
THE DIFFICULTIES MODERN INTERNATIONAL LAW FACES WHEN IT IS COMBATING SEA PIRACY: IS INTERNATIONAL COOPERATION ENOUGH?

Modern Uluslararası Hukukun Deniz Haydutluęuyla M¼cadele Ederken Karşılaştığı Problemler: Uluslararası Birliktelik Yeterli mi?

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Abstract

The stability of the international trade depends upon the security given to the merchants in the high seas since the most part of the international commercial transportation is made by sea. To this end, the crime of piracy is a big threat. However, the unique international community's attempts (working together) to repress it does not seem to work. When it is compared the risk involved in piracy with the profit gained by the pirates, it seems that taking the risk of easy-wealth will never fade away unless efficient reputable policies are recognized by the international society. Bring pirates to justice therefore may close the large and growing impunity gap for piracy. This article examines the piracy in international law (piracy *jure gentium*). Responses given by the international community as measures to secure the international maritime commerce take place. Security issues are mentioned from the angle of international efforts given to combat piracy. To this end, the present combat against Somali pirates is given as a case study. It is clear that international law gives priority to the coastal State to deal with the pirates entering into their territorial waters as a result of sovereignty. However, if the coastal State has no capacity to deal with the situation there is a blank area of international law, viz., how to treat the case? It is assumed that general knowledge and a case study would open a gate to provide a solid answer to the crime of piracy. However, it soon became clear that a universal and a general answer to all situations

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cannot be given because of constraints involved in international law.

Key Words: Hot Pursuit, Sea Piracy, Privateering, Piracy off the coast of Somali, Failing State and Piracy, Security in the High Seas, International Cooperation, and Piracy Jure Gentium.

Özet

Uluslararası ticaretin büyük bir kısmı deniz taşımacılığı yoluyla yapıldığından uluslararası ticaretin istikrarı denizlerde tüccarlara verilen güvenliğe bağlıdır. Bu bağlamda, deniz haydutluğu suçu büyük bir tehdit oluşturuyor. Ancak, bunu bastırmak için uluslararası toplumun eşsiz girişimlerinin (birlikte çalışma) yeterli olduğu görünmüyor. Deniz haydutları tarafından elde edilen gelir ile ilgili riski karşılaştırıldığında, görünen o ki uluslararası toplumca saygın ve etkili politikalar tanınmadıkça kolay elde etmeye yönelik riskin üstlenilmesinin ortadan kalkacağı asla imkan dahilinde gözüküyor. Bu nedenle deniz haydutlarını adalete teslim etmek büyük ve büyüyen bir cezasızlık açığını kapatabilir.

Bu makale, uluslararası hukukta deniz haydutluğunu (piracy jure gentium) inceler. Uluslararası toplum tarafından uluslararası deniz ticaretini güvence altına almak için ortaya konan yanıtlar konu edilmiştir. Deniz haydutluğuyla mücadele için verilen uluslararası çabalar açısından güvenlik sorunlarından söz edilmektedir. Bu amaçla, Somalili deniz haydutlarına karşı mevcut mücadele, bir vaka çalışması olarak ele alınmaktadır. Uluslararası hukukun sahildevletine egemenliğin bir sonucu olarak kendi karasularına giren deniz haydutlarıyla başa çıkmak için öncelik verdiği açıktır. Ancak, sahildevletinin bu durumla başa çıkacak kapasiteye sahip değilse ortada uluslararası hukukun izahtan yoksun bir alanı mevcuttur, bu alan konunun nasıl çözüleceğidir. Genel bilgi ve örnek olay çalışmasının deniz haydutluğu suçunun çözümü için sağlam bir cevap vermeye yönelik bir kapıyı açacağı düşünülmüştür. Ancak, çalışma sonucunda görüldü ki, uluslararası hukukta yer alan kısıtlamalar nedeniyle her olaya uygulanabilecek evrensel bir cevap verilemeyeceği ortaya çıkmıştır.

Anahtar Kelimeler: Sıcak Takip, Deniz Haydutluğu, Somali Kıyılarındaki Deniz Haydutluğu, Başarısız Devlet ve Deniz Haydutluğu, Açık Denizlerde Güvenlik, Uluslararası Birliktelik, ve *Piracy Jure Gentium*

Introduction

In recent years, modern world is facing an old fashion concept of crime, *piracy*, which has become unexpected concern of international community because of its increasing intensity in number and ransom demanded have reached to the level of severe threat to the security of commercial shipping and the safety of crews and passengers. During the last two decades conflict with armed groups who have been attacking foreign vessels not only in the territorial sea but even at distances beyond 200 nm¹ (nautical mile) from shore in Somalia has endemically been announced worldwide as an example of this increasing crime of piracy (Gagain, 2010: 169 ff). Even though military deterrence has managed to reduce the ratio of successful attacks off the coast of Somalia, a long-term solution for Somali piracy (the current and the main worldwide hotspot) cannot be provided as the root causes of piracy are ashore. The situation has many dimensions. Therefore, a broad approach is needed to address instability, lack of governance and poverty in Somalia and other countries which generate piracy, as well as to ensure effective prosecution of pirate suspects, in compliance with human rights standards. Unless this is done, the high seas off the coast of Somalia will continue being a risky environment for the sea trader.

1. The Scope of the Study

The reasons behind the crimes committed in the high seas may of course differ² but our concern here is to analyze the crime of piracy from the international law point of view and draw attention to how the international community should response to it. The issue raised here holds several dimensions; mainly legal, political and security measures. The article thus gives brief information, with an historical background, about the legal aspect of piracy in international law and then focus on the subject-matter from international security and policy making point of view.

