

Piracy, terrorism and war

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‘An investigator finds that instead of a single relatively simple problem [defining piracy], there are a series of difficult problems which have occasioned [at different times] a great diversity of professional opinion.’¹

I. Introduction

Historically, there has been some difficulty in defining both the term ‘pirate’ and the term ‘terrorist’. They are both quintessentially words that stigmatise someone as *other*: a violent, outlaw actor who seeks to impinge upon States’ legitimate monopoly over violence. As a matter of legal usage the controversial relationship between piracy and terrorism springs from three words in the modern definition of piracy which requires that piracy on the high seas must involve an act *‘for private ends’*. That is, both the 1982 UN Convention on the Law of the Sea (UNCLOS) and the 1958 Geneva High Seas Convention (HSC) tell us:

‘Piracy consists of any of the following acts: ... any illegal 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 ... on the high seas, against another ship or aircraft, or against persons or property on board ...’²

This immediately suggests a distinction between *private piratical acts* and some other class of *public or political acts*. A common view of the effect of these words is that:

‘by limiting the definition to acts committed for “private ends” any actions taken for political motives such as terrorist attacks are excluded.’³

However, even if this is a correct statement of the law today (which I doubt), it is far from clear that this was the uniform intention of those who were early advocates of this definition. It is also less than entirely clear when the words ‘for private ends’ first entered commonly-

¹ Harvard Research in International Law, ‘Part IV: Piracy’, (1932) 26 *American Journal of International Law Supplement* 739 (hereafter ‘Harvard Research’), 764.

² Geneva Convention on the High Seas (adopted on 29 April 1958, entered into force 30 September 1962) 450 UNTS 82 (‘High Seas Convention’) art 15; United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (‘UNCLOS’) art 101. Emphasis added.

³ Donald R Rothwell and Tim Stephens, *The International Law of the Sea* (Oxford, Hart, 2010), 162.

used legal definitions of piracy. Their earliest use in any textbook definition appears to date to 1892, where they were used in the phrase ‘for gain or other private ends of the doers’ seemingly as a synonym for intent to plunder (discussed below).⁴ Earlier sources do not appear to use any directly equivalent term at all.⁵ Piracy had, traditionally, simply been defined as robbery on the high seas (often with the further qualification that the robbers lacked a government commission or letters of marque). So why were the words ‘for private ends’ thought necessary? As Lauterpacht put it in 1937:

‘Piracy in its original and strict meaning is every unauthorised act of violence committed by a private vessel on the open sea against another vessel with intent to plunder (*animo furandi*). … But there are cases possible which are not covered by this narrow definition … [I]f unauthorised acts of violence, such as murder … are committed on the open sea without intent to plunder, such acts are in practice considered to be piratical … Therefore, several writers, correctly, I think, oppose the usual definition [as too narrow] … But yet no unanimity exists … concerning a fit definition … and the matter is … controversial.’⁶

Lauterpacht clearly considered the traditional definition both too restrictive and at variance with practice, and so proposed a broader definition of piracy based on the *unauthorised character* of the violence. Similarly, the UK Privy Council in 1934 held that the definition of piracy ‘nearest to accuracy’ was ‘any armed violence at sea which is not a lawful act of war’.⁷ Such approaches emphasise that legitimate violence on the high seas was the province of States and, historically, State-licensed privateers and perhaps civil war insurgencies. In the present author’s view, Lauterpacht’s would have clearly been the clearer definitional approach to take. Instead, the ambiguous words ‘for private ends’ won out in the academic struggle over how to define piracy.

⁴ See: *New Commentaries on the Criminal Law*, 8th ed, 2 vols (Chicago, T.H. Flood and Company, 1892), vol.1, 339 at §553 and vol. 2, 617 at §1058; and Joel Prentiss Bishop (Carl Zollmann (ed)), *Bishop on Criminal Law*, 2 vols, 9th ed (Chicago, T.H. Flood and Company, 1923), 406 at §553. This appears to be Bishop’s first use of the phrase. It does not seem to appear in previous (editions under different titles). See e.g.: Joel Prentiss Bishop, *Commentaries on the Criminal Law*, 6th ed, 2 vols (Boston, Little, Brown and company, 1877). The author cites two authorities for his definition: *US v Palmer* 16 US (3 Wheaton) 610 (1818); and *US v Terrell*, Hemp 411. The former does not use the phrase ‘for private ends’. I have been unable to locate the latter.

⁵ The copious review of classical authorities in the eighteen-page footnote in *US v Smith* 18 US (5 Wheaton) 153 (1820) at 163-80 does not contain the phrase or, it seems, an equivalent in French or Latin. The quotes tend to focus on either the lack of state sanction or intention to plunder (*depredandi causa, pour piller*, etc).

⁶ H. Lauterpacht, *Oppenheim’s International Law*, 5th ed (London, Longmans, Green & Co, 1937), 486.

⁷ *In re Piracy Jure Gentium* [1934] AC 586, 598; compare the reference to ‘unauthorised warfare’ in *US v The Ambrose Light*, 25 Fed. 408, 413 (SDNY 1885).

The debate has had a number of phases. There is the early codification work of the League of Nations, the Harvard Research Project and the International Law Commission spanning the period 1926-52. For these bodies, the words ‘for private ends’ were meant to be limiting and exclusionary, but not necessarily in the sense commonly thought now. The debate in this early phase, although it did touch tangentially on whether anarchist terrorism could be assimilated to piracy, was far more concerned with whether *civil war insurgents* could be considered pirates. The development of law tends to be shaped by the live controversies of the day and the question of the status of insurgent vessels in Latin American conflicts and the Spanish civil war were still very much in the forefront of legal thought on questions of piracy at this time. Indeed, the very origins of the words ‘for private ends’ as part of the definition of piracy can only be understood in this context.

High profile maritime incidents of insurgency or terrorism, starting as early as 1955 but particularly in the 1960s and 1980s, reignited the debate, with a number of scholars calling for ‘terrorists’ to be assimilated to ‘pirates’ for the purposes of universal jurisdiction. In this phase discussion usually centres around the *Santa Maria* and *Achille Lauro* incidents. The latter, in particular, culminated the conclusion of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (‘the SUA Convention’ or ‘SUA’). The SUA Convention leaves us with a new doctrinal debate: are SUA ‘terrorist’ offences mutually exclusive with acts of piracy, or are they ‘gap-curing’ in such a way that *some* forms of piracy might also fall within the SUA Convention?

Finally, since the 1960s and again since 11 September 2001 there have been various attempts to assimilate terrorism to piracy either rhetorically or for more practical legal effect. It has been common since at least 1961 to describe aircraft hijacking as ‘air piracy’;⁸ more recently some have asked whether piracy fits into – or shares characteristics with – the so-called ‘War on Terror’, suggesting:

‘Many of the legal issues that prevent states from effectively suppressing pirates also plague responses to international terrorism. Pirates and terrorists fall in the gray zone between military combatants and civilians. Thus the antipiracy campaign and the so-called War on Terror both raise questions about the legal status of conflicts between states and diffuse armed networks with international operations. Issues that have impeded countries’ efforts on both these fronts include: ... rendition of suspects to

⁸ The earliest reference to ‘air piracy’ I have found so far is in: SA Bayitch, ‘International Law’ (1961) 16 *University of Miami Law Review* 240, 262.

countries with poor human rights records, claims of abuse by detainees, ... , and the legality of “targeted killings” of suspected hostile civilians.⁹

Many navies presently engaged in countering piracy off Somalia would recoil from the suggestion that there is *any* ambiguity as regards the status of pirates. The unequivocal position of the EU Naval Force, for example, is that counter-piracy is a constabulary operation directed against criminals.¹⁰ Nonetheless, the quote does highlight a debate that will not go away as to the precise relationship between piracy, war and terrorism. While the issue can be resolved at the level of positive law (as discussed below), the historical debate nonetheless tells us something about the changing and sometimes nebulous nature of the categories under discussion. Pirates and terrorists are almost always presented as the stigmatised *other*. It was thus common for sixteenth- and seventeenth-century sovereigns to refer to political allies as ‘privateers’ and to enemies as ‘pirates’,¹¹ in much the same way that modern political rhetoric has sometimes used the terms ‘freedom fighter’ and ‘terrorist’. It is also often assumed (as the quote above demonstrates), erroneously, that both categories must have some relationship to the laws of war. Notably, any close examination of the record shows that piracy has historically been a somewhat loose label, applied over time to a multitude of phenomena rather than a single activity that is stable across time.¹² Further, even the current textually stable definition may capture a number of different practices: Somali hostage-taking piracy is not the stick-up or smash and grab piracy of the Malacca Strait. It is never really accurate to speak of piracy, only of *piracies*.

