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The Applicability Of National Anti-Terrorism Laws To Piracy: A Comparative Analysis Of Japan, The Philippines, And Singapore

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MEMORANDUM FOR THE
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THE APPLICABILITY OF NATIONAL ANTI-TERRORISM LAWS TO PIRACY: A COMPARATIVE ANALYSIS OF JAPAN, THE PHILIPPINES, AND SINGAPORE

PUBLIC INTERNATIONAL LAW & POLICY GROUP (PILPG)

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I. Introduction

This paper is provided in support of the Public International Law and Policy Group (PILPG) High Level Piracy Working Group. A series of legal memos in the fall of 2011 are focused on the prosecution of piracy and the rules relating to private security contractors (PSC's) at sea.

Both pirates and terrorists fall in the gray zone between military combatants and civilians. This status raises difficult questions about the legality of conflicts between states and diffuse armed networks with international operations.[1] Owing to limitations in international laws against piracy, criminal prosecution of pirates must be based on municipal criminal law norms.[2] Hence, domestic criminal justice systems must be able to deal effectively both with alleged pirates and terrorists, particularly given the increasing scale and impact of their conduct.

Contemporary piracy is a problem because it threatens security, commerce, and political stability at the national and international level. Pirate attacks have been on the rise throughout the past decade. In 2011, the International Maritime Bureau (IMB) reported 421 attacks and 42 hijackings worldwide. Somali pirates were reportedly responsible for 231 attacks, 26 hijackings, 450 hostage takings, and 15 deaths.[3] Piracy poses staggering economic costs, estimated between $1 and $16 billion, which threaten international commerce. The private sector bears costs in the form of ransoms, piracy-related insurance premiums, deterrent equipment, and the

[1] Eugene Kontorovich, *"A Guantanamo on the Sea": The Difficulty of Prosecuting Pirates and Terrorists*, 98 Cal. L. Rev. 243, 245 (2010).
[2] Robin Geiss & Anna Petrig, Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden 152 (2011) (stating neither Article 15 of the Convention on the High Seas nor Article 101 UNCLOS contains substantive criminal provision on piracy).
[3] IMB Piracy Reporting Center, Piracy News and Figures, *available at* http://www.icc-ccs.org/piracy-reporting-centre/piracynewsafigures (Accessed on December 16, 2011).

re-routing of vessels away from piracy risk zones. National governments bear the costs of naval deployments in piracy hot zones, piracy prosecutions, and diplomatic efforts.[4]

By at least one measure, terrorism has also gained momentum in recent years. From 2006 to 2010, the number of attacks worldwide (excluding Iraq) increased each year, rising from an annual rate of approximately 7,763 to 8,916. The number of deaths resulting from these attacks increased each year from 2006 to 2009, reaching 11,656 deaths. This number declined to 9,822 in 2010.[5] In 2011, it was reported that for the second consecutive year, the largest number of reported attacks occurred in South Asia and the Near East, with more than 75 percent of the world's attacks and deaths occurring in these regions.[6]

II. Background

A. Piracy and Terrorism

One of the issues critical to dealing with piracy as a threat to global security is the distinction between pirates and maritime terrorists. In general, piracy and terrorism are regarded as two distinct activities, though each has been difficult to universally define. The main distinctions are thought to be the following:

Piracy is unlawful depredation at sea involving the use or threat of violence.[7] It is a crime carried out to achieve an economic goal, that is, immediate financial gain. Terrorism is based mainly on political purposes beyond the immediate act of attacking a target.[8] It involves

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[4] Kate Richards Memo at 10.
[5] National Counterterrorism Center, 2010 Report on Terrorism 36 (2010) (These figures can explain only part of the seriousness of the terrorism threat facing a country or region; for example, attack targets may be military or civilian, and may or may not result in loss of life. Also, counting attacks involves various methodologies and limitations (e.g., under-reported attacks)).
[6] *South Asia faces high terror threat: US report,* Indo-Asian News Service, Aug. 19, 2011.
[7] Martin N. Murphy, Small Boats, Weak States, Dirty Money: Piracy and Maritime Terrorism in the Modern World 7 (2009).
[8] Mark J. Valencia, *The Politics of Anti-Piracy and Anti-Terrorism Responses in Southeast Asia, in* Piracy, Maritime Terrorism and Securing the Malacca Straits 87 (Graham G. Ong-Webb ed., 2006).

the public and systematic use of abnormally high levels of violence against combatants and non-combatants to provoke fear and impose unacceptable costs through loss of life, property, or prestige. Maritime terrorism is terrorism at sea, on inland water, or against places touched by water such as ports.[9] Yet another category has been defined as "political piracy," or piracy carried out for the purpose of generating funds for a political, ideological, or religious struggle.[10] The distinction between political piracy and "ordinary" piracy is complicated by the fact ideological pretexts can disguise what is really a profit-oriented motive.[11]

It is often difficult in practice to separate these phenomena. For example, in the Niger Delta, rebels engaged in piracy justify it by citing political goals such as pushing the government to equitably distribute profits from the oil industry.[12] In 2004, a Filipino terrorist group bombed the ferry *Superferry 14*, in what was until that time the deadliest attack on any passenger vessel. Although the attack marked the group's return to politically motivated activity after a long period of criminal activity, it was reportedly mounted to extort money from the ferry owners.[13] In 2011, lawmakers in the Somali parliament successfully blocked a bill allowing for the prosecution and detention of pirates in a local tribunal. They argued the pirates were protecting national waters from foreign vessels "plundering [the country's] fish and other marine resources."[14]

Piracy committed for "private ends," as defined by UNCLOS, would not encompass crimes driven by these motivations. For that and other reasons, the validity and utility of the distinction between political and financial objectives have been seriously questioned by some

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[9] Murphy, *supra* note 7, at 185.
[10] Stefan E. Amirell, *Political Piracy and Maritime Terrorism: A Comparison between the Straits of Malacca and the Southern Philippines, in* Piracy, Maritime Terrorism and Securing the Malacca Straits 53 (Graham G. Ong-Webb ed., 2006).
[11] *Id*.
[12] Joseph M. Isanga, *Countering Persistent Contemporary Sea Piracy: Expanding Jurisdictional Regimes*, 59 Am. U. L. Rev. 1267, 1283, 1313 (2010).
[13] Murphy, supra note 7, at 337, 340-341.
[14] Somalia anti-piracy law: MPs block law banning 'heroes', BBC News, Jan. 20, 2011.

commentators.[15] The following section summarizes current arguments concerning whether pirates and maritime terrorists ought to be distinguished for purposes of law enforcement. It then discusses the consequences currently associated with this distinction.

