

# *Introduction*

**T**HIS COLLECTION OF essays aims to provide a comprehensive assessment of the legal and policy issues pertaining to the maritime counter-piracy approaches adopted by the UN, the EU and other regional actors over the last few years. In view of the social structure, global dimensions and repercussions of contemporary piracy, the present volume has set itself the objectives of rethinking the conceptual framework of international and European law and exploring the current practice of states and international organisations. The recent decline in piracy incidents off the Somali coast makes the present analysis even more topical, as the contributors had the opportunity to observe the entire cycle of the phenomenon, and draw conclusions regarding the legality and effectiveness of the instruments, methods and policies employed for the repression of piracy.

Piracy at sea is a phenomenon that has been steadily brought to the top of the agenda of international policy-makers. This is due to economic and security factors. On the one hand, the financial cost of piracy for the maritime industry and world economy as a whole (estimated to be about \$18 billion by 2010 in the 2013 World Bank Report on Somali piracy)<sup>1</sup> as well as, more specifically, the cost of tackling the phenomenon effectively (including, but not confined to, the protection of vessels, the prosecution and imprisonment of pirates, and the process of building national and regional capacity to fight piracy) is considerable. On the other hand, piracy may be linked to state failure and collapse, and adds a significant dimension to other pathologies bred by it, such as organised crime and terrorism. In parts of Somalia, in particular, a pirate economy took hold over a certain period of time, and piracy evolved into a transnational criminal business activity based on hostage-taking and ransom, with links and support outside the country. The film industry's stereotypical and plot-generating figure of the romanticised pirate with his antics has to be replaced by the more sophisticated persona of the ruthless and media-savvy pirate leader as a businessman acting on the invisible side of world society's economic and political systems.

The emerging significance of piracy is illustrated by the increasing attention it has attracted by international actors. The EU, for instance, in its Security Strategy, adopted in 2003, well before piracy at the Horn of Africa became an issue of international concern, highlights it as a new dimension of organised crime.<sup>2</sup> Five years later, in its 'Report on the Implementation of the European Security Strategy', the Union elevates piracy as one of the main issues in its effort to build stability in Europe and beyond (along with development and the proliferation of small arms and light weapons).<sup>3</sup> The

<sup>1</sup> World Bank, 'The Pirates in Somalia: Ending the Threat, Rebuilding a Nation' (2013) 15, available at <http://siteresources.worldbank.org/INTAFRICA/Resources/pirates-of-somalia-main-report-web.pdf> (last accessed on 28 September 2013).

<sup>2</sup> 'A Secure Europe in a Better World—European Security Strategy' (Brussels, 12 December 2003).

<sup>3</sup> 'Report on the Implementation of the European Security Strategy' (Brussels, 11 December 2008).

UN Security Council has been adopting resolutions regularly since 2008 urging the international community to tackle piracy and the UN General Secretary has adopted a number of reports on the matter.<sup>4</sup>

However, it is not only in rhetoric that international actors focus on piracy. The EU has been carrying out a maritime mission off the coast of Somalia since 2008 in its efforts to tackle the spread of piracy in the area (EU NAVFOR Operation Atalanta). It was the intensity of the incidents in that area in the late 2000s that attracted greater attention to the phenomenon of piracy: NATO has been deploying missions in the area too since 2008; the US has been leading combined maritime forces from a number of states and covering a very wide zone; China has been carrying out its first overseas mission in the Gulf of Aden since 2009; a number of individual states maintain vessels patrolling the area, including India, Russia and Japan.

Piracy off the coast of Somalia has brought attention to the phenomenon of piracy more generally and also some urgency in international efforts to tackle it. This is due to the large area in which such incidents occur, as well as its significance for maritime transport. This sense of urgency may also be explained in the light of the disintegration and fragility of Somalia, which makes the link between state failure and piracy all the starker. However, piracy is by no means confined to the area off the Horn of Africa, and the emphasis on that region should not underestimate its presence and perseverance in other areas, such as the Gulf of Guinea or Southeast Asia.

In the light of its increasing topicality and the ongoing efforts of the international community to tackle the phenomenon, piracy at sea has attracted the interest of international law and EU law scholars as well as policy-makers. This inter- and intra-disciplinary appeal is reflected in the approach of this book to both its subject matter and its contributors.

First, in terms of its subject matter, this collection of essays examines the approaches to piracy as these emerge in different geographical areas. For instance, in addition to the Horn of Africa, it also examines piracy in Southeast Asia, a case of significance due to the advanced level of regional cooperation achieved in order to tackle the problem.