The remainder of this paper will attempt to tease apart the relationship between the concepts along historical and functional lines, before making some observations about the present state of the positive law.

II. Piracy and terrorism: early codification efforts (1926-52)

⁹ Eugene Kontorovich, “‘A Guantanamo on the Sea’: The Difficulties of Prosecuting Pirates and Terrorists” (2010) 98 *California Law Review* 243, 245.

¹⁰ House of Commons Foreign Affairs Committee (United Kingdom), ‘Piracy off the coast of Somalia’ (HC 2010-12, 1318), 5 January 2012, Evidence Annexe, 14, available at: www.parliament.uk/business/committees/committees-a-z/commons-select/foreign-affairs-committee/publications/.

¹¹ A Rubin, ‘The Law of Piracy’ (1986–7) 15 DJILP 173, 198; although one should note that piracy has not always had a strong pejorative sense in English: A Rubin, *The Law of Piracy*, 2nd ed (New York: Transnational, 1997), Chapter 1. See also: Harvard Research, 803.

¹² See further: Harvard Research, 787 (“The facts that piracy has had a distinct place in law and that the foreign private pirate has been treated with universal public enmity continuously from ancient times, should not mislead us into assuming that the law of piracy in its basic principles, or in its definition of the offence, or in the details of state authority to act in the interest of suppressing it always has been the same.”)

A. Introduction

The currently accepted definition of piracy found in UNCLOS is taken, with only minor changes, from the HSC definition. The HSC definition, in turn, was taken with very few modifications from the ILC's articles on the law of the sea.¹³ The ILC in its work was strongly influenced by the work of the Harvard Research in International Law project on piracy and its resultant draft convention and commentaries ('the Harvard Research').¹⁴ Much of the Harvard Research is an enormous compilation of loosely organised quotes from sources with additional commentary by the authors. This methodology (or lack of it) has the virtue of making the sources upon which the authors relied transparent. Outside of the Harvard Research authors' commentary and draft articles the words 'private ends' appear among their original sources only eight times in three contexts: several references to the work of the League of Nations (discussed below);¹⁵ a translated portion of the criminal code of Spain;¹⁶ and a twice-repeated quote from the American jurist Bishop,¹⁷ whose works were highly influential and who appears to have been the first to include these words in a definition of piracy.¹⁸ The Harvard Research appears to have lifted the words 'for private ends' for use in its own draft Convention from the reports of the League of Nations on the topic. Therefore, even though the Harvard Research was more influential on later developments, we must begin with the work of the League.

B. The League of Nations Committee of Experts for the Progressive Codification of International Law 1926

The League of Nations Committee of Experts work on piracy was brief. Ambassador Matsuda prepared a brief set of draft articles for discussion (without scholarly references or detailed explanation of his drafting choices), which provoked a significant volume of responses from government and a brief report from the Committee of Experts itself, before

¹³ [1956] II *Yearbook of the International Law Commission* 253.

¹⁴ See: [1955] I *Yearbook of the International Law Commission* 40 ff., [1956] II *Yearbook of the International Law Commission* 253, 282–4.

¹⁵ Harvard Research, 775, 802, 808, 873-74.

¹⁶ Harvard Research, 781.

¹⁷ Harvard Research, 791 (quoting *Bishop on Criminal Law*, above n. X, section 533; and Schlikker, *Die Volkerrechtliche Lehre von der Piraterie und den ihr Gleichgestellten Verbrechen* (1907), 43 quoting Bishop).

¹⁸ On Bishop's influence as a scholar: Chas S. Bishop, "Joel Prentiss Bishop. LL.D." (1902) 36 American Law Review 1, 5-8. On his definitions of piracy, see above n. X.

the topic was dropped from the League agenda as not being of sufficient practical interest.¹⁹ The key text is Ambassador Matsuda's draft Article 1, which provided:

‘Piracy occurs only on the high sea and consists in the commission for private ends of depredations upon property or acts of violence against persons.

It is not required ... that [such] acts should be committed for the purpose of gain, but acts committed with a purely political object will not be regarded as constituting piracy’.²⁰

This approach, at first glance, accords with the common contemporary understanding and divides ‘piracy’ and ‘terrorism’ into two mutually exclusive, watertight compartments. Matsuda thus appears to focus on the *subjective intentions* of the potential pirate, though he sets a high bar before political motives will prevent an act being considered piracy (requiring a ‘purely political object’). He thus appears to favour what is now the conventional view that the distinction inherent in piracy is one between *private* and *political* motives. This, however, was not what was intended. In his fuller memorandum Matsuda observed:

‘According to international law, piracy consists in sailing the seas for private ends *without authorization from the Government of any State* with the object of committing depredations upon property or acts of violence against persons.’²¹

This seems to divide the realm of acts of violence at sea into those authorised by a State and those not authorised by a State. This, in a seeming contradiction, appears to favour what is now the minority Lauterpachtian view: that the dividing line is one between *private* and *public* acts characterised objectively and without reference to the actors' motives. However, Matsuda (and perhaps the broader Committee) was in fact quite equivocal on the point of terrorism and political motives. Elsewhere he observed:

‘It is better, in laying down a general principle, to be content with the external character of the facts without entering too far into the often delicate question of

¹⁹ See: Rubin, *The Law of Piracy* (1997), 331-5; and ‘Report of the Committee of Experts for the Progressive Codification of International Law’, 13 June 192 reproduced in (1928) 22 *American Journal of International Law Special Supplement* 216, 222 (*AJIL Spec Supp*).

²⁰ As reproduced in: Harvard Research, 873; (1926) 20 *AJIL Spec Supp* 228-9; or Shabtai Rosenne, *League of Nations Committee of Experts for the Progressive Codification of International Law (1925-1928)* (Dobbs Ferry NY, Oceana, 1972) , vol 2, 145.

²¹ League of Nations Document C.48.M.25.1926.V., Annexe (emphasis added); as reproduced in Rosenne, *League of Nations Committee of Experts*, vol 2, 142 or (1926) 20 *AJIL Spec Supp* 223. Quoted in Harvard Research, 775.

motives. Nevertheless, when the acts in question are committed from purely political motives, it is hardly possible to regard them as acts of piracy.’²²

It is difficult at first to see why the political motive requirement has been reintroduced in the second sentence, given the general conceptual approach of the first. The answer appears to be to deal with a particular historical difficulty. Matsuda’s Article 4 provided: ‘Insurgents committing acts of the kind mentioned in Article 1 must be considered as pirates unless such acts are inspired by purely political motives.’²³ This appears to indicate that civil war insurgencies who commit acts of violence at sea were the class of actors principally targeted by the words ‘for private ends’. (This reading is borne out by the review of contemporary debates conducted by the Harvard Research, discussed below.) Matsuda’s approach appears to have been that even civil war insurgents (who certainly should be considered political actors) would ordinarily be pirates if they commit such acts *unless* there was some particularly close connection between the crime and their political goals. This reading is borne out by the Committee President’s (uncontested) summation of Matsuda’s position:

‘In the general case, whether the crime of piracy has been committed follows from the character of the acts. If acts of violence or depredation are committed, there is piracy, regardless of the motives for those acts. Nevertheless, the rapporteur has admitted an exception for acts committed for a purpose which is political and *solely political*.’²⁴

The Committee President went on to add that the drafting of Article 4 must be read alongside the Article 1 definition of piracy:

‘*not as an exception to the latter*, but as an *extension* of the idea of acts of piracy to [cover] certain acts of insurrection.’²⁵

Thus, in the final analysis, the Committee appeared to concede that ‘purely political motives’ would exclude an act from being piracy and thus agreed with Matsuda but *only* in the narrow

²² League of Nations Document C.48.M.25.1926.V., Annexe; as reproduced in Rosenne, *League of Nations Committee of Experts*, vol 2, 143 or (1926) 20 *AJIL Spec Supp* 224.