One of the principal arguments that pirates and maritime terrorists should not be distinguished by definition is that their activities involve the same criminal behavior. That is, they share essentially the same *actus reus* (actions) and *mens rea* (purpose or mental state).

i. *Actus reus*

The general view among scholars is there is currently no "nexus" between acts of piracy and terrorism. In this context, "nexus" refers to a relationship characterized by collusion or subcontracting between pirates and terrorists. Specifically, commentators have expressed doubt that pirates train terrorists on how to conduct maritime attacks;[16] that terrorists would subcontract out missions to maritime crime gangs; or that pirates and terrorists would otherwise carry out joint attacks.[17]

Nonetheless, this viewpoint does not diminish the argument that pirates and terrorists engage in essentially the same criminal conduct. Acts of piracy and terrorism can demonstrate common features and thus pose similar threats to maritime safety. In a sense, it is futile to restrict the definition of piracy to commercially motivated acts when acts motivated by terrorist or political causes have substantially the same impact.[18] Specifically, both pirates and terrorists

[15] *See, e.g.,* Milena Sterio, *Fighting Piracy in Somalia (and Elsewhere)*, 33 Fordham Int'l L.J. 372, 400-401 (arguing pirates should be treated as terrorists to ensure more effective prosecution).
[16] Murphy, *supra* note 7, at 380.
[17] Peter Chalk, The Maritime Dimension of International Security: Terrorism, Piracy, and Challenges for the United States 53 (2008); *But see* Milena Sterio, *The Somali Piracy Problem: A Global Puzzle Necessitating a Global Solution*, 59 Am. U. L. Rev. 1449, 1458-1461 (2010) (noting pirates have smuggled weapons and delivered them to terrorist groups and financially contributed to them).
[18] Isanga, *supra* note 12, *at* 1286.

may (1) threaten all states by attacking many states indiscriminately;[19] and (2) carry out attacks involving a high level of violence[20] for which generally no state can be held responsible.[21]

This is not to argue all acts of piracy necessarily converge with terrorism. Piracy encompasses a wide spectrum of criminal behavior ranging from in-port pilferage, to hit and run attacks, to temporary and long term seizure, and at the "high end," permanent theft of the ship. This spectrum corresponds to an escalating scale of risk and return. As the risk and potential return increase, so does the threat posed by pirates in their degree of violence and level of organization.[22]

Organized piracy, at the "high end" of the spectrum, has the most potential to overlap with maritime terrorism and to pose a threat to global security in general.[23] These pirates, like terrorists, use such tactics as ship seizures and hijackings. Organization and significant capital are required to seize moving ships. Pirates need boats, grappling hooks, arms, training, enough people to control the crew, and potentially costly inside information on vessel cargos.[24] Organized piracy often results in theft of millions of dollars of cargo, kidnappings, and murder.[25] As of 2011, the trend in pirate attacks was toward increasing levels of organization and violence.[26]

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[19] Malvina Halberstam, Terrorism on the High Seas: the Achille Lauro, Piracy, and the IMO Convention on Maritime Safety, 82 Am. J. Int'l L. 269, 288 (1988)
[20] Murphy, supra note 7, at 183-184; Amirell, *supra* note 10, at 63
[21] Halberstam, *supra* note 19, at 288.
[22] Valencia, supra note 8, at 86.
[23] *See* Brian Fort, *Transnational Threats and the Maritime Domain*, *in* Piracy, Maritime Terrorism and Securing the Malacca Straits 28 (Graham G. Ong-Webb ed., 2006); Adam J. Young & Mark J. Valencia, *Conflation of Piracy and Terrorism in Southeast Asia: Rectitude and Utility*, Contemporary Southeast Asia, vol. 25, no. 2 (2003); Murphy, supra note 7, at 409.
[24] Valencia, supra note 8, at 86.
[25] Fort, *supra* note 23, at 28.
[26] *See, e.g.*, Avril Ormsby, *Piracy attacks bigger, bolder, more violent – report*, Reuters News, July 14, 2011; Jessica Hume, *Thick with thieves: Journalist Jay Bahadur gets a Somali pirate's view of life on the high seas*, National Post (Canada) (July 23, 2011).

Pirates and terrorists are also more likely to cooperate to the extent similar factors encourage and sustain both types of operations. As a result of such similarities, their activities and operating areas at sea can overlap or become more likely to overlap in the future.[27]

First, piracy and terrorism are fostered by broadly similar circumstances. These can include poor economic conditions; political instability and corruption; favorable geographical conditions, and ineffective law enforcement.[28]

Second, highly organized pirates and terrorists are involved in or connected to international organized crime.[29] Through such activities, they either cooperate on varying levels or simply have a common interest in amassing and laundering money.[30] Money laundering critically enables both groups. Broadly speaking, organized criminal activity is motivated by simple profit. Criminals, particularly those involved in drug trafficking, must move and obscure the origins of immense volumes of cash. Terrorist groups amass money as a means to an end, and maintaining a terrorist network is an expensive undertaking. They need to be able to distribute large amounts of money in a clandestine and efficient manner to sustain and expand a network of small cells.[31]

Financial motive, a common feature of most criminal operations, is the principal reason criminal and terrorist groups have been known to cooperate.[32] Terrorist groups have turned increasingly to criminal enterprises as a source of funding due to various pressures. These include reduced state sponsorship following the Cold War and successful efforts of the global

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[27] Murphy, *supra* note 7, at 380.
[28] *Id*. at 28; Young & Valencia *supra* note 23, at 276.
[29] Fort, *supra* note 23, at 28; Murphy, supra note 7, at 409.
[30] Fort, *supra* note 23, at 25; John Rollins & Liana S. Wyler, International Terrorism and Transnational Crime: Security Threats, U.S. Policy, and Considerations for Congress 5-13 (Congressional Research Service 2010).
[31] Fort, *supra* note 23, at 28.
[32] Graham G. Ong-Webb, *Southeast Asian Piracy: Research and Developments, in* Piracy, Maritime Terrorism and Securing the Malacca Straits xxi (Graham G. Ong-Webb, ed. 2006)(paraphrasing Fort, *supra* note 23).

war on terror to trace, disrupt, and freeze terrorist funds.[33] Criminal groups may have both financial and ideological motives for becoming involved with terrorists. Some younger and more loosely organized criminal groups have become ideologically radicalized and actively pursue illicit operations that generate lucrative profits while furthering terrorists' goals.[34]

Interactions between criminals and terrorists vary widely in nature and scale.[35] One proposed framework posits the relationship between terrorism and crime can take the form of cooperation, convergence, or transformation.[36] Cooperation covers a range of mutually beneficial arrangements, such as provision of arms, and exchange of skills, intelligence and other specific services. Convergence includes partnerships to exploit criminal opportunities for mutual benefit without losing either group identity. Transformation may include terrorist groups who have developed in-house criminal capabilities, or a terrorist or criminal group that transforms into or is co-opted by the other, forming a "hybrid" enterprise.[37]

In the case of Al-Shabaab, a terrorist group which spearheads a violent insurgency against the transitional Somali government, the link with criminal groups such as pirates is unclear. The U.S. State Department finds that "While there is no clear nexus [between piracy and] terrorism, such a link remains possible." On the other hand, some analysts believe there is such a relationship. Reportedly, pirates provide ransoms and other profits from piracy to Al-Shabaab activities on shore or in exchange for training and weapons from the group. The pirates

[33] Murphy, *supra* note 7, at 391-392.
[34] Rollins & Wyler, supra note 30, at 6.
[35] Myriad group and organizational variables determine these features of the relationship: differing group motivations, objectives and challenges; and strategic consideration of an organization's sustainability and growth in the short and long term. *Id*. at 13.
[36] Murphy, *supra* note 7, at 393.
[37] *Id*.; Rollins & Wyler, *supra* note 30, at 14.

also help traffic weapons and people to an Al-Shabaab-controlled port.[38] There are also reports of Somali pirates paying "docking fees" and "taxes" to al-Shabaab.[39]

ii. *Mens rea*

Behavior aside, the primary distinction between piracy and terrorism centers on the nature of the motivations behind these phenomena. The utility and validity of the distinction between private versus political ends has been the subject of fierce scholarly debates, which are summarized below.

