

# CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL

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**VOLUME 24****FALL 1993****NUMBER 1**

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## THE CASE OF THE *CASTLE JOHN*, OR GREENBEARD THE PIRATE?: ENVIRONMENTALISM, PIRACY AND THE DEVELOPMENT OF INTERNATIONAL LAW

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“How can anyone call me a terrorist? . . . Terrorism means causing injuries to innocent people. There were no injuries at Reykjavik. We’ve never injured anyone.

We saved the lives of 200 whales by sinking those ships. To call me a terrorist means you are placing private property above the sanctity of life.”<sup>1</sup>

In the wake of the 1992 Glasgow meeting of the International Whaling Commission (IWC), the withdrawal of Iceland from this regulatory structure, and the threatened formation of a North Atlantic Marine Mammal Commission,<sup>2</sup> it is particularly appropriate to consider the *unacceptable* face of marine environmentalism. The sixteenth century was rife with stories of the

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1. Graham Rockingham, *Man hunts whalers, not whales*, available in LEXIS, Nexis Library, UPI, November 15, 1986.

2. Toby Moore, *10-year ban on whaling collapses*, THE DAILY TELEGRAPH, June 30, 1992, at 2, available in LEXIS, Nexis Library. This body is to include Norway, the Faroes, Greenland and Iceland and “could assume powers to grant licenses and quotas for the commercial exploitation of whales. . . .” *Id.*

Barbarossa (or “Redbeard”) brothers, renegade Algerian corsairs,<sup>3</sup> the eighteenth century with the exploits of the indomitable Blackbeard.<sup>4</sup> Will the twentieth century see the zenith of a *new* form of piracy and the advent of “Greenbeard” the pirate?

### PIRACY AND ITS PROBLEMS: AN INTRODUCTION

In considering the interface between piracy and environmentalism, we may see the development of international law at work. The crime of piracy is as old as the Code of Hammurabi,<sup>5</sup> while classical sources are rife with mentions of the practice.<sup>6</sup> It is of almost universal occurrence, spanning the centuries and many cultures; “[t]here were Dalmatian pirates, Viking raiders, Japanese *Wako* (or Chinese *Wok’ou*), sea rovers who operated in the Indonesian archipelago, and Arab pirates in the Red Sea and Persian Gulf.”<sup>7</sup> Along with this “universality,” however, came competing definitions of the crime. Individuals such as Francis Drake, Henry Morgan, John Paul Jones, Jean Lafitte, Thomas Hogg, and Henrique Galvao—each a patriot in his way—have all been termed “pirates” by others.<sup>8</sup> While each country has its *own municipal* laws as to what constitutes piracy, even *international* law on the subject has not been static. Not only do cases, treaties, and the opinions of commentators play an important role in this process, but so does the *practice* of states. This is not to suggest that the evolution of the concept of piracy is necessarily *manifest* or that reasonable men and women, much less

3. See annotation, *Barbarossa*, in 3 ENCYCLOPEDIA AMERICANA 220 (1991); *Barbarossa* in 1 ENCYCLOPEDIA BRITANNICA 886 (15th ed. 1992).

4. See J.K.L. [John Knox Laughton], *Teach or Thatch, Edward*, in 19 SIR LESLIE STEPHEN AND SIR SIDNEY LEE, THE DICTIONARY OF NATIONAL BIOGRAPHY 481-82 (reprint ed. 1973); DANIEL DEFOE, A GENERAL HISTORY OF THE ROBBERIES AND MURDERS OF THE MOST NOTORIOUS PYRATES [sic] 15-66 (1972) (noting that “Captain Teach, assumed the cognomen of Black-beard, from that large quantity of hair which, like a frightful meteor, covered his whole face and frightened America more than any comet that has appeared there a long time . . .” and that “[t]his beard was black, which he suffered to grow of an extravagant length; as to breadth, it came up to his eyes. He was accustomed to twist it with ribbons, in small tails, after the manner of our Ramillies wigs, and turn them about his ears” *Id.* at 57).

5. Samuel Pyeatt Menefee, *Scourges of the Sea: Piracy and Violent Maritime Crime*, 1 MARITIME POLICY REPORTS 13 (1989) [hereinafter Menefee (1989a)] (circa 1948-1903 B.C.).

6. *Id.*, noting:

King Minos of Crete is traditionally believed to have swept the sea of pirates, Herodotus and other Greeks report the kidnappings engineered by Phoenician seafarers, while Odysseus himself was queried on his travels as to whether he was trader or pirate. Julius Caesar hunted down and executed the mariners who had seized and held him to ransom, and Pompey the Great exterminated many of their fellows.

(Footnotes omitted). See also RALPH T. WARD, PIRATES IN HISTORY 4-44 (1974); PHILIP GOSSE, THE HISTORY OF PIRACY 301-08 (1946); HENRY A. ORMEROD, PIRACY IN THE ANCIENT WORLD: AN ESSAY IN MEDITERRANEAN HISTORY (1924).

7. Menefee (1989a), *supra* note 5, at 13 (footnote omitted). See also WARD, *supra* note 6, at 63-64, 77-88, 160-73; GOSSE, *supra* note 6, at 88-90, 254-90, 323-26.

