1. Introduction: piracy, law and lawyers

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1.1 OUR APPROACH

This book considers the legal challenges posed by piracy, and in doing so attempts to bring together the perspectives of both public and private lawyers. These two groups of practitioners and scholars have a number of common interests when it comes to piracy, but frequently risk speaking past rather than with each other. One aim of the present book is to considering piracy ‘in the round’: to examine piracy in context and from both public and private law perspectives. The substantive chapters of this book are therefore divided into three parts: Part I deals with piracy in context, Part II considers the legal issues from the perspective of state and government actors, and Part III examines the law as it relates to private actors. Each of these sections is outlined below. The aim is to examine a selection of key questions in detail, while remaining throughout as accessible as possible to the non-specialist.

A preliminary distinction to make is one of definition. When we discuss piracy, are we always talking about the same thing? The simple answer that emerges from this volume is ‘no’. First, viewed in context, every major instance of piracy is always factually different – piracy is a single label for a diverse phenomenon which is highly contingent on local conditions. Second, lawyers do not have a single definition of piracy. For the public international lawyer, piracy principally refers to an act of violence, detention or depredation committed on the high seas by a private vessel against another vessel for private ends.1 Acts occurring within the territorial sea or internal waters (ports, rivers, etc.) are thus usually referred to as ‘armed robbery against ships’. The commercial lawyer is likely familiar with a broader concept of piracy which will encompass the international law definition but which also extends to

attacks in port, or even attacks originating from the shore. Thus an armed group attacking vessels in Nigeria’s internal waterways may constitute ‘pirates’ in common parlance and commercial law, but would not be ‘pirates’ in international law. Some of the consequences of these distinctions are explored in later chapters.

1.2 PART I: CONTEXT

The first section of this book considers the regions currently most affected by piracy, and the nature of the international response. Chapters in Part I thus deal with the differing forms of maritime violence found in Southeast Asia, off the coast of Somalia and within and off the coast of Nigeria; a final chapter provides an overview of counter-piracy practices and the organisations involved.

In Chapter 2 Robert Beckman considers piracy and armed robbery in Southeast Asia, which was as recently as 2000 the area of the world that saw the greatest number of attacks against shipping. Superficially at least, Southeast Asia is the great counter-piracy success story. After a period of rising attacks between 1998 and 2004, measures taken by regional states and the international community, including through the establishment of a regional Information Sharing Centre, appear to have significantly reduced the number of attacks. Beckman’s analysis eschews a direct cause and effect relationship between those governance measures and the subsequent fact of piracy attacks ‘coming under control’, and further outlines a number of important differences between piracy in this region and off Somalia.

I discuss Somali piracy in Chapter 3. My chapter begins with an extended account of the history of Somali piracy and its context, presenting Somali piracy as a highly adaptive business. It is worth understanding the facts of Somali piracy and its business model(s) for a number of reasons. First, given the obvious topicality of Somali piracy, it forms a recurrent example or case study in later chapters. Second, understanding how Somali piracy is shaped by its context cautions us against concluding either that Somali-style piracy may ‘spread’ elsewhere or that approaches that appear to have contained piracy elsewhere will translate readily to the Somali context. A further theme of the chapter

2 See Chapter 11.4.
will be the impact of Somalia on international law and organisation. The main argument will be that while the response to Somali piracy has not changed the substantive public international law applicable to piracy, that response has generated new models of cooperation and soft law.

Chapter 4 by Martin Murphy deals with the often overlooked phenomenon of West African piracy, in particular Nigerian maritime violence. Acts of depredation against ships and oil platforms frequently occur on the inland and coastal waters of Nigeria but have also ranged on occasion over 100 miles out to sea. Indeed, in the context of the Nigerian oil industry Murphy suggests that Nigerian ‘piracy’ may inflict ‘far greater financial losses and [have] a far wider [global] economic impact’ than piracy anywhere else. Murphy’s chapter conducts a thorough historical and political survey of the sobering causes of conflict in the Niger delta and offers a stern warning as to how difficult it may be to combat disorder in oil rich states. Setting strict law to one side, this chapter more than any other may prompt us to ask who the real pirates may be.

