

Douglas R. Burgess, Jr.

## **THE WORLD FOR RANSOM: PIRACY IS TERRORISM, TERRORISM IS PIRACY**

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In 2010, Prometheus Books published a work by Douglas R. Burgess Jr., *The World for Ransom. Piracy is Terrorism. Terrorism is Piracy*. The author is assistant professor of history at Yeshiva University and of legal history at its Benjamin N. Cardozo School of Law.<sup>1</sup>

The book consists of two logically structured parts preceded with foreword and introduction. The title of the first part is *Piracy is Terrorism* and it contains the following subchapters: 1. *At War with All the World*, 2. *Piracy and the American Experience*, 3. *A new Hybrid: Political Piracy and Maritime Terrorism*. The second part is titled: *Terrorism is piracy* and it is divided into the following subchapters: 4. *The Pirate Muse*, 5. *Trial and Error: The Definition of Terrorism*, 6. *A new Terrorist Law*. The book ends with conclusions. There are additional items such as bibliography, calendar of significant incidents of piracy and maritime terrorism in the period 1961–2010 and glossary of certain legal and political terms of art discussed in this book.

The war on terrorism has already taken a decade and it is not expected to end any time soon. The American reaction has not only caused war crises in Iraq and Afghanistan but it has also equipped Islamic fundamentalists with the argument that the West's intention is to destroy the Islamic world. More, the US crossed swords with many of its existing allies. Burgess examines the legal instruments used by the US government in the war on terrorism and draws interesting conclusions. The war on terrorism is often fought in breach of human rights and fundamental freedoms. Importantly, many measures undertaken after 11th September 2001 to fight the

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<sup>1</sup> He is the author of *The Pirates Pact: The Secret Alliances between History's Most Notorious Buccaneers and Colonial America* and *Seize the Trident: The Race for Superliner Supremacy and How It Altered the Great War*. His articles have appeared in the *New York Times*, *Legal Affairs*, *American Bar Association National Security Law Report*, *Legal Affairs: The magazine at the intersection of law and life* and other periodicals.

terrorist plague were not supported in international law or even contradicted its standards. The author claims that the solution lies not in innovatory legal formulas but rather in drawing from historic experience.

This historian and lawyer offers a simple solution: terrorists should be treated as pirates. D.R. Burgess claims that contemporary terrorism is not an unprecedented phenomenon. The world struggles with terrorists now just as it did with pirates before. D.R. Burgess goes on to prove that the war once fought with pirates was the only known state versus non-state conflict until the current war on terrorism began. The author claims terrorism to be the oldest crime against international law: *delicta juris gentium*, otherwise known as piracy. In our struggle against terrorism, we should rely on the legal instruments developed a long time ago to combat piracy and treat terrorists as *hostis humani generis*. This way we can combine effective fight on terrorism and respect for the law.<sup>2</sup>

D.R. Burgess, in his introduction to the book, provides an outline of the the Italian cruise ship *Achille Lauro* being hijacked in October 1985. On that occasion four members of the Palestine Liberation Front assumed control over the ship and took the crew and passengers hostage, demanding that several dozen Palestinians be released from Israeli prisons. The hijackers killed one person, Leon Klinghoffer, an American billionaire of Jewish decent. Those captive passengers were some of the first victims of the phenomenon which was soon to be known as “the war on terror”. At that time, however, on hearing that Palestinians hijacked the ship, US President Ronald Reagan referred to it as “an act of piracy”. Also, the rapid increase of terrorist attacks through hijacking planes in the 1970s was termed “aerial piracy”.<sup>3</sup> Such terminology issues are not accidental. D.R. Burgess proves that there are many similarities between terrorism and piracy. Both terrorism and piracy involve bands of brigands that divorce themselves from their nation-states, both crimes aim at civilians; both involve acts of homicide and destruction and last but not least both crimes act for private ends. Furthermore, the phenomenon of piracy has for many years been developing from common sea robbery to maritime terrorism. Criminal organisations learn from one another. Terrorists use the pirate *modus operandi* and commit acts of piracy themselves to gain funds for their operations. Pirates are either directed by terrorist organisations or basically considered by the latter as useful. Nowadays, the relations between terrorists and pirates are so close that we can coin the term *piraterrorism* to name this phenomenon.<sup>4</sup>

