Lebanese law defining terrorism with the assistance of international treaty and customary law. This was a departure from the traditional approach of treaty interpretation, as reflected in Article 32 of the Vienna Convention on the Law of Treaties, in which the Tribunal would apply the "ordinary meaning" of the terms of the Statute unless the text was found to be either ambiguous or obscure or would lead to an interpretation which is manifestly absurd or unreasonable. Since the Statute of the STL clearly stated that the Court was to apply the Lebanese domestic law on terrorism, under the traditional approach resort to supplementary means of interpretation would be appropriate only if the Court had found that there was an inconsistency or gap in the applicable Lebanese law.

In deverging from the traditional approach, the Appeals Chamber stated that "the old maxim *in claris non fit interpretation* (when a text is clear there is no need for interpretation) is in truth fallacious," explaining that "it overlooks the spectrum of meanings that words, and especially a collection of words, may have and misses the truth that context can determine

meaning." Instead, the Appeals Chamber adopted a "semiotic" approach to interpretation. Semiotics begins with the assumption that terms such as "terrorism" are not historic artifacts whose meaning remains static over time. Rather, the meaning of such terms changes along with the interpretative community or communities. As the STL Appeals Chamber explained, this interpretative approach "recognizes the reality that society alters over time and interpretation of a law may evolve to keep pace."

The Appeals Chamber thus held that it was appropriate to read the Lebanese law in the context of "international obligations undertaken by Lebanon with which, in the absence of very clear language, it is presumed any legislation complies." This interpretive approach opened the door for the Appeals Chamber to then opine on the question of whether a defined offense of terrorism exists under customary international law. To that end, the Appeals Chamber found "although it is held by many scholars and other legal experts that no widely accepted definition of terrorism has evolved in the world society because of the marked difference of views on some issues, closer scrutiny reveals that in fact such a definition has gradually emerged."

Based on its review of state practice and indicators of *opinio juris*, the Appeals Chamber declared that the customary international law definition of terrorism consists of "the following three key elements: (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element."

Reading the Lebanese law on terrorism together with the definition of terrorism under customary international law, the Appeals Chamber concluded that the particular means used in an attack were not dispositive in determining whether an attack was terrorism or simply murder. In other words, contrary to Lebanese case law, the Appeals Chamber opined that attacks committee by rifles or handguns, which are not likely per se to cause a danger to the general population, are nevertheless within the jurisdiction of the STL.

Yet, the significance of this aspect of the Appeals Chamber opinion is far broader than its application to the case before the STL. This is the first time in history that an international tribunal has authoritatively confirmed the crystallization of a general definition of terrorism under customary international law. The decision will almost certainly spark a debate about whether the STL's conclusion is correct in light of the conventional view that the international community has not yet reached consensus on a general definition of terrorism. Since the decision has been issued by an international tribunal, and penned by a highly respected jurist, it is possible that the decision itself will be seen as "a Grotian moment," crystallizing a customary international law definition of terrorism. If so, the decision will have a momentous effect on the decades-long effort of the international community to develop a broadly acceptable definition of terrorism.

Unable to reach consensus on a general definition, the international community has instead proceeded over the past thirty years to adopt a dozen separate counter-terrorism conventions that impose an obligation to prosecute or extradite in cases of hostage-taking,

hijacking, aircraft and maritime sabotage, attacks at airports, attacks against diplomats and government officials, attacks against U.N. peacekeepers, use of bombs or biological, chemical or nuclear materials, and providing financial support to terrorist organizations. By listing the dozen counter-terrorism conventions in the preambular clauses of numerous U.N. General Assembly and Security Council counter-terrorism resolutions, which confirm that acts of terrorism are criminal and unjustifiable, the United Nations has arguably crystallized the acts prohibited by those Conventions into customary international law crimes. Yet, there are significant gaps in the coverage of these anti-terrorism conventions. For example, assassinations of businessmen, engineers, journalists and educators are not included, while similar attacks against diplomats and public officials would be covered by the treaties. Attacks or acts of sabotage by means other than explosives against a passenger train or bus, or a water supply or electric power plant, are not dealt with, while similar attacks against an airplane or an ocean liner would be covered. Moreover, most forms of cyber-terrorism are not encompassed by the treaties. Additionally, acts of psychological terror that do not involve physical injury are not covered, even though placing a fake bomb in a public place or sending fake anthrax through the mails can be every bit as traumatizing to a population as an actual attack.

Notably, the STL Appeals Chamber stated that the customary rule can be held to impose a duty on States to prosecute those who commit acts of terrorism as defined under customary international law. This would include cases falling within the gaps of the dozen counter-terrorism conventions. Moreover, the U.N. Security Council in Resolution 1373 prohibited the financing of terrorism without defining the term or listing proscribed groups. The Appeals Chamber's general definition of terrorism could potentially facilitate more effective implementation of that important resolution.

