

THE LAWS OF WAR AND THE FIGHT AGAINST SOMALI PIRACY: COMBATANTS OR CRIMINALS?

DOUGLAS GUILFOYLE*

Despite its codification in treaty law, the law applicable to the repression of high seas piracy remains a subject of unnecessary confusion and speculation. It is sometimes suggested that because pirates were described by classical authors as hostes humani generis ('enemies of humankind'), or because the United Nations Security Council has authorised the use of 'necessary means' in repressing Somali piracy, that we are at war with pirates. Alternatively, it might be thought that because the current counter-piracy operations in the Gulf of Aden are being conducted by naval forces, the appropriate law governing their actions should be the laws of armed conflict. On the contrary, this commentary confirms the view accepted by all governments involved in counter-piracy operations: that this is a law-enforcement operation to which the laws of armed conflict have no application. This follows from the fact that pirates are not in any relevant legal sense engaged in an armed conflict. Further, it is far from obvious that deeming the laws of armed conflict to be applicable would make the task of navies any easier on the one hand, or provide any greater human rights protection to suspect pirates on the other. There is already a clearly established framework for law-enforcement operations at sea; not only is this the correct law to apply as a matter of doctrine, it is hard to see what advantages would follow from applying the laws of war as a matter of policy.

CONTENTS

I	Introduction.....	1
II	Are the Laws of Armed Conflict Prima Facie Applicable?.....	3
III	The Consequences of Applying the Laws of Armed Conflict to Counter-Piracy Operations	7
IV	The Applicable Law of Law Enforcement Operations	8
V	Do the Laws of Piracy Apply to Civil War Insurgents?	11
VI	Conclusions.....	12

I INTRODUCTION

Poverty, lack of employment, environmental hardship, pitifully low incomes, reduction of pastoralist and maritime resources due to drought and illegal fishing and a volatile security and political situation all contribute to the rise and continuance of piracy in Somalia.¹

Pirate attacks off the coast of Somalia are now endemic. In the early 1990s such attacks were limited, conducted relatively close to shore and were allegedly

* BA (Hons), LLB (Hons) (ANU); LLM, PhD (Cantab); Lecturer in Law, Faculty of Laws, University College London. The present commentary is a revised and expanded version of a presentation given at the International Committee of the Red Cross 10th Bruges Colloquium on International Humanitarian Law in October 2009. I am grateful to the anonymous referees for their helpful comments. Any errors remain my own. Email: d.guilfoyle@ucl.ac.uk.

¹ International Expert Group on Piracy off the Somali Coast, *Piracy off the Somali Coast — Final Report: Assessments and Recommendations* (Workshop Commissioned by the Special Representative of the Secretary General of the United Nations to Somalia Ambassador Ahmadeou Ould-Abdallah, 21 November 2008 15 <<http://www.imcsnet.org/>> ('UN Expert Report').

the work of groups trying to protect Somalia's waters from unregulated foreign fishing.² Indeed, it is often suggested that these early pirates were trained by internationally financed coastguard development programs discontinued during the civil war.³ Claims that piracy is also a response to the illegal dumping of toxic waste off Somalia's coast are often repeated but have not been substantiated by United Nations Environment Programme investigations.⁴ Irrespective of their origins, pirate attacks have now escalated to hostage-taking for ransom, with vessels being indiscriminately seized far outside Somali waters. The terror of piracy now jeopardises trade and fishing as far from the Somali shore as the Seychelles.⁵ There is no doubt that piracy has outgrown any alleged displaced-fishermen origins and is now a serious, organised criminal activity. While it principally targets foreign ships, it also affects regional trade and shipping. Various national and multinational counter-piracy missions now patrol the Gulf of Aden⁶ and this military presence — along with the wording of relevant Security Council resolutions endorsing the use of 'all necessary means' or 'all necessary measures' at sea *and on land* to suppress piracy⁷ — has raised the question of whether the laws of war have any role to play in combating piracy.

The simple answer is 'no'.

The purpose of this commentary is to set out briefly the reasoning that supports the conclusion that the laws of armed conflict have no application to the case of Somali piracy. The generally accepted starting proposition is that the fight against piracy is a law enforcement operation and that the applicable rules are those of police powers. Pirates are not combatants, they are ordinary

² On the history of Somali piracy, see generally *ibid* 14–22.

³ On the role of the United Kingdom firm Hart Security in training 'coastguard' units in the Puntland region of Somalia, see *Firms Reap Somali Piracy Profits* (9 September 2009) Al Jazeera <<http://english.aljazeera.net/>>.

⁴ UN investigations in 1992, 1997 and 2005 have failed to find any traces of toxicity on Somali beaches reported to be so heavily contaminated that locals had died. See United Nations Environment Programme, 'The State of the Environment in Somalia: A Desk Study' (December 2005), 33 <http://www.unep.org/depi/programmes/Somalia_Final.pdf> at 21 March 2010. Claims that Somali warlords have allowed European companies access to land sites for unsafe waste disposal are better documented. See, eg, Jonathan Clayton, *Somalia's Secret Dumps of Toxic Waste Washed Ashore by Tsunami* (4 March 2005) Times Online <<http://www.timesonline.co.uk>>.