²³ Rosenne, *League of Nations Committee of Experts*, vol 2, 145; (1926) 20 *AJIL Spec Supp* 229; or Harvard Research, 873.

²⁴ Minutes of the League of Nations Committee of Experts for the Progressive Codification of International Law, Second Session, 14th Meeting, 20 January 1926 reproduced in Rosenne, *League of Nations Committee of Experts*, vol. 1, 124. Author’s translation and emphasis (‘D’une manière générale, c’est d’après le caractère des actes que l’on peut déterminer le crime de piraterie. Si des actes de déprédition ou de violence sont commis, il y a piraterie, quel que soit le motif de ces actes. Toutefois, le rapporteur a admis une exception pour les actes commis dans un dessein politique et uniquement politique’).

²⁵ Ibid, 126. Author’s translation (‘non pas comme une exception à cette dernière, mais comme une extension de la notion d’actes de piraterie à certain faites d’insurrection’).

context of certain acts committed during a civil-war insurgency.²⁶ As discussed below, the principal contemporary debates concerned less anarchist terrorism than the laws of armed conflict. This distinction is more apparently in the work of the Harvard Research which, though contemporaneous, notably had *nothing* to say about terrorism.

Terrorism was absent from the debate League of Nations Committee of Experts. Yet one authoritative contemporary commentator thought the formulation adopted did have implications for terrorism – anarchist terrorism. In his 1926 Hague Academy lectures on piracy Vespasian Pella contended that the Matsuda formulation would actually *bring within* the definition of piracy any acts of anarchist violence perpetrated on the high seas.²⁷ Pella's line of argument to this end was that the dangers posed by anarchist terrorism have a general character and, despite appearing to be targeted at a single government, in fact attack the social foundations of civilised societies everywhere.²⁸ Thus '[t]errorist attacks do not have an *anti-governmental* character, but an *anti-social* one. They reach the public and legal order of all States ...'²⁹ On a strict understanding of the League of Nations approach, this is perhaps correct, the class of political actors potentially excluded from being pirates was limited to those wishing to overthrow a particular government and not a general social system. Pella thus thought: (a) that the consequence of introducing the words 'for political ends' would be the inclusion of anarchist terrorism, effectively violence *outside* politics, within the definition of piracy; and that (b) this showed that definitions moving away from a strict focus on intention to rob were too elastic.³⁰ The point is not whether we agree with Pella's line of reasoning or not, it is simply worthwhile noting that at least one eminent commentator of the time considered that the words 'for political ends' could result in certain types of terrorism (constructed as apolitical or radically anti-social) being classed as piracy.

C. Harvard Research in International Law 1932

The objective of the Harvard Research was to assemble the legal sources relevant to piracy (largely the opinions of commentators, but also national legislation and judicial decisions) and to formulate a draft Convention on the topic. Theirs was a codification effort, and in the course of this they had to confront historic cases falling outside the narrow definition of

²⁶ See generally the debate reproduced in *Ibid*, 124-6.

²⁷ V Pella, 'La Répression de la Piraterie' (1926) 15 *Collected Courses of the Hague Academy of International Law* 149, 218.

²⁸ Pella, 'Répression de la Piraterie', 217.

²⁹ Pella, 'Répression de la Piraterie', 217. Author's translation, emphasis in the original ('Les attentats terroristes n'ont pas un caractère *anti-gouvernemental mais anti-social*. Ils atteignent l'ordre public et légal de tous les États ...').

³⁰ *Ibid*, 218.

piracy (i.e. robbery at sea) which had nevertheless been treated as piracy. The main examples were cases in which insurgent vessels in a civil war had been treated as pirates when interfering with the shipping of third States. Such cases obviously involved a choice as to classification. Such cases could be: distinguished as simply misinterpreting or misapplying the law (i.e. to preserve the narrow definition); integrated into an expanded definition of piracy (i.e. reformulating the theory to better reflect practice); or excluded as, in fact, being evidence not of the content of the law of piracy but as evidence of some separate rule of international law. The authors of the Harvard Draft put it this way:

‘[I]t may be useful to explain the paucity of pertinent cases and of evidence of modern state practice on most of the important moot points in the law of piracy. Except for a few international cases, *chiefly concerning the status of insurgent vessels or of irregular privateers*, and a few municipal law cases, there are no official determinations which will help an investigator to cut a way through the jungle of expert opinion. Indeed the lack of adjudicated cases and of pertinent instances of state practice is the occasion for the chaos of expert opinion. Most of the municipal law cases on piracy are of little value in solving the international problems, because municipal law covers a different field, as a preceding part of this introduction explains, and the judicial opinions are colored by the national legislation.’³¹

Once again, as before the League of Nations Committee of Experts, the controversial case for inclusion or exclusion from the definition of piracy was thus not the terrorist but the civil war insurgent.³² Nonetheless, despite confronting the same problem, the Harvard Research did not entirely adopt the Matsuda approach.

The Harvard Research’s Draft Article 3 defined piracy as involving various acts committed ‘for private ends without bona fide purpose of asserting a claim of right’.³³ While the words ‘for private ends’ might be thought to show a debt to Matsuda, Matsuda’s further explanatory sentence (‘acts committed with a purely political object will not be regarded as constituting piracy’) is absent. It is not entirely obvious what the words ‘without bona fide purpose of asserting a claim of right’ are intended to exclude from the definition of piracy. It is hard to think of private individuals having a ‘claim of right’ which would allow them to take violent action against another private vessel on the high seas, but this was apparently what the

³¹ Harvard Research, 764 (emphasis added).

³² See e.g. Joel Prentiss Bishop, *Commentaries on the Criminal Law*, 3rd ed, Vol 2 (Boston, Little, Brown and company, 1865), 548-9 at sections 1018-19.

³³ Harvard Research, 769 (emphasis added).

authors of the Harvard Research had in mind (giving as their sole example ‘quarrels [between] fishermen of different nationalities’).³⁴ We are left then, only with the task of determining what the authors intended by the words ‘private ends’.

One might think it telling that in its review of the acts under consideration for inclusion in the definition of piracy (on the basis of various authorities) the commentary to the Harvard Research groups together the following examples:

‘(12) Using a ship to attack another for some political purpose provided the attack is not made under the authority or protection of any state or recognized belligerent government.

(13) Attacks on commerce by illegitimate privateers during a war or revolution.

(14) Participation in privateering attacks of a foreign belligerent on commerce of a nation with which the offender’s state of nationality is at peace.’³⁵

These are not necessarily separate categories. If item 12 is understood narrowly (that is, as referring only to the acts of *unrecognised belligerents*³⁶) then these are all cases of what we would now call illegal participation in hostilities by civilians. They are acts of unauthorised violence lacking *public* sanction which could, on the Lauterpacht approach, readily be classed as piracy. Indeed, the impression that this might be what the authors of the Harvard Research intended is only reinforced by the authorities referred to in the following pages: every single one deals with questions arising under the laws of armed conflict.³⁷ However, despite the authorities they marshal, the authors of the Harvard Draft eventually favour a motives-based approach over the ‘unauthorised violence’ approach. In their commentary to the words ‘for private ends’ they state:

‘Although states at times have claimed the right to treat as pirates unrecognized insurgents against a foreign government who have pretended to exercise belligerent rights on the sea against neutral commerce ... *and although there is authority for subjecting some cases of these types to the common jurisdiction of all states*, it seems best to confine the common jurisdiction to offenders acting for private ends only.’³⁸

³⁴ Harvard Research, 809. This first appears to have been a concern of Matsuda’s: Rosenne, *League of Nations Committee of Experts*, vol 2, 143; (1926) 20 *AJIL Spec Supp* 224.

