

## BOOK REVIEW

**Panos Koutrakos and Achilles Skordas (eds). *The Law and Practice of Piracy at Sea: European and International Perspectives*. Hart Publishing, Oxford (2014). xl, 374 pp. ISBN 9781849464123**

Dr Chris Rahman\*

The problem of piracy is an age-old one, almost as ancient as seafaring itself. However, the character, costs and consequences of piratical endeavour across the world's seas and oceans in contemporary times has been a variable story specific to particular geographical and political-cultural contexts. Initially, in the 1990s, shipping industry and maritime user state concern was directed at the alleged growth in the rate of piratical incidents in Southeast Asia, particularly in and around Indonesian waters. The focus of international concern quickly shifted in the mid 2000s to the Horn of Africa, though, as the threat to international shipping and good order at sea posed by Somali pirates began to spiral out of control. And, just as the Somali problem is now seemingly under control, ever greater concern is currently focused upon the problem in the Gulf of Guinea, where attacks, largely but not exclusively conducted by Nigerians involved in the Niger Delta insurgency, have been on the rise.

It is in these contexts that this book has been produced, to address legal issues related to the international law of piracy and its adequacy, and practical arrangements to counter the piracy threat, particularly in light of the Somalia experience.

There are a number of potential warning signs with this book. First, as an edited volume with its origin in a workshop, one can typically expect significant variability in chapter quality. Second, the European and international perspectives promised in the book's subtitle may be slightly misleading: aside from one American contributor, all others are either European or Europe-based. As the initial workshop was sponsored by the European Commission, there exists the obvious potential for a narrowly European Union-centric approach to the volume. Third, the book could have been a purely academic exercise sans policy relevance. Happily, none of these concerns are particularly well founded. It is a well-edited book with an overall high standard of individual chapter content. Although it does have a strong Europe bias, this is perhaps unsurprising given the heavy commitments made by European states to combat the Somali pirate threat, both within the auspices of the European Union as part of EU NAVFOR Operation Atalanta and as NATO members. Most encouragingly, contributors include legal advisors to the Council of the European Union, NATO, the UK Foreign and Commonwealth Office, and the US State Department, which adds extra credibility to the book.

It is a substantial volume, including 40 pages listing cited cases, legislation and international legal instruments, an introduction; and 15 extensively footnoted chapters divided into three parts: Part I on the underlying legal norms related to piracy and counter-piracy operations; Part II on specific national, regional and international approaches to dealing with aspects of the threat; and Part III on new policy, legal and conceptual approaches to the piracy problem.

Article 101 of the 1982 *UN Convention on the Law of the Sea* (LOSC)<sup>1</sup> sets out the international legal definition of the transnational crime of piracy, closely derived from that established in the 1958 High Seas Convention.<sup>2</sup> The three most salient features of the LOSC definition are that two ships (or aircraft), victim and pirate, must be involved; that the crime must be carried out for 'private ends'; and that it must occur on the high seas, including the exclusive economic zone (EEZ) due to LOSC Article 58(2), which applies Articles 88 to 115 on the high seas also to the EEZ. The meaning, provenance and alleged inadequacies of the LOSC definition are discussed in detail in the book's first chapter, written by senior legal scholar, Robin Churchill, co-author of what was for two decades the standard law of the sea textbook. He evaluates a number of criticisms of the LOSC definition of piracy, including the lack of clarity in the definition regarding the precise meaning of 'acts of violence or detention, or any act of depredation' and 'private ends.' He also critiques the LOSC for not requiring parties to establish legislative jurisdiction over the crime: without such implementing legislation it is not possible for

---

\* Senior Research Fellow in Maritime Strategy and Security, Australian National Centre for Ocean Resources and Security (ANCORS), University of Wollongong.

<sup>1</sup> 1833 UNTS 3.

<sup>2</sup> 450 UNTS 11.

states to arrest and prosecute pirates under universal jurisdiction, as established by LOSC Article 105. As later chapters in Part II discuss in more depth, this has been a significant shortcoming in efforts to combat Somali pirates. It should be noted, however, that even in cases where treaties do establish such legislative jurisdiction requirements, it does not follow that parties to the relevant treaty always actually enact implementing legislation, or that that legislation is either adequate or consistent with treaty intent. The 1988 *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* (SUA Convention)<sup>3</sup> may be an example of that particular phenomenon.