⁵ *Seychelles Coastguard Vessel Rescues Fishermen from Somali Pirates* (29 March 2010) France24 Online <<http://www.france24.com/>>.

⁶ States and organisations involved include Australia, Canada, Denmark, France, India, the Netherlands, the Russian Federation, Spain, the United Kingdom, the United States, NATO Operation Ocean Shield, the Coalition of the Willing's Combined Taskforce 151 and EU Naval Force Operation Atalanta. See SC Res 1846, UN SCOR, 63rd sess, 6026th mtg, UN Doc S/RES/1846 (2 December 2008) [6] ('*Resolution 1846*'); SC Res 1897, UN SCOR, 64th sess, 6226th mtg, UN Doc S/RES/1897 (20 November 2009) Preamble ('*Resolution 1897*'); Max Blenkin, *HMAS Toowoomba Turns Heat on Pirates*, (9 November 2009) The Age Online <<http://www.theage.com.au>>. See also Douglas Guilfoyle, 'Counter-Piracy Law Enforcement and Human Rights' (2010) 59 *International and Comparative Law Quarterly* 141.

⁷ SC Res 1816, UN SCOR, 63rd sess, 5902nd mtg, UN Doc S/RES/1816 (2 June 2008) [7(b)] ('*Resolution 1816*'); *Resolution 1846*, UN Doc S/RES/1846, [10(b)] (both concerning action in Somalia's territorial waters); SC Res 1851, UN SCOR, 63rd sess, 6046th mtg, UN Doc S/RES/1851 (16 December 2008) [6] ('*Resolution 1851*') (concerning action in Somalia's land territory); *Resolution 1897*, UN Doc S/RES/1897, [7] (renewing the authorisation given in earlier resolutions).

criminals. This is the view taken by all governments engaged in counter-piracy operations in the Gulf of Aden, a view demonstrated by the conclusion of agreements allowing for the transfer of captured pirates to Kenya and the Seychelles for criminal investigation and prosecution.⁸ The Security Council has endorsed this approach and has stressed that the governing law is that of the *United Nations Convention on the Law of the Sea*.⁹ The laws of armed conflict could *potentially* apply to Somali piracy only under the most limited conditions, none of which presently appear to be met. The analysis here proceeds in several steps:

- First, why the laws of armed conflict are not *prima facie* applicable;
- Second, why the laws of armed conflict — if they did govern piracy operations — would simply be counterproductive or question-begging;
- Third, I will suggest that there is an applicable *lex specialis* of law enforcement operations at sea that already covers the field — there is no need to have recourse to the laws of armed conflict to fill any legal ‘black hole’; and
- Fourth, I will briefly discuss the historical debate as to the status of civil war insurgents who ‘take to the seas’ in their fight to overthrow a government.

II ARE THE LAWS OF ARMED CONFLICT PRIMA FACIE APPLICABLE?

Despite the rhetoric of classical writers on this subject, denouncing the pirate as *hostis humani generis* (‘an enemy of humankind’),¹⁰ we cannot start from the presumption that we are at war with pirates. The laws of war only apply during an armed conflict. The existence of an international or non-international armed conflict is a question of fact:

[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.¹¹

On this basis, an international armed conflict occurs whenever there is recourse to violence between states;¹² a non-international armed conflict requires

⁸ See, eg, Eugene Kontorovich, ‘Introductory Note to Exchange of Letters between the European Union and the Government of Kenya on the Conditions and Modalities for the Transfer of Persons Suspected of Having Committed Acts of Piracy’ (2009) 48 ILM 747, 747–9; Guilfoyle, ‘Counter-Piracy Law Enforcement and Human Rights’, above n 6, 152 (on the Seychelles).

⁹ Opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) (‘UNCLOS’). This endorsement has most recently occurred in *Resolution 1846*, UN Doc S/RES/1846, [15]; *Resolution 1851*, UN Doc S/RES/1851, Preamble; *Resolution 1857*, SC Res 1857, 63rd sess, 6046th mtg, UN Doc S/RES/1857 (16 December 2008) Preamble. While space precludes further discussion here, this also supports the idea that law-enforcement is the applicable paradigm.

¹⁰ See, eg, Joseph Bingham, ‘Codification of International Law: Part IV — Piracy’ (1932) 26 *American Journal of International Law Supplement* 739, 770 (attributing the term to Cicero), 774, 796, 806–7 (noting the term is not a definition of piracy but rhetorical invective) (‘Harvard Draft Convention and Commentary’).

¹¹ *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) [70] (‘*Tadić*’).

‘protracted armed violence’¹³ (which may be a question of intensity more so than duration)¹⁴ involving armed groups organised along military lines. Each classification thus turns on a criterion of identity regarding the parties involved and, in the case of non-international armed conflicts, a further threshold level of violence is required. If these criteria are not met there is no armed conflict and the laws of armed conflict have no application.