³⁵ Harvard Research, 777.

³⁶ This appears to have been the understanding of Matsuda: Rosenne, *League of Nations Committee of Experts*, vol. 1,126 (reproducing the Committee minutes referred to above, n. 24).

³⁷ Harvard Research, 777-9; see similarly the commentary at 798-802.

³⁸ Harvard Research, 798 (emphasis added).

To the modern reader, this may seem a rational enough effort to separate a question of the laws of war from the laws of piracy. The point, however, requires further unpicking. Did the authors of the Harvard Draft mean this in the same sense as the League of Nations Committee of Experts – that the *only* political ‘other’ excluded from the definition of piracy were certain categories of acts committed by civil war insurgents?

We have noted already the peculiar historical question regarding the status of *unrecognised* insurgents in a civil war purporting to exercise rights arising under the law or armed conflict and whether such illegal participation in hostilities should be classed as piracy. Simply put, the doctrine of belligerency held that insurgent forces in a civil war could be given the rights of lawful combatant forces through recognition of their belligerent status by the government they sought to overthrow or by foreign governments.³⁹ Such recognition could be objectively construed from the conduct of the parties, and the rights it conferred were opposable only to the recognising State. Simply put: ‘[i]nsurgents (as non-state actors) had no right to take action against neutral vessels [e.g. by enforcing a blockade or searching the vessel for contraband destined to the enemy] and were liable to be treated as pirates unless the [relevant] flag state had recognised their belligerency’.⁴⁰ While the doctrine of recognition of belligerency has now fallen into desuetude,⁴¹ this should not obscure the fact that the words ‘for private ends’ – despite their seeming generality – appear once again to have been used by the authors of the Harvard Draft to *distinguish* questions arising under the laws of war.

The Harvard Draft concluded, as indicated above, that such acts by insurgent forces were *not* piracy. The power to take action against such offenders was instead addressed in a separate Article 16, based on the idea that such illegal attacks vested a special jurisdiction in the flag State of attacked vessels. This article provided:

‘The provisions of this convention do not diminish a state’s right under international law to take measures for the protection of its nationals, its ships and its commerce

³⁹ See generally: Yair M Lootsteen, ‘The Concept of Belligerency in International Law’ (2000) 166 *Military Law Review* 109; Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge, Cambridge University Press, 2002), 4-18; Hersch Lauterpacht, ‘Insurrection et Piraterie’ (1939) 46 *Revue Générale de Droit International Public* 518; DP O’Connell (IA Shearer (ed)) *The International Law of the Sea*, vol 2 (Clarendon Press, Oxford, 1984) 975-6. See also: *The Prize Cases* 67 US 635 (1863); *The Ambrose Light* 25 Fed 408 (SDNY 1885); and the arguments of counsel in *The Three Friends* 166 US 1 (1897). Some authors considered that recognition was not relative and there existed a duty of granting such recognition: Ti-Chiang Chen, *The International Law of Recognition* (Stevens & Sons, London, 1951) 350-1 (powers arise from the fact of war and there may be a duty of recognition); Hersch Lauterpacht, *Recognition in International Law* (Cambridge, Cambridge University Press, 1953) 250-3.

⁴⁰ D. Guilfoyle, ‘The Mavi Marmara incident and blockade in armed conflict’ (2011) 81 *British Yearbook of International Law* 171, 192.

⁴¹ Moir, *Law of Internal Armed Conflict*, 19-21; Lootsteen, ‘The Concept of Belligerency’, 110-11, 125.

against interference on or over the high sea, when such measures are not based upon jurisdiction over piracy.'

The relevant commentary notes that this provision:

'covers *inter alia* the troublesome matter of illegal forcible acts for political ends against foreign commerce, committed on the high sea by unrecognized organizations. For instance a revolutionary organization uses an armed ship to establish a blockade against foreign commerce, or to stop and search foreign ships for contraband ... These acts are illegal under international law, at least if the revolutionary organization has not been recognized as a belligerent by the offended state ...'

Some writers assert that such illegal attacks on foreign commerce by unrecognized revolutionaries are piracies in the international law sense; *and there is even judicial authority to this effect.* It is the better view, however, that these ... are special cases of offences for which the perpetrators may be punished by an offended state as it sees fit.'⁴²

The point being made here is that Article 16 was intended to define the scope of 'private ends' used in the definition of piracy provided in Article 3. The only class of persons acting for 'private ends' under consideration were 'unrecognised' or 'revolutionary' organisations involved in a civil war insurgency.⁴³ Nonetheless, the authors still assume there is a clear division involved: the narrow class of belligerent acts excluded as being 'for private ends' from Article 3 are excluded because they are regulated by a rule of the laws of war (here, belligerency and neutrality) as indirectly acknowledged in Article 16. The Harvard Research thus, it seems, intended to adopt a broadly approach similar to that of the League of Nations Committee of Experts.

However, the authors of the Harvard Draft appear to have placed much stronger emphasis on the question of motives as the *primary* distinction involved than did Matsuda or the Committee of Experts. As discussed above, Matsuda appears to have assumed all violence by unrecognised insurgencies against third States would be piracy unless it fell within an exception for acts committed with exclusively political motives. The Harvard draft appears, conversely, to have assumed the acts of unrecognised insurgencies would generally not be piracy, unless committed for private ends. On either approach the introduction of questions of

⁴² Harvard Research, 857 and see also 786.

⁴³ In accord see: Halberstam, 'Terrorism on the High Seas', 279.

subjective motives was not strictly necessary. Lauterpacht considered that ‘in general, the attitude of governments consists of refusing to treat as pirates the vessels of [even] *unrecognised* insurgents, so long as their depredations are limited to the [vessels] of their state of origin’.⁴⁴ The relevant consideration then becomes not the political motives of the insurgency ‘but the class of vessel attacked, being those that are legitimate targets for insurgents in the course of a civil conflict.’⁴⁵ Put another way, there is no conflict between the State practice the codification efforts were attempting to account for and Lauterpacht’s unauthorised violence conception of piracy, so long as

‘one accepts that insurgents attacking legitimate targets [i.e. the government they seek to overthrow] in an internal conflict are exercising a limited form of public power. ... Insurgents can thus be distinguished from both pirates and terrorists on the basis that they have the [expressly] recognised capacity at international law to become a lawful government.’⁴⁶

However, on Lauterpacht’s unauthorised violence approach, there is no reason to suggest that such acts could not constitute both an illegal assertion of belligerent rights and piracy in the proper sense. An act breaching the law of armed conflict (for example, by targeting vessels taking no part in the conflict and not flagged or belonging to a party to the conflict) is inherently an act of unauthorised violence. It is also piracy, if that act of violence against a vessel is committed by a private vessel, such as those used by unrecognised insurgencies. This is not to suggest any breach of the law of armed conflict could constitute piracy, for the simple reason that piracy (at least under the modern definition) must be ‘by the crew or the passengers of a private ship ... and directed ... on the high seas, against another ship’.⁴⁷ Thus it is quite clear that State warships and vessels cannot commit piracy unless their crews mutiny.⁴⁸ However, the vessels of an unrecognised insurgency would remain ‘private’ vessels capable of committing piracy unless and until they achieved recognition as belligerents (and thus legitimate combatants).