Most interesting, perhaps, is Churchill's discussion of 'private ends' and, in particular, whether acts of environmental protest or terrorism at sea could satisfy the private ends requirement – as opposed to the widely held assumption that such acts are conducted for political ends – and thus potentially constitute piracy. In the former case he rejects the argument made by Belgian and American courts in two cases that environmental protest could be conducted for private ends. More controversially, though, he argues that 'Insofar as the rationale for labelling conduct as piracy is that it constitutes an indiscriminate and violent menace to shipping ... terrorist acts generally fall within such conduct' (p. 17). The following chapter by Douglas Guilfoyle on piracy and terrorism adopts the same argument based on a review of the legal history of the meaning of 'private ends.' He argues that the original and more sensible use of the term related to the exclusion of attacks on ships by insurgents in civil war contexts (for which he uses the term 'public violence') from definitions of piracy, which could better be covered by the laws of armed conflict. Thus he concludes that the 'correct dichotomy' is better viewed as 'private/public, not private/political,' meaning that 'an act of piracy would remain piracy, even if committed for political motives' (p. 52). Rather less controversial, on the other hand, is Guilfoyle's argument that the SUA Convention, in addition to its intent to suppress certain politically motivated offences, might also be used to prosecute some piratical acts, including potentially in circumstances where the LOSC may not necessarily apply.

At a mammoth 85 pages, the first chapter of Part II by two legal advisors to the Council of the European Union provides an incredibly comprehensive survey of EU policy and practice in combating piracy, which is largely focused on the considerable experience gained over the past decade in the waters off Somalia. This comprehensive approach is understandable but does have a downside, involving considerable overlap with other chapters, including those dealing with the legal definition of piracy, the use of force, the potential applicability of international humanitarian law, human rights issues and prisoner transfer agreements.

One theme that arises repeatedly is the extent to which counter-piracy operations may invoke the law of armed conflict. The question of the applicability of international humanitarian law is often raised in the Somalia situation in part due to the fact that the series of UN Security Council resolutions negotiated to combat Somali piracy have been adopted under Chapter VII of the UN Charter. However, as Achilles Skordas' initial concluding chapter of Part III notes, the resolutions do not determine that Somali piracy itself constitutes a threat to peace and security, and argues that the usual constraints of international law usually applied to law enforcement at sea also apply in this case. This is consistent with Thilo Marauhn's chapter on the limits of international humanitarian law in counter-piracy operations, which states bluntly that there is 'no role to play for the laws of war' and that counter-piracy operations need to 'be understood as law enforcement activities' (p.68). Marauhn further notes that one reason confusion sometimes abounds is a misguided assumption that 'the use of military force per se triggers the application of international humanitarian law.'

It is notable that governments and navies involved in counter-piracy operations off Somalia enjoy far greater clarity of understanding of this issue than do certain legal scholars, although it is the experience of this reviewer with the education of naval officers over a number of years that some operators do share the confusion. This may in part be due to the fact that some naval officers have participated in maritime security (i.e. counter-terrorism) operations in the northern Indian Ocean, in which occupants of suspect vessels potentially could be viewed as both criminals and enemy combatants. Pirates, on the other hand, ought more obviously be treated solely as criminals, which is one reason why the clouding (rather than clarifying) arguments by the likes of Churchill and Guilfoyle that terrorists should be viewed as acting for 'private ends' are unhelpful.

Perhaps the most intriguing perspective in the book is that provided by Skordas, who argues that the costly and sometimes ineffectual use of naval forces (due to a frequent unwillingness to arrest and prosecute, and therefore deter, pirates, and the inappropriate application of human rights and refugee law to Somali pirates, inter alia) has given rise to the greater acceptance amongst governments and the International Maritime Organization of the role of private maritime security companies in the protection of shipping in the waters off Somalia. In fact he

---

<sup>3</sup> 1678 UNTS 221.

goes further, suggesting that 'self-regulation' could be the future to safeguarding navigation globally, with the maritime industry taking the lead by integrating private security 'in the overall system of activities and risk management' of the industry and 'formulating globally applicable rules and best management practices' (p. 325). This is provocative but possibly points to a fruitful future policy evolution for international shipping. His is also the only chapter to address, albeit all too briefly, the important consideration that there are many groups who have prospered from Somali piracy other than the pirates themselves, not least of whom are City of London financiers and ransom negotiators.

Perhaps Skordas aside, there is little in the book that could be considered new or ground breaking; an unsurprising result given the copious amounts written on the subject over the past decade. In practice the book deals only with piracy in generic terms and with the Somalia case. The one chapter comparing Somali piracy with the problem in Southeast Asian waters is not entirely satisfactory, and none addresses the Gulf of Guinea. It might have been better, then, to somehow reflect the Somalia focus in the title. If one accepts such a focus, then the only substantive criticism to be made is that there are no industry perspectives represented here. The perspectives of shippers, charterers, marine insurers, commercial maritime lawyers and the like would have enriched the content, particularly given the arguments, noted briefly above, made in the Skordas chapter. A minor but unfortunate omission is a list of acronyms, which made some chapters difficult to follow given the extent of acronym usage.

Overall, though, this is a handsomely produced and timely book, which brings analysis of the law of piracy fully up to date, incorporating the wealth of experience gained in combating Somali pirates over recent years. It represents a useful reference volume and is recommended.