2. Historical Background

Oceans and seas have always provided opportunities for the relatively cheap transport of products and persons, and the resulting movement of vulnerable assets has attracted from earliest times predators called pirates. This form of predation has been global in its incidence and, at times, at least partly global in its structure. In the Caribbean, piracy originated in and was fuelled by Old World rivalries. Piracy at its peek point, 16-17th century was dealt with or policed by the European navy in European royal navies (Barbour, 1911: 529). Over the years the common understanding of combating piracy by international community took place

1 *It has been reported that attacks sometimes go up to as far as 700 miles off the coast of Somali. See Documenti IAI 0916 available at <http://www.iai.it/pdf/DocIAI/iai0916.pdf>. at p. 7.*

2 *For instance, poverty, lack of authority and impunity of piracy etc. may be some causes increasing the crime. In his essay Ford approaches the crime's cause from different angle and concludes that up to 1403, crimes on the seas were not the result of 'piracy' or 'unlicensed privateering' but the conscious policies adopted by both the English and French governments in their pursuit of wider political objectives. (Further See Ford, 1979: 63-78).*

(Shaw, 1991: 411). In the nineteenth century, piracy was indirectly stimulated and eventually suppressed by the economic and technical changes that were associated with the British industrial revolution (Headrick, 1981: 43-57). The action suppressing the piracy by the world community was followed by the legal terminology. Misdeeds were the law's concern. Then as now the law was concerned that ships should be secure from depredation and violence upon the highways of the sea (Dickinson, 1925: 334-360).

3. Terminology

In our analyses it became clear that the term *piracy* and *privateering* are quite different concepts (Pazarıcı, 1999: 47; Mervine, 1908: 462). Thus the differentiation is briefly examined. The applicable law is also rather different.

3.1. *Privateering and Piracy*

From the historical perspective privateering can be defined as the pirates who obtained an authorization (*letters of marque and reprisal*) to private ship-owners to seize property of foreign parties, usually ships or property from ships (Marshall, 1997: 954).³ So licensed privateers were capturing the ships on the high seas or defeating enemies. In these previous times privateers were not granted pardon to attack on the friendly nations but enemies ((Wheaton, 1863: 628).*ibid*). Today this concept has been outlawed over 150 years with the 'Declaration of Paris' of 1856.⁴ However, piracy is still on the scene and threatening the international stability and the safety of sea trade (IMO Report: 2009).⁵

3.2. *Piracy as an International Crime and Piracy as in Municipal Law*

Two types of piracies, piracy under international law (or piracy *jure gentium*) and piracy under municipal law, must be distinguished. Piracy has, as pointed out above, long been regarded as an international crime as well as a crime by municipal law. As an international crime it is within the jurisdiction of all States wheresoever or by whosoever committed.⁶

3 Another definition was given by Wheaton as the practice of cruising with private armed vessels commissioned by the State as a legitimate means of destroying the commerce of an enemy (Wheaton, 1863: 628).

4 "The Declaration of Paris was the first and remains the most important international instrument regulating the rights of belligerents and neutrals at sea which received something like universal acceptance" Malkin, 1927: 2). See <http://oll.libertyfund.org> (2010) for the wording of the Declaration

5 Nevertheless, the concept of piracy is a well established crime of international law which is punishable.

6 "Piracy by the law of nations, in its jurisdictional aspects, is *sui generis*." S.S. *Lotus* (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10, 4 (7 September), para. 70. The Draft Convention on Jurisdiction with Respect to Crime, prepared by the Harvard Research in International Law, 29 AJIL Supp. 435 (1935), provided for two categories of universal jurisdiction. However, only jurisdiction over piracy was absolute, or unconditional. Universal jurisdiction for other offenses depended on specified conditions, e.g., that the crime was "committed in a place not subject to

Additionally, International Maritime Organization (IMO) has made another distinction in its reports which is not essential to examine in detail for this article.⁷ This distinction is made between acts of piracy and armed robbery/hijacking etc. (Annex 1 of the IMO Report: 2009) and attempted attacks (Annex 2 of the IMO Report, 2009). Armed robbery can be defined as the acts of piracies taken place in the territorial waters of coastal States.

4. The International Legal Framework

4.1. *The United Nations Convention on the Law of the Sea*

The United Nations Convention on the Law of the Sea (UNCLOS), the only international convention dealing with piracy (Articles 100 to 108 and Art. 110), stipulates in Article 105 that States may exercise their right of repression against piracy and in so doing are entitled to seize the ship and to arrest the pirates and bring them to justice. Article 105 further grants every State the power to arrest “on the high seas, or in any other place outside the jurisdiction of any State” persons guilty of acts of piracy and to take them before its courts. But this is just an option for the State concerned (the State of the pirates’ nationality or the flag State maintain the right to exercise their criminal jurisdiction if they so wish). The State concerned is free to choose to what extent it wishes to exercise jurisdiction of any kind in cases of piracy: it can either claim jurisdiction over the arrested pirates and the seized ship and property, or restrict its jurisdiction to cases corresponding to more specifically defined criteria.⁸

Pursuant to Article 100 (duty of States to cooperate in the repression of piracy), the matter of jurisdiction might be resolved by referring to other standards that are specific to the repression of piracy.⁹ Moreover, judicial cooperation or extradition agreements could enable a State having established its criminal competence but not involved in the arrest to bring to trial a pirate captured on the territory or in the territorial waters of another State.¹⁰ All things considered, the UNCLOS allows repressive action to be taken on the high seas against the intention to commit an act of piracy and against indirect participation in past or future acts of piracy. However, as will be considered below, there is no provision in the UNCLOS as to answer the question of who and how will try the pirates and punish them should they transfer the attacked vessels into the territorial seas. Another convention could be used in order to fill

the authority of any State.” Ibid. at pp. 440-41.

- 7 *The Secretariat of IMO has, since July 2002, started classifying incidents as piracy and armed robbery at sea (international or territorial waters) vis-à-vis acts of armed robbery allegedly committed in port areas, as well as attempted acts of armed robbery (the IMO Report, 2009).*
 - 8 *When the hijacked vessel or victims of an attack hold that State’s nationality, for example, or when a natural person or legal entity holding its nationality suffers prejudice as a result of the act of depredation.*
 - 9 *Security Council Resolution, bi - or multilateral agreement such as the US-Kenyan agreement and possibly an IMO regional agreement, provided that it covers the aspect of criminal jurisdiction.*
 - 10 *Without such a mechanism, the “universal” competence foreseen for the repression of acts of supporting or inciting piracy would be meaningless.*
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the gaps of the UNCLOS¹¹ when dealing with piracy (as it is a threat to maritime safety) is the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA) (1988) and its 2005 Protocols which are examined next.