Stepping back a little, in Chapter 5 Christian Bueger provides a concise overview of the ‘myriad of governmental and non-governmental actors, UN agencies and international organizations [that] have become active in counter-piracy’. The task of understanding contemporary counter-piracy is made complex by the fact that it is now characterised by a plurality of actors and agencies with overlapping mandates and missions. At best, these various activities are horizontally coordinated; at worse they are duplicating effort. Bueger’s chapter helpfully illuminates this field by addressing the various strands of international practice in counter-piracy: ‘includ[ing] governance, epistemic, military, law enforcement, development, and humanitarian practices’. Without such a thematic mental map, the organisational terrain of counter-piracy can be next to incomprehensible. This is important background when considering the later chapters dealing with counter-piracy practice from the perspective of states (and their lawyers).

1.3 PART II: PIRACY AND PUBLIC LAW

The focus of Part II is not simply the public international law of piracy, but also the practicalities of counter-piracy operations as viewed by government lawyers. While they are all writing in a personal capacity, the

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Chapter 4.1.
Chapter 5.1.
Ibid.
present volume benefits greatly from the practical perspective of a number of contributors in government service. It also has the benefit of commencing with an authoritative exposition of the basic law.

Judge Tullio Treves, in Chapter 6, introduces the public international law of piracy and outlines the major debates. The focus is upon Somali piracy in particular, which has been the crucible for contemporary international law developments. The chapter thus serves as an introduction to the rest of Part II, in which some of the particular themes outlined by Judge Treves are taken up in further detail. The chapter begins by reviewing the scope and limitations of the general public international law definition of piracy and the jurisdictional rules applicable to states’ counter-piracy efforts. It then turns to the tailored regime created by a succession of UN Security Council resolutions to deal with the phenomenon of Somali piracy, and the extent to which these both broaden the traditional rules and contain their own limitations. The legal framework applicable to prosecuting pirates is introduced, in particular the difficult questions attendant on capturing warships transferring Somali piracy suspects to third jurisdictions for prosecution. This discussion provides important context for Chapter 8, in particular. The possibility of using the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation7 as a counter-piracy instrument is also explored, as are the fundamental rules governing the use of force against pirates by warships.

The role of warships in counter-piracy is the crux of Chapter 7 by Andrew Murdoch and me (though it is principally the work of the former). International law gives vessels (or aircraft) on government service unique positive authorisation to intervene against pirates. One of the most visible and discussed aspects of such operations off Somalia is what happens when a naval vessel encounters a suspect pirate craft which is either attacking a merchant vessel or threatening to use force against a naval vessel or personnel. The question becomes how much force naval vessels or personnel may use either to deter or disrupt an attack or to capture suspects and what law applies to such actions. While the chapter focuses principally on such maritime activities, the law applicable to counter-piracy operations ashore is also noted. Chapter 7 also considers the framework for cooperation between the various national and multinational missions deployed off Somalia and how the law works in an operational context, particularly through the adoption of military Rules of

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Engagement. The latter is an important and understudied issue, explored through two case-studies of real counter-piracy incidents involving lethal force.

Chapter 8 by Håkan Friman and Jens Lindborg goes on to consider more generally the impact of (and rationale for) conducting counter-piracy operations within a paradigm of law-enforcement and prosecution. In this context, it explores the practical legal difficulties for navies at the moment they capture suspect pirates and become part of a criminal justice process. This involves often complex questions of mutual legal assistance between states, as well as the problems that can follow from the length of time that may pass between capturing possible pirates and a decision being made either to transfer them (usually to another state) for prosecution or to release them. As a practical matter, it is not entirely clear that the states or international organisations involved have entirely shaken off the intellectual baggage of treating counter-piracy as first and foremost a military deployment. Thus, Chapter 8 concludes that if ‘piracy is to be treated [successfully]…as a criminal problem, much more attention must be given to the resulting legal challenges. States detailing military forces to collective operations must ensure that they have the legal tools necessary to perform a law-enforcement job efficiently.’ 8