5. PIRACY

ASIL Insights, International Legal Responses to Piracy off the Coast of Somalia, February 6, 2009, By Eugene Kontorovich

Introduction

The extraordinary growth in piracy off the coast of Somalia in recent months has led to a multipronged international response. Several nations have sent naval assets to patrol the Gulf of Aden in an effort to protect international commercial shipping. The United Nations Security Council has, under its Chapter VII powers to address threats to international peace and security, passed a series of resolutions that give these forces unprecedented legal authority to pursue pirates. While the traditional definition of piracy under international law restricts military responses by outside powers to those carried out on the high seas, the 2008 Security Council resolutions authorize the use of military force within sovereign Somali waters and territory. Despite this authorization of expanded powers to interdict and detain pirates at sea, states have expressed frustration at the limited available options for prosecuting captured pirates. Thus Britain has entered into an agreement with Kenya to permit sea robbers captured by the Royal Navy to be

tried in Kenyan courts. All these developments are innovative legal responses to a modern epidemic of the oldest recognized international crime.

Background

The international crime of piracy, like the slave trade, was believed to have largely disappeared in modern times, or at least to have fallen to levels that would not demand international attention. Contrary to that belief, for the past several years, piracy has become endemic off the coast of Somalia, which has not had a government capable of broadly asserting its authority over the country since 1991. In the past year alone, attacks on international shipping in the Gulf of Aden increased by 200% over 2007. But the surge in sea robbery over the past six months is unprecedented, and perhaps the most significant eruption of such criminal activity in nearly two hundred years.

The problem is exacerbated by geography. All vessels transiting the Suez Canal must pass through the narrow straight between the Horn of Africa and the Arabian Peninsula, where cargo vessels with unarmed crews become easy prey. Pirates typically hijack a vessel with the goal to ransom it and its crew back to the owners, though sometimes pirates take the vessel to shore to sell the cargo. A single seizure can earn each pirate $150,000. (In Somalia, per capita GDP is $600 and male life expectancy is around 47 years.) Currently hundreds of crewmembers from many different countries remain in captivity pending ransom negotiations. In the past year, the pirates have become busier and bolder. Pirates have attacked a vessel even further from the coast, and made some spectacular seizures, including a freighter loaded with Saudi oil, a ship carrying Ukrainian tanks bound for Kenya, and most tragically, several ships laden with United Nations relief supplies for Somalia. The pirates make no discrimination among vessels. Anything is fair game. Experts predict to see even more attacks in 2009 as the recent successes inspire others.

International Patrols

The unprecedented upsurge in piracy has prompted unprecedented international naval cooperation. A still-expanding coalition has been patrolling the Gulf of Aden with the navies of the United States, Great Britain, France and India playing leading roles. This coalition now includes the first-ever European Union naval force and China's first naval deployment outside of the South China Sea region. As of mid-January, this flotilla of ships from more than twenty countries is being coordinated by the United States. The increased military presence has successfully prevented or interrupted numerous attempted piracies, and members of the coalition have on several occasions exchanged fire with the Somalis. Yet thus far the role of the naval force has been to ward off pirates, rather than to pursue or apprehend them, which may not be sufficient to deter piracy motivated by outsized financial gains. Moreover, the deployment of a naval contingent is an expensive undertaking, particularly relative to the costs of ransom.

Security Council Enforcement Action under Chapter VII

In 2008, the United Nations Security Council passed five separate resolutions dealing with Somali piracy -- more resolutions than on any other subject last year. Each of these was passed pursuant to Chapter VII of the UN Charter, under which the Council may authorize the use of military force against threats to international security. These resolutions have bolstered the

authority of the multinational armada by expanding the authority of the navies beyond acts permitted under the customary international law of piracy. Absent Security Council authority to use force, international law permits nations to act against foreign piracy only on the high seas. In the Gulf of Aden, where international shipping must pass through a narrow corridor, pirates are able to launch attacks in international waters and then quickly return to Somali territorial waters. The Council responded to this problem on June 2 by passing Resolution 1816, which authorizes nations to take action against pirates even in sovereign Somali waters. That resolution noted that it was passed with the consent of the government of Somalia "which lacks the capacity to interdict pirates or patrol and secure its territorial waters."

On December 16, 2008, the Council passed an even broader resolution, drafted and promoted by the United States (in the last weeks of the Bush administration) extending the authorization of military force to land-based operations in Somalia mainland. For a one-year period, Resolution 1851 authorizes nations to "undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea." Concerns raised by other Council members led the U.S. to withdraw draft language referring to operations in Somali "airspace," though the U.S. argues that the effect of the resolution remains the same, and that use of Somali airspace is permitted.

Authorizing armed action against pirates in sovereign territory is an unprecedented measure by the Security Council. Because the resolutions permit responses beyond those permitted under customary international law they caused some apprehension on the part of states with a history of piracy problems, fearing the resolutions may set a precedent eroding national territorial sovereignty. The text accompanying the resolutions and statements made by Council members stressed that the resolutions applied solely to the Somali situation, and would not establish any precedent of customary international law. Indeed, the measures were sought and welcomed by the transitional Somali government, which is too weak to deal with the piracy problem itself.