The distinction based on private/political motive has been criticized in either of two principal ways: it is impractical and it is historically inaccurate.

Arguments that mutually exclusive categories do not reflect the realities of modern piracy range from acknowledging "gray areas" to finding the distinction does not in fact exist. Commentators have noted the line between piracy and terrorism blurs in certain situations, such as when pirates "rob or arrest a ship and crew for a ransom as a fundraiser scheme to fund their political activities."[40] Others find it is often impossible to separate the private from the political.[41] That is, "in a complex world where material gains are often intermingled with political objectives, such hairsplitting distinctions" may only hinder efforts to suppress piracy.[42]

It is also argued the terms "pirate" and "terrorist" are social constructions created by governments and societies, not the perpetrators themselves. In the case of modern piracy, the perceived distinction is based on extraneous assumptions about what is meant by "private" and "political." For example, one can argue terrorism is largely carried out for private ends by a

[38] Rollins & Wyler, *supra* note 30, at 30.
[39] Financial Action Task Force, Organised Maritime Piracy and Related Kidnapping for Ransom 9 (2011).
[40] H.E. José Luis Jesus, *Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects*, The International Journal of Marine and Coastal Law, vol. 18, no 3 (2003).
[41] Murphy, *supra* note 7, at 14.
[42] Isanga, *supra* note 12, at 1286.

group of individuals, since their political ideology is not shared by the majority of the public domain.[43] The view the pirate-terrorist distinction is socially constructed ensures such distinction is weakened to the extent the assumptions underlying it prove false.

Finally, even if distinctions are credibly made, that fact alone does not necessarily justify their acceptance, since the "rigidity [of pirate/terrorist distinctions] fails to contribute to the demands of new strategies, which require a reconceptualization of the status quo."[44]

Another line of argument criticizing the distinction is that to the extent the language "private ends" is thought to exclude all politically motivated acts, such conception is historically inaccurate. This view is based on examination of the original intent of drafters of international piracy laws or agreements, such as the Harvard Draft Convention and 1958 Geneva Convention on the High Seas. Commentators find evidence the drafters' intent was not to exclude from the definition of piracy all political activity, but to exclude only state-connected actions. These included actual state actions, state-sponsored piracy, or piracy by revolutionary governments targeting a particular state.[45] Outside of such actions, neither pirates nor terrorists may claim a "political exemption" from piracy laws.[46] Today, dealing with pirates and terrorists involves conflicts not between states, but between state and non-state actors, "where non-state actors are either as powerful or more powerful than some states." In this context, defining piracy to exclude all political activity is unsustainable.[47]

Despite these considerations, it can be argued the distinction, although difficult in practice, remains valid and useful on a theoretical level. A motive element could promote a

[43] Ong-Webb, *supra* note 32, at xiv.
[44] *Id*.
[45] Halberstam, *supra* note 19, at 290; D.R. Burgess, The World for Ransom: Piracy is Terrorism, Terrorism is Piracy 145 (2010).
[46] Burgess, *supra* note 45, at 166-167.
[47] Isanga, *supra* note 12, at 1283.

more finely calibrated legal response to specific types of socially unacceptable behavior.[48] Thus, a society could more accurately target reprehensible infringements of important values, whether they are social, ethical, or political. There may also be a powerful symbolic value in condemning the motivation behind an act apart from condemning the criminal act itself.[49]

Other commentators support this position. Using a motive-based distinction would allow countries to identify the main characteristics of the different threats posed by maritime crime and terrorism and develop appropriate responses. The fact such distinctions may be very fine in practice "makes it all the more important to identify the most fundamental motives behind the specific piratical activity in order to identify and deploy the most efficient counter-measures."[50] Similarly, others observe that although the circumstances allowing piracy and terrorism to develop are similar, the root causes are different. Long term solutions aimed at eliminating these causes require a focus on what has created the threat as well as its symptoms.[51] Since motivations are linked to root causes, they remain an important source of information in combating piracy and terrorism.

Ultimately, commentators generally seem to support the following principles: (1) the distinction may be difficult to implement in practical terms to satisfy the immediate needs of law enforcement, (2) nonetheless, the distinction is useful in crafting effective, long term solutions to piracy and terrorism.

The pirate-terrorist distinction may have a significant impact on a tribunal's ability to prosecute pirates. UNCLOS, which codifies international customary law, defines piracy as an act of violence or depredation "committed for private ends." The plain language of this

[48] Ben Saul, Defining Terrorism in International Law 41 (2008).
[49] *Id*.
[50] Amirell, *supra* note 10, at 53.
[51] Valencia, *supra* note 8, at 88-89, 98.

definition excludes any non-pecuniary motive from the definition of piracy. However, as noted above, the relationship of piracy to other forms of international crime grows increasingly complex and ill-suited to mutually exclusive categories.

Based on the weaknesses of the current legal regime, some commentators argue erasing the distinction between private and political motive would allow more effective prosecution of pirates.[52] Conceivably, suspected pirates and terrorists could take advantage of the limited jurisdiction of special tribunals and claim motives over which courts lack jurisdiction. If a tribunal is limited to the UNCLOS definition of piracy, it would lack jurisdiction over pirate attacks committed for non-pecuniary purposes. Although the suspect could be transferred to court with jurisdiction over terrorism charges, the efficacy of the piracy tribunal would be undermined. Similarly, a terrorist suspect might claim to have commercial rather than political purposes to circumvent anti-terrorism laws. Such possibilities highlight the disadvantage of requiring motive as an element of an offense. Motives can be difficult to prove, particularly when they are disingenuous.

Given the controversy and import of the pirate-terrorist distinction, a review of how some countries approach the respective security threats of these actors is instructive. The following analysis explores the extent to which acts of piracy may be covered by existing national anti-terror legislation. It will examine laws criminalizing acts of terrorism, terrorism financing, and hostage taking. With each of these laws, the task will be to determine the breadth of offenses and motives contemplated by the law.

[52] Sterio, *supra* note 15, at 400-401 (arguing pirates could be more effectively prosecuted if treated as terrorists); Tina Garmon, *International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11th*, 27 Tul. Mar. L.J. 275 (2002) (stating "reconciliation between conceptions of piracy and terrorism would enable more effective prevention and punishment of such acts)

III. How certain States deal with piracy and terrorism

A. Japan

Given Japan's scarce natural resources and export-oriented economy, its economic survival relies on constant access to sea routes.[53] In contrast, terrorism is not a galvanizing issue domestically. This is partly due to the fact the country has not experienced terrorism on an extensive scale.[54] Nonetheless, since 9/11 Japan has greatly expanded the role of its military in counter-terrorism efforts overseas to demonstrate its cooperation with the international community.[55] This has put a strain on its Article 9 of the Japanese Constitution, which limits the country engaging in the use of force.

The following examines how piracy is defined with respect to terrorism in anti-terror and terrorism financing laws.

Anti-Terrorism Law

Japan's definition of an act of piracy is in fact more robust than its conception of a terrorist act. First, whereas the Act on Punishment of and Measures against Acts of Piracy ("Act") specifically defines acts of piracy, the Anti-Terrorism Special Measures Law does not define terrorism or what constitutes a terrorist act. Second, the Japanese government's interpretation and application of the Act's private ends requirement is sufficiently flexible to cover at least some acts of maritime terrorism. Thus, Japan's piracy law likely covers acts of maritime terrorism in ways the Special Measures Law cannot.