4.2. The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA) (1988 and 2005)

The SUA Convention aims at suppressing unlawful acts against maritime safety. This convention, unlike the UNCLOS, has the advantage of making it obligatory for States to either prosecute or extradite the perpetrators, hence avoiding the risk of a legal deadlock. Moreover, according to a certain interpretation of one of the 2005 protocol to the SUA Convention, a port State that is a signatory to the Convention is under the obligation to take into custody a terrorist captured by a ship and handed over to it. Since the USA does not draw any distinction between pirates and terrorists, it sees in the 1988 SUA Convention and its 2005 protocol a solution making it possible for individuals it has arrested to be prosecuted abroad for acts of piracy. By lumping piracy and terrorism together in the same category, the USA is actively promoting a legal approach to the fight against piracy in which the SUA Convention is taken as the sole source (or the only one that is explicitly mentioned) of international law.

From the strictly operational standpoint such an approach justifies the use of military forces to combat piracy in connection with the fight against terrorism. It is also a possible recourse to alternative legal bases for action against piracy, *viz.*, the UNSC allows action to be taken against terrorism under relatively flexible conditions, making the conditions for military intervention more flexible. Last of all the use of private military companies would appear to be in keeping with international law in the fight of piracy even though this is not compatible with the UNCLOS legal framework which attributes to States (government ships and aircraft) the sole right to suppress piracy. Outside the UNCLOS framework the use of private military companies therefore becomes possible within the SUA Convention framework.

From the political standpoint, application of the SUA Convention is not specifically restricted to the high seas. Therefore, using the SUA Convention as the legal basis for counter-piracy action makes it possible to include action both at sea and on land, a highly controversial issue within the United Nations Security Council. Once the study points out the main zones affected by sea piracy it will focus on the problems that international law faces when it combats piracy.

4.3. The Main Zones Affected by Sea Piracy

It has been reported that in recent years sea piracy took on significant proportions in five regions of the world: the Caribbean, the Strait of Malacca (between Indonesia and Malaysia), the Red Sea, the Gulf of Guinea, the Gulf of Aden and off the coast of Somalia (the Report, 2009). However, the reports indicate that since 2007, piracies occurring in the Caribbean

11 *It has provisions particularly for the cases not covered by the UNCLOS (i.e., the hijacking of ships) and for those that are politically motivated (i.e., acts of terrorism).*

and off the coasts of Peru and Ecuador had considerably calmed down (the Report, 2009). It is also pointed out that “the same had been true of the Strait of Malacca following the creation in 2004 of coordinated police patrols by Indonesia, Malaysia and Singapore under the code name *Malsindo*” (the Report, 2009). However, the current collapse of the government of Somalia, fed by the political instability and terrible State of the economy, piracy in the Gulf of Aden and the waters off the Somali coast continues being a major threat to international trade because of the simple fact that it creates danger for shipping. Therefore the situation there is analysed deeper within the scope of this study. Thus next section refers to the situation in Somalia and the Gulf of Aden.

4.4. Somalia and the Gulf of Aden

The piracy in Somalia initially started with the local fishermen who attacked foreign vessels involved in illegal activities (unauthorized fishing/dumping of toxic material, waste) or simply entering the territorial waters of Somalia without permission (<http://www.time.com>, 2009). With the deterioration of Somalia’s agriculture due to internal strife and disorder, other Somalis have ‘recycled’ themselves as fishermen – and sometimes pirates – as a way to make a living. All actors in the region, including the government of Somalia, now recognize that piracy has become a part of organized crime and that pirates are sophisticated criminals, let alone insurgents fighting against foreign intrusion in Somalia’s territorial waters. This does not mean, however, that the phenomenon lacks a political dimension. The Gulf of Aden is a *sine qua non* passage for shipping between Europe and Asia. The region covers two million square kilometres and traffic in 2007 of 14.6 million teu,¹² or 20,000 - 25,000 ships per year (the IMO Report, 2009), is the world’s second busiest shipping route (the Report, 2009).

5. The Role of the United Nations in Combating Piracy

5.1. General Assembly

United Nations General Assembly (UNGA) recognized that combating piracy necessitates crucial role of international cooperation at the global, regional, sub-regional and bilateral levels (A/RES/63/111: 13, para. 61). It then emphasized the importance of prompt reporting. This would enable accurate information on the scope of the problem of piracy. The IMO in this respect would have an important role (A/RES/63/111: 13, para. 62). Further UNGA urged States to take appropriate steps under their national law to facilitate the apprehension and prosecution of those who are alleged to have committed acts of piracy (A/RES/63/111: 13, para. 63). Most importantly, it welcomed the progress in regional cooperation, wherever the act of piracy is a concern of nations. To this end some examples of cooperation were enumerated, such as “the Jakarta, Kuala Lumpur and Singapore Statements on Enhancement of Safety, Security and Environmental Protection in the Straits of Malacca and Singapore,

¹² teu (or TEU) = twenty foot equivalent unit, corresponding to the size of a standard container.



adopted on 8 September 2005, 20 September 2006 and 6 September 2007, respectively (A/RES/63/111: 13, para. 72). In short it can be said that UNGA points out a necessity of fight against piracy and declares the role of international cooperation towards it.

