

BOOK REVIEW

Douglas Guilfoyle (ed), *Modern Piracy. Legal challenges and responses*. Edward Elgar, Cheltenham (2013). xvi, 354 pp. ISBN 9781849804844

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This book contains papers presented at a workshop convened at University College London in 2011 by the members of the Modern Laws of High Seas Piracy Project. The contributors include judges and former judges, legal academics, legal practitioners, former naval officers and senior civil servants and thus provides both private and public law perspectives on this ever challenging issue.

As the title indicates, the book is primarily concerned with the legal challenges posed by modern piracy. The book is divided into four parts: the first part considers the current situation in Southeast Asia, Somalia and West Africa and the various bodies involved in the anti-piracy response; the second and third parts are concerned with public and private law questions respectively; while in the final part the editor highlights some of the major themes.

One of the most fundamental problems in combating piracy, if not *the* key problem, is the definition of piracy itself. As Robert Beckman points out, the definition of piracy in the *United Nations Convention on the Law of the Sea 1982* (UNCLOS III), which itself was largely a codification of customary international law, refers in Article 101(a) to acts of violence, detention or depredation committed on the high seas by a private vessel against another vessel for private ends. Even though piracy can also be committed in the Exclusive Economic Zones (EEZ) of coastal States as specified in Article 58(2), and two other offences constituting piracy under UNCLOS III have no specific locational restriction (voluntary participation in a pirate craft and facilitating or inciting piracy) (see page 326), the fact remains that the restriction of piracy to private acts committed on the high seas means that many instances commonly described as piracy are, in fact, ‘armed robbery against ships’ as defined by the International Maritime Organization (IMO) in the *Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships* (2009) or offences under the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* 1988 (as are also many of the actions of the Sea Shepherd vigilantes).

Robert Beckman examines offences against ships in Southeast Asian waters and the measures taken especially by Singapore, Malaysia and Indonesia to suppress attacks on shipping. Although this cooperation has been largely successful, there are still two disturbing trends: ‘theft against ships at anchor in territorial waters’ and hijacking and ‘re-birthing’ of tugs to order. He sees the way forward as involving improved information sharing, capacity building, ratification and enforcement of international conventions in this area and review of national legislation against piracy – all suggestions which are equally relevant elsewhere.

Somali piracy has attracted the most attention in recent years. As Douglas Guilfoyle explains, while illegal fishing in Somali waters is sometimes used as a justification by the pirates for their activity, the reality is that the breakdown of law and order in Somalia, and particularly in Puntland, has led to the creation of a successful business model which, with the use of ‘mother ships’, has enabled the Somali pirates to range ever further from the coast. Hijacking of vessels and the taking of hostages for ransom led the UN Security Council to adopt Resolution 1816 on 2 June 2008, authorising member States to enter Somali territorial waters and use ‘all necessary means to repress acts of piracy and armed robbery’ (paragraph 7). Subsequently, naval operations have been conducted by the United States (CTF-151), NATO (Ocean Shield) and the European Union (EU NAVFOR) and by a number of countries whose shipping has been affected (including India, China and South Korea). Shortly thereafter, UN Security Council Resolution 1851 of 16 December 2008 authorised a shift towards law enforcement, including arrangements for the custody and prosecution of pirates and armed robbers. Many of the problems with suppressing piracy revolve around these last two issues. Taking a warship out of a naval convoy to transport a few pirates back to Europe, Australia or the United States is both deleterious from a military viewpoint and not cost effective. At the same time, there is not a lot of inclination to prosecute, sentence and detain captured Somali pirates.

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Piracy in the Gulf of Guinea, primarily in Nigerian waters against ships and oil installations, is less well known, but far more serious and deadly. Martin N Murphy details the role of official corruption and the continuing ethnic and other causes of rebellion (such as loss of oil revenue) in the Delta region, which fuel the issue. Of course, strictly speaking, most of the so-called 'illegal bunkering' is not piracy since it is taking place in coastal and inland waters.

The final chapter in Part I, by Christian Bueger, considers the efficacy of the more than 50 organisations and arrangements involved in fighting piracy. Bueger looks at current practice under a number of heads, including government, law enforcement, security, development and humanitarian. There is widespread consensus that the 'root cause' of piracy, at least in Somalia, is the breakdown in law and order, corruption and poverty and a number of international efforts are directed at improving this situation. In addition, NGOs and development agencies are aimed at supporting the local fishing industry, reducing local support for the pirates and spreading anti-piracy messages.

In Part II, Tullio Treves examines public international law relating to piracy. He correctly notes that the UN Security Council Resolutions already mentioned have broadened the scope of existing rules, although the Security Council was careful to limit their scope both temporally and geographically. Nevertheless, some States are concerned about extending the UNCLOS III regime. Other significant legal issues concern the handling and prosecution of captured pirates and armed robbers, inadequacy of the transfer agreements negotiated with neighbouring African and Indian Ocean States and the use of force to suppress attacks on ships.

Andrew Murdoch and Douglas Guilfoyle take up the issue of the use of force against Somali pirates in the next chapter. After first examining the cooperation arrangements between the various naval forces involved and the impact of the UN Security Council Resolutions, they turn their attention to the question of naval rules of engagement, using as case studies operations carried out by HMS *Cumberland* and INS *Tabar*.

Håkan Friman and Jens Lindborg next take this analysis one step further by looking at the criminal versus 'enemies of mankind' question. A number of offences are widely recognised as international crimes, such as slavery, trafficking in women and children, gun-running – and piracy – but this does not allow pirates, and even less so, armed robbers to be treated as 'enemies' in a military sense. This discussion highlights another paramount issue in combating piracy. If pirates are simply to be treated as criminals there needs to be more international cooperation in respect of their arrest, transfer, prosecution and detention, as well as into evidentiary issues.