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[53] Alessio Patalano, *Japan: Britain of the Far East?*, The Diplomat, Jan. 18, 2011, http://the-diplomat.com/2011/01/18/japan-britain-of-the-far-east/.
[54] Mark Fenwick, *Japan's Response to Terrorism Post-9/11*, in Global Anti-Terrorism Law and Policy 327, 333 (2005); Matthew H. James, *Keeping the Peace-British, Israeli, and Japanese Legislative Responses to Terrorism*, 15 Dick. J. Int'l L. 405, 439 (1997) .
[55] Fenwick, *supra* note 54, at 335.

Japan enumerates specific acts of piracy, some of which may encompass acts of maritime terrorism.[56] For example, the Act proscribes seizing a ship using assault, intimidation or other means. It also covers kidnapping, making ransom demands, and breaking into or damaging a ship for the purpose of committing piracy. Finally, as in the UNCLOS, the definition includes attempts to commit piracy (operating ship and approaching close-by another for purpose of committing act of piracy, and preparing weapons and operating ship for purpose of committing act of piracy).[57]

In contrast, the Special Measures Law does not define a terrorist act,[58] nor does Japan have an offense of terrorism per se. Rather, Japan relies on the normal provisions of its criminal code to prosecute the underlying offenses of such acts, such as kidnapping and homicide.[59] Japan also has a several special laws which provide harsher penalties for specific terrorist acts which it has historically experienced. These laws ban such tactics as the use of sarin gas and Molotov cocktails.[60]

The Act is potentially limited in its coverage of terrorist acts by its requirement that an act of piracy must be committed for private ends. Yet, the Act at least appears to avoid such limitation to a greater extent than UNCLOS, given the Japanese government's flexible interpretation of "private ends" and its commitment to case by case determination of what constitutes piracy.

The language of "private ends" appears primarily aimed to exclude acts authorized by a state or quasi-state. That is, the private ends requirement "mean[s]…acts such as those with

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[56] By contrast, UNCLOS somewhat vaguely describes piratical conduct as "any illegal acts of violence, detention or…depredation", which raises the question of what exactly constitutes an "illegal" act.
[57] Act on Punishment of and Measures against Acts of Piracy, 2009, Article 2.
[58] Anti-Terrorism Special Measures Law, 2001.
[59] James Beckman, Comparative Legal Approaches to Homeland Security and Anti-Terrorism 143 (2007).
[60] *Id*.

national authorization or those based upon intention of a foreign country are excluded from the acts of piracy in the Act."[61] This position is consistent with that of commentators who argue UNCLOS' similar private ends requirement was intended not to exclude all politically motivated acts, but rather to exclude only acts sponsored by the state.[62] Assuming Japan adheres to this view, its law is applicable to at least some acts of maritime terrorism.

Also, the Japanese government has acknowledged the possibility the Act covers situations in which dual motives, both piratical and terrorist, are involved. The government has explained that whether an act constitutes piracy under the Act is determined by the private ends requirement, which does not exclude cases in which the act is also one of terrorism…"the fact that actors are terrorists does not make a difference in that judgment."[63] It should be noted the government has presented conflicting positions as to whether obstructive acts by the *Sea Shepherd* against the Japanese scientific research whaling fleet constitute acts of piracy.[64] However, the concerns underlying this ambivalence do not arise in the forms of piracy about which this paper is concerned.

Whether an act of piracy meets the "private ends" requirement will be determined based on a case by case consideration of the context of the situation. Specifically, the Japanese government states "it is necessary to consider the precedents of acts of piracy, appearance of the vessel concerned, irregular movements of the crew and other surrounding circumstances."[65] This

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[61] Atsuko Kanehara, *Japanese Legal Regime Combating Piracy: The Act on Punishment of and Measures Against Acts of Piracy*, *in* Japanese Yearbook of International Law 478 (Akira Kotera, ed. 2010) (quoting Yasuo Oba, Secretary General of the Headquarters for Ocean Policy of the Cabinet Secretariat, JYIL).
[62] *See, e.g.,* Halberstam, *supra* note 19, at 290 (stating "for private ends" reasonably interpreted as intending to exclude only acts by unrecognized insurgents and acts by state vessels for which that state assumed responsibility)
[63] Kanehara, *supra* note 61, at 480.
[64] The debate centers on whether criminalization of piracy ought to take into account political concerns (i.e., some international support for the protests against whaling), or simply look to the nature of the protesting activities. *Id*. at 478-479.
[65] *Id*. at 478.

flexibility further increases the possibility the law will cover acts of piracy which also have terrorist motives.

Although the Act's definition of piracy preserves some of the limitations of UNCLOS, such as the "high seas" and "two-ship" requirements, it covers a broader array of pirate activity than does the anti-terrorism law.

Law Prohibiting the Financing of Terrorism

Japan has ratified the Convention on Terrorism Financing, but does not have legislation specifically implementing that treaty. Instead, it relies on the Act on Punishment of Financing to Offenses of Public Intimidation ("Financing Act"), which criminalizes the provision and collection of funds to facilitate specified terrorist acts, or "offenses of public intimidation."[66]

The Financing Act defines an offense of public intimidation as a specified offense carried out with the requisite intent. Relevant specified offenses include murder, infliction of serious bodily injury, and the taking of a hostage. They also include specific acts against ships: endangering a ship's navigation; seizing or exercising control over a ship in navigation by force, threat thereof, or any other form of intimidation that cannot be resisted; and destroying or causing serious damage to a ship by detonation of an explosive, arson, or any other means.

Any such offense must be executed with intent to intimidate:

- the public;
- national or local governments;
- foreign national or local governments; or
- international organizations established pursuant to treaties or other international agreements

[66] Act on Punishment of Financing to Offenses of Public Intimidation, 2002, Article 1.

The Financing Act criminalizes the provision or collection of funds by:

- any person who knowingly provides or attempts to provide funds for the purpose of facilitating commission of an offense of public intimidation[67]
- any person who intends or attempts to commit an offense of public intimidation and for that purpose induces, requests, or collects funds by any means.[68]

The law defines the requisite intent behind the terrorist act sought to be financed in relatively broad terms. The intent is simply defined as "intimidation," which does not appear to require an extreme or widespread public impact or the ultimate purpose of coercion. Further, it avoids descriptive elements requiring a particular category of purpose, such as private or political. By including domestic and foreign governments, the public in general, and international organizations formed by treaty it is more likely to punish indiscriminate violence.

Of course, the Financing Act's ability to capture such acts as political piracy also hinges on its regulation of the assets and intent to finance terrorist activities. In this regard, the extent to which the law may be applied to acts of political piracy is limited.

Although the law criminalizes attempts to provide or collect funds for terrorist purposes, these provisions are subject to limitations in their applicability to acts of piracy that aid terrorist purposes. A World Bank report notes Article 3 appears to criminalize the collection of funds for terrorist purposes only if undertaken or attempted by terrorists themselves. Fund collectors who are not terrorists (i.e., not proven to have intent to carry out a terrorist act) would not be covered by the offense unless it could be proven they provided or attempted to provide funds for terrorist purposes.[69] The law is thus susceptible to the possibility pirates who aid terrorist groups or

[67] Act on Punishment of Financing to Offenses of Public Intimidation, 2002, Article 2.
[68] Act on Punishment of Financing to Offenses of Public Intimidation, 2002, Article 3.
[69] World Bank, Mutual Evaluation Report of Japan (full report) 46 (2008).

activities can escape more serious punishment by claiming their motive was not to directly aid acts of terrorism.