Chapter 9, by Brian Wilson, in turn suggests that if maritime law-enforcement operations are to be effective then they require the coordination of assets and expertise within states (i.e., between departments and agencies). This is especially the case if timely decisions are to be made. Thus, ‘[w]hile the onus of resolving maritime threats traditionally has rested with naval assets, the spectrum of responses now extends into diplomatic, investigative and judicial venues. The intersection of agencies with separate command structures, operating procedures and authorities poses considerable coordination challenges.’ 9 In the United States, such inter-agency coordination is achieved through the Maritime Operational Threat Response (MOTR) Plan. Chapter 9 examines the MOTR plan’s origins, implementation, and the potential lessons learned both for piracy and maritime law-enforcement more generally.

Part II thus starts at the highest level of generality, with a detailed account of the general legal framework. It then moves through the legal challenges inherent in states’ conduct of counter-piracy operations and states’ efforts to cooperate in piracy prosecutions, before concluding with an examination of intra-state concerns in maritime security coordination.

8 Chapter 8.9.
9 Chapter 9.1.
1.4 PART III: PIRACY AND PRIVATE LAW

Broadly, Part III deals with two important and complex questions which can be opaque to the non-specialist. The first is the legal framework governing the relatively recent rise of private armed security as a counter-piracy defence aboard merchant ships. The second is the general law of marine insurance as it relates to piracy, including: the definition of piracy (as a question of commercial law); insurance against the risk of piracy (under ship or cargo policies) and the payment of ransoms; and the question of piracy under contracts for the carriage of goods by sea. The essential theme of Part III, then, concerns the role of law in the allocation of, and protection against, risk by and among private parties. On questions of commercial law, the treatment in this volume is largely from the perspective of common law jurisdictions and that of the United Kingdom in particular.

In Chapter 10, James Kraska explores the legal issues surrounding the use of private contracted armed security personnel (PCASP) in protecting merchant vessels. In particular, he notes that, through the work of the International Maritime Organization, the shipping industry and flag states 'standards and rules are emerging for employment of PCASP to guard ships transiting the High Risk Area threatened by Somali pirates in the western Indian Ocean'. The issues involved include: the division of authority between master and PCASP aboard; appropriate rules for the use of force; questions of liability arising from any use of force; and the potential difficulties involved when a ship carries weapons into foreign ports. While many of these issues can be regulated by the flag state, many will also fall within the jurisdiction of other states, including port states. Despite the potential complexities involved, and the potential for liability if and when things go wrong, there has been a steady shift in the position of the major shipping industry associations in favour of the use of armed guards – at least in certain cases. That said, PCASP will never be a panacea; rather they are one more possible tool as part of a larger package of state and private measures designed to shave the odds against successful piracy attack.

Of course, when there is a successful piracy attack, costs follow. In some types of piracy, especially that prevalent in Southeast Asia, the losses involved may be little more than the theft of readily moveable property – essentially burglary at sea. In Somali piracy the costs may run to millions of dollars, including ransom of the vessel and crew, delay of

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10 Chapter 10.1.
the vessel’s voyage, etc. Commercial parties will be keen to mitigate such losses and the laws of insurance and carriage of goods by sea both have implications for how such losses are allocated – or avoided in the first place.

In Chapters 11 and 12, Peter MacDonald Eggers outlines the fundamental questions relating to insurance law and piracy. Chapter 11 examines the common law definition of piracy in historical perspective. Clear definitions are an essential aspect of the law of piracy just as much in the commercial as in the public sphere. The purpose of defining words used in commercial contracts is, of course, ‘to give effect to the understanding of those words shared by the “ordinary commercial community”’. The point being that while the commercial concept of piracy encompasses those acts that would be piracy at public international law, the commercial definition is – as noted above – much broader.

