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Modern Piracy at Sea: Selected Legal Aspects

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Abstract. Resurgent in the 1980s from a hiatus of close to a century, the phenomenon of modern piracy continues to threaten the safety, security, and efficiency of seagoing ships – the lifeblood of world trade and commerce. This paper examines selected issues related to the international legal framework of piracy at sea and concludes that a greater level of clarity in the legal framework must be achieved in order for any counter-piracy measures to succeed.

Keywords: Piracy, Law of the Sea, Somalia.

1. Introduction

Between January 1991 and December 2011, a total of 5,881 robberies and violent attacks against merchant vessels have been reported world-wide [1]. From the mid-1990s to the 2000s, piracy and armed robbery against ships were concentrated in the Far East, particularly the waters of the South China Sea and the Straits of Malacca. Between 2006 and 2007, just when the number of Southeast Asian incidents started to wane, the number of reports relating to Somali piracy began to rise dramatically. Somali piracy is a phenomenon that continues to menace the lifeblood of world trade, threatening innocent seafarers with injury and death [2], and costing billions of dollars in counter-piracy measures, ransom payments, and re-routing [3; 4; 5].

Dozens of states have contributed substantial naval and military assets to contribute to the protection of merchant shipping in the waters off Somalia. International naval action against Somali pirates has not been free from complications and challenges, particularly in terms of the legal aspects. The international law relating to maritime piracy is no model of clarity in terms of issues such as the identification of the crime; the arrest, detention, and prosecution of suspects; and the protection of human rights of both victims and criminals.

2. Legal Aspects

Article 15 of the 1958 Geneva Convention on the High Seas, and Article 101 of the United Nations Convention on the Law of the Sea (UNCLOS), 1982 provide the world community with what today is generally accepted as the definition of the high seas crime of piracy. By distilling the essence of these articles, it may be said that for an act to be considered piracy under international law, the following conditions or rules must be met:

- The illegal violence rule, i.e., the act must be an illegal act of violence, detention, or depredation.
- The *lucri causa* rule, i.e., the act must be motivated by private gain.
- The two-ship rule, i.e., two ships must be involved in the incident – the victim ship and the pirate ship.
- The high seas rule, i.e., the act must be committed on the high seas or waters outside the jurisdiction of any state.

When examined in the light of pirate attacks (i.e., not counting the present Somali piracy phenomenon), these conditions were always the subject of some controversy and considered as frustrating complications when attempting to identify the crime. The first element on the above list is straightforward. All pirate attacks are illegal acts of violence since these are committed by elements other than naval forces or other public instruments of violence sanctioned by the state.

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With regard to the second point, there is controversy whether the reported attacks are motivated by private gain or by public gain. Indeed, some argue that the two are not necessarily mutually exclusive. Logina writes, "Private aims always constitute an important part of public aims, because public aims cannot exist without individuals. If a person truly associates himself/herself with a particular group, the aims of this group are also his/her individual aims."

The third point constitutes the "two-ship rule," which means that for an act to qualify as piracy under UNCLOS, both a pirate ship and a victim ship must be present. In actual fact, the majority of non-Somali piracy attacks do not involve two ships; attacks are usually made while ships are at anchor or tied to the dock or pier. Even in the case of Somali piracy, purists might argue that notwithstanding the use of mother ships to extend the range of pirate boarding teams, most victim ships are boarded by perpetrators using skiffs or rubber boats which are not, strictly speaking, ships.

Finally, the fourth point listed above means that, depending on how Article 58 [6] and "high seas" in Article 101 of UNCLOS are construed, the act would need to have occurred either outside the 12 nautical mile limit (i.e., beyond the territorial sea) or as far out as 200 nautical miles from shore (i.e., beyond the exclusive economic zone). As it happens today, most non-Somali pirate attacks occur landward of the territorial seas of a coastal state. In what might be characterized as a gerrymandering [7] of the oceans, piracy was artificially or virtually eliminated when UNCLOS pushed the high seas to as much as 200 nautical miles from shore.

In its maritime security deliberations, the IMO circumvents the complication posed by the UNCLOS definition of piracy and the imprecise use of the term in certain quarters by resorting to the expanded construction "piracy and armed robbery against ships." IMO defines armed robbery against ships as "any unlawful act of violence or detention or any act of depredation, or threat thereof, *other than an act of piracy*, (italics supplied), directed against a ship or against persons or property on board such a ship, within a State's jurisdiction over such offences" [8].

One crucial implication of identifying an act as piracy under UNCLOS is that it affords any state the option to claim universal jurisdiction by invoking Article 105 [9]. Until recently, this remained mainly a hypothetical option because most reported attacks did not meet the UNCLOS criteria. China [10] and India [11] present us with some of the rare examples in contemporary times where piracy cases were prosecuted even in the absence of a nexus with the arresting state. By the mid-2000s the concept of "universal jurisdiction over piracy was largely thought to be a historical artefact with little or no modern relevance" [12, p. 13]. This notion has since been negated by the piracy phenomenon off the coast of Somalia, where most attacks from the mid-2000s onwards have been reported outside what would theoretically be Somalia's exclusive economic zone (EEZ) [13]. Nonetheless, while attacks by Somali pirates easily "fall within the (UNCLOS) definition, which is therefore perfectly adequate to deal with the present situation," [14] states tackling the maritime criminal phenomenon in the Horn of Africa still face numerous challenges.