The following examines the scope of jurisdiction for countering acts of piracy and terrorism in anti-terror and terrorism financing laws.

Anti-Terrorism Law

Japan's laws against piracy and against terrorism mark a significant departure from the country's earlier security laws by greatly expanding the role of Japan's military overseas. Both laws are similar in jurisdictional scope. Specifically, they apply to acts occurring (1) on the high seas, including the exclusive economic zone, (2) within foreign territories, with those countries' consent, and (3) in Japan's territorial and internal waters.

However, the Act provides greater coverage by authorizing vessels of the Japanese Coast Guard or Self Defense Forces to capture pirates on the high seas based on universal jurisdiction.[70] This allows Japan to capture pirates regardless of the nationality of pirate ships, pirates, or victims. The Special Measures Law does not provide for such jurisdiction. The anti-terror law further restricts its scope to "areas where combat is not taking place or not expected to take place."[71] Yet, the law does not define combat.

Overall, the Act could more readily be applied to acts of maritime terrorism based on its jurisdictional scope.

[70] Masataka Okano, *Is International Law Effective in the Fight Against Piracy?, in* Japanese Yearbook of International Law 199 (Akira Kotera, ed. 2010).
[71] Anti-Terrorism Special Measures Law, 2001, Section 3.

Law Prohibiting the Financing of Terrorism

The Financing Act specifically provides for jurisdiction over offenses committed outside Japan. It states "[t]he offenses as set forth in Articles 2 and 3 shall be dealt with according to the provisions of Articles 3 and 4-2 of the Penal Code Law No. 45 of 1907." [72]

Article 3 of the Penal Code applies to any Japanese national who commits one of a number of specified crimes outside the territory of Japan. These include rape, homicide, injury, unlawful detention, kidnapping, and robbery. Article 3 of the Financing Act punishes the financing of murder or bodily injury with the intent to intimidate the public, local or foreign governments, or organizations governed by treaty. Should Japanese nationals commit such crime outside the territory of Japan, they would be subject to Japan's jurisdiction.

Article 4-2 provides that if a crime observed by an international convention corresponds to a provision of the Criminal Code, Japan is obligated to punish anyone who commits the crime outside the country.[73] Since the Financing Act corresponds to the Convention, Japan must enforce the law against any citizen or foreigner, or local or foreign government who violates the law outside Japan. However, since the definition of the offense itself is limited with regard to pirates who aid terrorists, such broad jurisdiction may not improve enforcement.

[72] Act on Punishment of Financing to Offenses of Public Intimidation, 2002, Article 5

[73] *See* K. Itoh, *The 1987 Penal Code and Other Special Criminal Amendments Law: A Response to the Two UN Conventions Against International Terrorism*, 32 Jap. Ann. Int'l. 18 (1989), cited in Matthew H. James, *Keeping the Peace - British, Israeli, and Japanese Legislative Responses to Terrorism*, 15 Dick. J. Int'l L. 405, note 218 at 450 (1997).

B. Philippines

Prevailing economic difficulties have forced many Filipinos to resort to piracy and other criminal activities as an easy source of money.[74] The involvement of insurgent groups in pirate attacks has given this economic activity a political dimension.

Since the 1970's, the Moro Islamic Liberation Front (MILF) and Abu Sayyaf Group (ASG) have demanded the independence of predominantly Muslim parts of the Southern Philippines.[75] MILF and ASG engage in piracy, seaborne robberies, and extortion as regular sources of funds and income and even as a political tool.[76] The insurgent groups' use of the sea has rendered maritime piracy and terrorism indistinguishable (and interchangeable) in the region.[77]

MILF and ASG also have ongoing connections to broader, international causes. Both groups have received training (in skills such as bomb-making) and funding from terrorist organizations such as al-Qaeda and Jemaah Islamiyah (JI).[78]

The following examines how piracy is defined with respect to terrorism in anti-terror and terrorism financing laws.

Anti-Terrorism Law

The Human Security Act (HSA) of 2007 defines a terrorist act by listing a set of specific acts incorporated from other statutes and presidential decrees, and requires that these acts create

[74] Eduardo Santos, *Piracy and Armed Robbery against Ships in the Philippines*, *in* Piracy, Maritime Terrorism and Securing the Malacca Straits 56 (Graham G. Ong-Webb ed., 2006).
[75] Amirell, *supra* note 10, at 59-60.
[76] Santos, *supra* note 74, at 46.
[77] Murphy, *supra* note 7, at 337.
[78] *Id*. at 60, 327-335.

"a condition of widespread and extraordinary fear and panic among the populace, in order to coerce the government to give in to an unlawful demand."[79]

The law incorporates acts constituting piracy either under Article 122 (Piracy in General and Mutiny in the High Seas or in the Philippine Waters) or Presidential Decree No. 532 (Anti-piracy and Anti-highway Robbery Law of 1974).

Article 122 defines a pirate as any person who, on the high seas or in Philippine waters, attacks or seizes another vessel or seizes the whole or part of another vessel's cargo, its equipment, or passengers' personal belongings. Presidential Decree No. 532 provides the same definition but recognizes pirate attacks may be committed by passengers and specifies a pirate attack occurs "by means of violence against or intimidation of persons or force upon things." In *People of the Philippines v. Tulin*, the Supreme Court of the Philippines declared Decree 532 to be consistent with Article 122, noting the decree merely widened the coverage of Article 122 to include passengers.

The Philippines anti-terror law presents advantages and disadvantages in combating piracy and maritime terrorism. By explicitly incorporating piracy acts within the definition of terrorism, the law expands the options available to respond to the threat of piracy to the extent it resembles maritime terrorism. For example, the anti-terror law allows for seizure of financial assets of a person suspected of or charged with the crime of terrorism or conspiracy to commit terrorism.[80]

Nonetheless, the law is potentially limited in its coverage of maritime terrorism (carried out by pirates for terrorists, by terrorists themselves, or just organized piracy) in that it applies only to acts which have a significant domestic impact. First, it requires intent to coerce the

[79] Human Security Act, 2007, Section 3.
[80] Human Security Act, 2007, Sec. 39-40

government to submit a demand by affecting the "populace." The country's focus on localized activity may be a result of its unique experience with piracy and maritime terrorism. However, given MILF and ASG's links to international causes, restricting its definition of piracy in this way may not capture piracy attacks with broader objectives. Also, what is meant by an "unlawful" demand is not clear.

Second, a terrorist act must "[sow] and [create] a condition of widespread and extraordinary fear and panic among the populace."[81] This provision does not specify what portion of the populace must be affected. The high emotional impact required by the law suggests it contemplates a larger scale terrorist attack than the typical sea robberies on which insurgent groups rely to fund their activities. Philippine courts may interpret these requirements as demanding a particularly high degree of harm, danger or malice in determining whether a trigger offence has been committed. And, it is not yet clear how courts will mesh established and separate interpretations of the incorporated statutes with the terrorism law.[82]

Law Prohibiting the Financing of Terrorism

The Philippines has signed and ratified the International Convention for the Suppression of the Financing of Terrorism,[83] but has no implementing legislation for the treaty. Nonetheless, the country has similar legislation in the Anti-Money Laundering Act of 2001 (AMLA) and the HSA. AMLA prohibits transacting, or attempting to transact, the proceeds from an 'unlawful activity' and thereby creating the appearance the proceeds originated from legitimate sources. Like the HSA, AMLA explicitly incorporates other statutory crimes in defining what constitutes

[81] Human Security Act, 2007, Sec. 3
[82] T.M.A. Luey, *Defining "Terrorism" in South and East Asia*, 38 HKLJ 129, 178 (2008).
[83] UN Treaty Collection, online: UN <http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-11&chapter=18&lang=en>

"unlawful activity." Among these are piracy,[84] kidnapping for ransom,[85] hijacking (expressly including acts "perpetrated by terrorists against non-combatant persons"),[86] and robbery and extortion.[87]

AMLA presents advantages and disadvantages in combating piracy and maritime terrorism. On the one hand, by explicitly incorporating piracy as a predicate offense, the law publicly recognizes the link between piracy and money laundering activity, providing at least a symbolic condemnation of those ties.