Let us consider the facts. Somali pirates are at best several different groups acting without state sanction who have mounted a series of individual attacks against vessels of varying nationalities. These attacks are, on occasion,¹⁵ seen off by foreign naval vessels with (on fewer occasions still) shots being exchanged and pirates killed as a result.¹⁶ The actors involved are disparate private parties of Somali nationality on the one side and disparate military forces of varying nationality on the other. When pirate–naval encounters take place they are sporadic, brief and usually involve only small-scale fire. The actors involved could not seriously justify characterisation as an international armed conflict for the simple reason that pirates are not state forces. Nor do the pirates satisfy any of the usual definitions of armed groups engaged in a non-international armed conflict: they do not satisfy the tests for combatant status (discussed further below), they control no territory,¹⁷ they conduct no hostilities *within* Somalia¹⁸ and their attacks are not directed against other armed bands or government forces.¹⁹ On the latter point, the principal targets of Somali pirates are obviously

¹² There is some debate as to whether any violence between states is sufficient or whether there is a minimum threshold of intensity (the majority view being the former): Robert Cryer et al, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 2007) 233 (nn 75–6). See also UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford University Press, 2004) [3.3.1] (‘UK Manual’).

¹³ *Prosecutor v Haradinaj (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-04-84-T, 3 April 2008) [49].

¹⁴ *Ibid.*

¹⁵ January – April 2009 saw 26 military interventions in pirate attacks, ten resulting in arrests. See UN Operational Satellite Applications Programme (‘UNOSAT’), UN Institute for Training and Research, *Spatial Analysis of Somali Pirate Activity in 2009* (4 May 2009) 3 <http://unosat.web.cern.ch/unosat-maps/SO/Piracy/2009/UNOSAT_Somalia_Pirates_Analysis_Q1_2009_23April09_v1.pdf>.

¹⁶ For example, the *HMS Cumberland* or *INS Tabar* incidents of 12 November 2008 and 18 November 2008 respectively. See Richard Norton-Taylor and Tom Parfitt, ‘British Commandos Kill Two Pirates in Stand-off’, *The Guardian* (London) 13 November 2008, 7; *India Navy Defends Piracy Sinking* (26 November 2008) BBC News <<http://news.bbc.co.uk>>.

¹⁷ IHL refers to control of territory as part of the definition of ‘armed groups’ required for a non-international conflict to exist. See *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, opened for signature 8 June 1977, 1125 UNTS 609, art 1(1) (entered into force 7 December 1978) (‘*Additional Protocol II*’). Neither *Tadić* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995) [70], nor the *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90, (entered into force 1 July 2002) art 8(2)(f) (‘*Rome Statute*’) contains any similar requirement.

¹⁸ See *Additional Protocol II* art 1(1).

¹⁹ *Tadić* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-AR72, 2 October 1995) [70]; *Rome Statute* art 8(2)(f).

private merchant vessels and crew. They do not seek out engagements with foreign navies. The episodes in which pirates have mistakenly attacked French and German naval vessels²⁰ are at best comic, and the results of their attack on the Indian naval ship *Tabar*, tragic.²¹ Further, the existence of an armed conflict requires ‘parties’ to that conflict, and it is sometimes suggested that to qualify for such status a ‘party’ must be under a responsible command that has the ability to secure respect for international humanitarian law (‘IHL’).²² Obviously, Somali pirate bands have some degree of organisation and leadership which makes it worthwhile considering briefly the conventional test of combatant status in cases other than the regular armed forces of a state. The criteria in such cases require: carrying arms openly; ‘being commanded by a person responsible for his subordinates’; wearing a fixed emblem visible at a distance; and conducting ‘operations in accordance with the laws and customs of war’.²³ Pirates certainly bear arms openly, although they wear no distinctive emblem. As to the requirement for command, while pirates may be organised along clan lines or upon business models,²⁴ this is insufficient of itself. Responsible or superior command is a ‘legal term of art’ under the laws of armed conflict;²⁵ such a ‘command’ must itself be ‘responsible to that party [to the conflict] for the conduct of its subordinates’.²⁶ That pirate gangs have bosses or ‘masterminds’ does not alone make out the more developed chain of command and accountability envisaged by a military superior–subordinate relationship. It is

²⁰ *Pirates’ Shock as They Pick on the Wrong Ship* (30 March 2009) Sky News <<http://news.sky.com/skynews/Home/Somali-Pirates-In-Gulf-Of-Aden-Attack-German-Naval-Ship-By-Mistake/Article/200903415252116>>.

²¹ The *INS Tabar* returned fire upon pirates, sinking their mothership but without realising the original crew were hostages aboard. One hostage was later rescued, one is confirmed dead and 14 remain missing at sea: see ‘Thai Company Says *INS Tabar* Sank Its Vessel’, *The Times of India* (online) 26 November 2008 <<http://timesofindia.indiatimes.com>>.