5.2. Security Council

United Nations Security Council (UNSC) has adopted several resolutions which all provide the legal framework for the protection of ships chartered by the World Food Programme (WFP) and contribute to ensuring the safety of sea lanes under threat of piracy in the Gulf of Aden and off the coast of Somalia. Following the seizure of *Le Ponant* (<http://www.vanityfair.com>, 2009), the legal framework for the fight against piracy by providing a legal basis for national and multinational operations in this zone UNSC prepared very first two resolutions (UNSC Resolution 1814, 2008).¹³ The concept of hot pursuit (normally from territorial seas towards high seas) was then changed and the resolution 1816 led a possibility of a reverse hot pursuit doctrine. In others word, this resolution made an alteration to the concept of hot pursuit (Shaw, 1991: 371-372; Zwanenberg, 1961: 785-817).¹⁴

Following these two resolutions UNSC adopted resolution 1838 on 7 October 2008 in which it authorised the deployment of warships and airborne capabilities to combat piracy off the Somali coast and extended for a further six months the decisions taken under previous resolutions on the Maritime Security Patrol Area (MSPA)¹⁵ initiative establishing a corridor under military protection through which any ship could transit. It then adopted the following resolutions: Resolution 1844 (on 20 November 2008) (S/RES/1844, 2008), resolution 1846 (on 2 December 2008) (S/RES/1846, 2008), resolution 1851 (on 16 December 2008) (S/RES/1851, 2008), resolution 1897 (on 30 November 2009) (S/RES/1897, 2009), and resolution 1918 (on 27 April 2010) (S/RES/1918, 2010). All these documents have *inter alia* one common concern, *viz.*, there is an ongoing threat of piracy off the cost of Somalia and there shall be an international cooperation between all States and regional organizations that should fight against it.

13 This resolution is adopted on 15 May 2008, in which it aimed at reiterating its support for escorts of WFP vessels to be provided by nations or regional organisations. Second one was the resolution 1816 adopted on 2 June 2008 at the initiative of the United States and France, which bolstered the naval forces by giving their warships, for an initial period of six months, the right of hot pursuit of pirates into Somali territorial waters.

14 The right of hot pursuit of a foreign ship is as a principle designed in international law in order to prevent a vessel which has infringed the rules of coastal State to escape punishment by fleeing to the high seas.

15 The MSPA is being established in support of the International Maritime Organization's (IMO) ongoing efforts. Coalition actions will give the IMO time to work international preventative efforts that will ultimately lead to a long-term solution. Coalition ships are in the area as part of our continual presence in this region. While they have conducted routine operations in the area in the past, the establishment of the MSPA will focus the efforts to counter destabilizing activities in the region and improve security while long-term initiatives mature (<http://www.icc-ccs.org>, 2011).

6. The International Maritime Organisation

The International Maritime Organisation (IMO) has an agenda of maritime security. As an integral part of IMO's responsibilities a comprehensive security regime for international shipping entered into force on 1 July 2004 (Facts of IMO, 2009: 22). To this end, the IMO was the first specialised UN body to draw the attention of the UNSC to acts of piracy off the coast of Somalia in 2005, (Resolution A.979(24), 2005) leading to the first report (UN Doc. S/2007/436, para. 89 to 91 and 118 and 119; Report of the Monitoring Group on Somalia pursuant to Security Council resolution S/Res/1724, 2006) of the Monitoring Group¹⁶ on Somalia, and to the adoption of Resolutions mentioned above between 2008 and 2010.

The IMO gives warnings to countries and ship owners to the procedures to be followed in the event of a possible attack. The IMO adopted resolution A1002(25) (<http://docs.imo.org>, 2010) on piracy and armed robbery against ships in waters off the coast of Somalia, in which it called on the Transitional Federal Government of Somalia (TFG) to take the necessary measures to prevent and suppress acts of piracy and deprive pirates of the possibility of using its coastline as a safe haven from which to launch their operations. It requested that the government take appropriate action to ensure the prompt release of all ships seized by pirates and brought into its territorial waters, and that it consents to the use of its territorial waters and airspace by warships or military aircraft escorting the WFP ships in the framework of international operations (<http://docs.imo.org>, 2010: 7, para. 6).

The IMO later chaired a regional meeting in Djibouti, attended by 17 of the 21 countries of the region in January 2009.¹⁷ A code of conduct (C 102/14, Resolution 1, 2009)¹⁸ was adopted whereby the participants agreed to establish closer regional cooperation, in a manner consistent with international law, with a view to the arrest and prosecution of presumed pirates; the seizure of suspect ships (mother ships and skiffs), the rescue of vessels and their crews and the conduct of shared operations between the signatories and with other naval forces on the scene. This agreement provides for three information centres (in Mombasa, Dar es Salam and Sanaa) to be set up and for a training centre for officials in charge of

16 *The Security Council established the monitoring Group through resolution S/Res/1519(2003); and later its mandate was renewed and expanded through resolutions S/Res/1558(2004), S/Res/1587(2005), S/Res/1630(2005), S/Res/1676(2006), S/Res/1724(2006) and S/Res/1766(2007).*

17 *The Djibouti Meeting adopted the Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden, which was signed on 29 January 2009 by the representatives of Djibouti, Ethiopia, Kenya, Madagascar, Maldives, Seychelles, Somalia, the United Republic of Tanzania and Yemen. It remains open for signature at IMO Headquarters by other countries in the region. Comoros, Egypt, Jordan, Mauritius, Oman, Saudi Arabia and Sudan have since signed making the current total 16 countries from the 21 eligible to sign the Djibouti Code of Conduct. See <http://www.imo.org/OurWork/Security/PIU/Pages/DCoC.aspx>*

18 *This was an instrument related to Adoption of a code of conduct concerning the repression of piracy and armed robbery against ships in the Western Indian Ocean and the Gulf of Aden, adopted on 29 January 2009 at the Djibouti Meeting, available at <http://www.imo.org/OurWork/Security/PIU/Documents/DCoC%20English.pdf>.*



counter-piracy operations to be opened in Djibouti. The code of conduct also calls on States to take appropriate legislative measures nationally to facilitate the arrest of pirates and bring them to trial (Article 4 of C 102/14, Resolution 1, 2009: 9).

Thus the response of the IMO to the Somali situation has mainly taken the form of agenda-setting for the TFG and the UN (Onuoha, 2009, 31-43).