Kontorovich and Art argue that, "the nominal availability of universal jurisdiction for piracy does not translate in practice into ending impunity for the crime" [15]. Because the exercise of universal jurisdiction over piracy cases is only a recent phenomenon, state practice is still in a very early and inefficient stage of development. Nanda observes that, "the needed mechanisms, logistics, and facilities to ensure apprehension and prosecution, detention, extradition, and imprisonment are barely in place" [16]. Arresting states invariably transfer suspects to third states. Among these, Kenya has prosecuted more piracy cases where there are no clear Kenyan interests involved [17]. There is an obvious strain on the country's resources, resulting in backlogs that not only delay justice, but also weaken the arrests' deterrent effect. Trials in the courts of arresting states, situated thousands of miles from the actual theatre of operations, are no more efficient, not only because of the manifest delay in transporting suspects but also in assembling witnesses based in different countries around the world [18]. In the worst case, insufficiencies in the domestic legislation of arresting states [19] or unwillingness to commence domestic criminal proceedings [20] leave the naval forces of these countries no choice but to release alleged perpetrators soon after they are captured. The UN Security Council (UNSC) noted "that the lack of capacity, domestic legislation, and clarity about

how to dispose of pirates after their capture, has hindered more robust international action against the pirates off the coast of Somalia and in some cases led to pirates being released without facing justice" [21].

Evidence handling and crime-scene preservation are a crucial area that requires improvement. With naval, rather than coast guard or constabulary, forces being deployed to deter and arrest pirates, it is not surprising that evidence collection has been focused on intelligence gathering and maritime target development [12, pp. 58-59], rather than on building a criminal case against suspected pirates. This lack of skill and knowledge in gathering and handling evidence has affected its admissibility before the courts and allowed many pirates to escape punishment [22].

Failure to observe the human rights of the accused is yet another contributory factor to inefficiency in arrest and prosecution under the current regime of universal jurisdiction over piracy cases. According to Petrig, "It is not rare that criminal prosecutions fail because arrests, investigative steps or handovers are secured in violation of human rights." She also cautions that, even though the legal instruments governing counter-piracy operations do not explicitly mention the applicable human rights norms, enforcement powers cannot be exercised in a legal vacuum and *ad libitum*. Rather, their exercise is restricted by the application of general human rights law. This is insinuated by (UNSC) Resolution 1851 deciding that any measure based on the enforcement powers conferred by that Resolution "shall be undertaken consistent with applicable… human rights law" [23].

Guilfoyle identifies the following four human rights issues as being relevant vis-à-vis counter-piracy operations in the Horn of Africa [24]:

- Legal authority to detain suspect pirates at sea and their right to be brought promptly before a judicial authority.
- *Non-refoulement* and transferring suspect pirates to regional States for prosecution.
- The application of fair-trial rights in such transfers.
- In the European Convention on Human Rights (ECHR) context, the right to an effective remedy requiring the ability to challenge one's transfer.

A related issue is the question whether arrested piracy suspects are entitled to protections under the law of armed conflict and international law in general [25]. Bahar draws on his experience as the Staff Judge Advocate for the *Nassau* Strike Group during the US Navy's first capture of suspected pirates in recent memory (the *Safina al Bisarat* pirates) and offers the following answer: "Pirates are not combatants or enemy prisoners of war, but they are international maritime criminals entitled to international and constitutional due process protections" [12, p. 6]. Indeed, while the epithet *hostis humani generis* [26] characterizes universal abhorrence towards pirates, their torture, maltreatment, and unfair trial will only "call into question the motives and values of states that participate in antipiracy efforts."

To make a complicated situation even more complex, it has been established that a significant number of pirates are actually 15 years old or younger. This drags another area of treaty law into the picture (e.g., International Convention on the Rights of the Child, 1989 Worst Form of Child Labour Convention , 1999) [27]. Nevertheless, because global trade and commerce are dependent on safe and efficient maritime transport, it is only "in every state's best interest that the fight against piracy" is given its best chances for success by ensuring that operations remain "legally and morally beyond reproach" [25, pp. 39-40].

3. Conclusion

There is no doubt that the problem of Somali piracy can only be fully addressed by long-term measures to reinstate political, social, and economic stability in Somalia. In terms of immediate relief, however, the multinational naval force assembled off the Somali coast has been and continues to be of primary consequence. Regrettably, the international nature of the crime provides any counter-piracy operation with enormous challenges, not least in terms of the relevant international legal aspects. Confabs such as the International Conference on Piracy at Sea (ICOPAS) held in Malmö, Sweden in October 2011 help identify numerous other problems related to the legal aspects of counter-piracy programs. Aside from those already discussed above, these other obstacles relate to inadequate levels of cooperation among law enforcement agencies and institutions; interface between military forces, national police organizations, and Interpol;

interface between ship operators and crews and assisting Interpol response; legal capacity building in states affected by piracy; regional judicial and enforcement training; and the possibility for asylum requests by convicted pirates [28].

Achieving clarity in the international law of maritime piracy is of paramount importance if the world is to expect more rapid relief from one of the most deplorable scourges facing shipping today.

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5. References

[1] There are a number of databases on piracy incidents. One of the earliest ones is maintained by the International Maritime Bureau (IMB) of the International Chamber of Commerce (ICC). A specialized division of the ICC, the IMB is a non-profit making organization, established in 1981 to act as a focal point in the fight against all types of maritime crime and malpractice. The Bureau publishes data and information relating to piracy attacks four times a year – a first quarter report, a second quarter report, a third quarter report, and an annual report. For over 25 years, the IMB has used industry knowledge, experience and access to a large number of well-placed contacts around the world to protect the integrity of international trade by seeking out fraud and malpractice. ICC Commercial Crime Services. *http://www.icc-ccs.org,* accessed 25 July 2012.

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