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Maritime piracy operations: Some legal issues

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ABSTRACT

The international legal regime pertaining to maritime piracy has developed and grown over the years. These changes were prompted due to lacunas in the legal system, which surfaced when the codified laws were implemented. The problem of maritime piracy flares up every few years, especially with the modernization of boats and weapons. Dealing with maritime piracy involves coordinated and orchestrated efforts at different levels including, domestic, regional and international. Anti-maritime piracy operations have been very successful in controlling and reducing piratical activities, for example, attacks on merchant vessels off the Somalian coast have considerably reduced. Given the success of such anti-maritime piracy operations, it becomes imperative to underscore some legal issues that may stand out and flag the gaps in the international maritime piracy legal regime. Identifying such legal issues will help the future lawmakers in deciding if such issues need resolution, and does it require further development or amendment of the current maritime piracy legal regime.

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Piracy is an ancient phenomenon and its history dates to hundreds of years. Earlier the law of piracy existed in the form of customary laws and practices. It was only in the 20th century that the codification of piracy-related customary laws and practices began. Over the year, this law has grown and developed, with the increase in maritime piracy operations some legal complications have also surfaced.

Maritime piracy operations require cooperation and coordination at international, regional and national levels. At the domestic level, government agencies and institutions need to develop a coherent system of information and data sharing, to avoid laps and overlaps within the system. The piracy regime has been successful in controlling piracy to some extent, but due to the nature and location of the act, complete eradication of piracy does not seem possible. This paper discusses and underscores some legal issues that a state may face when combating maritime piracy, such an exercise will help us in identifying the core areas which need deliberations amongst states internationally and regionally, which would lead to changes in their domestic laws to make maritime piracy regime more effective.

Definition of piracy

Definition of piracy has been baffling the academic community since the efforts for codification first have begun. The Harvard Researchers (Harvard Research in International Law 1932) while drafting the Harvard Draft Convention of Piracy, 1932 proceeded in their quest to define piracy by differentiating between its definition under the law of nations and domestic laws. This distinction was based on the location of the act; as international piracy was committed beyond all territorial jurisdictions, whereas in domestic law, piracy was committed in the territorial jurisdiction of the state. They further pointed out that under domestic law; piracy was a crime but not so under the law of nations. Their reasoning was based on the fact that the law of nations was different from municipal law, as it does not apply to private individuals. In other words, there is no super-government and no international administrator of justice for private individuals. Thus, maritime piracy is not envisioned as a crime under the law of nations, but only as a special basis for state jurisdiction (Rubin 2007).

The definition of piracy in the UNCLOS was inspired by Harvard Draft, 1932 and the Convention on the High Seas, 1958. The key facets of piracy as per UNCLOS, Article 101 are (i) committed for private ends, (ii) takes place on the high seas and (iii) done by one ship on another ship.

The first element of UNCLOS definition, namely private ends has been a matter of debate. The issue revolves around *animo furandi* of the act. In other words, does it exclude the acts committed under state sponsorship or does it require the element of *animo furandi*, thus excluding politically motivated acts (Paige 2013; Honniball 2015; Seshan 2008; Peter Chalk, Smallman, and Burger 2009). International Law Commission (ILC) has made it clear that *animo furandi* is not required, as piracy may be committed by

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a feeling of hate or revenge and not only for private gains (International Law Commission (ILC) 1957). Moreover, the act of piracy must be committed for private ends. Thus, the use of the word "private end" points towards the lack of state sponsorship argument (Guilfoyle 2008, 2010; Houghton 2008; Bahar 2007; Kraska 2011). On the other hand, some scholars argue that *animo furandi*, as opposed to political motive, is an essential element for the act of piracy (Morris 2001; Kontorovich 2004). As per this argument, if there is *animo furandi*, then it would suggest that the act was done for selfish motives. In that case, the consideration of *mens rea* would help determine if the act was politically motivated or not (Kontorovich 2004). Thus, not considering *animo furandi* would result in disqualifying acts committed for political or ideological reasons to be considered as piracy (Sterio 2017).