7. The Role of the European Union in Combating Piracy

The European Union (EU) has carefully studied the issue of piracy and armed robbery in the Gulf of Aden and off the coast of Somalia in 2008 (EU Report on Atalanta Operation, 2009-2010), it also referred to the danger these attacks represent for food relief being delivered to Somalia¹⁹ under the WFP and for international trade. With the weakness of the Somali State who could not prevent the piracy by effective measures, and with the legal vacuum at international level in relation to bringing pirates to justice EU established a legal framework for action in cooperation with Somalia (Joint Action 2008/851/CFSP of 10 November 2008; Council Decision 2009/29/CFSP of 22 December 2008), Kenya (<http://www.rfi.fr/actuen>, 2009)²⁰ and other States, like Seychelles (<http://af.reuters.com>, 2009) and organised maritime operations to combat piracy. To this end naval operation (EUNAVFOR Somalia – Atalanta) (Council Joint Action 2008/851/CFSP, 2008; Council Joint Action 2008/851/CFSP, 2008) can be mentioned. This operation has made a real contribution to the fight against piracy.²¹ The methods implied at the region against piracy were as follows: organising patrols and escorts in the Gulf of Aden; installing representatives of ship owners at the Northwood Operation headquarters; and creating an information website enabling warships to share information in real time (<http://www.eunavfor.eu/>, 2011).

8. The Role of the NATO in Combating Piracy

NATO approaches the act of piracy and armed robbery as a threat to vital sea lines of communication and economic interests in the Gulf of Aden and off the Horn of Africa, as well as disrupting the delivery of humanitarian aid to Somalia (<http://www.nato.int>, 2010). Pursuant to a request on 25 September 2008 by the UN Secretary-General, Ban Ki-moon, and to UNSC Resolutions 1814, 1816 and 1838, NATO agreed to participate in the escort of the

19 UNSC resolution had shown concerns about this fact and estimated in its resolution 1838 that as many as 3.5 million Somalis would be in need of food aid by the end of 2008.

20 The EU and Kenya signed an agreement, which enabled the transfer of suspected Somali pirates to the east African country as part of the EU Atalanta anti-piracy naval operation.

21 As of writing this article in addition to the decisions given by Kenyan courts, the first judgment in Seychelles court was given. This first prosecution in connection with the interdiction of a pirate group by an EU NAVFOR warship consisted of 92 individuals arrested, of which 43 have now already stood trial and been found guilty. The maximum sentence upon conviction for piracy offences in Seychelles is 30 years; under Seychelles Law – and indeed as a precondition for all suspected pirates being transferred by EUNAVFOR – capital punishment is not available. See <http://www.eunavfor.eu/2010/11/united-nations-working-group-on-legal-issues-met-in-copenhagen/>

WFP ships with the launch of *Operation Allied Provider* (<http://www.nato.int>, 2008). After that *Operation Allied Protector* took over and helped to deter, defend against and disrupt pirate activities in the Gulf of Aden and off the Horn of Africa (<http://www.nato.int>, 2008). It is now *Operation Ocean Shield* is principally focusing on at-sea counter-piracy operations in the area in coordination with other international actors, including the European Union. NATO has also agreed, at the request of the UN, to escort the UNSOA - United Nations Support Office for AMISOM - supply vessels to the harbour entrance of Mogadishu within means and capabilities available at the specific moment. This operation was approved by the North Atlantic Council on 17 August 2009 and has been extended until the end of 2012 (<http://www.nato.int>, 2008).

9. The Role of Some States Practice in Combating Piracy

Among the States engaged in combating piracy in this maritime zone, USA and France particularly stand out for their ambition to launch not just national but also multinational operations in order to eradicate this problem. USA Navy forces have been acting in the Gulf of Aden and Indian Ocean since 2002 in the name of Operation Enduring Freedom-Horn of Africa (OEF-HOA)²² as part of the wider counter-terrorism operation, Enduring Freedom, set up the year before in the wake of the 11 September attacks. OEF-HOA is being conducted jointly with the naval forces of a number of countries (France, Spain, Germany, the United Kingdom, etc.). Its naval component, Combined Task Force 150 (CTF 150) (<http://www.cusnc.navy.mil>, 2008),²³ operates under the command of the US Fifth Fleet. At the beginning of January 2009 the US set up a specific naval task Combined Task Force 151 (TF 151)²⁴ to carry out counter-piracy operations, with its command based in Bahrain. France is also actively engaged heavily in counter-piracy operations. It has maintained a naval presence in the Indian Ocean (ALINDIEN) (<http://www.mschoa.org>, 2009)²⁵ for several decades and she is also part of the TF 150 multinational task force.

Additionally, other States took sensible measures to protect their fleet against acts of piracy. Major forces can be enumerated as follows: the UK, China, Russia, India, Japan, Pakistan, Malaysia, and Turkey. These all also contributed to counter-piracy operations in the Gulf of Aden, on the basis of the resolutions adopted by the United Nations mentioned

22 See http://www.cdi.org/program/document.cfm?documentid=365&programID=39&from_page=../friendlyversion/printversion.cfm.

23 CTF 150 conducts Maritime Security Operations (MSO) in the Gulf of Aden, Gulf of Oman, the Arabian Sea, Red Sea and the Indian Ocean. Since its inception, CTF 150 has been commanded by France, Netherlands, UK, Pakistan, Canada and Australia.

24 CTF 151 is a multinational task force established in January 2009 to conduct counter-piracy operations under a mission-based mandate throughout the Combined Maritime Forces (CMF) area of, disrupt and suppress piracy in order to protect global maritime security and secure freedom of navigation for the benefit of all nations' responsibility to actively deter. CTF 151 has previously been commanded by the U.S. Navy, the Korean Navy and the Turkish Navy.

25 ALINDIEN is the counter-piracy operation operated by the French Force Commander, Indian Ocean. <http://www.mschoa.org/Links/Pages/ALINDIEN.aspx>



above. Some of these countries, like Pakistan, Japan and Turkey, have joined Task Force 151. Others such as Russia, China and India have remained independent of it while at the same time coordinating their action with that of the European forces and the Task Forces.