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2 See also: D.R. Burgess. *The Dread Pirate Bin Laden*. How thinking of terrorists as pirates can help win the war on terror, *Legal Affairs: The magazine at the intersection of law and life*, July/August 2005, available at: [http://www.legalaffairs.org/issues/July-August-2005/feature\\_burgess\\_julaug05.msp](http://www.legalaffairs.org/issues/July-August-2005/feature_burgess_julaug05.msp)

3 D.R. Burgess, *Somali Piracy: Send in the Marines... Then the Lawyers*, available at: [http://www.huffingtonpost.com/dr-burgess/somali-piracy-send-in-the\\_b\\_829989.html](http://www.huffingtonpost.com/dr-burgess/somali-piracy-send-in-the_b_829989.html)

4 D.R. Burgess, *The World for Ransom. Piracy is Terrorism* Terrorism is Piracy, Amherst, New York 2010, p. 24.

In his article “Piracy is Terrorism” published in the New York Times in 2008, D.R. Burgess commented on the raging plague of piracy off the Somalian shore and proposed that pirates be treated as terrorists. In his most recent work, however, he goes on to claim that it is terrorists that should be thought of as pirates. Although the international community has successfully developed a number of sectoral conventions for combating individual forms of terrorism, there still exists no single general convention on terrorism just as there is no universal definition of this phenomenon. The history of piracy is, however, incomparably longer and we have several hundred years of experience combating this crime. The Roman creator of law, Marcus Tullius Cicero, defined piracy as crime against the entire civilisation. English lawyer, Edward Coke, coined a popular term for this concept: “hostis humani generis” which means enemies of the human race. This special definition distinguished pirates from all other criminals and meant they could be hunted down at will by anyone, at any time, anywhere they are found.

D.R. Burgess claims that the war on terror which began after 11 September 2001 is a war on ideas. The phenomenon of terrorism has existed since the beginning of time. The temptation to achieve political goals with crime is an indispensable part of human history. We cannot combat ideas but we can fight terrorist organisations trying to implement the ideas. Unfortunately, it will be difficult to win the war as long as we are unable to define the notion of terrorism. To date, many attempts have been made to create a universal definition of terrorism.<sup>5</sup> None of them was successful – largely due to the unique hybrid status of terrorism. Terrorists are neither common criminals nor military combatants. So who are they actually? The author believes they are pirates – enemies of the human race.<sup>6</sup>

D.R. Burgess argues for his thesis that piracy and terrorism are one crime. For this uniformity to occur, terrorism and piracy need to share three elements: *mens rea* – the criminal subject which involves mental phenomena driving the culprit’s behaviour; *actus reus* – the criminal object or behaviour constituting the crime; and *locus in quo* – the location where crime is committed. Doug Burgess believes that terrorism and piracy share enough elements to merit joint definition under international law.

Both Article 101 of the Territorial Sea Convention of 1958 and Article 15 of the Maritime Law Convention of 1982 stipulate that an act of piracy should be committed for private ends. Whether this condition excludes politically motivated terrorist activity from the definition of piracy is a highly controversial scholarly issue. D.R.

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5 These attempts have been vividly and accurately described by Geoffrey Levitt: “The search for a legal definition of terrorism in some ways resembles the quest for the Holy Grail: periodically, eager souls set out, full of purpose, energy and self-confidence, to succeed where so many others before have tried and failed”, [in:] G. Levitt, *Is “Terrorism” Worth Defining?*, [in:] *Ohio Northern University Law Review* 1986, no. 13, p. 97.

6 Available at: <http://www.nytimes.com/2008/12/05/opinion/05burgess.html>

Burgess points out that based on travaux préparatoires of the Geneva Convention of 1958 and the Jamaica Convention of 1982, the notion of private ends has been used in Article 101 to exclude from the definition of piracy activities undertaken by rebels who have not been recognised as combating party by the country they fight against but who restrict their attacks solely to targets belonging to this country. The authors of this definition intended to avoid a situation where governments fighting against rebels could qualify the rebellious activities as piracy. Another important factor is the historical context of when the definitions were created, namely the Cold War. At that time international law distinguished only between two kinds of wars: state versus state and civil war. The ongoing war on terror is a third, previously unknown, category of military conflicts: state versus non-state. Contrary to conventional wars, the war on terror is not fought either within the territory of a single state or against a single state but it is rather fought all over the world against a multitude of states. The situation is completely different from the times when the Geneva Convention and the Montego Bay Conventions were created. For authors of these conventions, the understanding of “political” was limited to state conflicts and civil wars. The Cold War period is now over but the then-created definition of piracy still applies despite over 50 years of evolution in piracy, the emergence of terrorism and the growing relations between the two phenomena.