The final contribution in this Part, by Brian Wilson, discusses the origin and application of the US Maritime Operational Threat Response Plan (MOTR Plan) and concludes that, following a piracy attack, the following steps should be undertaken: extensive details of the incident should be recorded; full personal details of all captured pirates should be obtained; and all equipment and weapons seized should be itemised. The purpose of these records is to assist with providing evidence for prosecution and establishing a chain of custody. In addition, personal details of victims should be obtained, amongst other things, in order to be able to trace them if necessary.

James Kraska considers the use of private maritime security companies (PMSC) to help combat piracy. Following incidents involving actions by private security contractors on the battlefield, the International Committee of the Red Cross drew up the Montreux Document on legal obligations and good practice for private military and security companies *during armed conflict*. However, as mentioned above, pirates are not regarded as being at war. Therefore, an International Code of Conduct for Private Security Service Providers was developed from the Montreux Document and has been supported by Singapore and the Philippines within the IMO. The Maritime Safety Committee of IMO has been examining PMSC's for some time and Kraska provides a good overview of these considerations (see pages 226-248).

Queen's Counsel Peter MacDonald Eggers next looks at the definition of piracy and distinguishes the elements of a common law offence. These are:

- theft or attack on a ship or other maritime property and/or persons on board (and possibly coastal property) carried out from another vessel or from shore, whether successful or not;
- carried out at sea – including territorial waters and even inland waters;
- using violence, threatening violence or intending to use violence;
- without the authority or complicity of a state; and
- for motives of personal gain or vengeance or hatred.

This definition goes a long way to meeting some of the weak points in the UNCLOS III definition, but still leaves open ambiguity around political and ideological considerations. Are Somali pirates really only responding ‘politically’ to threats to the local fishing industry? The requirement that there be no state complicity would also exclude some piracy incidents in the South China Seas.

In the following chapter Eggers deals with piracy as a peril insured against in policies of marine insurance and the nature of the loss from an insurance perspective. For readers not familiar with marine insurance, the discussion in this contribution is very important. He also examines the legality and public policy issues involved in the payment of ransoms, which are driving the Somali ‘business model’. For those interested in this issue, I suggest reading the judgment in *Masefield AG v Amlin Corporate Member Ltd* [2011] EWCA Civ 24.

The remaining private law contribution by Keith Michel examines the effect of hijacking – and the consequent off-hire, delay and frustration issues – on charter parties and contracts of carriage evidenced by a bill of lading. He also discusses standard war risk and piracy clauses. Again, for those less familiar with carriage of goods by sea, this chapter provides a good although brief overview.

In the final chapter, Douglas Guilfoyle returns to some recurring themes: the obvious one of definition, but also whether there is one form of piracy or multiple types, the tension between efficiency and justice, sovereignty versus multilateral action, and market intervention.

There was not always such a problem of definition. Under the *Offence at Sea Act 1536* (incidentally, like the subsequent British Piracy Acts, still in force in the Australian Capital Territory and possibly elsewhere until repealed in 2002) ‘traytors, pirates, thieves, robbers, murtherers and confederate upon the sea .. or in any other haven, river, creek or place where the admiral or admirals have or pretend to have power, authority or jurisdiction’ were all treated alike. The problem was, then as now, since the civil laws were being applied, that the offender had to ‘plainly confess their offences .. or else their offences (had to) be so plainly and directly proved by witness indifferent’.

Since only ‘torture or pains’ would bring about a confession and witnesses were often killed or had sailed on, trial before admirals fell into disuse. The *Piracy Act 1698* sought to address the greatly increased ‘insolencies’ of pirates in the East and West Indies and the difficulties of prosecuting them in England by allowing them to be tried ‘in any place at sea, or upon the land, in any of his majesty’s islands, plantations, colonies, dominions, forts or factories’.

The *Piracy Act 1717* applied to ‘pirates, felons or robbers’ and tackled another problem that had emerged in practice, claims to benefit of clergy, from which pirates were to ‘be utterly debarred an excluded’. I do not believe that modern pirates and armed robbers have resorted to this tactic, but the remedy has already been tried. The next change, the *Piracy Act 1721*, tackled a new development that had emerged, help by others to provide, fit out and supply pirate ships. Those who ‘consulted, combined, confederated or corresponded’ with any pirate, felon or robber upon the seas were to be treated in exactly the same manner in order to prevent ‘trade and navigation into remote parts’ from suffering further.

Finally, the *Piracy Act 1744* was enacted because British subjects had entered into French and Spanish service on board privateers. Even though Britain was at war with France and Spain, doubts had arisen as to whether those apprehended had committed high treason. The new act, however, made clear that they were guilty of felony and could be tried as pirates – in a court of Admiralty, *on shipboard*, or upon the land. Upon conviction they were to ‘suffer such pains of death, loss of lands, goods and chattels, as any other pirates, felons and robbers.’

There is, as the saying goes, nothing new under the sun. This brief excursus on the historical legislation illustrates that many of the definitional and practical issues were also present in the 16th-18th centuries. Can we learn anything from past experience? Perhaps there is scope in Eggers’ common law definition to include other felonies. Should we have shipboard trials? What about dealing more firmly with those aiding and abetting or conspiring with pirates?

These are just a few thoughts inspired by a very interesting and informative book, well produced as always by Edward Elgar.