Secondly, the focus of the book is broad as, in addition to the law of the sea, it also tackles the central issues which counter-piracy raises in terms of the most topical aspects of international law, such as international humanitarian law and armed conflict, piracy and terrorism, and use of force. It also focuses on the approach of the EU, given the increasing prominence which counter-piracy at sea has taken in the Union's external action. Therefore, the book places counter-piracy in its broader legal context.

Thirdly, the book brings together two different perspectives: on the one hand, it provides a detailed doctrinal exploration of the issues which counter-piracy raises; on the other hand, it emphasises and draws upon the insights of the practice of counter-piracy. The broad approach of this book is also reflected by the different perspectives which the contributors bring in order to explore piracy. Academic lawyers from different backgrounds (EU and international law) and legal advisors of the main actors in the area are brought together in order to highlight the multifarious aspects of a phenomenon which has challenged traditional and unilateral approaches to the

<sup>4</sup> For a recent report see S/2012/45 on piracy in the Gulf of Guinea (19 January 2012).

development of the law as well as policy-making in the area. Therefore, the book examines piracy not only in its broader legal framework, but also in its policy context.

The analysis starts off by placing piracy within the framework of public international law. Churchill explores its defining elements in the light of the United Nations Convention on the Law of the Sea (UNCLOS) and explores whether customary and treaty rules on piracy are identical, and whether they are still important for contemporary counter-piracy policies. He articulates the problems raised by the definition of piracy under UNCLOS rules and focuses on the issue of jurisdiction for persecuting pirates as the main shortcoming. This conclusion ties in with the distinct reluctance of states participating in counter-piracy operations to prosecute and the practice of concluding international agreements between them and states in the region where piracy takes place in order to enable the latter to assume this function. The relevant questions of law and practice are examined later in the chapter by Thym.

Once its conceptual parameters under the law of the sea have been set out, Guilfoyle examines whether pirates can be normatively treated as terrorists. This question arises in the context of interpretation of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, which aims to ensure safety of maritime navigation against acts of violence that may be subsumed under the concept of piracy, but are also considered as acts of terrorism. In the post-9/11 environment, the 'person' of the pirate has been differentiated from that of the terrorist in terms of affiliation to or membership of different violent non-state groups, but this is not necessarily true for each relevant act of violence in terms of law; thus the broader question whether counter-terrorist policies should be employed against acts of piracy becomes all the more pertinent. Guilfoyle's analysis engages in a historical and contextual examination of the terms 'piracy' and 'terrorism', and suggests that a strict, exclusive and inflexible categorisation is neither warranted nor necessary.

In his chapter, Proelss discusses piracy in relation to the use of force. The legality of recourse to force against pirates has to be assessed, inter alia, on the basis of the law of interstate force, as provided for by the UN Charter and customary international law, as far as the territorial integrity or political independence of the state where pirates have established their basis of operation is affected. For instance, taking into account the consent of the Somali authorities, the UN Security Council has authorised the use of force in the territorial waters and on the land in Somalia under a number of resolutions adopted pursuant to Chapter VII of the UN Charter. Proelss argues that such measures may not substantiate an authorisation to disregard the prohibition of the use of force, and no state engaged in counter-piracy operations has invoked its right to self-defence under Article 51 UN Charter. However, he discusses the question whether international law prohibits recourse to military force in an absolute manner, and concludes that enforcement measures against private actors that are a priori not covered by the *jus ad bellum* may lawfully involve the exercise of force, subject to legal limits set out in international human rights law.

Another issue raised by the proliferation of piracy in areas of weak governmental structures and regional tension is the relationship between counter-piracy practices and international humanitarian law. Marauhn discusses the issue of application of international humanitarian law in the course of counter-piracy operations. This matter is intimately connected with the question whether the increased level of piracy activities in areas such as the Gulf of Aden could generally reach the threshold of an 'armed

conflict' between pirates and the international naval forces. Marauhn answers in the negative, considering that counter-piracy operations have a law enforcement character, and their legality should be measured on the basis of human rights law. However, he does not exclude the possibility of an overlap between human rights law and humanitarian law in counter-terrorism and counter-piracy operations.

Following the conceptual analysis of piracy and its examination within the context of public international law, Part II of the book looks in detail at the ways in which national, regional and international actors have tackled piracy. Reflecting the subtitle of the book (*European and International Perspectives*), this part starts with an assessment of the approach adopted by the EU. Gosalbo Bono and Boelaert highlight the dual focus of the EU's approach. On the one hand, in the context of its security and defence policy, the EU has been carrying out its only maritime operation (EU NAVFOR Atalanta) off the coast of Somalia since 2008. Its mandate was expanded in March 2012 to cover attacks on targets on Somalia's coast. Extended until December 2014, this is a high profile mission which has raised the visibility of the Union in the area. On the other hand, the fight against piracy has also been an increasingly prominent objective of other EU policies, such as development cooperation. This chapter explores both the ways in which these approaches have developed and how they interact in legal and policy terms.