²² Eve La Haye, *War Crimes in Internal Armed Conflicts* (Cambridge University Press, 2008) 6; W Hays Parks, ‘Combatants’ (2009) 85 *International Law Studies Series* 247, 264.

²³ See *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) art 13(2) (‘*Geneva Convention I*’); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) art 13(2) (‘*Geneva Convention II*’); *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) art 4(A)(2) (‘*Geneva Convention III*’); (collectively, ‘*Geneva Conventions*’) *Protocol Additional to the Geneva Conventions, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1125 UNTS 3, (entered into force 7 December 1978) arts 43(1), 44(3) (‘*Additional Protocol I*’), which refer only to carrying arms openly and responsible command.

²⁴ UN Expert Report, above n 1, 17. For reports of a pirate ‘stock exchange’, see also Mohamed Ahmed, *Somali Sea Gangs Lure Investors at Pirate Lair* (1 December 2009) Reuters <<http://www.reuters.com>>.

²⁵ Michael Passman, ‘Protections Afforded to Captured Pirates Under the Law of War and International Law’ (2008) 33 *Tulane Maritime Law Journal* 1, 23.

²⁶ Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law* (Cambridge University Press, 2005) vol 1, 14, 15–17; UK Manual, above n 12, [4.3]. Even under the wider definition of combatant under *Additional Protocol I* art 43, responsible command remains essential.

thus far from established that pirates are organised in any manner analogous to military discipline. Further, 'no pirate conducts his piracy operations in accordance with the laws and customs of war because the act of piracy is itself outside the law of war.'²⁷ Pirate activity thus seems closest to 'situations ... such as riots, [and] isolated and sporadic acts of violence'²⁸ falling below the threshold for the existence of any armed conflict. Although one might question whether Somali piracy is really 'isolated and sporadic', it is worth bearing in mind that despite the frequency of reported pirate attacks, close to 99 per cent of all vessels that transit the Gulf of Aden do so without coming under pirate attack and only a minority of such attacks result in hostage-taking.²⁹

However, it remains worth asking whether the fact that a non-international armed conflict in Somalia has directly or indirectly fuelled the rise of piracy changes this conclusion. This question is returned to below, under the heading of the historical approaches to links between insurgency and piracy. By way of a preliminary thought experiment, however, let us consider the following. Imagine persons displaced by civil war (not insurgents) cross a land border and begin hijacking trucks, to make a living following the destruction of their farm lands. In such a case we would not seriously contend that such displaced persons were in any sense acting as belligerents.

The final point to consider at this stage is whether the Security Council Resolutions under Chapter VII of the *Charter of the United Nations*, authorising the use of force in counter-piracy action in respect of Somalia, somehow carry with them the laws of war. The first step must be to begin by scrutinising the resolutions themselves. *Resolutions 1816, 1838 and 1846* dealt with the fight against piracy on the high seas or similar acts in the territorial sea of Somalia. Each authorises states to use 'all necessary means' or 'the necessary means' to this end, in accordance with the international law governing action against pirates, as set out in the *UNCLOS*.³⁰ The resolutions thus authorise only the use

²⁷ Passman, above n 25, 23–4. See also below Part IV.

²⁸ *Additional Protocol II* art 1(2). Cf *Rome Statute* arts 8(2)(d), 8(2)(f). While it is sometimes argued the minimum guarantees of *Geneva Conventions* common art 3, should apply in such cases, the argument is without merit. It is true that governments are obliged not to torture, not to take hostages and not to commit other human rights violations in suppressing riots and banditry by general human rights law, not the laws of armed conflict. See Lindsey Moir, *The Law of Internal Armed Conflict* (2002) 43–4.

²⁹ This figure is based on 204 attacks in 2009 on approximately 20 000 vessel transits through the Gulf of Aden each year. Of these, in 2009 only 48 incidents resulted in hijacking. On traffic volume in the Gulf of Aden, see Jerry Frank, 'Crews Are Now Cash Cows for New Breed of Pirates' *Lloyd's List* (London) 12 March 2009, 6. For International Maritime Organization figures on piracy, see International Maritime Organization, *Reports on Acts of Piracy and Armed Robbery against Ships: Annual Report 2009*, IMO Doc MSC.4/Circ.152 (2010) annex 2 <<http://www.imo.org>>. Note that when compared with annex 5, it becomes apparent that all attacks off East Africa are Somali piracy related.

³⁰ *Resolution 1816*, UN Doc S/RES/1816, Preamble, [7(b)]; SC Res 1838, UN SCOR, 63rd sess, 5987th mtg, UN Doc S/RES/1838 (2008) (7 October 2008) Preamble, [2] ('*Resolution 1838*'); *Resolution 1846*, UN Doc S/RES/1846, Preamble, [10(b)]. *Resolution 1816* operated only for a period of six months, renewed for a further 12 months in *Resolution 1846*. This has been extended for further 12 months from 30 November 2009 by *Resolution 1897*, UN Doc S/RES/1897, [7]. This Resolution, however, does not directly use the term 'necessary means' but instead refers back to *Resolution 1846*.

of *existing powers* under the ‘laws of peace’ or extend the reach of those powers to Somalia’s territorial waters. They do not authorise recourse to force governed by the laws of war.