8. See PHILIP GOSSE, THE PIRATES’ WHO’S WHO: GIVING PARTICULARS OF THE LIVES & DEATHS OF THE PIRATES & BUCCANEERS 117-18, 222-28, 175-76, 187-88 (1968) (covering Drake, Morgan, Jones, and Lafitte, respectively); Samuel Pyeatt Menefee, *Piracy, Terrorism, and the Insurgent Passenger: A Historical and Legal Perspective*, in MARITIME TERRORISM AND INTERNATIONAL LAW 43, at 47-50, 56-58 (Natalino Ronzitti ed., 1990) [hereinafter Menefee (1990a)] (covering Hogg and Galvao, respectively).

attorneys, may not differ in what is or is not to be included. The same evidence viewed in different contexts may lead to strikingly different conclusions. Take, for example, the idea of treating the *slave trade* as a form of piracy. This position has been advocated by individuals in both the United States and the United Kingdom; statutes and diplomatic evidence might suggest that slavers are pirates, but most commentators feel that the case for this has not been made.<sup>9</sup> Similarly, in the interwar years, the attempt to analogize certain attacks on vessels, particularly by submarines, to “acts of piracy” in the Washington Declaration of 1922 and the Nyon Agreement of 1937 “have subsequently been roundly criticized as unjustifiable and inappropriate extensions of the concept.”<sup>10</sup> The idea of “air piracy” may prove to be an extension of the basic concept or perhaps only another inappropriate usage.<sup>11</sup>

One problem of the developing international law of piracy concerns the significance of the definition found in the 1958 Geneva Convention on the High Seas and repeated, almost verbatim, in the 1982 Convention on the Law of the Sea. This was that piracy consists of

1. Any illegal acts of violence, detention [the 1982 Convention reads “acts of violence or detention”] or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
  - a. on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
  - b. against a ship, aircraft, person or property in a place outside the jurisdiction of any State;
2. Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
3. Any act of inciting or of intentionally facilitating an act described . . . [above].<sup>12</sup>

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9. See Samuel Pyeatt Menefee, *The New “Jamaica Discipline”: Problems with Piracy, Maritime Terrorism and the 1982 Convention on the Law of the Sea*, 6 CONN. J. INT’L L. 127, 134-36 (1990) [hereinafter Menefee (1990b)]. See also C. JOHN COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA* 416, 420 (1962); ALFRED P. RUBIN, *THE LAW OF PIRACY* 147-50 (1988).

10. Menefee (1989a), *supra* note 5, at 14. See also P.W. Bimie, *Piracy Past, Present and Future*, in *PIRACY AT SEA* 131, 137 (Eric Ellen ed., 1989); Raoul Genet, *The Charge of Piracy in the Spanish Civil War* in 32 AM. J. INT’L L. 253-54 (1938); Comment, *The Nyon Arrangements: Piracy by Treaty?*, 19 BR. YBK. INT’L L. 208 (1938).

11. See Menefee (1989a), *supra* note 5, at 14; EDWARD MCWHINNEY, *AERIAL PIRACY AND INTERNATIONAL LAW* (2d ed., 1987); NANCY DOUGLAS JOYNER, *AERIAL HIJACKING AS AN INTERNATIONAL CRIME* (1974).

12. Convention on the High Seas, April 29, 1958, art. 15, 13 U.S.T. 2312; 450 U.N.T.S. 82. See also Convention on the Law of the Sea, art. 101, *opened for signature* Dec. 10, 1982, U.N. DOC. A.CONF. 62/122, *reprinted in* UNITED NATIONS, OFFICIAL TEXT OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA WITH ANNEXES INDEX (1983).

Two general sets of problems occur in relation to this definition, which, for ease of treatment, may be termed micro and macro. The former deal with issues of *textual interpretation*, while the latter consider wider problems beyond the four corners of the treaty documents. The micro problems have been discussed elsewhere at length;<sup>13</sup> here, it is only necessary to summarize the five major issues they encompass.

First, there is the question of whether “illegal acts” are to be determined under *national* or *international* law. The former could produce discrepancies in enforcement, while the latter might restrict the statute’s coverage.<sup>14</sup> Second, the conventions require that the relevant acts be committed for “private ends.” While this is nowhere defined, it seems clear that if the term excludes political seizures, most, if not all, acts of maritime terrorism might be left untouched. At the same time, it is clear the exception could swallow the rule, particularly if the actors are allowed to characterize their own actions—the possibility that acts may have both public and private motives is not considered.<sup>15</sup> To give but one example, Burley’s Case involved the Confederate hijack of a northern steamer, the *Philo Parsons*, on Lake Erie. In the subsequent trial, it was found that Burley’s robbery of a \$20 note from the ship’s clerk “constituted an act against a non-combatant involving a violation of neutral territory and was, therefore, not a lawful act of war.”<sup>16</sup> The court further declined to give effect to the Confederate commission which not only had been issued to Burley *before* the seizure, but had been endorsed “*ex post facto* by Jefferson Davis himself, ‘declaring that the enterprise . . . was a belligerent expedition ordered and undertaken under the authority of the Confederate government and for which that government assumed responsibility. . . .’”<sup>17</sup> “Private ends” comes from the traditional conceptions of piracy involving either actions for *gain* or those committed with *animo furandi*—a willful desire to inflict injury on others. Nonprivate ends are not specifically defined, but it is accepted that these included actions undertaken under color of a lawful privateering commission issued by a recognized power.<sup>18</sup> In the 19th century, the major issues would have been the *legitimacy* of the power granting the commission and whether the actions considered went beyond its terms.<sup>19</sup> Today, with the demise of privateering,

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13. See Menefee (1990a), *supra* note 9, at 141-48.

14. See Menefee (1990b), *supra* note 9, at 142.

15. See Menefee (1990b), *supra* note 9, at 142-43; Menefee (1990a), *supra* note 8, at 60.

16. Menefee (1990a), *supra* note 8, at 53. See also JUDITH BASSETT MOORE, EXTRADITION AND INTERSTATE RENDITION 319-20 (n.p. 1891).

17. Menefee (1990a), *supra* note 8, at 53; see also MOORE, *supra* note 16, at 320.

18. See Act of Apr. 30, 1790, 89, 1 Stat. 112 (An Act for the punishment of certain crimes against the United States) (which considers piracy by a U.S. citizen under color of a foreign commission); Act of Mar. 3, 1847, 9 Stat. 175 (An Act to provide for the Punishment of Piracy in certain Cases) (dealing with privateers acting against the United States *contrary* to the provisions of a treaty between the United States and their country of nationality); Samuel Pyeatt Menefee, “*Yo Heave Ho!*”: *Updating America’s Piracy Laws*, 21 CAL. W. INT’L L.J. 151, at 153-54, 158, 163-65 and notes therein (1990) [hereinafter Menefee (1990c)].