⁴⁴ Lauterpacht, ‘Insurrection et Piraterie’, 518 (‘En général, l’attitude des gouvernements consiste à refuser de traiter comme pirates des navires d’insurgés non reconnus, tant que leurs déprédati ons se limitent à leur Etat d’origine’) and compare 515, 516, 521, 523. See in agreement: LC Green, ‘The Santa Maria: Rebels or Pirates?’ (1961) 37 *British Year Book of International Law* 496, 501-2.

⁴⁵ D. Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge, Cambridge University Press, 2009), 33.

⁴⁶ Guilfoyle, *Shipping Interdiction*, 35.

⁴⁷ HSC art 15; UNCLOS art 101.

⁴⁸ See now: HSC art 16; UNCLOS art 102.

Ultimately, The approach of the Harvard Research was not to attempt to come up with a rule that could be reconciled with actual State practice and judicial pronouncements but to propose a rule based on (in their view) analytical clarity. The Harvard Research may also have been influenced by the authors' seemingly heavy reliance on the German jurist Steil, who defined piracy as 'a non-political [*unpolitisches*] professional course of robbery'.⁴⁹ The suggestion can only have been intended *de lege ferenda*.⁵⁰

D. The International Law Commission Articles on the Law of the Sea 1950-56

It is unclear whether the ILC in its heavy reliance on the work of the Harvard Research fully appreciated that the latter had been engaged in, at best, a work of progressive development of the law. Nonetheless, it appears the ILC simply lifted the words 'for private ends' straight out of the Harvard Research draft convention into its own articles on the law of the sea. The commentary to the ILC articles contains no explanation of the reasons for including the term or its intended meaning.⁵¹ The ILC rapporteur JPA François in speaking to his initial draft made the point that requiring intention to rob (*animo furandi*) would overly narrow the definition and, after reviewing various authorities, he appeared to endorse the position of the Harvard Research (above) that 'it seems best to confine the common jurisdiction to offenders acting for private ends only' thus excluding cases involving government warships or civil war insurgencies.⁵² The point did not otherwise receive detailed consideration in the ILC debates. A great deal of time, however, was spent in ILC debates on the question of whether States could commit piracy, largely due to incidents involving Nationalist China's seizure of Polish ships.⁵³ As noted above, that proposition has been widely rejected and is expressly ruled out in the modern treaty law.⁵⁴

Ultimately, the ILC adopted a definition of piracy, being a simplified version of the Harvard Research Draft Article 3, which included a 'for private ends' requirement. That ILC definition is the one now found almost verbatim in the treaty law definitions reproduced at the beginning of this chapter.

⁴⁹ Rubin, *Law of Piracy*, 339 quoting Paul Steil, *Der Tatbestand der Piraterie ...* (1905), 28. The passage quoted by Rubin and reproduced here, however, does not appear anywhere in the copious compilation of quotes in the Harvard Research.

⁵⁰ Rubin, *Law of Piracy*, 339.

⁵¹ [1956] II *Yearbook of the International Law Commission* 253 at 282.

⁵² [1955] I *Yearbook of the International Law Commission* 40-41.

⁵³ [1955] I *Yearbook of the International Law Commission* 37 ff; see also Halberstam, 'Terrorism on the High Seas', 280-1. On the widely misunderstood Nyon Arrangement on Submarine Warfare 1937 (181 LNTS 135), which could be taken to suggest certain State acts constitute piracy, see Guilfoyle, *Shipping Interdiction*, 37-8.

⁵⁴ HSC art 16; UNCLOS art 102.

III. The Terrorism Debate 1955-1988

A. ‘Terrorist’ hijacking and piracy

Aircraft and ship hijacking incidents from 1955 onwards⁵⁵ resulted in calls for an assimilation of such incidents to piracy, or assertions that universal jurisdiction extended to such crimes on a similar basis as such acts are universally condemned.⁵⁶ Pella had said of such calls regarding anarchist terrorism in the 1920s that it would be preferable to conclude ‘a special convention’ dealing with such crimes than to assimilate them to piracy.⁵⁷ Somewhat belatedly, given the failure of the 1937 League of Nations Terrorism Convention to enter force,⁵⁸ Pella’s wish was granted in the so-called terrorism suppression conventions of 1970-2010.⁵⁹

The history of these conventions is too well-known to warrant detailed repetition here. The usual historical account runs that in the absence of general agreement within the UN system on a single universal definition of terrorism, it was easier to conclude issue-specific treaties which criminalised certain acts or tactics associated with terrorism.⁶⁰ Many of these treaties criminalise particular acts without any express requirement of a special ‘terrorist’ motive. Thus the offences envisaged could, *prima facie*, equally apply to non-politically motivated crimes (as further discussed below). The term ‘terrorism suppression convention’ can therefore be misleading, and they are better referred to as ‘suppression conventions’ as their aim is to suppress certain defined conduct.

⁵⁵ Shubber records over 100 aircraft hijacking incidents from 1955-1969: Sami Shubber, ‘Is Hijacking of Aircraft Piracy in International Law?’ (1968-9) 43 *British Yearbook of International Law* 193, 193-4 at n. 1.

⁵⁶ E.g. Robert A Friedlander, *Terrorism: Documents of International and Local Control*, vol 1 (Dobbs Ferry NY, Oceana, 1979) 11-13 and see materials cited at n. 37; Halberstam, ‘Terrorism on the High Seas’, 289; Kenneth C Randall, ‘Universal Jurisdiction under International Law’ (1988) 66 *Texas Law Review* 785, 788-9 and 828-31. Against such approaches, see: Shubber, ‘Is Hijacking of Aircraft Piracy?’.

⁵⁷ Pella (1926), 219.

⁵⁸ See: Kimberley N Trapp, *State Responsibility for International Terrorism* (Oxford, Oxford University Press, 2011) 292-3.

⁵⁹ See generally: Malcolm N Shaw, *International Law*, 6th ed (Cambridge, Cambridge University Press, 2008), 1159-60 and n. 212; and the useful list of relevant treaties at: treaties.un.org/Pages/DB.aspx?path=DB/studies/page2_en.xml. Neither includes the Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation 2010 (Beijing, 10 September 2010, not yet in force).

⁶⁰ Trapp, *State Responsibility for International Terrorism*, 15-23; Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, 2nd ed (Cambridge, Cambridge University Press, 2010), 339-40; Guido Acquaviva, ‘Terrorism’ in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (Oxford, Oxford University Press, 2009) 533-4.

Of more immediate concern is the relationship between piracy and maritime terrorism, which is usually discussed through the prism of the *Santa Maria* (1961)⁶¹ and *Achille Lauro* (1985)⁶² incidents. In the *Santa Maria* incident of 1961 grew out of the opposition of General Delgado and his supporters to Dr Salazar (Prime Minister of Portugal from 1932-68). The *Santa Maria* was a cruise liner and:

‘among the passengers who boarded the liner ... was a number of persons who subsequently, under the leadership of a Portuguese political dissident, Captain Galvao, took over the liner by armed force. In the course of the seizure one of the ship’s officers was killed, while other members of the crew, including the captain, were placed under armed guard. ... Captain Galvao gave the seizure what appeared to be a political complexion by describing it as “the first step aimed at overthrowing the Dictator Salazar of Portugal”.’⁶³

Under the HSC definition this was clearly not piracy, for the simple reason that it did not involve an attack: ‘by the crew or the passengers of a private ship ... and directed ... on the high seas, *against another ship*’ (the ‘two-ship requirement’). The treaty-law definition simply excluded such an incident of mutiny, unless the captured vessel went on to be used to attack other vessels. It was also widely considered that the political motives of Galvao meant the incident could not have been ‘for private ends’.⁶⁴

Similarly, in the *Achille Lauro* incident of 1985, Palestinian Liberation Front members posed as tourists, boarded an Italian cruise ship in Port Said and hijacked it from within. They threatened to kill those aboard if the government of Israel did not release 50 prisoners, and they did in fact kill one US citizen outside the Syrian port of Tartus.⁶⁵ Once again, this was not piracy as it did not satisfy the two-ship requirement and on the motive-based approach it was not generally considered an act ‘for private ends’. Despite the fact that this episode could

⁶¹ See, for example: Green, ‘The Santa Maria’; Benjamin Forman, ‘International Law of Piracy: And the Santa Maria Incident’ (1961) 15 *JAG Journal* 143; Thomas M Franck, ‘To Define and Punish Piracies - The Lesson of the Santa Maria: A Comment’ (1961) 36 *New York University Law Review* 839.