Chapter 12 introduces the law applicable to marine insurance: that is, contractual promises by an insurer to compensate for loss caused by an insured against peril. Questions of who bears the risk of piracy will be relevant to a range of commercial actors involved in the voyage of a ship and its cargo (‘a maritime adventure’) including ship owners, cargo owners and crew members, among others. Though other legal interests (such as profits or the crews’ lives) may be insured, a ship will usually be insured under a ‘hull and machinery’ policy and its cargo under a ‘cargo’ policy. If a pirate attack occurs, those interested in a maritime adventure will almost invariably involve their insurers. What then follows requires an understanding of the basic principles of insurance law and the common forms of maritime insurance: what losses can be attributed to piracy and when are such losses covered by insurance policies? In answering such questions four issues will be critical. First, the contract itself may contain certain conditions or exclusions. Second, insured perils may be defined in differing ways, with implications for piracy-related claims. Third, as a fundamental principle, there must be a loss caused by the insured against peril. Further, the classification of any loss (i.e., as a partial loss, an actual total loss or a constructive total loss) arising from piracy will have important legal consequences. Thus in ransom cases ‘[w]here pirates seize a vessel and decide to keep the vessel, there may well be a total loss, an actual total loss if the deprivation is irretrievable and a constructive total loss if the recovery of possession [of the vessel]

11 Chapter 11.6.
Modern piracy

is unlikely within a reasonable time’. 12 Fourth, the insured party is usually under an obligation to take reasonable measures to avert or minimise any loss. Thus, if paying a ransom is not contrary to English law or public policy, it may be positively required under an insurance contract in situations where such payment is reasonable. It may therefore be that an insured does not have a good claim for total loss of a vessel where there is a reasonable prospect of recovering it through a ransom payment. It is thus unsurprising that UK courts have recently had to consider the question of such ransom payments in marine insurance law.13

In Chapter 13, Keith Michel reviews the law of carriage of goods by sea as it applies to piracy. (The definition of piracy used under such contracts is essentially the same as that discussed in Chapter 11.) This includes an examination of various commonly used contractual clauses either drafted specifically to deal with piracy or potentially relevant to piracy. Particular attention is paid to the relationship between standard clauses dealing with war risk (‘war risk clauses’) and piracy specific clauses (the latter are often based on principles found in the former). An interesting point arises, then, in terms of the definition of ‘war’ under war risk clauses. English courts have typically adopted a wide view of ‘an act of war’, such that some acts of maritime violence – even those not attributable to a state – may be covered by a war risk clause. War risks may thus in some cases already cover certain acts of piracy. By contrast, the definition of piracy is rather more tightly prescribed. Of particular interest is the chapter’s consideration of the practical impact of piracy on contracts of carriage. Piracy may cause, in relation to a contractually covered voyage, either loss of time (e.g., through taking a longer route to avoid pirate-prone areas) or delay (e.g., by being captured for ransom). With regard to the former, who should meet the costs of any lost time will depend on whether or not a so-called off-hire clause applies. Regrettably, the case law in this field remains limited. The chapter therefore outlines how other elements of the law of carriage of goods by sea might apply in the piracy context. Relevant considerations may include the law determining responsibility for the chosen route on a contractual voyage (e.g., under the contract may the master vary the route taken to minimise exposure to possible pirate attacks?). For those of us

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12 Chapter 12.5.4.
13 Masefield AG v Amlin Corporate Member Ltd [2010] EWHC 280 (Comm); [2011] EWCA Civ 24. The editor is pleased to note that our author on this point, Peter McDonald Eggers QC, appeared successfully for the insurers in this case.
who are not specialists, these questions are important if we are to understand the behaviour and incentives of the commercial actors affected by piracy.

1.5 PART IV: CONCLUSIONS

The final chapter of this volume draws together a number of recurrent themes. First, there is – as noted above – the problem of definition. A second, and closely related, observation is that piracy is always situated and contingent. It is more useful to talk of *piracies* than piracy. Third, efforts to repress piracy off Somalia raise questions about the tension between efficiency and justice in attempting to conduct law-enforcement through a multinational military deployment. Our fourth theme is that the legal response to piracy always involves a delicate balance between state sovereignty or jurisdiction on the one hand and collective responses on the other. Finally, we can ask the intriguing question: ‘when State repression fails, does the market intervene?’