19. See generally RUBIN, *supra* note 9, at 154-62.

the problem of demonstrating a non-private end is compounded, not only by the exercise of maritime terrorism by national liberation and separatist groups, but also by environmentally-motivated actions which are not easily categorized.<sup>20</sup>

A third micro problem has variously been termed the “internal seizure” issue or the “one ship/two ships controversy.”<sup>21</sup> Under the convention, a piratical act on the high seas must be directed “against *another* ship or aircraft, or against persons or property on board such ship or aircraft. . . .”<sup>22</sup> Many have argued that this inserts a requirement that two ships be involved for any action to qualify as piracy.<sup>23</sup> The counter-response is that the definition also classifies piracy as an act “against a ship, aircraft, persons or property in a place outside the jurisdiction of any State.”<sup>24</sup> As the high seas would obviously qualify as being outside national jurisdiction, this would be held to support the view that acts on a *single* ship might still qualify.<sup>25</sup> Unfortunately, the twist in clause structure, emphasizing the *place* in the first instance, and the *target* in the second, leaves it unclear which was to receive primary emphasis.<sup>26</sup>

Fourth, we have *further* problems with jurisdiction. What happens when a state asserts excessive jurisdictional claims—like a 200-mile territorial sea—which are not recognized by others?<sup>27</sup> Another question is the effect of exclusive economic zones allowed under the later, 1982 Convention. “[T]he redefinition of high seas . . . to exclude economic zones and archipelagic waters substantially reduced theoretical jurisdiction over piracy as defined in international law.”<sup>28</sup> Article 58 of the new Convention allows application of the high seas piracy articles (among others) “insofar as they are not incompatible” with the Exclusive Economic Zone section (Part 5), but this leaves open the possibility that a *different* type of regime might be held to apply to the area.<sup>29</sup> The meanings of “voluntary participations” “inciting” or “intent . . .” are a fifth micro problem area; it is unclear in the

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20. See Menefee (1990c), *supra* note 18, at 163-64; Menefee (1990b), *supra* note 9, at 142-43.

21. See Menefee (1990b), *supra* note 9, at 144. See also Menefee (1990a), *supra* note 8, at 60.

22. See *supra* text at note 12 (italics added).

23. See 2 D.P. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 970-73 (1989); RUBIN, *supra* note 9, at 322-23.

24. See *supra* note 12.

25. See Menefee (1990b), *supra* note 9, at 144; Menefee (1990a), *supra* note 8, at 60; Samuel Pyeatt Menefee, *The Achille Lauro and Similar Incidents as Piracy: Two Arguments*, in PIRACY AT SEA, *supra* note 10, at 179 [hereinafter Menefee (1989b)].

26. See Menefee (1990a), *supra* note 8, at 68 n.199.

27. See Menefee (1990b), *supra* note 9, at 145.

28. Menefee, *Forward* [sic], in International Maritime Bureau, A Third Report into the Incidence of Piracy and Armed Robbery From Merchant Ships [ii] (Oct. 1985). See also Menefee (1990b), *supra* note 9, at 145-46; Menefee (1989a), *supra* note 5, at 15; Birnie, *supra* note 10, at 141.

29. See Menefee (1990b), *supra* note 9, at 146; Thomas A. Clingan Jr., *The Law of Piracy*, in PIRACY AT SEA, *supra* note 10, at 168-70.

absence of textual definitions whether external international definitions or municipal ones are to control.<sup>30</sup>

Having considered these five subdivisions, we may turn to the macro problems of the Convention definitions, which are to be found *outside* the given text of the document. The major question is to what extent the 1958 Convention and its 1982 successor provide *exclusive* definitions of "piracy" in international law. As the '82 Convention is not yet in force, states which have ratified or acceded are only obliged to act in a way *not inconsistent* with the terms of the treaty,<sup>31</sup> and the problem of course would not arise under the 1958 Convention on the High Seas for any state *not* a party.<sup>32</sup> As the United States *has* ratified the 1958 Convention,<sup>33</sup> it must be asked whether the Convention, which allegedly codified the law on the subject, should therefore be considered the *exclusive* definition of *piracy jure gentium*, piracy under international law.

No less an authority than D.P. O'Connell, author of *The International Law of the Sea*, has noted that "the question is open whether it [Article 15] is comprehensive so as to preclude reliance upon customary international . . . law . . ." <sup>34</sup> and again "[p]iracy remains a difficult legal concept, partly because of doubts as to the inclusiveness of the definition in Article 15 of the Geneva Convention of the High Seas. . . ." <sup>35</sup> If the 1958 Convention does *not* encapsulate the full definition of piracy, prior (and subsequent) incidents may be reviewed to see what *other* matters may be included, and how these augment the treaty definition. This process has previously been followed to analyze a series of political passenger attacks on vessels, including the *Cagliari* takeover of 1857,<sup>36</sup> several Civil War seizures (the *Joseph L.*

30. See Menefee (1990b), *supra* note 9, at 147; Menefee (1989a), *supra*, note 5, at 15; Birnie, *supra* note 10, at 140.

31. According to art. 308 of the convention, the treaty will enter into force twelve months after the deposit of the sixtieth instrument of ratification or accession. This occurred on November 16, 1993. Parties to date include Angola, Antigua and Barbada, Barbados, Bahamas, Bahrain, Belize, Botswana, Brazil, Cameroon, Cape Verde, Costa Rica, Côte d'Ivoire, Cuba, Cyprus, Djibouti, Dominica, Egypt, Fiji, Gambia, Ghana, Grenada, Guinea, Guinea-Bissau, Guyana, Honduras, Iceland, Indonesia, Iraq, Jamaica, Kenya, Kuwait, Mali, Malta, Marshall Islands, Mexico, Micronesia (Federated States of), Namibia, Nigeria, Oman, Paraguay, Philippines, Saint Lucia, Saint Kitts and Nevis, Sao Tome and Principe, Senegal, Seychelles, Somalia, Sudan, Togo, Trinidad and Tobago, Tunisia, Uganda, United Republic of Tanzania, Uruguay, Yemen, Yugoslavia, Zaire, Zambia, and Zimbabwe.