The second element of the UNCLOS definition requires the act of piracy to be committed on the high seas; as the act of piracy is closely linked with the concept of universal jurisdiction (Sterio 2017; Kontorovich and Art 2010). Interestingly, both the contiguous zone and the exclusive economic zone are considered as high seas for piracy (by virtue of Article 33 and Article 58 UNCLOS) (Paige 2013). Some have argued that this requirement disqualifies many cases of maritime violence from the purview of the definition, especially the ones within the jurisdiction of a state. For instance, the acts of piracy taking place within the territorial seas of Somalia. The international community could not conduct anti-piracy operations off the Somalian coast, within the territorial sea, unless the Somali TGF (Transitional Federal Government) consented to such operations (Treves 2009). That is why; some scholars contended that the high sea requirement of piracy serves as a deterrent for the enforcement strategies as anti-piracy operations could not be initiated within the territorial sea of a state without proper permissions (Bento 2011; Garmon 2002). But, from the standpoint of international law the requirement of high seas is sine que non, as it coincides with the concept of sovereign equality and territorial integrity or political independence of states as provided under the Charter of the United Nations.

The ILC commentaries on Articles concerning the Law of the Sea (International Law Commission (ILC) 1957) clearly state that piracy can only be committed on the high seas, and not within the territory of any state. The argument of TGF tendering consent to the international community to conduct anti-piracy operations in their territorial seas falls in line with the requirement of high seas. Since the act of piracy within the territorial waters of Somalia falls within its jurisdiction, any international operation could have access to such areas only after Somalian government's permission/consent (Azubuike 2009). Although the requirement of high seas may restrict the scope of the UNCLOS definition, it is in consonance with basic principles of international law.

Further, the problem with UNCLOS definition can be perceived while considering the piratical acts committed in the inland waters of Nigeria (the Gulf of Guinea in West Africa). Most pirates in this region target oil-carryingships with the motive of stealing oil rather than taking the ship and crew hostage (Kao 2016; Guilfoyle 2014; Otto 2014). These attacks are similar to armed robbery, rather than traditional piracy as defined under UNCLOS (Loverdou 2015). Similarly, the acts of piracy in Southeast Asia are also more in the nature of armed robbery rather than traditional piracy (Amri 2014). This problem was resolved by the adoption of the IMO's Code (IMO 2010).

The third element of UNCLOS definition required two ships to be involved in any piratical act, as per Article 101. This Article states that two ships must be involved in any act of piracy. It means that the illegal act must be directed against another ship or aircraft or persons or property onboard such ship or aircraft. It more specifically requires "private ship" to be used for a piratical act against another ship. Therefore, crew seizure, mutiny or passenger takeover of the same ship does not fulfil the "two-ship" requirement under UNCLOS. In *Achille Lauro* case, the members of Palestine Liberation Front (PLF) boarded the vessel as passengers and hijacked it off the coast of Egypt while sailing between Alexandria and Ashdod. In this case, no second ship was involved and hence it did not constitute piracy under UNCLOS Article 101. The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) was adopted to rectify this inherent defect in the definition of piracy (IMO 2010; Paige 2013; Madden 2009; Geiss and Petrig 2011).

The shortcoming in the definition of piracy under UNCLOS has been sought to be addressed by the adoption of the SUA Convention and International Maritime Organization (IMO)'s Code. Over the period, the UNCLOS definition of piracy has become more settled and firmly rooted. One current issue relating to the definition of piracy is that although some countries have incorporated the UNCLOS definition in their domestic law, many have failed to do so. For example, Indian domestic law does not define piracy at all, which has either resulted in procedural delays during trials or failure to achieve effective prosecution of apprehended pirates.