On the other hand, its applicability to the money laundering aspect of piracy is likely to be limited give its overly restrictive definition of "transaction." A transaction is defined in Section 3 of the AMLA as "any act establishing any right or obligation or giving rise to any contractual or legal relationship between the parties thereto. It also includes any movement of funds by any means with a covered [i.e. reporting] institution."[88] The definition requires that some legal relationship be established between the perpetrator of money laundering and another party. Unlike most transfers of funds through the formal financial system, most cash transfers made by pirates would not establish an enforceable "transaction."[89] These requirements limit the law's applicability to the assets and dealings of pirates, who mostly receive ransoms in the form of bulk cash and most likely use non-formal remittance systems.[90]

The following examines the scope of jurisdiction for countering acts of piracy and terrorism in anti-terror and terrorism financing laws.

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[84] As defined by Presidential Decree No. 532
[85] As defined by Article 267 of the Revised Penal Code
[86] As defined by Republic Act No. 6235
[87] As prohibited by Articles 294, 295, 296, 299, 300, 301 and 302 of the Revised Penal Code
[88] Anti-Money Laundering Act of 2001, Sec. 3(h)
[89] World Bank, Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism, Republic of the Philippines 46-47 (2009).
[90] Financial Action Task Force, Organised Maritime Piracy and Related Kidnapping for Ransom (2011) (stating a nexus has been shown between piracy off the coast of Somalia and certain locales used for receipt, transit, and possible repository of ransom payments).

Anti-Terrorism Law

Although the geographic jurisdiction under the HSA is broad (the law applies outside as well as within state territory), the Act requires some nexus between the conduct and the state in order to prosecute. The HSA applies to any act occurring within the territory of the Philippines, specifically, "within [its] terrestrial domain, interior waters, maritime zone, and airspace."

However, conduct occurring outside such territory may be prosecuted only if it involves a Philippine ship, national, or the government. Each of these requirements is subject to further limitation. The crime must be committed on board a Philippine ship; against a Philippine national provided the person's citizenship or ethnicity was a factor in the crime; or directly against the Philippine government.

It would be difficult to apply the law to acts of piracy occurring outside Philippine territory. In those areas, the law appears to require attempts at piracy to occur on board a ship in order to prosecute such as a terrorist act. The law would not cover indiscriminate acts of violence against civilians. Even activity that is purported to be politically motivated may not be covered if committed to raise funds for terrorist activity and not "directly against the Philippine government."

Law Prohibiting the Financing of Terrorism

Because terrorism financing is not an independent offense, jurisdiction is based on the underlying offense giving rise to money laundering. This restriction limits the capacity of AMLA to enforce anti-terrorism financing laws against political piracy in two ways.

First, acquiring funds from a piracy attack committed in the service of terrorism is not punishable unless the attack itself qualifies as a terrorist act under the HSA. An offender cannot

be prosecuted for the mere act of collecting or providing funds with the intention that they be used in a terrorist act.

Second, although AMLA created a special commission to investigate money laundering related to unlawful activities, its authority is limited with regard to terrorist funding procured through piracy. The commission can investigate an individual in the absence of a predicate offense if transaction reports materially indicate any specified unlawful activity, suspicious transaction, money laundering activities and/or other AMLA-related violations.[91] However, this excludes transfers of assets that do not flow through formal financial institutions.

C. Singapore

Located along the Straits of Malacca, Singapore oversees a major chokepoint of world trade. Approximately 50,000 vessels passing annually carry between one-fifth and one-quarter of the world's sea trade through the Straits. This includes half of all oil shipments carried by sea. In addition to being at the center of global commerce, the Malacca Straits are one of the world's most vulnerable areas because of their high potential for political conflict.[92] Due to concern over the impact of such conflict on its economy, Singapore has enacted a comprehensive set of maritime security laws.

The following examines how piracy is defined with respect to terrorism in anti-terror and terrorism financing laws.

[91] World Bank, *supra* note 89, at 86.
[92] Hans-Dieter Evers & Solvay, The Strategic Importance of the Straits of Malacca for World Trade and Regional Development (2006).

Anti-Terrorism Law

The centerpiece of Singapore's anti-terrorism legislation is the Internal Security Act of 1960 (ISA).[93] However, Singapore has ratified and enacted legislation to implement SUA, which more directly applies to maritime crime. The country has not enacted legislation implementing the piracy provisions of UNCLOS. Thus, the following analysis will: (1) describe the coverage of the SUA-implementing legislation, the Maritime Offenses Act (MOA), using SUA as a reference point; and (2) compare MOA and the piracy provisions under the Singapore Penal Code.

Like SUA, MOA does not include a definition of terrorism, relying instead on a list of specific offenses;[94] nor does it require intent to be "political" or "private."

MOA establishes essentially the same offenses as SUA. In relevant part, these include: hijacking a ship by force or threats of any kind;[95] destroying, damaging, or committing an act of violence on board a ship so as to endanger its safe navigation; and threatening to do any such acts when such threat is likely to endanger the safe navigation of the ship. Unlike SUA, MOA requires only "unlawful" seizure of a ship, rather than "unlawful and intentional" seizure.

Like SUA, MOA creates a separate offense for acts of violence carried out in connection to the commission or attempted commission of the law's other specified offenses. MOA defines an "act of violence" as any act, whether committed in or outside of Singapore, that constitutes the offense of "murder, attempted murder, culpable homicide not amounting to murder, voluntarily causing grievous hurt, or voluntarily causing hurt by dangerous weapons or means"

[93] Michael Hor, Terrorism and the Criminal Law: Singapore's Solution, 2002 Sing. J. Legal Stud. 30 (2002).
[94] Maritime Offenses Act, 2003, Sec. 3-6.
[95] SUA states "force or threat thereof" whereas MOA allows for any kind of threat, not merely one involving force.

in Singapore.[96] An act of violence also incorporates offenses from other statutes, such as the Kidnapping Act[97] and Explosive Substances Act.[98]

Like SUA, the law also criminalizes attempts to commit offenses. Unlike SUA, it does not cover attempts to commit each specified offense (which also include damaging maritime facilities, planting explosives on ships, etc.) but rather only attempts to destroy, damage, or commit an act of violence on board a ship so as to endanger its safe navigation. On the other hand, it covers a broader range of intent to commit such acts. Whereas SUA provides for attempting, aiding, and abetting, MOA provides for "attempting or conspiring to commit an offense or aiding, abetting, counseling, procuring, or inciting the commission of the offense."