32. See Convention on the High Seas, *supra* note 12. Parties include Afghanistan, Albania, Australia, Austria, Belgium, Bulgaria, Burkina Faso, Byelorussia, Cambodia, Central African Republic, Costa Rica, Cyprus, Czechoslovakia, Denmark, Dominican Republic, Fiji, Finland, Germany, Guatemala, Haiti, Hungary, Indonesia, Israel, Italy, Jamaica, Japan, Kenya, Lesotho, Madagascar, Malawi, Malaysia, Mauritius, Mexico, Mongolia, Nepal, Netherlands, Nigeria, Poland, Portugal, Romania, Senegal, Sierra Leone, Solomon Islands, South Africa, Spain, Swaziland, Switzerland, Thailand, Tonga, Trinidad & Tobago, Uganda, Ukraine, U.S.S.R., United Kingdom, United States, Venezuela, Yugoslavia. See TREATY AFFAIRS STAFF, OFFICE OF THE LEGAL ADVISOR, DEPARTMENT OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 1992, at 350. Notably absent are Iran and most of the Arab world.

33. On April 12, 1961. See INDEX OF MULTILATERAL TREATIES ON THE LAW OF THE SEA 135 (P. De Cesari et al. eds., 1985).

34. 2 O'CONNELL, *supra* note 23, at 970. See also Menefee (1990a), *supra* note 8, at 61; Menefee (1989b), *supra* note 25, at 180.

35. 2 O'CONNELL, *supra* note 23, at 966. See also Menefee (1990a), *supra* note 8, at 61.

36. See Menefee (1990a), *supra* note 8, at 43-47.

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*Gerrity [In Re Tivnan]*,<sup>37</sup> the *Salvador* and *Guatemala*,<sup>38</sup> the *Chesapeake*,<sup>39</sup> the *Philo Parsons [Burley's Case]*,<sup>40</sup> and the *Roanoke*<sup>41</sup>), the takeover of the Spanish steamer *Montezuma* by Cuban insurgents in 1876,<sup>42</sup> the seizure of the *S. S. Falke* in 1929 by Venezuelan revolutionaries<sup>43</sup> and the commandeering of the Portuguese cruise liner *Santa Maria* in 1961,<sup>44</sup> which, taken together, offer support for treating the *Achille Lauro* hijackers as pirates under international law.<sup>45</sup> A newer problem, however, is that of maritime environmental attacks. This will be considered in general, with the case of the *Castle John* being reviewed in particular as a potential example of "environmental piracy."

#### ENVIRONMENTALLY-INSPIRED MARITIME ATTACKS: SOME EXAMPLES

It is somewhat disconcerting for most of us to view "environmentalism" and "extremist violence" as intersecting sets. While marine environmental terrorism *has* been discussed elsewhere,<sup>46</sup> a review of several examples should indicate that a potential problem *does* exist. Because of its general notoriety, and the probability that events at the 1992 IWC meeting have made further incidents more likely,<sup>47</sup> the so-called "Whale Wars" will be considered first. In 1978, the F.B.I. raided the home of James Rose, a Miami diver and arrested him for the interstate transportation of explosives. They subsequently recovered a two-man (yellow) submarine, several pictures of the Soviet and Japanese whaling fleet in Talcahuano, Chile, three hundred pounds of plastic explosives, one hundred and fifty electronic blasting caps,

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37. *Id.* at 47-49.

38. *Id.* at 49-50.

39. *Id.* at 51-52.

40. *Id.* at 52-53.

41. *Id.* at 53-54.

42. *Id.* at 54-55.

43. *Id.* at 55-56.

44. *Id.* at 56-58.

45. *See id.* at 59 ("Almost without exception, the issue of piracy has been raised in connection with vessel seizure by pirates.")

46. *See* Samuel Pyeatt Menefee, "'Green Terror' at Sea: The Unrecognized Threat of Marine Ecological Terrorism" (unpublished manuscript on file with California Western International Law Journal.) [hereinafter Menefee (ms)]; Samuel Pyeatt Menefee, *Maritime Terror in Europe and the Mediterranean*, 12 MAR. POL. 143, at 146 (1988) [hereinafter Menefee (1988)]; Samuel Pyeatt Menefee, "Any Port in a Storm": *The Worldwide Threat to Port Security*, in PORTS AT RISK 248, 277-78 (Eric F. Ellen ed., 1993) [hereinafter Menefee (1993)].

47. Since the actual delivery of this paper to the University of San Diego's Oxford Institute on International and Comparative Law at Magdalen College, Oxford on July 7, 1992, this prediction has been justified by the December, 1992 sinking of the Norwegian whaler *Nybraena* for which the Sea Shepherd group has claimed responsibility. *See* Kate Williams, *Noted environmentalist explains radical techniques*, The Cavalier Daily (Univ. of Virginia, Charlottesville, Va.) at 7 (Mar. 29, 1993); Charles Moore, *Sea Shepherd founder calls for care, activism*, The University Journal (Univ. of Virginia, Charlottesville, Va.) 1, at 5 (Mar. 30, 1993).

and 3,000 feet of shaped charges.<sup>48</sup> The plot—which incidentally appears to have been based on a 1976 novel, *Leviathan*—was to damage the ships and thus help to prevent commercial whaling.<sup>49</sup> “According to individuals with direct knowledge of the details, ‘the money came from an international environment organization involved in the bitter fight over commercial whaling. But these sources could not name the group.’”<sup>50</sup>