10. Problems International Law Faces in Combating Piracy

The first question may be asked is if there is/are general rule/s applicable to all types of attacks to vessels on the sea. In this way, for instance, one question may be raised as to whether the UNSC resolutions on Somali piracies can be employed as a general rule for all types of piracies. As it is now well known UNSC Resolutions 1816 and 1838 in particular provided a solution precisely to cases, such as the Somali one, in which foreign intervention in territorial waters might be required to combat piracy, given the absence of a coastguard and of stable and effective State authorities capable of enforcing the law and prosecuting the pirates. Accordingly, foreign fleets can now operate in Somalia's territorial waters, but only 'in cooperation' with the local government, notably the TFG (<http://daccessdds.un.org/doc>). To this end it can be said that given the poor effectiveness of the TFG, this solution is good as far as it goes. The problem remains whether to develop international law in this area further by extending the definition of piracy to armed robbery/hijacking/kidnapping in the territorial waters of a failing State. This development is firmly opposed by some of the permanent members of the UNSC, especially China. The Chinese government has in fact warned against considering UNSC Resolution 1816 and 1838 as a 'precedent'. The principle that China seems to want to defend is the fundamental one of 'non-interference' in the internal affairs of a sovereign State (SC/9344, 2 June 2008).²⁶

Some international law experts point out, moreover, that the UNSC should in any case refrain from adopting international law-making provisions (Alvarez, 2005: 189-217; Alvarez, 2003, 873 ff). The Security Council's mandate is to prevent or manage international crises by granting, if necessary, authorization to use force as a last resort (Lobel, and Ratner, 1999: 154). Its prerogative to decide on the lawful use of force to peace keeping does not make it a legislator. If major international actors were to conclude that the legal definition of piracy has to be broadened, then this would have to be incorporated into a new international treaty or convention, exclusively binding the States that would be party to it.

Other areas of international law are also worth further clarification and development. Those are *apprehension, detention, prosecution, and reintegration of pirates into society*. As concerns the first point, there is a general consensus that operations against pirates cannot be carried out by private actors. Although it is argued that the very presence of weapons aboard risks creating a whole set of further practical and legal problems, the employment of security guards onboard ships for the protection of the crew and cargo as a simple measure

26 *China's representative comment, Security Council Condemns Acts of Piracy, Armed Robbery off Somalia's Coast, Authorizes for Six Months 'All Necessary Means' to Repress Such Acts Resolution 1816 (2008) Adopted Unanimously with Somalia's Consent; Measures Do Not Affect Rights, Obligations under Law of Sea Convention, available at <http://www.un.org/News/Press/docs/2008/sc9344.doc.htm>*

of self-defence may be allowed.²⁷ However, serious legal issues may arise from the arming of merchant mariners when nations put military personnel or private security forces aboard their flagged vessels. Legal problems arise because ships are subject to a host of different legal regimes including international regulations during every voyage. Flag States, coastal States and port States all may have conflicting rules about firearms, ranging from an unfettered right to carry weapons, to a complete ban,²⁸ to a regulatory system of more or less complexity. Violation of coastal or port State laws may subject a seafarer to criminal sanctions, including a long prison sentence, even though his possession of arms is perfectly legal under the law of the ship's flag or at sea. It is difficult not only to comply with these conflicting laws but also to understand the content of all of the national laws that might apply. Therefore, the vast majority of shipping organizations, for example, the United Nations' maritime branch, and the IMO, strongly discourage such practices. Additionally, UNCLOS specifies that the fight against piracy is a State responsibility. Even though a private company taking action without a mandate could itself be accused of "piracy", but which authorities can provide such a mandate is unclear. Further problem of carrying weapons on board is the authorization to be sought from the port State. Because of these difficulties, currently majority of ship-owners agrees to an escort and a (State-sanctioned) military onboard protection team but refuse outright to have private protection teams on board. 'Counter-piracy', in sum, pertains to navies.

Navies, however, themselves face limitations. They can intercept and inspect ships, but they cannot seize them or detain crews unless there is sufficient evidence that they are involved in pirate activities, even if weapons are found onboard (Pham, 2010; CNN World, 11 December 2002) Because of high risk of pirate activities off the coast of Somalia, most of the ships sailing in the area are likely to be carrying weapons, often kept onboard for self-defence against pirates. Intervention on the coasts themselves, including pirates' sanctuaries (such as small ports, gulfs, etc.), is understood to be prohibited unless the UNSC explicitly authorizes it.²⁹ One could also justify interventions on the coasts as taking place under the right of self-defence against non-State actors or invoke the right to protect nationals abroad, but this would require evidence of hostages being kept in such places. In this case, moreover, force could be used to free the hostages only if strictly necessary.

There are also limits on the use of force, which has of course to be proportionate and cannot be used preventively. Experts are still debating as to the norms regulating the use of force against pirates. Some suggest that the doctrine of preventive actions can be employed to deal with piracy as it allows the use of force even prior to an actual attack, provided that humanitarian principles are respected.³⁰

27 *As more shipments are threatened, operators, shippers and crews are considering ways to protect their personnel and cargo at sea.*

28 *For example Egypt approaches the issue as an illegal import of weaponry if a vessel carries arms on the board.*

29 *UNSC Resolution 1851 might provide a basis for such actions, but has not yet been used to date.*

30 *Resolution 1851 and other documents approving the use of armed force against the pirates*



The detention of pirates when seized raises several issues as well. One has to do with the time lag between seizure and surrender to authorities. There have been complaints passed a decree in December 2008 by which the arrest of seized pirates was validated via a televised procedure by a judge sitting in Rome (<http://www.camera.it>).³¹ More broadly, detention raises issues of human rights because pirates are held on boats in conditions that do not necessarily meet the necessary standards for convicts established in the European Convention on Human Rights. The issue is further complicated by the fact that pirates currently operating in the Gulf of Aden are often juveniles. In brief, when taking action against pirates, the basic principles and norms both of Human Rights and International humanitarian law should be applied. Those principles cannot be derogated and should be applied in all circumstances.