MOA's more limited coverage of attempts for certain offenses presents some practical challenges. For example, if a pirate vessel approaches a ship in a hijacking attempt, the ship would not have a legal right to forestall the attempt unless an act of violence was involved. But in at least some attacks, this may not occur until the pirates have arrived at the ship, by which time the attempt will have progressed to an actual attack. Also, it may not be clear what action pirates intend to take as they are approaching a ship, assuming they are detected in the first instance.

Overall, MOA provides much broader and more detailed coverage of violent and harmful acts at sea than Singapore's piracy laws. Acts of piracy are proscribed by two provisions in the Penal Code (Chap 224): Section 130B provides "[a] person commits piracy who does any act that by the law of nations is piracy." Section 130C defines more specifically what constitutes acts of piracy. These include:

[96] Maritime Offenses Act, 2003, Sec.
[97] Chap. 151, Sec. 3, 1961
[98] Chap. 100, Sec. 3 or 4, 1924

- Stealing a Singapore ship
- Stealing or without lawful authority throwing overboard, damaging, or destroying any part of the cargo, supplies, or fittings in a Singapore ship
- Doing or attempting to do a mutinous act on a Singapore ship
- Counseling or procuring a person to do any of the above acts

The definition of piracy is severely limited in its coverage of piracy offenses. First, defining piracy according to the law of nations creates a vague standard which is not specific enough to prosecute certain acts as piracy. Second, although a separate provision lists certain acts, these are not readily applicable to modern instances of piracy. For example, acts of "high-end" piracy and maritime terrorism are characterized by more serious and violent undertakings, such as hijackings, rather than petty thefts. Such cases do not technically involve "stealing" a ship, but rather constitute an offense broader than stealing. Mutiny in modern times is of even less relevance. Acts of violence to persons on board are not covered by any of the violent acts referenced in Sec. 130C. Third, the law requires a nexus between the state and the offense of piracy before it will prosecute piracy according to the law of nations. As long as a specified offense does not victimize a Singapore ship, it does not constitute piracy.

In sum, despite its limitations, Singapore's conception of maritime terrorism is much more comprehensive than its treatment of piracy. By implementing SUA, Singapore avoids categorical motives and simply looks to the nature of the criminal act.

Law Prohibiting the Financing of Terrorism

Singapore has several laws prohibiting terrorism financing. The principal regulation is the Terrorism (Suppression of Financing) Act (TSOFA),[99] which implements the International

[99] Terrorism (Suppression of Financing) Act, 2002

Convention for the Suppression of the Financing of Terrorism (Convention). Other regulations include two pieces of subsidiary legislation: the United Nations (Anti-Terrorism) Regulations 2001 and the Monetary Authority of Singapore Regulations (2002). The apparent overlapping provisions in the TSOFA, the UN Regulations, and the MAS Regulations, which provide for different penalties, have raised concerns the complicated legal framework could reduce the effectiveness of prosecutions.[100] Because TSOFA was adopted to comprehensively address money-laundering concerns, the following analysis will focus on that law.

Under the TSOFA, a terrorist act involves the use or threat of action intended (or reasonably regarded as intending) to: (1) intimidate the public; or (2) influence or compel a government or international organization from doing or refraining from doing any act.

Aside from intent, such action must meet two requirements. First, it must be an offense listed in the schedule (analogous to the Convention's annex). Since the schedule includes the Hostage Taking Act and the MOA,[101] it would be possible to apply the TSOFA to acts of financing a ship hijacking, taking a ship's crew hostage, and maritime terrorism. Second, the action must involve serious violence against a person, serious damage to property, or another specified effect.

Compared with the Convention, the TSOFA covers a broader range of financing offenses. The TSOFA applies broadly to property and how it is handled for purposes of terrorism. The definition of "property" encompasses "assets of every kind, whether tangible or intangible, movable or immovable, however acquired,"[102] which includes both legitimate and illegitimate

[100] World bank report, 41
[101] However, TSOFA does not include all the treaties listed in the Convention annex. Offenses covered by omitted treaties are thus subject to a higher purpose requirement, since unlike the Convention, these acts are not terrorism *per se*, but rather must be committed with the requisite intent.
[102] TSOFA, Article 2.

assets.[103] Also, whereas the Convention prohibits the provision or collection of funds, Singapore has criminalized four financing offenses: (1) provision or collection of property for terrorist acts; (2) provision of property and/or services for terrorist purposes; (3) use and possession of property for terrorist purposes; and (4) dealing in property owned or controlled by terrorists. The broad definition of property makes it applicable to illicit dealings by pirates and maritime terrorists. And depending on the circumstances, any of the above offenses might result from an act of piracy undertaken to further terrorist activity.

Additionally, the law is broad with respect to the scope of involvement required to trigger an offense. Ancillary offenses to each of the four main offenses include conspiracy to commit, inciting another to commit, attempting to commit, aiding, abetting, counseling, or procuring the commission of the offense. Terrorist financing offenses do not require that funds are actually used to carry out or attempt a terrorist act, or that they are linked to a specific terrorist act. Finally, a "terrorist act" includes the threat to carry out such act.

The TSOFA also creates a more flexible intent requirement than the Convention in two significant ways. First, a terrorist act includes actions which "influence," rather than "compel," a third party to do or not do an act. Such an allowance broadens the intent which triggers a terrorist offense, as it simply requires a political motivation and not necessarily an intention to remove or coerce an elected government. Second, financing a terrorist act may occur without intent or knowledge regarding a terrorist act, but a *reasonable belief* that property would be used to commit such act. The law allows for these mental states to be inferred from objective factual circumstances.[104]

[103] World Bank report Singapore
[104] World bank report, 40

The following examines the scope of jurisdiction for countering acts of piracy and terrorism in anti-terror and terrorism financing laws under Singapore law.

Anti-Terrorism Law

The MOA applies to offenses whether they are "committed in Singapore or elsewhere, whatever the nationality or citizenship of the person committing the act and whatever the state in which the ship is registered." This provision essentially affords Singapore universal jurisdiction over MOA offenses.

Jurisdiction under the piracy laws is generally more restricted. Under the Supreme Court of Judicature Act,[105] the Singapore High Court has criminal jurisdiction over any offense committed (1) on board a ship or aircraft registered in Singapore; (2) by a Singapore citizen on the high seas or on any aircraft; or (3) by any person on the high seas where the offence is piracy by the law of nations. The laws do not apply to acts committed on ships not flying a Singapore flag or by citizens of countries other than Singapore. Since pirate attacks often occur indiscriminately, this restriction is a considerable limitation.

Further, universal jurisdiction over piracy by the law of nations is likely not applicable in many modern instances of piracy. Because the "law of nations" language does not precisely define what conduct constitutes the offense of piracy, it is a standard which would be difficult to implement at sea and in court. For example, some pirates may go unpunished if a court concludes their acts do not fall within the conduct punished by the law of nations.

Law Prohibiting the Financing of Terrorism

Like the MOA, the TSOFA has adopted universal jurisdiction over terrorism financing offenses. If any person outside of Singapore commits an act or omission which would constitute

[105] SCJA, Chap 322, Sec. 15(1)

an offense under TSOFA, he or she can be prosecuted in Singapore regardless of the location of the terrorist, terrorist organization, or terrorist act.[106]

IV. Note on anti-hostage taking laws

Kidnappings for ransom constitute an area prone to overlap between pirates and maritime terrorists.[107] Hostage taking for ransom, whether committed by pirates or terrorists, represents an extremely lucrative source of income critical to both groups. And ransoms are rising exponentially, having increased from an average of $150,000 per vessel/crew in 2005 to an estimated $5.2 million per vessel/crew in 2010. Payments on the higher end exceeded $9 million. Almost all ransom payments are in the form of bulk cash air-dropped onto a hijacked vessel.[108]

Both the Philippines and Singapore have ratified the International Convention against the Taking of Hostages, however, only Singapore has legislation implementing the treaty.