In June 1979, Paul Watson, skipper of the *Sea Shepherd* (and founder of the Sea Shepherd Conservation Society) deliberately rammed the whaler *Sierra* outside Oporto harbor. Although Watson claims that, “I did not want to hurt anyone . . . because I oppose causing injury to any living thing,”<sup>51</sup> he has also written that his intention was to cut the whaler in half.<sup>52</sup> Subsequently he noted, “We rammed her good and proper . . . I hope the owners of all other . . . whaling ships will take note. I’ll do the same to them.”<sup>53</sup> In December 1979, the *Ibsa Uno* and *Ibsa Tres*, two Spanish whalers, were slightly damaged by magnetic mines in Corcobian Bay.<sup>54</sup> On February 5/6th of the same year, the *Sierra*, undergoing repairs in Lisbon, was sunk by a magnetic mine.<sup>55</sup> On April 27, it was the turn of the *Ibsa Uno* and the *Ibsa Dos* in Marin Harbor near Vigo, Spain.<sup>56</sup> While crew members of *Sea Shepherd* claimed to have set at least one of the mines, other sources state that “[t]he bombers were professionals with military training and military explosives”—basically mercenaries.<sup>57</sup> In 1980, and again in 1981, a posted reward of \$25,000 was offered to anyone who could sink one, of the “pirate whalers” still operating in the Atlantic or off South America.<sup>58</sup> In November, 1986, the icelandic whalers *Hvalur 6* and *Hvalur 7* were sunk in

48. See Menefee (ms), *supra* note 46; Tom Mathews & Ron Sympson, *A Whale of a Tale*, NEWSWEEK, Sept. 18, 1978, at 35; Bill Richards, *Whale War*, WASH. POST, Sept. 5, 1978, at A-1; Menefee (1993), *supra* note 46, at 277.

49. See JOHN GORDON DAVIS, *LEVIATHAN* (1976); Menefee (ms), *supra* note 46; Samuel Pyeatt Menefee, “‘Terror by the Book’: Fiction’s Influence on Maritime Violence,” (unpublished manuscript on file with California Western International Law Journal.) (Paper delivered to I.C.C.-International Maritime Bureau, Barking, Essex, England, May 8, 1989).

50. Menefee (ms), *supra* note 46; Richards, *supra* note 48, at A-1. See also Menefee (1993), *supra* note 46, at 277.

51. Menefee (ms), *supra* note 46; PAUL WATSON, *SEA SHEPHERD: MY FIGHT FOR WHALES AND SEALS 230-31* (1982) (as told to Warren Rogers).

52. See Menefee (ms), *supra* note 46; WATSON, *supra* note 51, at 231-33.

53. Menefee (ms), *supra* note 46; *A Pirate Whaler Meets Its Match*, NEWSWEEK, July 31, 1979, at 60.

54. See Menefee (ms), *supra* note 46; DAVID DAY, *THE WHALE WAR 62-63* (1987); Menefee (1988), *supra* note 46, at 146; Menefee (1993), *supra* note 46, at 277.

55. See Menefee (ms), *supra* note 46; WATSON, *supra* note 51, at 247-50; DAY, *supra* note 54, at 57-58; Menefee (1988), *supra* note 46, at 146; Menefee (1993), *supra* note 46, at 277.

56. See Menefee (ms), *supra* note 46; DAY, *supra* note 54, at 63-64; WATSON, *supra* note 51, at 250; Menefee (1988), *supra* note 46; Menefee (1993), *supra* note 46, at 277.

57. See Philip Shebecoff, *Rusty Trawler to Lead Battle Against Whale Hunters*, N.Y. TIMES, May 31, 1981, § 1, pt. 1, at 1; DAY, *supra* note 54, at 63-64; Menefee (1988), *supra* note 46, at 146; Menefee (1993), *supra*, note 46, at 277.

58. See Menefee (ms), *supra* note 46; WATSON, *supra* note 51, at 250; DAY, *supra* note 54, at 61; Paul Hodge, *Champion of Whales Charts New Voyage*, WASH. POST, May 28, 1981, at 6.



Reykjavik Harbor when their sea cocks were opened.<sup>59</sup> Subsequently, other threats have been issued, and most recently, a Norwegian whaler was scuttled in December of 1992.<sup>60</sup> This summation presents the highlights, but certainly not the totality of whaling-related attack.

A similar series of less-spectacular incidents is related to the maritime transportation and dumping of toxic wastes. In early 1980, for example, Greenpeace defied a British high court order forbidding the *Rainbow Warrior* from interfering with the unloading of nuclear fuel to be reprocessed from the *Pacific Fisher*.<sup>61</sup> In May of the same year, Greenpeace staged a three-day blockade of ships carrying Bayer AG waste, preventing this material from being dumped at sea.<sup>62</sup> One month later a group of environmental protesters, at least one of whom was subsequently a member of the European terrorist group, the Fighting Communist Cells (CCC), boarded the *Andrea Smits* (which carried nuclear waste) and smashed \$700,000 worth of radio and navigation equipment. Several protesters were hurt in the melée and there were eight arrests.<sup>63</sup> In July of 1981, activists interfered with dumping from the *Gem* at a site off Land's End in Cornwall.<sup>64</sup> Action by Greenpeace in August of 1982 resulted in members storming the *Gem* with grappling hooks and chaining themselves to dumping platforms.

As a result, the Dutch nuclear authorities and the UKAEA resorted to the courts. An injunction was upheld in British courts preventing Greenpeace Netherlands from interfering with the dump, but it was acknowledged to be difficult to enforce. So in September the UKAEA went to the Netherlands and gained a partial victory in the courts there. The court recognized Greenpeace's right to carry out protests at the dump site but not its right to make the dumping impossible or to board the dumping Vessel. A fine of £2,000 would be levied for each day the organization failed to comply.<sup>65</sup>

Although the Dutch ships were accompanied to the limit of Belgian coastal waters by a naval vessel, harassment by Greenpeace activists continued. Volunteers again boarded a dumping vessel—the *Rijnborg*—and chained themselves to the dumping cranes.<sup>66</sup> As a result, these individuals were arrested and locked up by the ship's captain on the authority of a Dutch

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59. See Menefee (ms), *supra* note 46; DAY, *supra* note 55, at 132-33; Charles Fenyveski, *A militant turn for conservationists*, 101 U.S. NEWS & WORLD REPORT, Nov. 24, 1986, at 72; Menefee (1988), *supra* note 46, at 146; Menefee, (1993), *supra* note 46, at 277.