Security Council *Resolution 1851* authorises states cooperating with the Transitional Federal Government to ‘undertake all necessary measures’ within Somalia’s land territory to suppress piracy at sea and provides that such action is to be taken consistently with ‘applicable international humanitarian ... law’.³¹ It is worth stressing the word *applicable*. IHL does not apply automatically under *Resolution 1851*;³² its application must arise under the ordinary rules: if there is no armed conflict, IHL has no application. The provision appears to be a savings clause included out of abundance of caution. If pirates were also insurgents, or were defended or supplied by insurgents, then any foreign intervention force under *Resolution 1851* might find itself involved in an internal armed conflict where IHL would apply. In such cases, international counter-piracy forces on land might be ‘considered forces intervening in an otherwise internal conflict at the invitation of the [territorial] government’.³³

III THE CONSEQUENCES OF APPLYING THE LAWS OF ARMED CONFLICT TO COUNTER-PIRACY OPERATIONS

The second contention of this commentary is that applying the laws of armed conflict to pirates would simply be counter-productive. A cardinal principle of the laws of war is obviously that of distinction: persons should be treated either as combatants who may be targeted in the course of combat, or as civilians who may not directly be ‘the object of [an] attack’.³⁴ If pirates are considered combatants they could legitimately be targeted with lethal force based on that status alone. While it is sometimes suggested that IHL does not provide a positive ‘license to kill’ the enemy, and targeting choices must still be justifiable — on the basis of principles such as military necessity and proportionality — there is not much textual support for the proposition. Certainly the preamble to the *St Petersburg Declaration* pronounces the principle that the aim of war is to ‘weaken’ and ‘disable’ enemy forces.³⁵ While this suggests that one should avoid killing if less drastic means are available, construing hard law from preambular statements of aspiration is a dubious practice. One can only accurately say that in relation to the use of force against combatants, the laws of war set out prohibitions, rather than a positive code, as to when force is

³¹ *Resolution 1851*, UN Doc S/RES/1851, [6]. This power was renewed for a further 12 months from 30 November 2009 by *Resolution 1897*, UN Doc S/RES/1897, [7].

³² *Contra* Eugene Kontorovich, *International Legal Responses to Piracy off the Coast of Somalia* (6 February 2009) American Society of International Law Insights <<http://www.asil.org/insights090206.cfm>>.

³³ Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press, 2009) 70. While there have been recent strikes by foreign forces against insurgents in Somalia none of these have invoked the counter-piracy powers granted in *Resolution 1851*, UN Doc S/RES/1851, as renewed in *Resolution 1897*, UN Doc S/RES/1897.

³⁴ *Additional Protocol II* art 13(2).

³⁵ *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grams Weight*, opened for signature 29 November 1868, [1901] ATS 125 (entered into force 11 December 1868) (‘*St Petersburg Declaration*’).

permissible,³⁶ and that combatants ‘are traditionally immune from criminal prosecution for war-like acts’ that do not violate humanitarian law,³⁷ acts which necessarily include ‘killing or injuring ... enemy military personnel’.³⁸ While this does not mean in strict logic that what is not prohibited in war is positively permitted, the practical reality of war is that one may target with lethal force direct participants in hostilities without prior warning. As discussed in the next section, the international law on the use of force in policing actions would certainly not permit such a ‘shoot to kill’ policy against pirates. Thus, invoking the laws of armed conflict could justify using against criminals what would otherwise be excessive force. This would provide a *lower* standard of human rights protection than the ‘laws of peace’. Rather, more alarmingly, classifying pirates as combatants would also mean they had the benefit of the combatant’s privilege and could also use lethal force against ‘the enemy’ without warning.

The other possibility, if one considers the laws of war to apply, is of course that pirates should be classified as civilians. Clearly, under IHL the deliberate targeting of civilians *as such* is prohibited (except where they illegally take up arms and fire is returned in self-defence).³⁹ Civilian casualties are only acceptable where proportionate to achieving a legitimate military objective,⁴⁰ while in law enforcement operations reasonable force may be used to secure a range of objectives, including the defence of others from violence or prevention of a serious crime.⁴¹

Invoking the laws of war in counter-piracy actions thus only confuses the issues involved. It may result in the application of a set of rules providing fewer human rights protections than the laws of law enforcement, or alternatively, restricting the use of force to a narrower set of categories than would be permitted under such law. Clearer and less problematic standards are, unsurprisingly, found in the rules applicable to policing operations.

IV THE APPLICABLE LAW OF LAW ENFORCEMENT OPERATIONS

The central contention of this commentary is that public international law grants all the authority needed for warships to engage in counter-piracy operations on the high seas and sets out rules on the use of force in those

³⁶ Cf Brennan J in *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 579; UK Manual, above n 12, 21–6.