Private actors

The use of private armed guards (PAG) onboard ships has increased over the years; this is in response to the growing maritime security threats due to maritime piracy. Maritime security, which is considered as one of the prerogatives of a sovereign, is slowly losing

ground to private security companies (Liss 2013; Abrahamsen et al. 2010; Caldwell 2012). Some scholars attribute this growth in the use of private armed guards to the failure of Governments in their duty to offer protection to the international shipping, especially with regards to piracy, which affects some of the most important shipping routes in the world (Williams 2014; Fitzsimmons 2013). The activities of armed guards on merchant vessel fall under overlapping jurisdictions. They need to comply with laws of the flag state, international law, and while operating in waters or port of a coastal state, the domestic laws of that state (Liss 2013). There is no international regulatory framework of binding nature applicable to the PAGs. IMO, through MSC, has developed guidelines for the guidance of ship-owners in this regard. Two important observations can be made with regards to the use of privately contracted armed security personnel (PCASP) and the IMO; firstly, IMO does not endorse the use of PCASP and second, the decision-making process of the ship-owner to carry PCASP is complex, as it involves complicated legal requirement of transport, carriage and the use of firearms (IMO 2011; Kojima 2015; Williams 2014).

There are two more instruments that need to be mentioned in this regard: firstly, the Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict (the Montreux Document) (United Nations (UN) 2008) and secondly, the International Code of Conduct for Private Security Service Providers (ICoC). Both documents do not apply to piracy directly, but they do relate to activities of private actors in an armed conflict (Williams 2014). The Montreux document reaffirms the legal obligations and spells out the good practices for states to observe with respect to the use of private military and security companies during an armed conflict (Cockayne 2008; Coito 2013; Petrig 2013). The ICoC, on the other hand, comprises principles and processes set by private security providers in support of the rule of law, reinforcing obligations on their part with regards to international humanitarian law and international human rights law.

A question may be asked as to why are these two codes being discussed when they are not directly connected to piracy? The reason for mentioning the above two codes is that the IMO's MSC, in its Circular 1443, has referred to the two documents as "… are useful reference points for PMSC, but are not directly relevant to the situation of piracy and armed robbery in the maritime domain and do not provide sufficient guidance for PMSC …" (IMO 2012). Thus, the MSC refers to both the documents as useful reference points, even though the codes do not directly relate to the issue of piracy. IMO and other maritime security stakeholders requested the International Organization for Standardization (ISO) to develop standards for compliance and best practices for PMSCs. Considering this, the ISO developed a pilot certification program, titled as ISO/PAS 28007. This program has emerged as the benchmark standard of compliance and best practices for private maritime security companies to follow and be certified, indicating that they operate at the highest possible standard. The ISO/PAC 28007 is not a mandatory certification; rather it is up to the flag states to accept it as the foundation for the operation of PMSCs on their vessels.

On many occasions to fend off pirates and to protect merchant vessel, private security personnel onboard ships may use force, includeing the use of firearms, which has resulted in the killing of pirates or suspected pirates in the past. Since there is no international law applicable to them on the high sea, the use of PCASP has caused a lot of concerns amongst the international community. These concerns were brought forth in the following cases:

The Almezaan

In this case, private security guards onboard a UAE-owned cargo ship shot dead a pirate attempting to board the ship off the coast of Somalia. Later, a Spanish warship took custody of apprehended pirates, and their boat. The apprehended pirates were released by the captain of the warship. This incident raised questions about the law applicable to the action of the private security guards, particularly with regards to the investigation of the incident, as applicable jurisdiction was not clear (Williams 2014; Dubner and Pastorius 2013). This was the first incident where private security guards killed a pirate originating from Somalia (Morris 2010, BBC 2010).

MV Enrica Lexie

This incident took place off the Indian coast. Italian naval guards onboard the Enrica Lexie shot and killed an unarmed Indian fisherman (The Hindu 2012; Chowdhury 2016). The two states involved in this case, Italy and India, have been disputing over the location of the incident. Currently, the matter is before the ITLOS (ITLOS 2015), the tribunal will decide, based on facts, which country has jurisdiction over the marines, Italy claims that the incident took place outside Indian territorial sea, therefore Italy has jurisdiction over its national as flag state. On the other hand, India bases its claim on the Indian nationality of the fishermen. This case is different from the case mentioned above as the incident involved two serving naval officers of the Italian navy and not private security guards. This case brought forth the issue of

jurisdiction, state responsibility and immunities (Williams2014; Sankar 2013; Wu 2014; Oommen 2015).