60. See Menefee (ms), *supra* note 46; Menefee (1988), *supra* note 46, at 146; *supra* note 47.

61. See Menefee (ms), *supra* note 46; MICHAEL BROWN & JOHN MAY, THE GREENPEACE STORY 63 (2d ed. 1991).

62. See BROWN & MAY, *supra* note 61, at 69.

63. See Menefee (ms); Paul Taylor, *Police on Guerrillas' Trail, Fear Attack During Pope Trip*, May 14, 1985, available in LEXIS, Nexis Library; Gary Yerkey, *On nuclear wastes and international waters*, CHRISTIAN SCIENCE MONITOR, Apr. 15, 1981 (Midwestern ed.), at 16, available in LEXIS, Nexis Library); Menefee (1988), *supra* note 46, at 146.

64. See BROWN & MAY, *supra* note 61, at 76-77.

65. See BROWN & MAY, *supra* note 61, at 83. See also Menefee (ms), *supra* note 46.

66. See Menefee (ms), *supra* note 46; BROWN & MAY, *supra* note 61, at 83.

public prosecutor. An attorney representing the Belgian and Dutch Central Energy Agencies referred to the protest as “an act of modern piracy” and said that he would continue to seek an injunction against further interference.<sup>67</sup> The disruption of navigation—by chaining individuals this time to an anchor chain—was also used against a dumping barge in the United States.<sup>68</sup>

In 1984, two Greenpeace members were arrested after stowing away aboard the *Clydebank*, carrying a cargo of uranium oxides from Australia,<sup>69</sup> while halfway around the world a barge involved in dumping gypsum sludge off LeHavre was “sprayed with paint, occupied and immobilized. . . .”<sup>70</sup> Similar actions have continued, with ships being occupied individuals chaining themselves aboard ships, and other forms of disruption being practiced.<sup>71</sup> Many of these are chronicled in the book *The Greenpeace Story*, by Michael Brown and John May.<sup>72</sup> One incident, which is largely ignored, will form the basis of subsequent consideration.

CASTLE JOHN AND NEDERLANDSE STICHTING SIRIUS V.  
NV MABVECO AND NV PARFIN

The entire factual background given for this case in *The Greenpeace Story*—the legal action itself is not mentioned—is as follows. On April 26, 1985,

Greenpeace began an extensive campaign against NL Chemicals of Ghent and Bayer of Antwerp, who were freshly licensed by the Belgian government to dump titanium dioxide waste in the North Sea. Greenpeace activists boarded the NL Chemicals dump ship *Falco* on two occasions, and the *Sirius* was later used to blockade the passage of Bayer’s dump ship the *Wadsy Tanker* in Antwerp harbour. As a result, Bayer claimed damages against Greenpeace, and the Belgian authorities confiscated the *Sirius* at the beginning of May.<sup>73</sup>

The court records state that during an eleven-day period (April 25-May 5) dinghies from the *Sirius* accosted the *M.S. Falco and Wadsy Tanker* in

67. See Menefee (ms), *supra* note 46.

68. See BROWN & MAY, *supra* note 61, at 85, 87.

69. See *id.* at 103.

70. See *id.*

71. See *id.* at 112 (Feb. 25, 1985; blockade of the *Essi Flora*); 129 (Sept. 21, 1985; blockade of *Clydebank*); *id.* at 134 (May 17, 1986; boarding *Mediterranean Shearwater* and occupation of crane); *id.* at 134 (Aug. 13, 1986; blocking of discharge pipes of the *Nerva* and the *Niebla*); *id.* at 135 (November, 1986; blockade of *Forthbank*); *id.* at 129 (1986; blockade of *Vulcanus II*); *id.* at 149 (May 31, 1988; disruption of operations on the *MV Kronos*); *id.* at 151-52 (June 21, 1988; attempted boarding of *Vulcanus II*).

72. See *id.* at 132-55 (a chronology of Greenpeace actions from February, 1986-March, 1989); Menefee (ms), *supra* note 46.

73. BROWN & MAY, *supra* note 61, at 120. Greenpeace did not respond to an inquiry of June 18, 1992 for information on the incident.

Antwerp harbor and on the open sea in the Scheldt.<sup>74</sup> Activists from the dinghies dived in front of the bows or in the immediate vicinity of the dumping vessels, attached themselves to the ships' discharge pipes, painted over the windows on the bridge, and threatened to drop the anchors.<sup>75</sup> Additionally the *Sirius* itself impeded the passage of the *Wadsy Tanker* from the Van Cauwelaertsvis dock in Antwerp.<sup>76</sup> Taken together, these activities had the cumulative effect of preventing the *Falco* and *Wadsy Tanker* from proceeding to fully discharge their cargos.<sup>77</sup>

The legal action was based on the Greenpeace campaign against the *Falco* and the *Wadsy Tanker*, which involved "boarding, occupying and causing damage to the two vessels."<sup>78</sup> An initial hearing, before a Summary Sitting in the First Instance, concluded that

- defendants' refusal to give an undertaking to refrain from similar actions in the future and then to continue their campaign (as evidenced by a published news report) resulted in *actual* danger to the plaintiff and the intervenor;<sup>79</sup>
- one defendant was a foundation existing under Dutch law with its corporate headquarters in the Netherlands and that the *Sirius* was a Dutch ship;<sup>80</sup> and that
- on the high seas, vessels are exclusively subject to the legal authority of their flag state (in this case, the Netherlands).<sup>81</sup>

Since the action would effectively *forbid* the defendants from carrying on their campaign against the dumpers in Belgian territory and in territorial waters, the court concluded that it was necessary to determine whether such conduct was an acceptable form of expression in modern society.<sup>82</sup> Here the court noted that the Belgium constitution guarantees freedom of expression, not only by speech, but by conduct,<sup>83</sup> and that the defendants' right to engage in demonstrative conduct in order to influence public opinion and gain support for their campaign is thus putatively protected even if this

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74. See M.S. WADY TANKER, M.S. SIRIUS N.V. MABECO, N.V. PARFIN v. I J. Castle 2 Ned. Stichting SIRIUS, e.a., 20 European Transport Law 536, at 44. Summary hearing of Court of First Instance; June 12, 1985) [hereinafter M.S. WADY TANKER].