⁶² See, for example: Helmut Tuerk, ‘Combating Terrorism at Sea: The Suppression of Unlawful Acts against the Safety of Maritime Navigation’ (2008) 15 *University of Miami International & Comparative Law Review* 337; Malvina Halberstam, ‘Terrorism on the High Seas: The *Achille Lauro*, Piracy and the IMO Convention on Maritime Safety’ (1988) 82 *American Journal of International Law* 269; Larry A McCullough, ‘International and Domestic Criminal Law Issues in the *Achille Lauro* Incident: A Functional Analysis’ (1986) 36 *Naval Law Review* 53.

⁶³ Green, ‘The Santa Maria’, 496.

⁶⁴ Green, ‘The Santa Maria’, 503; Franck, ‘To Define and Punish Piracies’, 840.

⁶⁵ McCullough, ‘International and Domestic Criminal Law Issues’, 56-7; Halberstam, ‘Terrorism on the High Seas’, 269.

have been covered by the Hostage Taking Convention,⁶⁶ it was widely seen as demonstrating the need for a suppression convention applicable to maritime transport in the same manner that other conventions already covered hijacking and sabotage of airplanes.⁶⁷ This eventually lead to the conclusion of the 1988 SUA Convention.

The sponsoring governments who first introduced a draft text for the SUA Convention (Austria, Egypt and Italy) cited as part of their reason for doing so the restrictions inherent within the definition of piracy: that it necessarily involved an act for private ends, and in requiring an attack from one vessel against another it could not cover the internal seizure of a vessel.⁶⁸ The stated aim of the sponsoring governments was thus to produce a ‘comprehensive’ convention that did not rest on such arbitrary distinctions.⁶⁹

Another relevant inspiration for the SUA Convention was General Assembly Resolution 40/61, which called upon the IMO to ‘study the problem of terrorism aboard or against ships with a view to making recommendations on appropriate measures’. It is important to note, however, that the word ‘terrorism’ appears *only* in the SUA Convention’s preamble. The consequences of this drafting will be returned to below.

B. The SUA Convention and the Hostages Convention: Can Pirates be Terrorists?

As noted, the current conventional view is that the definition of piracy intrinsically excludes terrorism: a terrorist cannot be a pirate. However, it may still be the case that under the suppression conventions a pirate may be guilty of a ‘terrorist’ offence. The obvious texts to consider are the SUA Convention and the Hostage Taking Convention.

Article 3 of the SUA Convention creates a number of offences. Most relevant for present purposes is Article 3(1)(a), stating that ‘[a]ny person commits an offence if that person unlawfully and intentionally ... seizes or exercises control over a ship by force or threat thereof or any other form of intimidation’. There is no express requirement that the seizure be internal or be politically motivated. Thus any act of piracy involving exercising ‘control over a ship by force’ or its seizure will clearly fall within this definition. Piracy off the coast of Somalia, in which force is often used to compel vessels to stop and permit boarding and in which vessels are seized and diverted to Somalia in order to ransom the vessel and crew

⁶⁶ International Convention against the Taking of Hostages 1979 (1316 UNTS 205), art 1(1) and 5(1)(a) (defining the offence and extending its application to events aboard ships).

⁶⁷ Convention for the Suppression of Unlawful Seizure of Aircraft 1970 (860 UNTS 105); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971 (974 UNTS 177).

⁶⁸ IMO Doc. PCUA 1/3 (3 February 1987), Annexe, paragraph 2.

⁶⁹ Ibid.

clearly fall within this definition. Attempting, abetting and threatening such an offence are equally crimes under the Convention (Article 3(2)). The SUA Convention does not apply to offences committed solely within a single State's territorial sea, where the vessel was not scheduled to navigate beyond that territorial sea and the suspected offender was subsequently found within that coastal State's territory (Article 4). However as piracy must be committed outside territorial waters, Article 4 is no obstacle to the SUA Convention's application to acts of piracy. While the SUA Convention clearly does not cover piracy *in toto*, some acts constituting piracy under UNCLOS may also be SUA Convention offences.

As noted, certain forms of piracy may involve taking crews hostage for ransom. Article 1 of the Hostage Taking Convention states that: 'Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (... the 'hostage') in order to compel a third party ... [including] a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for release of the hostage' commits the offence of hostage-taking.⁷⁰ This definition is clearly met where a hostage is detained, threatened with continued detention, and a condition of his or her release is that a private person or company pay a ransom. The typical piracy offences being committed off Somalia involving holding crews for ransom could thus clearly fall within the Convention definition.

Two objections may be made against this application of the SUA and Hostages Conventions: first, that these Conventions only apply to terrorism or were only intended to apply to terrorism; or, second, that it would be incongruous to label a mere pirate a terrorist by convicting them under such offences ('fair labelling'). As far as the fair labelling argument goes, it doesn't apply here. These are not conventions that contain in their title the word 'terrorist', nor do they directly label any offence they create as being a 'terrorist' offence. They are only colloquially referred to as 'terrorism suppression conventions'. One does not label a person a 'terrorist' if they are convicted under national offences created to implement these conventions.

The more serious objection is that these Conventions apply only to terrorism or were intended only to apply to terrorism. As discussed, the commonly understood meaning of terrorism hinges on the *motive* of the criminal: a terrorist is politically motivated. In this context one may now refer to Article 2(1)(b) of the Terrorist Financing Convention 1999, under which terrorist offences include acts:

⁷⁰ See n. 66 above.

‘intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.’

No such language is included in either SUA or the Hostages Convention. It therefore forms no part of the offence. The reason no such language is included in either convention is obvious: such language was impossible to agree before 1999 due to the long-running (and still continuing) debate over the conditions under which national liberation movements should be exempt from classification as terrorists.⁷¹ Precisely because no agreement could be reached on this element of a general definition the approach of the suppression conventions was thematic. In the absence of a definition of terrorism (including its special intent element), tactics associated with terrorism were outlawed *irrespective of by whom or why* they were committed. No argument can be made based on the definition of the offences that these offences are restricted to politically motivated acts.

The final objection is that even if the text of these conventions contains no express terrorist motive requirement in their operative provisions, they were intended only to be applied to terrorism cases. The argument goes that while the offence-defining provisions of the treaty are silent on this question of terrorist intent, they are to be interpreted in their context – which includes the references in the preamble to terrorism.⁷² The SUA Convention preamble does indeed make five references to terrorism: four references to UN General Assembly Resolution 40/61 (as noted above), as well as noting the signatories’ deep concern ‘about the world-wide escalation of acts of terrorism in all its forms, which endanger or take innocent human lives ...’. More pithily, the Hostages Convention simply refers to the signatories’ conviction that ‘it is urgently necessary to develop international co-operation between States in devising and adopting effective measures for the prevention, prosecution and punishment of all acts of taking of hostages as manifestations of international terrorism’. The argument based on these preambular references has both a general problem and a further problem specific to the SUA Convention. The general problem is that one ordinarily applies a

⁷¹ See n. 60 above.