Prosecution of pirates is an extremely complicated issue as merchant shipping is a quintessential case of internationalization: the ownership, crew, cargo, and flag of a ship can all involve different nations. According to the law of the sea, the flag State has the power to punish captured pirates according to its law. Often times, however, States lack a viable national criminal legislation incorporating the principles of international law, or are reluctant to embark on a process that can be long and costly. This raises the issue of whether third countries can be involved in prosecution or whether *ad hoc* international courts should be established (UNSC Res 1918, 2010). In the case of Somalia, the EU has signed an agreement with Kenyan authorities to turn over seized pirates for prosecution (<http://www.consilium.europa.eu>).³² Similar agreements have been stipulated between the USA and Kenya (Morgan, 2009) and the UK and Kenya (Hourelid, 2008). Agreements with Kenya specify that prosecution cannot involve the use of torture. It has to be based on a fair trial, and has to abide by international human rights standards. Not all countries, however, seem to be oriented to relying on third countries or regional tribunals and doubts remain as to what law should be applied in each case. Logistical issues are potentially challenging, too.³³ A further issue has to do with reimbursement or aid for the expenses incurred when trying pirates. The EU for instance had to support the government of Kenya for its judicial efforts (€ 2.4 million).³⁴

As for international courts, international law scholars seem to view them broadly as

specifically require that it be employed in a manner "consistent with applicable international humanitarian and human rights law".

31 Reference is obtained from ALESSANDRI, *supra* note 40, footnote 10.

32 An exchange of letters concluded on 30 October 2009 between the EU and the Republic of Seychelles allows the transfer of suspected pirates and armed robbers apprehended by ATALANTA in the operation area. This arrangement constitutes an important new contribution to the counter-piracy efforts.

33 The area to cover for surveillance is huge and so many attacking positions are available for pirates.

34 However, Kenyan authority complains that the international community has not lived up to its commitment to financial assistance to Kenya (Roach, 2010). This claim is nevertheless not in consistent with the facts. The U.N. Office on Drugs and Crime (UNODC) website gives some details about what the UNODC has been doing to counter piracy off the Horn of Africa. See, e.g., *Eastern Africa: What are We Doing?*, UNODC, <http://www.unodc.org>, 2009.

not advisable in this case. They tend to be costly to run and have to be based legally not on a UNSC Resolution (although there have been such cases in the past) but on an international treaty, which would take time and a lot of political will. So far, the most ardent proponent of an international court on piracy has been the Russian Federation (<http://network.nationalpost.com>). The Working Group on Legal Issues of the 'International Contact Group on Piracy'³⁵ is discussing the viability of regional and international tribunals, but has to date reached no agreement.

Pirates, finally, have to be re-integrated into society once they have finished their term in prison. This is another issue that has not been adequately addressed but will have to soon be released. Kenyan authorities are particularly concerned about the fate of the many imprisoned pirates that are currently kept in their country.³⁶ These are the possible issues that international law may face when it combats piracy. It is necessary to touch upon two other aspects of piracy that may create additional problems. These are the adopting national laws and the flag question examined next.

10.1. Adapting National Laws

States in combating piracy may employ UNCLOS provisions into their national laws. However, they are not under obligation to adopt all the provisions laid down in the treaty. They may choose to use its full potential or only part of it (for example, to repress piracy they may act only against those who attack their own flag or nationals, or, on the contrary, universally). Definition of piracy given by UNCLOS is a very broad and it also includes preparatory acts of piracy, including land-based activities. This is even true for the incitement, support, or voluntary participation in the operation of a ship with knowledge of facts making it a pirate ship. These broad provisions allow prevention measures to be taken for the repression of piracy. Prevention includes action taken against pirates before they even attack and repression is an action in flagrante or a posteriori. Therefore, counter-piracy operations may vary from one country to another. Differences in the national legislation of States remain a barrier to possible combined international operation against piracy.

However, the practice of members of the EU and other parties to the UNCLOS must undertake the necessary provisions of it into their national legislation in order to participate effectively in the fight against piracy. Accordingly, States wishing to participate in the fight against piracy should first of all incorporate in their legislation all the provisions for preventive

35 *The Contact Group on Piracy off the Coast of Somalia was created on 14 January 2009 pursuant to UN Security Council Resolution 1851. For the complete list of participants see <http://www.state.gov/t/pm/rls/othr/misc/129273.htm> The Contact Group on Piracy off the Coast of Somalia (CGPCS) held its sixth meeting in New York on June 10, 2010, under the Chairmanship of Greece. <http://www.icpat.org/index.php/events-archive-mainmenu-81/469-sixth-plenary-meeting-of-the-contact-group-on-piracy-off-the-coast-of-somalia>*

36 *"Kenyan authorities have said that they do not wish their country to become the repository for all captured pirates, and that they cannot cope with a further influx without more international assistance" (<http://www.hfw.com>, 2009).*



and repressive action against pirates. Secondly, they must empower the appropriate military services to engage in criminal policing activities in the context of piracy. Thirdly, they shall determine the conditions for detaining pirates on board ships or aircraft, their transfer and handover to the judicial authorities, and monitoring deprivation of freedom before handover. Fourthly, they must determine which judges should be responsible for monitoring deprivation of freedom and instigating the legal proceedings associated with the operation. Fifthly, they must determine at which point the judge should intervene in the process. Sixthly, they must determine rules for the seizure of pirate ships and equipment. Lastly, they must adapt their laws to enable certain operations to be carried out where the conditions for carrying out such operations are not compatible with common law.

Suffice to note that the application of these provisions when they are adopted may become very efficient. However, there are currently some difficulties. First of all, since UNCLOS came into force, a few States have undertaken to adapt their national laws to apply the Convention's provisions relating to the repression of piracy (and other offences on the high seas such as dealing in slaves, unauthorized broadcasting, etc). Certain States (for instance Germany) would not confer police powers on the military and they would not employ their armed forces within any combined power to carry out police missions at sea. In this regard, countries that allow their navies to carry out this type of action are very few, particularly within the EU. The members of EU, having signed up to the European Convention on Human Rights (ECHR), must take account of the requirements for fair trial, the prohibition of inhumane or degrading treatment and the non-application of the death penalty when undertaking criminal procedure. As a result they could not hand over captured pirates for trial to any country that does not meet ECHR criteria, nor could they capture them from on board ships under the flag and jurisdiction of such a State. Other States are on the other hand may be handicapped by the fact that there is no definition of the crime of piracy in their criminal law, or that the definition does not correspond to that given in UNCLOS. There may be others that have not taken any measures which would allow them to assume responsibility in case of errors and do not want to bear the cost. In short, the difficulties *prima facie* in incorporating UNCLOS provisions into national laws are other handicaps when States are combating piracy.

