



'Piracy, Terrorism and War: Clarifying the Concepts Involved' *Seminar Report*

On 6 November 2012, the British Institute of International and Comparative Law hosted the event, 'Piracy, Terrorism and War: Clarifying the Concepts Involved'. The panel included Stephen Askins (Ince & Co) as chair, Dr Douglas Guilfoyle (UCL) as the main speaker, and Nihan Unlu (IMO) as the discussant.

At the beginning Dr Guilfoyle presented the main issues concerning the reconciliation of piracy with terrorism and the law of armed conflict. He noted that the confusion stems from attempts to label Somali pirates in post-9/11 terms as terrorists. By dividing this discussion into two parts he identified and analysed the legal categories of pirate and terrorist, and whether these interpretations are accurate in light of early understandings of the crime. He presented two distinct approaches with regard to the expression 'for private ends', which is a distinguishing element in the definition of piracy. The first approach, advocated by scholar Hersch Lauterpacht, is focused on the objective character of the acts in question. The second approach, propounded by Ambassador Matsuda (Rapporteur of the Committee of Experts for the Progressive Codification of International Law in the League of Nations), emphasizes the subjective motives of the actor. The early codification efforts conflated these two approaches as a result of their construction in light of a need to prosecute civil war insurgency under the same universal jurisdiction as asserted over pirates.

Dr Guilfoyle analyzed the two-track development of piracy and the role of the 'for private ends' requirement. Radically divergent interpretations in the early process of codification resulted in uncertain thresholds and ambiguity. He went on to discuss the implications of labelling the actor as either terrorist or pirate. For example, if Somali pirates were considered as terrorists this would mean that the payment of ransom might be prohibited under the Terrorist Financing Convention. The conclusion is that there is no reason why 'for private ends' cannot be interpreted in the objective sense of including all unauthorised acts of violence. Conversely, the Convention on the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation (SUA Convention) does not provide for a subjective terrorist motive. Consequently, certain acts of piracy can also be read into the SUA definition. The pedantic argument of whether they should be brought under SUA or piracy under UNCLOS, and the resulting overlap, serves no great purpose. Although there are practical reasons for keeping them separate, such as the issue of when the 'extradite or prosecute' clause under SUA is triggered, these can be overcome by consistent interpretation. Ultimately, Dr Guilfoyle recognised that, as in national law, a crime can be classified in a number of ways, and there is no good reason to keep them wholly separate.

Nihan Unlu concentrated on the practice of treaty creation at the IMO. She pointed to the reliance of states on their needs and political will, rather than on the awareness to follow a strictly legal approach. In simple terms this means that if states are confronted with a specific concern, a treaty may be interpreted in

accordance with existent circumstances, or a new treaty may be created to deal with the new subject matter. In the case of piracy, the SUA Convention and its 2005 Protocol evidenced a preference for the interpretation of existing treaties to suit the prevailing need at the time. The Preamble to the SUA Convention contains references to resolutions referring to both terrorism and piracy and can therefore incorporate piracy on the basis of states' preference to refer to it in the SUA legal regime.

Stephen Askins recognised the difficulty faced with proving that pirates are terrorists and welcomed difference of perspectives in the commercial and academic spheres. In a discussion that followed themes ranged from the academic to the more practical. The first query pointed to the post-9/11 tendency to treat terrorists as unlawful combatants and to the ensuing danger of importing formal discrimination of the laws of armed conflict into the law enforcement framework. In terms of clarification Dr Guilfoyle emphasized that the conventions on the suppression of piracy are all law enforcement conventions, and that military agencies and governments have stayed firmly within this paradigm.

Another proposition considered the identification and tracing of payments made to terrorists when piracy was a regular item on the Security Council's agenda. Mr Askins noted that there had been very little money recovered and that it would require increased sharing of information between the commercial and international sectors to overcome the difficulty in enforcement on a global scale. Along the same lines, questions were raised as to the possible sharing of ransoms between terrorist organisations and pirates. Dr Guilfoyle added that we need to understand the Somali contextual setting, which could mandate a payment of passage for any pirates that would traverse through terrorist-controlled territory. However, he denied any direct cooperation between pirates and terrorists with regard to the sharing of ransom payments, due to essential differences in aims of both groups.

The panel emphasised the deficiencies of the current definition of piracy and the 'for private ends' requirement, and the concomitant issues that would arise if the pirate was labelled as a terrorist. However, in light of Ms Unlu's discussion on the interpretation of existing law in accordance with the needs of states at the time, the SUA Convention was suggested as a viable alternative. In order to achieve suppression of piracy in pragmatic terms, the panel suggested increased collaborative efforts and sharing of information between governments and the commercial sector at the national and international levels. The panel's discussion on the understanding of piracy and its implications for the international, governmental and commercial spheres provided the audience with an awareness of the importance of defining these crimes. Furthermore, the diverse backgrounds of members of the panel provided a comprehensive overview of the definitional and codification issues related to piracy and drew attention to the commercial reality of private entities when confronted with the potential threat of piracy.

Report prepared by Aletta van der Merwe