75. See *id.*

76. See *id.*

77. See *id.*

78. CASTLE JOHN AND NEDERLANDSE STICHTING SIRIUS v. NV MARJLO AND NV PARFIN, 77 INT'L L.R. 537. Court of Cassation; December 19, 1986 [hereinafter CASTLE JOHN].

79. See M.S. WADY TANKER, *supra* note 78, at 545.

80. See *id.*

81. See *id.*; CASTLE JOHN, *supra* note 78, at 537.

82. See M.S. WADY TANKER, *supra* note 74, at 545.

83. See *id.*

causes damage (*unlawful* damage to be recompensed by the defendants).<sup>84</sup> The Greenpeace vessels, however, went too far in preventing the dumpers from leaving the harbor in accordance with the required permit and in those actions which violated accepted navigational practices.<sup>85</sup>

For these reasons, the court of first instance declared the claims were admissible. The court held itself without legal authority to the extent that actions occurred on the high seas, but declared the remaining parts of the complaint were well founded. It prohibited the defendants from engaging in any conduct hindering the free passage of the dumping vessels from their point of departure or in their navigation within Belgian territory or territorial waters, when such conduct would risk safety or lives. If Greenpeace did not honor the judgment, the defendants were to be subject to the payment of a penalty of 500,000 francs to the plaintiff or the intervenor—*approximately* \$15,000 in current value.<sup>86</sup>

On appeal to the Court of Appeal at Antwerp<sup>87</sup> the question of *urgency* was again noted, there being a serious danger to the appellants (plaintiffs in the court of first instance) that they would be victims of similar conduct, prevented from carrying out their lawful activities, and subject to risk. In considering *general capacity*, the court declared that even though the protest actions were for conservation, the end cannot justify the mean adopted. Damage to vessels is subject to the Criminal Code and conduct may be illegal even if it is not covered by a *specific* criminal provision. Here, freedom of navigation is guaranteed in the Scheldt by the Vienna Convention of 1815 and in the territorial waters and on the high seas by the Geneva Conventions of 1958 and the 1982 Convention on the Law of the Sea.<sup>88</sup>

Turning to the question of exclusive flag state jurisdiction on the High Seas, enunciated by the court of first instance, the Court of Appeal noted that this was applicable with reference to the exercise of police powers over navigation. States, however, have undertaken to intervene when provisions of treaties or rules of customary international law are infringed, using warships or ships in government service. Thus, exceptions do exist to the exclusive power of the flag state.<sup>89</sup> The threatened actions on the high seas involved conduct which would fall under the definition of piracy as defined by Article 15 of the 1958 Geneva Convention on the high seas.<sup>90</sup> According to the Court:

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84. *See id.*

85. *See id.* at 545-46.

86. *See id.* at 546 (Prof. D.J. Devine has supplied the monetary equivalent).

87. *See id.* at 536 (Antwerp Court of Appeal; July 19, 1985).

88. *See id.* at 540-41.

89. *See id.* at 542. *See also* CASTLE JOHN, *supra* note 78, at 538.

90. *See* M.S. WADY TANKER, *supra* note 74, at 542; CASTLE JOHN, *supra* note 78, at 538. For the text of Article 15, *see supra* text at note 12.

It appears from the facts available that, at the time of their action against the *Wady Tanker* and the *Falco*, the applicants resorted to "violence". . . . The actions in question were committed for personal ends, in furtherance of . . . [their] objects. Furthermore, more personal motivation such as hatred, the desire for vengeance and the wish to take justice into their own hands are not excluded in this case. There is no provision of municipal or international law which imposes restrictions on the competence of the Belgian courts, in relation to their own nationals to take measures to protect their free right of passage and their lawful activities and even if necessary to pronounce a civil sanction to ensure respect for the freedoms granted to all persons.<sup>91</sup>

The actions of the defendants were committed for *private* ends, here the achievement of their group or corporate goals. Indeed the Court felt that more *personal* motivations could not be excluded.<sup>92</sup> As the nature of the actions was held to qualify, and the "private ends" test was met, the Court of Appeal found that jurisdiction conferred by the piracy provisions applied. It therefore ordered the defendants to refrain from all conduct *wherever committed*, hindering or obstructing the freedom of navigation or the discharge of wastes. Further, those ignoring the court's ruling were to be fined the sum of 1,000,000 francs—approximately \$30,000 at current rates—for any twenty-four hour period or part thereof during which there was noncompliance, and trial and appellate costs were assessed against Greenpeace.<sup>93</sup>

The result of this appellate decision was a *second* appeal by Greenpeace, with a resulting judgment delivered by the Court of Cassation on December 19, 1986.<sup>94</sup> In bringing this case to the Court of Cassation, the appellant felt that its actions did not involve piracy, as they were not committed "for private ends." According to this argument

action which impedes, threatens, prevents, or makes more difficult the discharge at sea of waste products which are harmful for the environment, taken with a view to alerting public opinion, cannot be considered as having been committed "for private ends" merely because that aim corresponds with the objects set out in the articles of association (*objet social*) of the applicant. The consideration that personal motives such as hatred, the desire for vengeance or the wish to take justice into their own hands "are not excluded" in this case, is insufficient in law to deduce the existence of "personal ends." Furthermore, the jurisdiction of the Belgian courts with regard to Belgian nationals on the high seas is insufficient for

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91. CASTLE JOHN, *supra* note 78, at 538-39. See also M.S. WADY TANKER, *supra* note 74, at 542. The Court of Appeal noted that violence was included among the actions undertaken by the defendant against the *Wady Tanker* and the *Falco*. This consisted not only of *material deeds* such as boarding, painting the vessels, making threats with a knife, detaching the cable used for dumping and sawing through it, but also included *moral pressure* on the crews, such as threats to throw themselves across the bow, the presence of divers in the water, and threats to loose the anchors, all of which could be labeled as forms of violence. See *id.*

92. See M.S. WADY TANKER, *supra* note 74, at 542.

93. See *id.* at 543 (monetary equivalent supplied by Prof. D.J. Devine).

94. CASTLE JOHN, *supra* note 78, at 537.

the imposition on the high seas of prohibitive measures on ships sailing under a foreign flag.<sup>95</sup>

In considering, and rejecting, this contention, the Court of Cassation noted that:

The applicants do not argue that the acts at issue were committed in the interest or to the detriment of a State or a State system rather than purely in support of a personal point of view concerning a particular problem, even if they reflected a political perspective.