Considering the lacunas mentioned above in the international legal regime applicable to private military and security companies, the United Nations has developed a U.N. Draft International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies (United Nations (UN) 2009; Gómez Del Prado 2011). It emphasises, the responsibility to protect all persons, whether civilian or military, in violation of their human rights by non-state actors, including private military and security companies (Williams 2014).

The use of PMSC will continue as long as ships transiting piracy hotspots outnumber naval vessels deployed in such regions. It is not possible for the naval vessel to offer protection to every vessel. On the contrary, it has been observed that no ship with armed security guards onboard has even been hijacked, this speaks volumes about the effectiveness of such personnel. The legal issues identified above have been baffling the international community with regards to the method of operations and law applicable to such personnel. Some relevant steps are now being taken to address the lacunas in the international legal regime by way of the U.N. Draft convention mentioned above.

Prosecution of apprehended pirates

Universal jurisdiction over pirates is well established under international law (Kontorovich and Art 2010; Paige 2013; Hesenov 2013; Huang 2012; Song 2015). As mentioned above, the Harvard Draft which inspired the later codification of the law of piracy leading up to UNCLOS did not consider piracy as an international crime. The drafters of the Harvard Draft clarified that the definition of piracy developed by them is only to be treated as a foundation for universal jurisdiction over pirates and it does not mean to make piracy an international crime (Harvard Research in International Law 1932). They emphasised that the purpose of the code is "… not to unify throughout the various municipal laws of piracy, nor to provide uniform measures for punishing pirates, but to define this extraordinary basis of state jurisdiction …" (Harvard Research in International Law 1932). Thus, all states have jurisdiction over pirates, which they may or may not use to capture and prosecute pirates, prosecution must be done as per the domestic law of the capturing state, as it is incumbent upon the individual state to develop domestic legislation criminalising piracy. It is submitted that this universal jurisdiction is different from the customary universal jurisdiction for war crimes and crimes against humanity, which are based on the heinousness of the crimes (Oliver 1962; Paige 2013). In fact, the universal jurisdiction with regards to piracy simply provides municipal jurisdiction to states in areas which are outside their jurisdiction. However, the nature of act has nothing to do with the exercise of universal jurisdiction as in case of war crimes and crime against humanity (Paige 2013). In other words, piracy does not fall under the category of international criminal law as the jurisdiction and foundation of that jurisdiction is different (Paige 2013; Boister 2012).

If we compare the definition of piracy under UNCLOS and any other convention dealing with war crime or crime against humanity, we will see that UNCLOS does not provide any description of the offence. For instance, if we consider the Genocide convention, 1948 (Genocide Convention 1948), Article 1, refers to genocide as a crime against international law, which needs to be prevented and punished (Genocide Convention 1948). Furthermore, Article 2 defines genocide and Article 4, states that whoever is responsible for the act of genocide will be punished (Genocide Convention 1948). Thus, the genocide convention provides in clear terms the following: (i) the act of genocide is an international crime, (ii) the acts will constitute genocide, and (iii) that the act of genocide is punishable.

Now, if we consider UNCLOS, Article 101, it only defines; what constitutes the act of piracy. However, it does not state that such acts are punishable, nor what needs to be done once the pirates have been apprehended. Moreover, Article 105 empowers the courts of the capturing state to decide the penalty to be imposed and determine what is to be done with the captured ship and property onboard. The reason behind this has been discussed above, the drafters of the Harvard draft convention on which the Convention on High Seas and UNCLOS are based, did not envision piracy as an international crime. In fact, it was used as a foundation to extend the jurisdiction of states beyond their territory, in turn, making apprehension and prosecution possible. The actual prosecution was to be done by domestic laws of the states apprehending such suspects (Geiss and Petrig 2011). In pursuance of this, the United Nation General Assembly called upon member 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 …" (UNGA 2010). It further urged the member states to adopt appropriate national legislation that would assist "… enforcement personnel in the prevention, reporting and investigation of incidents, bringing the alleged perpetrators to justice, by international law …" (UNGA 2010).