³⁷ Mark Maxwell and Sean Watts, “‘Unlawful Enemy Combatant’: Status, Theory of Culpability, or Neither?” (2007) 5 *Journal of International Criminal Justice* 19, 21. See also Louise Doswald-Beck, ‘Implementation of International Humanitarian Law in Future Wars’ in Michael N Schmitt and Leslie C Green (eds), *The Law of Armed Conflict: Into the Next Millennium* (Naval War College Press, 1998) 39, 55.

³⁸ Parks, above n 22, 261.

³⁹ Kontorovich, above n 32.

⁴⁰ *Additional Protocol I* arts 51(4), 51(5)(b), 57(2)(a)(iii).

⁴¹ *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, UN Doc A/CONF.144/28/Rev.1 (7 September 1990) annex (‘*Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*’) art 9 (‘*UN Basic Principles on Firearms*’).

operations. First, piracy is defined as:⁴²

- 1 'any illegal acts of violence or detention, or any act of depredation';⁴³
- 2 committed for private ends;
- 3 on the high seas or in a place outside the jurisdiction of any State; and
- 4 committed by the crew or passengers of a private craft, against another vessel or persons or property aboard.

This definition has a number of limitations: it only applies to acts on the high seas ('the geographic limitation');⁴⁴ it does not cover the internal seizure of vessels ('the two boats requirement'); and piracy must be committed 'for private ends'. The first two limitations are not relevant in the case of Somali piracy; the hijackings involved are never internal and are now almost invariably committed on the high seas. Insofar as the laws of piracy do not permit the pursuit of pirates into territorial waters or the conduct of counter-piracy actions within the land territory of a foreign state, the relevant Security Council Resolutions have now effectively removed these limitations.⁴⁵

We then come to the 'private ends' requirement. Somali pirates are not, at present, insurgents or clearly linked to insurgents. If, however, we assumed Somali hijackers were actually insurgents or politically motivated, would the 'private ends' requirement exclude their acts from being piracy? The common wisdom is that politically motivated acts cannot be piracy as they are not committed for private ends. In my view the correct dichotomy is not private-political but private-public.⁴⁶ Thus, all violence lacking state sanction (public violence) is violence for private ends. The 'private ends' requirement only emphasises the point that *states* cannot commit piracy. Politically motivated protestors have in recent decades, quite rightly, been found to have committed piracy.⁴⁷ In any case, while Somali pirates continue to operate against randomly targeted vessels of disparate nationalities to compel private parties to pay large ransoms, there is no credible argument they are acting for anything other than 'private ends'.

⁴² *Geneva Convention on the High Seas*, opened for signature 29 April 1958, 450 UNTS 82, art 15 (entry into force 30 September 1962); *UNCLOS* art 101(a). This definition is accepted as customary international law.

⁴³ The words 'any illegal act' have been criticised as question begging: Alfred Rubin, *Law of Piracy* (Transnational, 1998), 344; David O'Connell, *The International Law of the Sea* (Clarendon Press, 1984) vol 2, 969. *Contra* Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 33, 42–3. Nonetheless, the words will prevent any use of violence in lawful self-defence by a private vessel against an attacking pirate vessel from itself being classified as piracy.

⁴⁴ It should be noted for this purpose that the high seas regime applies to the Exclusive Economic Zone: *UNCLOS* art 58(2). Thus, third states may take counter-piracy action seaward of any State's territorial sea.

⁴⁵ See *Resolution 1846*, UN Doc S/RES/1846, [10]; *Resolution 1851*, UN Doc S/RES/1851, [6]; *Resolution 1897*, UN Doc S/RES/1897, [7].

⁴⁶ Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 33, 32–42. In accord see Harvard Draft Convention and Commentary, above n 10, 771 (quoting Hall and Brierly) and 777 (quoting Oppenheim); 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, 278–84.

⁴⁷ *Castle John and Nederlandse Stichting Sirius v NV Mabeco and NV Parfin* (1986) 77 ILR 537.

Most importantly, the laws of piracy carry with them a sufficient regime governing the use of force against pirates. The *UNCLOS* expressly provides that only warships or government vessels⁴⁸ have the right:

- 1 to stop, visit and inspect vessels suspected of piracy (or suspected of being intended for use in future pirate attacks)⁴⁹ and, where those suspicions are confirmed,
- 2 to 'seize a pirate ship ... or a ship ... under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed'.⁵⁰

The function is clearly a constabulary one: it is a power to arrest suspects and bring them to trial, one which necessarily carries with it an authorisation to use force.⁵¹ The applicable standards on the use of force are then found in case law. The International Tribunal for the Law of the Sea has held that the basic rule is that in 'boarding, stopping and arresting' a vessel 'the use of force [by a state vessel] must be avoided as far as possible and, where ... unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply'.⁵² Within this general framework, the applicable law will be the law of police powers of the intervening flag state. The *UN Basic Principles on Firearms* summarise the general position well: '[l]aw enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, [or] to prevent the perpetration of a particularly serious crime involving grave threat to life'.⁵³ This is a fair reflection of the accepted standards in most national legal systems. These rules are clearly more restrictive than those which would apply under the laws of war in relation to combatants. In a policing operation this is entirely appropriate. While pirates may not simply be blown out of the water (standards of due process having moved on since the days of hanging them at the yardarm),

⁴⁸ *UNCLOS* art 107.