A particular issue that was raised in the context of the EU's maritime operation is the prosecution of alleged pirates. As the general parameters of this problem under international law have been examined by Churchill, the specific practice developed by the Union is analysed in Thym's chapter. He focuses on the transfer agreements concluded by the Union with countries in the area, and explores their modalities and implications, not least in terms of protection of fundamental human rights. Whilst he concludes that all the requirements set out by the European Convention on Human Rights have been met, he points out that the application of the EU Charter of Fundamental Rights is bound to raise significant issues in the light of the exclusion of the jurisdiction of the Court of Justice of the European Union from the areas of common foreign and security policy and common security and defence policy. In the light of this state of affairs, he suggests that national courts and parliamentary fora are bound to be tempted to play a more intrusive role in the field.

In his analysis of NATO's approach to piracy, Olson assesses the organisation's operation off the coast of Somalia. He points out that NATO's capacity to launch and sustain an extended policing operation is effective, even though it may be of lower visibility. This highlights an interesting dimension of the role of NATO, all the more so in the light of the ongoing debate about the limits of its operational capacity and, therefore, its ultimate function.

What follows is an examination of the approach of three national actors, namely the US (by Swiney), the UK (by Murdoch) and Germany (by König and Salomon). Each of these contributions provides a useful illustration of the different issues which national authorities face in their effort to design and implement counter-piracy policies and operations. Swiney outlines the approach of the US and refers to recent case law, as well as to the objection of the US administration to the establishment of an international tribunal for the prosecution of suspected pirates. Murdoch explores the efforts of the British government to articulate a comprehensive approach with increasing emphasis on tackling the long-standing pathologies of the areas where piracy-related problems are the most acute. He explains the internal challenges which such an approach raises and places it in

the broader context of the interactions between the UK and other national and international approaches. König and Salomon explore the legal complexities and constitutional law background of Germany's participation in international military operations, and discuss the implications for the country's involvement in the fight against piracy. Their chapter also analyses the development of criminal law in order to deal with different types of piracy-related crimes that fall under German jurisdiction and explores the legal regime governing private security providers.

A common thread of the chapters of Part II is piracy off the coast of Somalia. In his chapter, Egede offers an African perspective by highlighting the main parameters of the genesis and development of piracy in East Africa and by reflecting on the role of both regional states and approaches to tackling this problem. Ong then engages in a comparative analysis of how piracy is approached off the Horn of Africa and in the Southeast Asian Waters. The latter is a topic which is not often explored in the literature. This chapter offers an in-depth compare-and-contrast analysis which sheds light on the differences between the characteristics of piracy as it emerges in the two areas, but also points out certain common threads which underpin their tackling as a matter of both law and policy.

Instead of a conclusion bringing together the themes developed in the contributions in this book, we thought that it would be more interesting to develop the debate about piracy further and open it up by enquiring about its development within the broader international law and policy conceptual framework. This is the main objective of the three chapters in Part III. Skordas explores issues of legal policy and attempts an assessment of the instruments employed for the repression of piracy. He emphasises the inadequacies of the military and law enforcement approaches, and considers that the maritime business should be prompted to take measures of self-help, such as the regular use of private maritime security companies, which can also function as deterrents taking pirates out of business even in the absence of successful nation-building.

Klabbers reflects on the proliferation of regional and international initiatives to tackle piracy and concludes that, for all the range of their legal bases and participants, they may not be seen as giving rise to a body of global law. However, these approaches do form part of what global governance is about—a development which raises serious questions about accountability.

Finally, Evans and Galani explore the issues of jurisdiction, human rights (including rights of pirates and rights of victims) and soft law, and question the prevailing regulatory and jurisdictional mechanisms for tackling piracy and their focus on the latter as a law of the sea problem. They argue that this is too narrow an approach, which distorts the main feature of piracy as a challenge to statehood itself.

Due to the multifarious issues which it raises across a number of areas of national, transnational and international law and policy, piracy will keep attracting the interest of scholars, practitioners and policy-makers. This book aims to contribute to this ongoing conversation by seeking to disentangle different conceptual elements of this phenomenon, highlighting the national, regional and international counter-piracy approaches, placing the emerging legal issues in their policy context, and raising broader questions about the direction of both the relevant law and policy.