Some states have developed and adopted relevant national legislation based on Article 101 of UNCLOS, along with prescribed punishment. For example, the United States' national legislation on piracy not only describes the offence of piracy but also makes piracy punishable by life imprisonment (18U.S.C. § 2280; 18U.S.C. § 1651; 18U.S.C. § 1652; 18U.S.C. § 1653; Menefee

1990; Rubin 1990; Kontorovich 2009a). On the other hand, many states do not have piracy-related national legislation till date. For instance, the Indian domestic criminal law regime does not define maritime piracy. Furthermore, due to nature and location of pirate attacks, the collection of evidence also becomes a major issue (Oceanus 2013). The United Nations Security Council acknowledged the issue of prosecution of apprehended pirates in 2008 as:

> (W)ith concern 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 … (UNSC 2008b).

As far as armed robberies at sea or acts which do not qualify as piracy under UNCLOS definition are concerned (UNSC 2008b), the SUA Convention applies. In contrast to the UNCLOS, Article 3 of the SUA Convention describes the crimes falling under the ambit of the Convention. Article 4 of the SUA Convention extends to vessels in the territorial seas of states. Thus, unlike piracy, which is limited to high seas, an act even in territorial waters can be considered a crime under the SUA Convention (Seta 2016). The member states to the SUA Convention are under an obligation as per Article 5, to make the crimes falling under the ambit of the Convention "punishable by appropriate penalties which take into account the grave nature of those offences". Another major difference between SUA Convention and UNCLOS is that the former specifies which state would have jurisdiction over the perpetrator as compared to universal jurisdiction under UNCLOS.

Extradition of apprehended pirates is not covered by UNCLOS. There have been some bilateral agreements between states for the prosecution of apprehended pirates: Kenya entered into Memorandum of Understanding with the United States and the United Kingdom, in 2008 and 2009, respectively (Gathii 2010; Hodgkinson 2011; Scharf et al. 2017). As per the memorandum, Kenya would receive and prosecute Somalian pirates apprehended by both these states. Republic of Seychelles entered a similar understanding with the European Union in 2009, for the prosecution of pirates apprehended in Seychelles' exclusive economic zone, territorial sea, archipelagic waters, and internal waters. Mauritius and the European Union entered into an agreement for the prosecution of apprehended pirates in 2011. While considering prosecution and extradition of apprehended pirates we do need to keep in mind the principle of non-refoulement. An important question that may arise here is that can the detainee of an anti-piracy operation be deported to another country which does not qualify as "safe"? If we consider this question with regards to the Somalian pirates, we will see that the obligation of non-refoulement would be breached if a detainee is deported back to Somalia, as Somalia is not considered a safe place by most states (Sterio 2011; Kontorovich 2009b).

From the above discussion, the prosecution of apprehended pirates is a major issue, not only the coastal states have been grappling with this problem, but United Nations has reiterated the same in various General Assembly and Security Council resolutions. Thus, it is a complex problem, and it can only be resolved if appropriate steps are taken by states to either cooperate with each other or by developing a multilateral treaty in this regard.

Enforcement

Enforcement of anti-piracy instruments is an arduous task; this argument can be understood if we look at the maritime security regime in general. Maritime security measures usually operate at national, regional, and international levels simultaneously. It is submitted that the anti-piracy regime suffers from weak surveillance, capacity-building, and enforcement mechanisms.

The United Nations General Assembly has pointed out on numerous occasions the issue of lack of capacity. In the most recent resolution on Oceans and Law of the Sea, the UNGA observed that:

> Recognizes the crucial role of international cooperation at the global, regional, sub regional and bilateral levels in combating, in accordance with international law, threats to maritime security, including piracy, armed robbery against ships at sea … the enhanced sharing of information among States relevant to the detection, prevention and suppression of such threats, … and the need for sustained capacity-building to support such objectives … (UNGA 2017).