⁴⁹ *Ibid* art 110. The right to take action against vessels intending to commit future attacks arises from the definition of 'pirate ship': art 103.

⁵⁰ *Ibid* art 105.

⁵¹ Nonetheless, the permissive enforcement jurisdiction granted by international law has seldom been fully implemented in adequate national laws, a fact that the Security Council has repeatedly noted 'with concern' as tending to hamper counter-piracy action. See *Resolution 1851*, UN Doc S/RES/1851, Preamble; *Resolution 1897*, UN Doc S/RES/1897, Preamble. States are now increasingly enacting new counter-piracy laws: see, eg, Taro Aso, 'Statement by Prime Minister Taro Aso on the Enactment of the Law on the Penalization of Acts of Piracy and Measures against Acts of Piracy' (Prime Ministerial Statement 19 June 2009) <http://www.kantei.go.jp/foreign/asospeech/2009/06/19danwa_e.html>; *Spain's New Law to Fight Somali Pirates and Piracy off Somalia* (13 November 2009) *Barcelona Reporter* <http://www.barcelonareporter.com/index.php?pg_print_article/spains_new_law_to_fight_somali_pirates_and_piracy_off_somalia/>.

⁵² *M/V 'Saiga' (No 2) (Saint Vincent and the Grenadines v Guinea) (Judgment)* (1999) 38 ILM 1323, 1355, citing *The Red Crusader (Denmark v UK)* (1962) 35 ILR 485 and *SS I'm Alone (Canada v United States)* (1935) 3 RIAA 1609, also cited in *Guyana v Suriname* (2008) 47 ILM 164, where the Arbitral Tribunal '[accepted] the argument that in international law force may be used in law enforcement activities provided that such force is unavoidable, reasonable and necessary': at [445]. See also Tullio Treves, 'Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia' (2009) 20 *European Journal of International Law* 399, 412–14; Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 33, 277–93.

⁵³ *UN Basic Principles on Firearms*, UN Doc A/CONF.144/28/Rev.1, art 9.

they need not be treated with kid gloves either. Reasonable force, including the use of firearms, may be used against pirates in self-defence, defence of others, or to prevent a serious crime involving a threat to human life being committed. Indeed, this would appear to be the most common legal basis upon which piracy suspects are killed or injured.⁵⁴ If piracy suspects are approached by a naval boarding party in a small unarmoured inflatable craft, refuse to drop their weapons and indeed raise them toward the boarding party, then the members of that boarding party may open fire in self-defence and defence of their colleagues. This is precisely what happened in the *HMS Cumberland* incident of November 2008, resulting in the death of two piracy suspects and the injury of one of their hostages, a Yemeni fisherman.⁵⁵

One might ask if the law is so clear cut, why more hostage-rescue operations are not mounted.⁵⁶ Elementary considerations of law, humanity and practicality simply dictate that in most hostage-takings, a military rescue operation will involve an unacceptable risk of death or injury to the hostages in any firefight. In April 2009, the French military operation to rescue hostages from the yacht *Tanit* resulted in the death of the yacht's captain.⁵⁷ Navies generally appear reluctant to attempt such an operation unless they believe pirates pose a real risk to the lives of the hostages, as any rescue attempt may also endanger hostages' lives.⁵⁸ In most hostage-takings for ransom this will not be the case. Further, where the hijacked vessel is carrying flammable or toxic cargo the use of firearms may pose an unacceptable risk of explosion, injury to hostages or rescue party or of environmental disaster.

V DO THE LAWS OF PIRACY APPLY TO CIVIL WAR INSURGENTS?

Again, there is no direct evidence that combatant groups active in the Somali civil conflict are also acting as pirates. However, if this were the case, would it change matters? The words 'for private ends' were first introduced into the definition of piracy expressly in order to exclude civil war insurgents from being considered pirates.⁵⁹ However, that intention must be read against the

⁵⁴ When Pirates have been killed by military personnel or ship-board private security, the invariable claim is the act was in self defence or to prevent an imminent threat to human life. See, eg, Norton-Taylor and Parfitt, above n 16; 'Thai Company Says INS Tabar Sank Its Vessel', above n 21, where the Indian Navy stated: 'We fired in self-defense and in response to firing upon our vessel'; Xan Rice and Lizzy Davies, 'Hostage Killed as French Storm Yacht Held by Somali Pirates' (11 April 2009) *The Guardian* (online) <<http://www.guardian.co.uk>>, which involved a special forces mission ordered after 'pirates threatened to execute the hostages'; *How Captain Phillips Was Rescued* (13 April 2009) BBC News <<http://news.bbc.co.uk>>, where pirates were shot when the hostage's life appeared in 'imminent danger'.