The mere fact that terrorists claim to be driven by political reasons is far from sufficient to judge that they are in fact politically motivated. As Samuel Menefee accurately pointed out: “I don’t think we can let terrorists define what the ends are”.<sup>7</sup> Therefore, summarises D.R. Burgess, unless they act on behalf of some national authorities or recognised rebel organisations, they are not realising political aims and, hence, they may be considered pirates. The condition which excludes political activity from the definition of piracy applies only to state officers and not to those who act for political ends. Other authors support this claim made by D.R. Burgess. Professor Gerald Fitzmaurice believes that political, or public, ends are those which have previously been authorised by relevant state authorities. This leads to the conclusion that activities conducted for private ends, as stipulated in Article 101 of the Jamaica Convention, are those which have not been authorised by any recognised government.<sup>8</sup> Also D.H.N. Johnson judged that it would be much more beneficial to assume that non-authorisation by any state government is the factor defining piracy rather than the private ends condition.<sup>9</sup>

7 D.R. Burgess, *The World...*, op. cit., p. 156.

8 M. Halberstram, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, *American Journal of International Law* 1988, vol. 82, p. 281.

9 D.H.N. Johnson, *Piracy in Modern International Law*, *Grotius Society Transactions. Problems of Public and Private International Law* 1957, Vol. 63, p. 77.

The author's reasoning is convincing. The authors of the definition provided in Article 101 of the Montego Bay Convention did not intend to restrict piracy to activities conducted for profit (*lucri causa*) when they added the private ends condition to it. In the comment to open sea articles developed by the 7th Maritime Law Committee in 1955, it is stipulated that while an act of piracy needs to be committed for private ends, the desire for profit (*animus furandi*) is not required and acts of piracy may be driven by hatred and revenge rather than for the desire for profit only.<sup>10</sup> Hatred and revenge are, as a matter of fact, some of the most critical forces behind terrorism.<sup>11</sup>

By strictly applying the requirement that pirates should aim for private ends (personal benefit) and excluding the political ends, we face the risk that many contemporary acts of piracy will not fulfil the conditions stipulated in Article 101 of the Convention and that offenders will not be considered pirates thereunder. How do we, for example, treat Somalian pirates who transfer a major part of the ransom they get for hijacked ships to an extremist Islamic militia al-Shabaab, which has contacts with Al-Qaeda and has been qualified by the US as a terrorist organisation fighting to seize control over Somalia from the internationally recognised Temporary Federal Government?<sup>12</sup>

Another issue which needs solving is the issue of the location where criminal act is committed. A basic question emerges: can piracy occur on land? The Harvard draft<sup>13</sup> accepted the possibility of piracy occurring on land by descent from the sea. Unfortunately, this provision was not used in the Territorial Sea Convention of 1958 or the Maritime Law Convention of 1982. Both conventions limited the location of piracy to areas outside of any state jurisdiction but the author believes such an option may still be considered acceptable under the international customary law. The occurrence of piracy on land has been accepted in the international law doctrine for a long time. For example, a Soviet manual of international law (1952) said that: "Sea piracy or buccaneerism are violent acts committed either by ships and their crews upon other ships at sea or they are attacks committed by ships upon seashore locations, mostly for robbery or to hijack ships and kidnap people, and less frequently for other illegal purposes."<sup>14</sup>

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10 United Nations General Assembly A/CN.4/94, p. 20. Available at: [http://untreaty.un.org/ilc/documentation/english/a\\_cn4\\_94.pdf](http://untreaty.un.org/ilc/documentation/english/a_cn4_94.pdf)

11 Under the definition of piracy used by the International Maritime Bureau, piracy does not need to be committed for private ends only. Also politically and ecologically motivated activities fall under the notion of piracy.

12 See also: Piracy ransoms funding Somalia insurgency, <http://www.reuters.com/article/2008/08/24/us-somalia-piracy-interview-idUSLO00572320080824>

13 The Harvard Draft Convention on Piracy developed under the supervision of Prof. Joseph Bingham in 1932 was, to a large extent, a model for the authors of the Territorial Sea Convention of 1958 which means that some of the stipulations therein were also used in the Maritime Law Convention of 1982.