On the basis of these considerations the Court of Appeal was entitled to decide that the acts at issue were committed for personal ends within the meaning . . . of the Convention [on the High Seas]. The ground of appeal is therefore unfounded in law.<sup>96</sup>

### CASTLE JOHN: NAVIGATIONAL BEACON OR DEAD END?

*Castle John*, therefore, stands for the proposition that maritime environmental violence may qualify as piracy under international law. Whether this view is subsequently accepted or ultimately becomes an evolutionary dead end in the development of the concept will depend upon a number of factors.

First, sufficient opportunities must arise for similar decisions to be made, so that cases and/or customary practice point to general acceptance of the inclusion of acts of environmental maritime violence under the general rubric of piracy. This presupposes that competing views over ocean uses (such as dumping and whaling) will continue to produce actions categorizable as “acts of violence.” The background given to the *Castle John* case, coupled with other developments, such as the split at the Glasgow IWC Conference, makes it likely that the opportunities for such decisions will continue to be generated.

The next, and more important criterion, however, is one of *universality*. Given the chance for decision, will *it generally* be held that environmental violence at sea is a form of piracy? Here, it is not as clear that the necessary majority will be found. The Belgian Court of Cassation, in setting up a private-public ends dichotomy, appears to have taken a restrictive view of the latter concept, noting that “public ends” are “in the interest or to the detriment of a State or State system,” and differentiating those cases involving “a personal point of view concerning a particular problem, even if they [the acts involved] reflected a political perspective.”<sup>97</sup> Other countries, judging other cases, might prefer the argument that *if* a particular nation allows commercial whaling or permits dumping at sea, that an environmental act undertaken against *private* whalers or dumpers is

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95. *Id.* at 539.

96. *Id.* at 540.

97. *See supra* text at note 95.

nonetheless not for private ends if it serves to challenge these public policies. Taken to its logical extreme, the Court's *implication* that formalized state or anti-state action is necessary to show that an incident does not merely result from "a personal point of view reflecting a political perspective" would tend to mean that almost every nongovernmental act of violence could arguably be classified as piracy. In retrospect, the court might have given more useful guidance in *defining what was a private end* rather than doing this *indirectly* by saying what was *not* a "public" end. Muddled definitions do not, in the long term, make for clear and consistent court decisions.

Two *external* factors also lessen the likelihood that the *Castle John* represents a turning point in the international definition of piracy. The first is the reluctance of some countries to face up to the problem of piracy at all; in Nigeria, for example, which was a hotbed of port attacks during the 1970's and early 1980's, a conference on "Coastal Piracy" was held in which speaker after speaker, relying exclusively on the definition of the *international* crime, rather than the definition of piracy under municipal law, insisted (quite rightly, of course) that (international) piracy did not exist within Nigerian waters.<sup>98</sup> This was undoubtedly true, as both the '58 and '82 conventions require a locus on the high seas or in a place *outside* national jurisdiction. Other countries have shown a similar reluctance to use the crime in their prosecutions. Vincent Buglosi, the author of *Helter Skelter*, has recently written a book *And the Sea Will Tell*, covering the murder of a yachting couple on Palmyra Atoll in the Pacific and the resulting court case.<sup>99</sup> It is interesting that while the American law of piracy obviously applied to the crime, and while the murder was (for once) accurately characterized as piracy in the popular press, that the charges brought against the alleged perpetrators nowhere included a count of piracy. If the United States is reluctant to prosecute incidents which obviously come under the classic definition of the term, it would appear even less likely that courts will be willing to stretch the definition to include environmental acts. This in turn makes it doubtful that the international conformity necessary for customary international law will be found to exist.

A second factor which makes the redefinition of piracy unlikely is the existence of a new alternate ground of prosecution, which was unavailable at the time the *Castle John*. The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, drafted in response to the *achille Lauro* hijacking has now entered into force,<sup>100</sup> its provisions allow

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98. See SMUGGLING AND "COASTAL PIRACY" IN NIGERIA: PROCEEDINGS ON A WORKSHOP (R.A. Akindele & M.A. Vogt eds., 1983).

99. See VINCENT BUGLOSI, WITH BRUCE B. HENDERSON, AND THE SEA WILL TELL (1991).

100. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Rome, March 10, 1988, *entered into force* March 1, 1992. Countries which have ratified or acceded to the agreement include Austria, China, France, Gambia, Germany, Hungary, Italy, Netherlands, Norway, Oman, Poland, Seychelles, Spain, Sweden, Trinidad & Tobago, and United Kingdom. See INSTITUTE OF MARITIME LAW UNIVERSITY OF SOUTHAMPTON, ENGLAND, THE RATIFICATION OF MARITIME CONVENTIONS 1.3.110 (1990).

for the trial or extradition of offenders, and the acts covered would generally include all those thus far discussed under the general heading of environmental maritime violence. The *very absence* of emotive terms, such as “piracy” and “maritime terrorism,” makes it more likely that this convention will be applied by ratifying or acceding States in appropriate environmental contexts,<sup>101</sup> and thus *less* likely that an expanded definition of international piracy will come into use.

### CONCLUSION

Examining the *Castle John* action in context has shown how the changing definition of piracy relates to the development of international law particularly in the interface between piracy and maritime environmental actions. While the decision of the Court of Cassation does not appear to herald a new trend in redefining the crime of piracy, it does suggest some of the problems raised by increasing maritime environmental violence. If this review of a contemporary problem and *one* possible solution makes us think further about these issues, then Greenbeard the Pirate, like his less fictional forebears, will have served his purpose.

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101. See the discussion in 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, 274-77, 305-09 (1988). Halberstam notes that “[t]he Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation has several advantages, aside from obviating, in part, the need for resolving whether terrorist acts constitute piracy. . . .” *Id.* at 308 (footnote omitted).