⁷² Article 31(1) and (2), Vienna Convention on the Law of Treaties 1969 (1155 UNTS 331). Such an argument was put in *United States v. Shi*, 525 F.3d 709 (9th Cir. 2008); see the case note by Eugene Kontorovich, ‘*United States v. Shi*’ (2009) 103(4) *American Journal of International Law* 734, 735.

principle of strict construction in criminal law.⁷³ This demands certainty in the drafting of criminal law so persons can know in advance if their behaviour accords with law. Neither the principle nor its objective is respected if one construes new substantive elements of a crime – which are simply not contained in the plain text of the operative provisions – out of ambiguous language in the preamble. Unsurprisingly, at least one domestic court has rejected arguments that a person should not be convicted under a national law implementing the SUA Convention unless they have a terrorist motive because to do so would exceed the intention of the treaty's drafters.⁷⁴ The argument further confuses the nature of the intent involved. Certainly many or all of the individuals involved in drafting the SUA and Hostages Conventions probably believed they were present to negotiate a ‘terrorism’ convention. However, lawyers are not concerned with the subjective intention of individuals when engaged in treaty interpretation. The job of those interpreting treaties is to give effect to the legislative intention of the drafters as expressed in what they mutually agreed. This is generally an objective exercise (discerning the will of the legislature), the principal guide to which is the text itself.⁷⁵ The simple fact that the drafters did not (and could not) reduce to writing any collective agreement on a ‘special intent’ for terrorism is far more important than preambular references to terrorism. One cannot argue the conventions were limited by a commonly shared concept of terrorism, for the simple reason that there was no such shared conception.

More specifically in the case of the SUA Convention, the Security Council has suggested on numerous occasions that it is an instrument which could be used to combat Somali piracy.⁷⁶ This authoritative contemporary international practice should weigh strongly against the argument that a special (yet undefined) terrorist intent requirement must be read into all the suppression conventions because that is what the drafters allegedly intended (despite their inability to reduce that intention to writing).

IV. The Piracy/Terrorism Debate after 9/11

⁷³ Antonio Cassese, *International Criminal Law*, 2nd ed (Oxford, Oxford University Press, 2008), 41-43, 47-51.

⁷⁴ See the references to *United States v. Shi*, above n. 72.

⁷⁵ See: Richard Gardiner, *Treaty Interpretation* (Oxford, Oxford University Press, 2008), 6 and 9; Philip Allott, ‘Power Sharing in the Law of the Sea’ (1983) 77 *American Journal of International Law* 1, 5; and compare William Twining and David Miers, *How to Do Things With Rules*, 4th ed (London, Butterworths, 1999), 187-90.

⁷⁶ UNSC Res 1846 (2008) UN Doc S/RES/1846, para 15; UNSC Res 1851 (2008) UN Doc S/RES/1851, preamble; UNSC Res 1897 (2009) UN Doc S/RES/1897, preamble; UNSC Res 1950 (2010) UN Doc S/RES/1950, preamble; and UNSC Res 2020 (2011) UN Doc S/RES/2020, preamble.

Despite the large-scale international naval deployments off Somalia to counter piracy in the region, there have been few efforts to deploy either a ‘laws of war’ or ‘war on terror’ paradigm against Somali pirates. The international response to Somali piracy has occurred very much within a law-enforcement paradigm and has been peculiarly resistant to ‘securitization’ and the invocation of exceptional counter-terrorism powers.⁷⁷ As Major General Buster Howes, Operation Commander of EU NAVFOR has put it:

‘We are engaged in a constabulary task, and that is the fundamental guiding principle that constrains what we can do.’⁷⁸

This has not stopped John Bolton, for example, suggesting that invocation of the rights the US has arrogated to itself in the course of the ‘War on Terror’ would be useful, allowing the extra-judicial execution of suspect pirates on sight:

‘Somali piracy fits far better (although admittedly imperfectly) into the war-against-terror paradigm than into law enforcement. ... It is nonsensical to engage in legal contortions, cramming piracy or terrorism into inappropriate criminal-justice models suitable within civil societies but not the state of nature prevailing in Somalia.’⁷⁹

Most States, obviously, have rejected the US conception of a global armed conflict with a non-State actor that would allow individuals to be targeted and killed anywhere on the planet.⁸⁰ Further, it would be very difficult to characterise Somali piracy as meeting the requirements of ‘protracted armed violence between governmental authorities and organized armed groups’ for an armed conflict to exist between navies and pirates.⁸¹ Just to begin: ‘Somali pirates’ are not organised in anything approaching ‘armed groups’ in the armed conflict sense; the State interests they attack are diffuse (making it harder to say there are specifically engaged State parties to a conflict); and it would strain credulity if the sporadic use of assault rifles and rocket propelled grenades against randomly selected vessels could be held to rise to ‘protracted armed violence’ in the technical sense under the law of armed

⁷⁷ See generally: D. Guilfoyle, ‘Piracy, terror and maritime security: An international lawyer’s perspective on piracy in the Indian Ocean’ (2012) 8 *Journal of the Indian Ocean Region* (forthcoming).

⁷⁸ House of Commons Foreign Affairs Committee (United Kingdom), ‘Piracy off the coast of Somalia’, Evidence Annexe, 14.

⁷⁹ John R Bolton, ‘Treat Somali pirates like terrorists’, *The Washington Times*, 14 October 2011, www.washingtontimes.com/news/2011/oct/14/treat-somali-pirates-like-terrorists/.

⁸⁰ Christine Gray, *International Law and the Use of Force* 3rd ed (Oxford, Oxford University Press, 2008) 227-253 especially at 253; David Turns, ‘The Law of Armed Conflict (International Humanitarian Law)’ in Malcolm Evans (ed), *International Law*, 3rd ed (Oxford, Oxford University Press, 2010) 814, 824.

⁸¹ *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber Case No IT-94-1-AR72, 2 October 1995), para 70.

conflict.⁸² Naval operators, as opposed to armchair commentators, are thus very clear that they are operating in a law enforcement, rather than a laws of war, paradigm.

This does not mean, however, that the other alternative – a conventional counter-terrorism framework outside the ‘war on terror’ – does not raise a number of awkward possibilities. First, there is the question of whether payment of ransom to pirates constitutes the financing of terrorism. There is actually little or no evidence – despite constant press, policy-maker and academic speculation – of any significant links between pirates and designated ‘terrorist’ groups such as the al-Shabab insurgency in Somalia.⁸³ This does not mean that some money raised by piracy may find its way indirectly to designated terrorist groups; again to take the Somali example, al-Shabab’s control of certain strategic ports and areas may place it in a position to ‘tax’ some pirate activities.⁸⁴ However, there is also evidence that al-Shabab:

‘seems to regard the buccaneering and this manner of raising money as an improper activity that goes against the moralistic and strict version of Islam that it follows.’⁸⁵

Nonetheless, even absent such links, this chapter has repeatedly made the point that one can commit ‘terrorist’ offences under some of the suppression conventions without having a terrorist motive. Article 2(1)(a) of the Terrorist Financing Convention makes it an offence to

‘by any means, directly or indirectly, unlawfully and wilfully, provide[] or collect[] funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out: ... [a]n act which constitutes an offence ... as defined in one of the treaties listed in the annex’.

The listed treaties include the SUA and Hostages Conventions. Thus Somali pirates could be considered ‘terrorists’ for the purposes of the Financing Convention. Arguably, then, paying pirate ransoms is providing funds in the knowledge that they will be used (at least in part) to finance future SUA Convention offences or crimes of hostage taking. Does this mean paying pirate ransoms is an offence under the Convention? The words of comfort to those paying such ransoms must be ‘unlawfully and wilfully’. A payment made under duress cannot be

⁸² See generally: D Guilfoyle, ‘The Laws of War and the Fight against Somali Piracy: Combatants or Criminals’ (2010) 11 *Melbourne Journal of International Law* 14. See also: Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (Oxford, Oxford University Press, 2010), 73-74, 107-8, 225-6.