⁵⁵ See Norton-Taylor and Parfitt, above n 16.

⁵⁶ As to the relatively high percentage of apprehended piracy suspects more generally being released without arrest, see Kontorovich, above n 8; Guilfoyle, 'Counter-Piracy Law Enforcement and Human Rights', above n 6, 141–2.

⁵⁷ Rice and Davies, above n 54.

⁵⁸ *Ibid*; Paul Wood, *Can Somali Pirates be Defeated?* (20 November 2009) BBC News <<http://news.bbc.co.uk>>, noting that the EU maritime force could overwhelm hijackers but 'the risk to the hostages is too great'. But see Alan Cowell, 'Crew of a Russian Destroyer Frees a Hijacked Oil Tanker', *The New York Times* (New York) 7 May 2010, 8.

⁵⁹ See, eg, Malvina Halberstam, 'Terrorism on the High Seas: the Achille Lauro, Piracy and the Convention on Maritime Safety' (1988) 82 *American Journal of International Law* 269, 277–9, 288; Harvard Draft Convention and Commentary, above n 10, 798, 857.

19th century practice of granting limited belligerent rights to ‘recognised insurgents’:

That is, it had sometimes been said that insurgents whose actions on the high seas were limited to attacking vessels of the government they were attempting to overthrow enjoyed a limited exception from being classed as pirates. The exemption could be understood as not being about [political] motive but the class of vessel attacked, being those that are legitimate targets for insurgents in the course of a civil conflict.⁶⁰

Whether an insurgency could claim rights opposable to neutral shipping was fiercely debated.⁶¹ Nonetheless, even if insurgents taking to the seas could claim belligerent rights, including rights to enforce a blockade against enemy ports and to seize contraband (that is, materiel capable of supporting the war effort) destined for the enemy,⁶² this would not justify the practice of hijacking for ransom. Such an act by a non-state actor would clearly remain piracy, although it might simultaneously constitute a war crime of hostage-taking.⁶³ Such a war crime could be committed not only by a member of an organised armed group which was a party to the conflict, but even by a civilian or non-combatant, provided that the crime had a sufficient nexus to the conflict.⁶⁴

In sum, civil war insurgents might not be classified as pirates if they restricted their attacks to legitimate military targets (being the vessels of the government they are attempting to overthrow), or to measures such as the blockade of ports or the inspection of cargoes destined for enemy-controlled territory. Hijacking foreign merchant vessels for ransom would clearly remain piracy.

VI CONCLUSIONS

The argument put in this commentary is that looking at the facts, there is no convincing case that Somali pirates are engaged in an international armed conflict. Further, they do not appear to be direct participants in an internal armed conflict. Even if the latter were the case, it is not obvious that the law governing their attacks on foreign shipping should be the laws of armed conflict. The laws of piracy carry with them adequate powers, rules regulating the use of force and — though there has not been space to deal with it here — human rights guarantees.⁶⁵ There is no need to have recourse to IHL in relation to the fight against piracy. While it might once have been said that because the pirate had

⁶⁰ Guilfoyle, *Shipping Interdiction and the Law of the Sea*, above n 33, 33.

⁶¹ O’Connell, above n 43, 2, 975–6; Sir Hersch Lauterpacht, ‘Insurrection et Piraterie’ (1939) 46 *Revue Générale de Droit International Public* 513; Moir, above n 28, 9–17.

⁶² On the doctrines of contraband and blockade see, eg, Department of the Navy (US), *The Commanders’ Handbook on the Law of Naval Operations* (2007) chs 7.6–7.7.

⁶³ *Geneva Conventions* common art 3(1)(b); *Additional Protocol II* art 4(2)(c); *Rome Statute*, art 8(2)(c)(iii).

⁶⁴ This position is expressed in the requirement of the ICC Elements of Crimes that the offence ‘took place in the context of and was associated with’ an armed conflict. See International Criminal Court, *Elements of Crimes*, Doc No ICC-ASP/1/3 (part II-B) (adopted 9 September 2002) arts 8, 8(2)(a)–(c), (e). On the conviction of civilians for war crimes see: *Tesch and Others (The Zyklon B Case)* 1 Law Reports of Trials of War Criminals 93; *Prosecutor v Akeyasu (Judgment)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-96-4-A, 1 June 2001) [430]–[445].

⁶⁵ See Guilfoyle, ‘Counter-Piracy Law Enforcement and Human Rights’, above n 6.

‘reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him’,⁶⁶ this is mere rhetoric and no basis upon which to consider the laws of armed conflict applicable. Although present counter-piracy operations in the Gulf of Aden may be carried out by warships, and despite the fact they are acting pursuant to relevant Security Council Resolutions, the case of Somali piracy remains simply a law enforcement operation, governed by international law and the criminal law of the relevant flag states.

⁶⁶ William Blackstone, *Commentaries on the Laws of England* (first published 1765–69, 1982 ed) vol 4, 71.