10.2. The Flag Question

Despite its time consuming nature, maritime transportation is mainly preferred for two reasons: namely its capacity of carriage and its cost. For the second reason, ship-owners generally try to save every cent. Perhaps it is this end that most of them register their ships where it costs less. Thus, a ship-owner has two choices. He may choose to register his ships under the flag of a State that is capable of protecting it against the threat of piracy, and pay an extra cost, or register his ships in another State where registration is not as expensive but which is not capable of exercising any sovereign prerogative on the high seas or assuming certain responsibilities *vis-à-vis* the ships flying its flag. Therefore registration for pragmatic ends does create problems. For this very reason States today are under difficulties to choose who should benefit from their protection. The possibilities are as follows: (i) a ship sailing under

flag X does not necessarily represent the interests of State X; (ii) a ship sailing under a foreign flag may represent the interests of another country (shareholders, cargo); and (iii) States have difficulty identifying strategic cargoes, or, on the contrary, identifying ships warranting no protection on account of the illegal activities they might be engaged in.

10.3. Lumping Piracy with Terrorism and Other Issues

Moving back to the definitional level, the important distinction that international law makes between piracy and terrorism must not dismiss the possibility of a link between these two phenomena. Legally as well as conceptually, terrorism is a fundamentally different phenomenon from piracy as it requires the existence of a political or ideological drive. However, terrorist attacks can be waged from the sea,³⁷ and ‘maritime terrorism’ has been used by the main international terrorist organization, Al Qaeda, both prior to and after the September 11 attacks.³⁸ It may be nevertheless argued that some international conventions, such as the 1988 Rome ‘Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation’, covering terrorism could be used to combat piracy (SUA). Similarly, others, like the International Convention against the Taking of Hostages (<http://treaties.un.org>), the International Convention for the Suppression of the Financing of Terrorism of 1999 (<http://www.un.org>, 2010) and the United Nations Convention against Transnational Organized Crime of 2000 (<http://www.unodc.org>, 2000) could be mentioned in this regard. It is of course possible to use these conventions in order fighting against piracy once it is established that there is a concrete link between terrorism and the pirate activities. However, there is to date no evidence of a link between piracy and terrorism in Somalia (this does not mean that there will never be). This is confirmed by all major institutions and entities operating in the region. At the same time, however, more and more sources speak of a penetration of terrorist groups in Somalia, including Al Qaeda (<http://www.huffingtonpost.com>). When it is approached from this angle it seems that there is a risk that pirates could be enlisted as terrorists or simply they could be hired by terrorists in the future. This possibility may well be a valid concern of States as terrorist groups might consider that response to piracy compared to terrorist attacks by international community is involved more legal loopholes and therefore terrorists

37 *The 2008 terrorist attacks in Mumbai, India, causing almost 200 casualties, for instance, were from the sea.*

38 *The seizure of the Achille Lauro, an Italian-flag cruise ship, on 7 October 1985, was characterized by USA as piracy. For the characterisation of the President see 24 ILM at 1515; and further see N.Y. Times, 12 October 1985, at A6, cols. 1-6; and by the Legal Adviser, id., 30 December 1985, at Al, col. 5; and the Justice Department obtained arrest warrants charging the hijackers with hostage taking, conspiracy and “piracy on the high seas,” see 24 ILM at 1554-57. This characterisation has been both supported and denied (McGinley, 1985: 700). “Thus it is evident that the seizure of the Achille Lauro was piracy jure gentium”, (Note, 1987: 159, where the author supports his claim in reference to the definition of piracy given by the 1958 Geneva Convention on the High Seas. He contends that the taking of the Achille Lauro is not included within the definition of piracy in the mentioned convention because there was no second vessel involved or because the hijackers did not act for ‘private ends’, customary international law and the history of the enforcement of the norm against piracy indicate that such a position is unfounded.*



may rely on pirates to carry out their attacks. This situation may create more sophisticated piracy activities which may cause higher risks for maritime trade. This is a current issue that the international community may face in the case of Somalia. Moreover, ransoms obtained from pirate activities can be re-invested in terrorist activities, in which payment of ransoms would be illegal.

Assuming that a connection between Somali piracy and terrorism were proven, what should be done? First of all the approach of existing actors would have to change entirely. New policies must be considered strategically and legally. It may rightly be argued that paying ransom for hostages would become illegal if pirates were also terrorists. The actors combating piracy would employ the relevant rules of international law in the high seas and territorial seas of the coastal States without prior authorization of the UNSC.

Last of all it is necessary to investigate another important link between piracy and the political dynamics of the coastal State, especially when the question of a failing State raised, like the current situation in Somalia. Somali pirates as mentioned before were initially fishermen who attacked foreign vessels involved in illegal activities (unauthorized fishing/dumping of toxic material, waste) or simply entering the territorial waters of Somalia without permission (Tharoor, 2009). However, the deterioration of Somalia's agriculture due to internal strife and disorder has led fishermen to become pirates. Their approach to piracy has now become as a way to make a living. To this end it must be noted that the internal poverty and economical crises of coastal States must be dealt with in a manner of creating stable environment for life. By this way, some causes of piracy may be defeated. Otherwise those situations would pump more fuel into the problem of piracy.

Conclusion

It is indeed pessimistic to claim that the problem of piracy will continue to exist as long as there are criminally inclined persons and maritime zones of ineffective law enforcement; there are littoral communities that are sunk in poverty or vulnerable to economic fluctuations and in which local traditional practice is more respected than the law of a remote central authority. However, the international community will be successful in combating piracy if the availability of appropriate technology for maritime surveillance is employed. The applicable rules concerning apprehension of offenders are necessary and they must be clarified for the effective suppression of piracy. In addition to all, further fighting against piracy requires national resolve, international cooperation, and economic development that improve the material conditions of maritime communities (Anderson, 1995: 199). However, this is not to deny that the modern international law still faces difficulties when combating piracy.

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