⁸³ House of Commons Foreign Affairs Committee (UK), ‘Piracy off the coast of Somalia’, para 16 and Evidence Annex at 20, 27, 33, 59 and 63.

⁸⁴ *Ibid*, paras 16 and 116.

⁸⁵ *Ibid*, para 137 (evidence of Sally Healy, a Somalia specialist at Chatham House).

‘wilful’ and in jurisdictions such as the UK paying ransoms is not inherently ‘unlawful’.⁸⁶ The UN Security Council has not taken steps to extend its regime targeting the assets of designated terrorists to pirates, although it does not need to as there is a separate regime of targeted economic sanctions under UNSCR 1844 which can be applied to persons designated as threatening ‘the peace, security or stability of Somalia’. Interestingly,

‘Despite its stance discouraging the payment of ransoms, the UK has taken steps at the UN to ensure that such payments remain legal. The UK placed a technical hold on a US proposal last year to add two known pirate ‘kingpins’, ... to the list of people subject to sanctions under UN Security Council Resolution 1844.’⁸⁷

Nonetheless, other ‘terrorism’ conventions may still have an impact on State behaviour, if considered applicable. The SUA Convention Article 7 provides that a State finding a suspect on its territory is *required* to commence a preliminary investigation and, if the circumstances so warrant, take that suspect into custody. Further, the SUA Convention then contains an obligation upon State parties to either extradite that suspect to a State party having jurisdiction or to submit the case for consideration by prosecutorial authorities (commonly called an ‘extradite or prosecute’ obligation).⁸⁸ To this every State party *must* have a national law allowing it to prosecute ‘in cases where the alleged offender is present in its territory and it does not extradite him’, even in the absence of any connection between the crime and the prosecuting State. Put simply, the test for State Party A is: (1) is the suspect within the territory of State A?; (2) has another State party established jurisdiction in accordance with SUA Convention Article 6 over the offence committed by the suspect?; and (3) has State A extradited the suspect to one of these States? If not, State A is obliged to submit the suspect to its prosecutorial authorities.

States may be reluctant, however, to invoke the Convention precisely because it creates a mandatory extradite or prosecute obligation applying to State territory. This could be awkward if Article 7 was found to apply to pirates aboard warships. While a warship is not ‘territory’ in the sense of being a ‘floating island’,⁸⁹ it is an object (or space) with a special

⁸⁶ On the question of whether paying ransoms is contrary to ‘public policy’ at common law, see: *Masefield AG v Amlin Corporate Member Ltd* [2010] EWHC 280 (Comm); [2011] EWCA Civ 24 (holding it is not).

⁸⁷ *Ibid*, para 114.

⁸⁸ See: Article 10(1), SUA Convention. For a more extended version of this discussion see: D. Guilfoyle, ‘Piracy, terror and maritime security: An international lawyer’s perspective on piracy in the Indian Ocean’ (2012) 8 *Journal of the Indian Ocean Region* (forthcoming).

⁸⁹ O’Connell, *International Law of the Sea*, 736-7.

status at international law. On the high seas *all* vessels are subject to the jurisdiction of their flag State, a status which the Permanent Court of International Justice ‘assimilated to’ a flag State’s jurisdiction over its territory.⁹⁰ Human rights bodies and courts have found vessels under the effective control of a State may fall within its ‘jurisdiction’ under treaties having principally territorial application.⁹¹ A State’s sovereign control over a warship is much stronger than in the case of other vessels: warships on the high seas enjoy complete immunity from the jurisdiction of other States.⁹² It should therefore be uncontroversial that – on the high seas – a warship may form part of the flag State’s ‘jurisdiction’ on a basis similar to ‘territory’. However, under the SUA Convention extradite or prosecute obligations apply *only* within a State’s ‘territory’ and do not seemingly extend to areas under a State’s ‘jurisdiction’. One could thus argue that the mere presence of persons suspected of SUA Convention offences aboard a warship does not trigger extradite or prosecute obligations. Conversely, one could argue such a result would undermine the object and purpose of the treaty: to see that such suspects do not go unpunished when they come within the effective control of a State party.⁹³ The point, however, remains unresolved.

V. Conclusions: Terrorists and Pirates – Mutually Exclusive or Overlapping Categories?

This chapter has attempted to review the debate over the lines of demarcation between acts of piracy and acts of war and terrorism. The terms ‘pirate’ and ‘terrorist’ have always been stretched in meaning by their colloquial use as terms of condemnation rather than terms of legal art. One particular focus has been the peculiar insistence of twentieth and twenty-first century authors that the words ‘for private ends’ constitute piracy and terrorism as mutually exclusive categories. The historical drafting reveals no such necessary outcome. The words themselves have no roots in historical case law, and seem simply to have first been used by a US textbook author in 1892. Their use, albeit with different emphases, by the legal experts of the League of Nations, the authors of the Harvard Research and the ILC rapporteur on the subject seems intended in each case to distinguish not a class of acts of terrorism from piracy,

⁹⁰ *Lotus Case*, [1927] PCIJ Ser. A No. 10, 25.

⁹¹ E.g. *PK et al v Spain*, Committee Against Torture, Decision, 21 November 2008, UN Doc. CAT/C/41/D/323/2007, para 8.2; *Medvedev v France*, European Court of Human Rights (Application No. 3394/03), Judgment of the Grand Chamber, 29 March 2010, paras 65-67, 81; *Hirsi v Italy*, European Court of Human Rights (Application No. 27765/09), Judgment of the Grand Chamber, 23 February 2012, para 180.

⁹² UNCLOS, art 95.

⁹³ Robin Geiss and Anna Petrig, *The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (Oxford, Oxford University Press, 2011) 163-4.

but a class of acts of war. In particular, the peculiar nineteenth century law surrounding the laws of naval warfare applicable to unrecognised civil war insurgencies.

The chapter has also argued that, as a matter of textual analysis, there is no reason that many acts of piracy could not be prosecuted under the SUA Convention or the Hostage Taking Convention. These conventions, due to the historic debate over the boundary between freedom fighters and terrorists, do not contain a requirement that the offences they define must be committed with a political motive. Thus, a pirate could be prosecuted under a ‘terrorism’ suppression convention. The chapter has also briefly noted the lack of appetite for assimilating the fight against piracy off the coast of Somalia to the ‘War on Terror’ or any conventional form of armed conflict. On the latter, there are serious doubts that Somali pirates could qualify as actors in a non-international armed conflict in any event.

Finally, we are left with the question of how best to interpret the words in the treaty law that have caused so much trouble over the years: ‘violence ... for private ends’. This chapter has argued that the preferable approach to defining piracy would have been Lauterpacht’s, focussing on the unauthorised character of the violence. Indeed, it is possible to argue that the correct interpretation of the words ‘violence ... for private ends’ is not that they should be read as opposed to ‘politically motivated violence’ but as opposed to ‘public violence’. That is, violence lacking State sanction may be considered violence ‘for private ends’. The correct dichotomy would thus be considered as private/public not private/political. On this reading, an act of piracy would remain piracy, even if committed for political motives. A growing number of scholars now support this idea.⁹⁴ It is in my view not only the preferable approach, but it one that is as consistent with the confused legal history behind the words ‘for private ends’ as any other interpretation.

In the final analysis, treating ‘pirate’ and ‘terrorist’ as reified categories is unhelpful. We have a criminal law of piracy and a criminal law of terrorism. It is a truism in national law that a wrongful course of conduct may be characterised as more than one offence. International law is, on this point, no different.

⁹⁴ Guilfoyle, *Shipping Interdiction*, 37; Halberstam, ‘Terrorism on the high seas’, 290; Geiss and Petrig, *The Legal Framework for Counter-Piracy Operations in Somalia*, 61; Shubber, ‘Is Hijacking of Aircraft Piracy?’, 200; compare James Kraska, *Contemporary Maritime Piracy: International Law, Strategy, and Diplomacy at Sea* (ABC-CLIO, 2011), 210.