As a point of reference, the Convention's definition of "hostage-taking" contains three elements: (1) detaining and threatening to kill, injure, or continue to detain a hostage; (2) in order to compel a third party to do or abstain from doing any act; (3) as a condition for releasing the hostage. The Convention criminalizes any person who attempts or acts as an accomplice of a person attempting to take a hostage. It is explicitly incorporated as a terrorist offense in the International Convention for the Suppression of the Financing of Terrorism, but not SUA.

The relevant national laws of the Philippines and Singapore define hostage-taking more broadly than the Convention. Article 267 of the Philippine Revised Penal Code requires only the

[106] TSOFA, Sec. 34
[107] Geiss, *supra* note 2, at 43
[108] Financial Action Task Force, Organised Maritime Piracy and Related Kidnapping for Ransom (2011).

first element (with a minimum detention period of five days) to establish the offense independently.[109] The law additionally requires the second element to establish a terrorist offense under the HSA.[110] Unlike the Convention, Article 267 criminalizes the act of detention itself, regardless of the demands of hostage takers. Singapore's implementing legislation requires only the first and second elements of the Convention. The country also has domestic legislation known as the Kidnapping Act,[111] which simply requires the intent to hold a person for ransom.

Like the Convention, both the Philippine law and Singapore's implementing law punish attempts and accomplices.

As in the Convention, both countries have incorporated their hostage-taking laws into other anti-terror legislation. The Philippines has incorporated Article 267 into the HSA and AMLA. Singapore incorporates its domestic law into the Maritime Offenses Act, and incorporates its implementing law into the TSOFA.

On the other hand, the Philippines provides a much more restricted scope of jurisdiction than does Singapore. Its law provides for jurisdiction over acts committed by a foreign national in Philippine territory and committed by either a foreign or Philippine national outside the territory when they occur on board a Philippine ship. The Philippines does not recognize jurisdiction over kidnappings outside Philippine territory, even when a Philippine national is held hostage. The country only recognizes jurisdiction outside its territory when the act is deemed to be a terrorist act under the HSA. Given the multinational character of many pirate attacks, this required nexus between the offense and the state is potentially severely limiting.

[109] Article 267, Revised Penal Code, Title 9 Crimes against Personal Liberty and Security
[110] HSA, Sec. 3
[111] Chap. 151, 1961

In comparison, Singapore asserts jurisdiction over "every person who, outside Singapore, commits an act that, if committed in Singapore, would constitute a hostage-taking offence."

This comparison teaches that both an offense and jurisdiction over the offense must be defined broadly to be readily applicable to acts of piracy.

V. Conclusion

Differences among the countries examined here indicate the pirate-terrorist distinction is to a notable extent one of social construction. That is, a country's conception of what constitutes piracy vis-à-vis terrorism is a product of its unique economic and political context.

Japan takes a far more robust approach to combating piracy than terrorism. Whereas it enumerates specific acts constituting piracy, its law against terrorist attacks does not define a terrorist act, but defines a limited role of military engagement. This may be attributed to several reasons: a perception that Islamic terrorism is not a Japanese problem, at least not within Japan; a painful history of state-sponsored terror has made it politically difficult to enact and enforce counter-terrorism laws; and the constitutional implications of broadening the role of its military abroad.[112] Although Japan preserves some of the limitations of UNCLOS,[113] its broader approach to piracy is telling. The threat of piracy profoundly affects Japan's economic interests, while the specter of terrorism, generally speaking, presents more of a political than security threat. These "push and pull" factors help explain why Japan defines piracy much more clearly and comprehensively than it does terrorism, at least with respect to terrorist attacks (as opposed to terrorist financing).

[112] Fenwick, supra note 54, at 333-334.
[113] The "high seas," "two-vessel," and "private ends" requirements

In contrast, Singapore approaches attacks at sea as terrorism, implementing SUA. What the country defines as piracy appears to be a far lesser perceived threat, given the piracy law's outdated and vague provisions. Singapore and its Southeast Asian neighbors are familiar with regional terrorist groups such as ASG, JI, and Gerakan Aceh Merdeka (GAM). Several groups in the region have used maritime terrorism to fund their activities or further their agendas. Singapore's concern that its continued support of Western nations, particularly the United States, has made it a target for terrorist groups has led top officials to draw a connection between terrorism and piracy. The country fears a piracy-terrorism nexus threatening its port and shipping facilities. It considers international trade necessary to the health of its economy and disruption of the flow of trade through the region as a direct threat to its well-being as a state.[114] These factors help to explain why Singapore approaches attacks at sea as a terrorist, rather than piracy, threat.

Japan and Singapore's economic interests and domestic or regional experience with terrorism shape their conception of piracy and terrorism as maritime security threats. It is possible that in some circumstances, depending on the flag flown by the vessel apprehending combatants, the combatants may be viewed as either pirates or terrorists.

This example illustrates that, at the stage of apprehension, the pirate-terrorist distinction may be of little use. Indeed, such distinction may even hinder a state's ability to prosecute pirates.

A critical issue is how to balance a State's ability to apprehend and detain suspects with its ability to address the root causes of the crime. One possible compromise is to be able to charge a suspect under both piracy and terrorism laws and allow the court to decide the issue.

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[114] Carrie R. Woolley, *Piracy and Sovereign Rights: Addressing Piracy in the Straits of Malacca Without Degrading the Sovereign Rights of Indonesia and Malaysia*, 8 Santa Clara J. Int'l L. 447, 456-459 (2010).

To create such flexibility, states should ensure their respective laws for piracy and terrorism have sufficiently broad definition *and* jurisdiction requirements. For example, although Japan's laws prohibiting acts of piracy and terrorism have similar jurisdiction requirements, it would not be able to charge piracy suspects under both laws, since it does not create a specified offense of terrorism.

Another option is to adopt an approach similar to the Philippines by incorporating existing piracy offenses into terrorism legislation. However, this approach may involve uncertainty about how established precedent will integrate with new legal elements. The State must also take care to define the terrorist offense with its practical application to incorporated offenses in mind. A State can also adopt an incorporation approach toward offenses common to both pirates and terrorists, such as hostage taking for ransoms. These should be stand-alone offenses but also incorporated in related laws. For example, both the Philippines and Singapore incorporate the offense of hostage-taking in their anti-terrorism and terrorism financing laws.

Finally, States with separate laws proscribing piracy and terrorism should ensure these laws reflect operational realities of both pirates and terrorists and complex linkages among various criminal actors. For example, the terrorism financing laws of Japan and the Philippines do not encompass the different types of assets and transactions that criminals and terrorists use outside of formal financial institutions. Current efforts to combat transnational threats often overlook the connection between terrorism and international criminal activity, particularly the use of funds from these activities to finance terrorism.[115]

In sum, States can improve their ability to prosecute those who engage in depredations at sea by ensuring their domestic laws adequately reflect the ever-evolving motives and means of a wide range of criminal actors.

[115] Fort, *supra* note 23, at 25.