Moreover, the resolutions require that any action in Somali territory be approved by that nation's provisional government and comport with international humanitarian law. The latter condition may greatly limit the scope of possible operations under the resolution. Pirates are not combatants, but rather civilians. Under international humanitarian law civilians may not be specifically targeted except in immediate self-defense. United States military officials have already warned that any action against the pirates on land will likely result in civilian deaths. Still, Resolution 1851 clearly broadens the scope of permissible "hot pursuit," allowing pirates to be chased from the high seas into Somali waters and farther onto dry land.

Thus it is not surprising that the authority given by these resolutions has apparently gone largely if not entirely unutilized, with military action against pirates taking place in international waters and confined to small, reportedly defensive incidents. Indeed, the most significant exception, an April 2008 raid by French commandos on pirates holding hostages on the mainland, preceded the first Chapter VII authorization. It also appears to have been a one-off mission, in response to the capture of a French luxury yacht and its passengers.

Jurisdiction to Try Captured Pirates

Another question raised by the resolutions is whether pirates captured in Somali territory would be amenable to universal jurisdiction. Piracy is the original universal jurisdiction crime. The doctrine of universal jurisdiction allows any nation to try certain offenders who have committed international crimes, even if the crime, the defendant and the victims have no nexus with the state carrying out the prosecution. For hundreds of years the doctrine applied exclusively to piracy. In recent decades, universal jurisdiction has been applied by national courts to prosecute cases of war crimes, crimes against humanity and torture. While its original application to cases of piracy appeared to have fallen into disuse, now universal jurisdiction has the potential to come full circle to help address the modern piracy epidemic.

However, in practice, the nations patrolling the Gulf of Aden have chosen not to prosecute pirates because of the anticipated difficulty and expense. What to do with apprehended pirates has become the central legal question of the current anti-piracy campaign. The dominant approach has been to avoid capturing pirates in the first place, or, if captured, releasing the pirates without charging them with a crime. Returning pirates to Somalia for trial has generally not been considered an option both because of the lack of a functioning government and the probability that the accused would be subject to unfair trials and cruel treatment. Some European governments have expressed concern that the latter problem presents a conflict with a sending state's obligation of *non-refoulement* under various international treaties, which prohibit sending people to countries where they will likely be abused. France, one of the more active nations in the piracy campaign, regularly resorts to repatriation of pirates to Somalia.

Nations have called for new venues or possibilities for prosecuting the pirates, including an international tribunal or domestic courts in other countries in the region. Britain is pioneering the latter solution. In December 2008, Britain signed a memorandum of understanding with Kenya formalizing the arrangement whereby captured pirates will be turned over for trial, and handed over the first group of captured pirates for prosecution. The United States was the first to experiment with this arrangement, rendering a group of pirates to the Kenyan government in a carefully controlled test case in 2006. While those pirates were convicted and the trial went off without major complications, it did not turn into a regular procedure. Great Britain and other patrolling nations are also discussing the possibility of other nearby states hosting piracy prosecutions.

The legality of such transfers from outside capturing states to third states is thrown into doubt by the piracy provisions of the Third United Nations Convention on the Law of the Sea (UNCLOS), a comprehensive multilateral treaty often described as the "constitution of the oceans." The treaty codifies the long-standing customary prohibition on piracy. UNCLOS article 105, codifying universal jurisdiction in cases of piracy, provides that "every State may seize a pirate ship" on the high seas, but that the prosecution should be by "the courts of the state *which carried out the seizure*." The drafting history reveals that this provision was intended to preclude transfers to third-party states. No court or tribunal has yet ruled on the effect of UNCLOS Article 105, but it may emerge as an issue in the case of those British-captured pirates on trial in Kenya.

Because international law defines piracy as an act taking place on the high seas, the increased authority conferred on outside states to take military action may not translate into a coextensive authority to prosecute. However, attacks on vessels are also punishable under the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation

(SUA). The SUA Convention is not limited to acts on the high seas, and arguably extends jurisdiction to any nation capturing the offenders. However, invoking SUA would also raise many questions, as it has only been used as a basis for jurisdiction in one reported case. Somalia has not ratified the treaty, which might create additional difficulties. However, the recent piracy problems have renewed international interest in using the dormant treaty.

Piracy Law Enforcement Going Forward

The international cooperation that Somali piracy has spawned is unusual and impressive. Yet while nations have been willing to shoulder serious enforcement costs, they have shied away from accepting judicial burdens. It is unlikely that piracy can be stopped if pirates are not prosecuted and punished. In the absence of a comprehensive international response that includes incapacitation of pirates, shippers are increasingly likely to turn to private security companies and other do-it-yourself solutions. Because the legal remedies under discussion -- whether through the SUA or third-party courts such as in Kenya -- raise numerous novel questions of international law. The most straightforward answer -- trial in the courts of the capturing nation -- is firmly rooted in customary and conventional international law. To date, however, this approach has not been treated as a serious option.