14 Editors: W.N. Durdieniewski, B. Kryłow, *Podręcznik Prawa Międzynarodowego*, Warszawa 1950, p. 269.

Furthermore, as D.R. Burgess points out, the legal systems of many countries, including the USA and the UK, allow for piracy to occur on land. The author emphasises the potential behind the concept of “descent by sea”. The descent may not only come from a seagoing vessel. The concept of aerial piracy largely extends the understanding of descent by the sea. Terrorists arriving in a country either by sea or by air could also be considered pirates and regardless so of whether their aim is against a coastal state or one that is landlocked. This thesis proposed by D.R. Burgess belongs to the most tentative ones. Terrorists commit criminal acts without territorial restrictions whether on land, at sea or in the air. Pirates, however, under Article 101 of the Montego Bay Convention may only act at open sea. Although history records many pirate attacks against coastal locations, nowadays the risk of an attack by descent from the sea seems rather unlikely. Contemporary piracy occurs only at open sea. This was accurately described by Martin N. Murphy: “piracy is a crime of the land that is manifested at sea”.<sup>15</sup>

D.R. Burgess knocks this argument down, however, with logical reasoning: “If some pirates are terrorists, and all pirates are *hostis humani generi*, then some terrorists must be *hostis humani generi* as well. Does it make sense for some terrorists to be enemies of the human race and others not?”<sup>16</sup>

D.R. Burgess shows how important it is to come up with a universal definition of terrorism by presenting the Hamdan vs Rumsfeld case.<sup>17</sup> Salid Ahmed Hamdan was a Yemeni citizen taken into custody by the US. Army during the invasion in Afghanistan, held in Guantanamo Bay prison and accused of conspiracy to commit terrorism as a member of Al-Qaeda. Salid Ahmed Hamdan went on trial before a military commission established under Military Commission Order No. 1, of 21 March 2002.<sup>18</sup> Ahmed and other persons put on trial were judged as enemy combatants at war with the USA. The American administration originally intended to treat person charged with terrorism as POW’s – as if they belonged to another army and fought on behalf of a foreign state. The problem was that enemy combatants had many rights guaranteed under the Geneva Convention. Bush’s administration did not want to grant these rights to Ahmed and his companions. This rhetoric had yet another gap in it. Ahmed was not charged with any particular act of terrorism, merely of conspiracy, which does not constitute a crime of war and may not serve as basis for putting charges before a military commission. Criminal conspiracy is a felony charge, appropriate only for domestic criminal courts. The problem emerged: how to proceed with Ahmed Hamdan and his companions? If we want to

15 M.N. Murphy, *Future Scenarios and Future Threats: What Happens if Piracy is not Controlled, and How Might Manifestations Change?*, [in:] *Global Challenge, Regional Responses: Forging a Common Approach to Maritime Piracys*, Dubai 2011, p. 37.

16 D.R. Burgess, *The World...* op. cit., p. 158.

17 Syllabus of *Hamdan v. Rumsfeld* available at: <http://www.supremecourt.gov/opinions/05pdf/05-184.pdf>

18 Available at: <http://www.defense.gov/news/Mar2002/d20020321ord.pdf>

treat them as POW's, they have rights under the Geneva Convention. If we want to charge them with conspiracy rather than any particular act of terrorism, they should be taken before domestic criminal courts. To preserve the possibility of putting the captives charged with terrorism before a military commission and be able to charge them with membership in terrorist organisations without evidence to prove their participation in any specific act of terrorism, the Bush administration started to label such persons "unlawful military combatants". The author claims that this term has no meaning under law and thinks that the attempts made by Bush's administration to define the crime of international terrorism was a complete disaster.<sup>19</sup> D.R. Burgess wants to convince the reader that building the definition of terrorism on the notion of piracy is much better than placing terrorism within the framework of genocide or crimes against humanity. The author claims that the latter mostly refer to states, governments and criminals acting on behalf of state authorities. Piracy is the only case in the law of nations where a single human being is covered by universal jurisdiction without governmental nexus.<sup>20</sup>

One could obviously argue with the reasoning presented by D.R. Burgess. Regardless of whether we subscribe to the author's view that piracy is terrorism and terrorism is piracy, the fact is the Doug Burgess provides an in-depth analysis of the relations between terrorism and piracy. In his work, Doug Burgess offers a completely new and fresh insight into the problem of combating international terrorism. To sum up, D.R. Burgess's work is an interesting book written by an expert in the field. It may be recommended to anyone interested in the phenomena of terrorism and sea piracy.

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19 D.R. Burgess, *The Word...* op. cit., p. 200.

20 *Ibidem*, p. 203.