6. The Legal Challenges in Fighting Piracy

Douglas Guilfoyle

The international law on piracy is straightforward and provides all the legal authority needed to combat pirate attacks off the coast of Somalia. The real difficulties arise in national legal systems’ implementation of that law and its application in individual cases. This chapter aims to sketch the legal framework and explain where problems may arise, and some of the steps that are being taken to address those problems, as well as to dispel some of the legal myths and misapprehensions that surround this field. It is primarily intended as an introduction to the topic that is accessible to non-lawyers, although specialised further reading for interested lawyers is outlined in the footnotes.

6.1 Piracy under International Law

Definitions
Article 101 of the UN Convention on the Law of the Sea (UNCLOS) defines piracy as:
1. an act of violence, detention or theft;
2. on the high seas;
3. committed for private ends; and
4. by a private vessel against another vessel (‘the two vessel requirement’).
This definition is accepted as customary international law (i.e. it applies to all states even without a treaty) and it also includes an offence of voluntary participation in a vessel intended for future pirate use (‘cruising with piratical intent’, as it were). It contains three obvious inherent limitations. First, piracy according to international law can only occur on the high seas. The high seas are all waters outside any territorial sea, meaning that piracy can also be committed in states’ 200 nautical mile Exclusive Economic Zones (EEZ). While similar crimes within a territorial sea (so-called ‘armed robbery against ships’) are solely coastal-state matters, the mere fact that piracy has occurred in a state’s EEZ gives the coastal state no special rights. Second, the two vessel requirement means that internal hijacking, as occurred in the notorious Achille Lauro incident, cannot be piracy. Third, piracy must be committed for ‘private ends’. There is some debate over the meaning of this phrase. Many

1 Articles 101(b) and 103, United Nations Convention on the Law of the Sea 1982, 1833 UNTS 3 [hereinafter, ‘UNCLOS’]. These provisions were taken almost without change from the earlier Geneva Convention on the High Seas 1958, 450 UNTS 82 [hereinafter, ‘High Seas Convention’].
2 Crimes in national law called ‘piracy’ may cover the enacting States’ territorial sea; and in UK insurance law the term can cover foreign internal waters. These are simply different legal concepts with the same label: they do not contradict international law, although they can cause confusion.
3 Although a State conducting law enforcement operations in a foreign EEZ is obliged to have ‘due regard’ for the coastal State’s rights in matters of natural resources and marine pollution in any action it takes: Art 58(3), UNCLOS.
5 Historically it revolved around the status of insurgents in a civil war and whether they could be classed as pirates if they: (1) attacked the vessels of the government they were attempting to overthrow; or (2) enforced a blockade on government ports against ‘neutral’ shipping. There is no suggestion Somali pirates are insurgents engaged in either activity. On the debate see: I. A. Shearer (ed.), D. P. O’Connell, *The International Law of*