With regards to the Somalian piracy, the UNGA has emphasised that the international community must assist the Somalian government in strengthening its institutional capacity to fight piracy and tackle underlying causes (UNGA 2017).

The United Nations Security Council has also called upon member states and international organisations to assist Somalia and nearby states by enhancing their capacity to ensure coastal security (UNSC 2008a). The lack of capacity is mostly with regards to enforcement infrastructure, naval force, legal institutional, lack of trained personnel, lack of appropriate law to deal with the issue and so on. With respect to Somalia, the United States (United States Government 2010) and European Union (European Union 2014) have initiated capacity building programmes; these programmes are based on the understanding that maritime security is a multi-dimensional concept and it requires capacity building at both sea and land. They aim at addressing the wider governance issue which is the root cause of maritime piracy. Thus, they tend to provide a link between

security, institution, and the socio-economic environments in such countries (Bueger at el. 2017; Edmunds 2017; Hänggi 2004).

Furthermore, one of the most important factors for suppression of piracy is international and regional cooperation between states (Guilfoyle 2009; Gottlieb 2015; Barnidge 2006). It is submitted that states have always taken international and regional cooperation against maritime security threats rather seriously, especially when piracy is involved (EU NAVFOR Somalia 2009). International and regional cooperation can be influenced by geopolitical or other issues: this makes the attainment of a conducive environment for achieving cooperation between states a complicated task. For instance, due to various unresolved delimitation claims, many coastal states have unsettled claims against their neighbours or otherwise. Such unresolved claims could affect inter-state relations (Sousa 2014). This would not only cause strains in cooperation efforts but also cause overlap of efforts (Sousa 2014).

Another important issue is the "soft law" nature of the regime. The Conventions, including UNCLOS, UN resolutions, IMO resolutions and IMO codes as mentioned above are couched in soft law terms. The adoption of such law is dependent upon the member states. In other words, such laws do not have legally binding consequences, except for the UNSC resolution adopted under Chapter VII of UN Charter. But, as many scholars have pointed out, soft law instruments are politically important as a lot of negotiations are involved in the development of such instruments. Professor Bharat Desai has pointed out- "At the core of the efforts to put in place such a normative framework is the widely accepted view that it is *permissive* in nature, reflects the desire of the states to ensure flexibility as well as room for manoeuvring." (Desi 2004). Although this observation is concerning Multinational Environmental Agreements (MEA), but it underscores the rationale behind the soft law nature of international instruments in general. In case of maritime security regime under UNCLOS as well, the element of national security makes international law-making a lot more difficult, as states are not willing to compromise with their sovereignty. Thus, in such a situation, soft law is the best possible option to make maritime security instruments, which give enough latitude to states with respect to enforcement and implementation (Boyle 2014, 2005).

Conclusion

The legal and institutional mechanism for combating maritime piracy faces various challenges mostly at the domestic level, which need to be legally addressed. All States may face one or more of the above-discussed issues. The solution to the above issues can only be obtained if states are willing to sit and reach a consensus on issues like extraditing and use of private security guards' onboard ships. It is submitted that most resolution will require some changes in domestic laws, which may be state specific and may involve a long legislative process, for instance, the adaptation of definition of piracy in the domestic laws. International and regional institutions/actors will also have to play a vital role in the development process because they act as platforms which help in facilitating discussions and help in identifying the underlining issues. The UN has been very vocal about the above-mentioned issues but has not been able to bring about a universal consensus amongst states. Although this consensus doesn't have to be regarding all aspects of anti-piracy operations regime, as the regime mostly relies on municipal rules and regulations of states, for example, prosecution of apprehended pirates, incorporation of definition of piracy in local laws and enforcement. It is incumbent upon the states actors to identify such issues in their respective legal systems and take appropriate actions to resolve them.

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