

MARSEQ

Combating Piracy

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Legal Gaps and Loopholes in the Legal Regime on Piracy

Robert Beckman

**Director, Center for International Law
Associate Professor, Faculty of Law**

CIL

Centre for International Law

www.cil.nus.edu.sg



NUS

National University
of Singapore

Importance of UNCLOS

- **1982 United Nations Convention on the Law of the Sea (UNCLOS) establishes the legal framework**
- **As of 24 Jan 2010, there are 160 Parties to UNCLOS, including all States in Southeast Asia except Thailand, Cambodia & Timor Leste**
- **Most of States in the Gulf of Aden region are parties, including Somalia, Yemen and Kenya**
- **All States with warships in the Gulf of Aden are parties, except the US**

Jurisdiction under UNCLOS

- Different principles of jurisdiction apply in zones within sovereignty (territorial sea and archipelagic waters) and zones outside sovereignty (high seas and 200 nm exclusive economic zone)
- In zones within sovereignty a foreign warship cannot arrest a ship without the consent of coastal State
- In zones outside sovereignty ships are subject to the **exclusive jurisdiction of the flag State**, and cannot be boarded without its express consent, except in the case of piracy

Issues to be examined

1. What is “piracy” under UNCLOS, and what gaps, loopholes and problems with the piracy regime are demonstrated by attacks in the Gulf of Aden and in SE Asia?
2. Can other international conventions be utilized to combat piracy and armed robbery against ships?

Piracy under UNCLOS

- Piracy provisions in UNCLOS apply on the high seas and in the 200 nm EEZ (anywhere outside of the territorial sea)
- UNCLOS provides that all States have duty to cooperate in the repression of piracy
- Piracy provisions create an exception to the general principle that ships on high seas cannot be boarded without the consent of flag State
- Warships of all States have a right to seize pirate ships and arrest pirates

Definition of Piracy

Piracy consists of any of the following acts:

- (a) any illegal acts of violence or detention
- committed for private ends
 - by the crew or the passengers of a private ship . . . ,
 - on the high seas [or EEZ],
 - and directed against another ship . . .

Definition of a Pirate Ship

- A ship . . . is considered a pirate ship . . if it is intended by the persons in dominant control to be used for the purpose of committing piracy
- The same applies if the ship . . . has been used to commit any such act, so long as it remains under the control of the persons guilty of that act

Seizure of a Pirate Ship

- On the high seas [or EEZ], every State may seize a pirate ship or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board
- The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships or property

Problems with piracy provisions

- 1. Piracy rules do not apply to attacks on ships in ports, in the territorial sea or in archipelagic waters**
- 2. Laws of the coastal State apply in areas under its sovereignty, and it has exclusive power to enforce its laws in these areas**
- 3. Attacks in areas under sovereignty are classified as “armed robbery at sea”, not piracy**

Piracy in Southeast Asia

- The vast majority of attacks on ships in Southeast Asia take place within the sovereignty of coastal States
- The area of the Straits of Malacca and Singapore from Port Klang to Horsburgh lighthouse is within the territorial sea of the littoral States
- Piracy rules do not apply to attacks in these areas – coastal State has exclusive right to enforce its laws in these areas

Straits of Malacca & Singapore



Security Council & Somali Piracy

- Because of the unique circumstances in Somalia, the UN Security Council used its “Chapter VII” powers and created an exception to the rules on piracy
- SCR 1816 authorizes States cooperating with the TNG of Somalia to enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea

Limits of exception on Somalia

- Exception only applies if the Transitional National Government of Somalia has given notice to the UN Secretary-General
- Indonesia and other developing countries insisted that resolution expressly provided that it as a “one-off” which could not be applied elsewhere

Problems in Seizing Pirates

- Piracy off Somalia has demonstrated that there are many problems in seizing pirates and pirate ships
 1. Difficult to identify pirate skiffs and their “Mother Ships”
 2. May have no right to seize skiff unless it is attacking a merchant ship
 3. “Mother Ships” themselves may not take part in attacks so warships may be reluctant to seize them

Problems with Hijacked Ships

- Piracy rules allow the seizure of ship taken by piracy and under the control of pirates
- However, warships seldom attempt to seize hijacked ships because of the risk it would pose to the crew members and to the hijacked ship
- Pressure from other stakeholders discourages seizure – flag state, ship owner, cargo owner, state of nationality of crew members, etc

Problems Prosecuting Pirates

- UNCLOS provides that States may seize persons who commit piracy and prosecute them in their courts
- States have a right to do so, but not an obligation to do so
- Also, the legislation in many States only gives their courts jurisdiction if
 - (1) the perpetrators were its nationals; or
 - (2) if the victim ship was flying its flag

Problems Prosecuting Pirates

- Prosecution in seizing State is often difficult because of the lack of witnesses and evidence, human rights obligations, etc
- Some European States are also fearful that pirates will seek asylum in their country
- US, UK and other States have entered into **Bilateral Transfer Agreements** with Kenya providing that seized pirates can be handed over to Kenyan authorities for prosecution

Part II

Can other international conventions be utilized to help combat piracy and armed robbery against ships?

Relevant UN Conventions

- The are more than 12 UN Conventions in which establish a cooperative regime to combat specific offences by making them “international crimes” among the States Parties
- Two of the these conventions could be used to combat piracy and armed robbery against ships:
 1. 1988 SUA Convention
 2. 1979 Hostages Convention

1988 SUA and 1979 Hostages

- **1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988 (1988 SUA) has 156 States parties as of 31 Dec 2009**
- **1979 International Convention Against the Taking of Hostages (1979 Hostages) has 167 States parties as of 24 Jan 2010**
- **Both establish a similar cooperative scheme among States parties**

Obligations of State Parties

- 1) Make offences in the Convention crimes under its national law
- 2) Establish jurisdiction over offender if offence within territory, if flag state, if offender is its national, or if offender is present in territory
- 3) If alleged offenders are present in territory, (a) take them into custody; and (b) either prosecute them or extradite them
- 4) Provide greatest measure of assistance in connection with criminal proceedings

Offences under 1988 SUA

Offence under 1988 SUA to:

1. **Seize or exercise control over a ship by force or threat thereof or any form of intimidation**
2. **Perform an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship**

Offences under 1979 Hostages

Offence of hostage-taking:

- the seizure or detention of, and threat to kill, injure, or continue to detain a hostage,
- in order to compel a State, . . . a person, or a group of persons to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage

How SUA & Hostages apply

- Hijacking of vessels off Somalia are offences under 1988 SUA because the seizure of a ship by force is an offence
- Hijackings off Somalia are offences under 1979 Hostages because they intend to hold the crew members hostage until ransom is paid
- They are offences under 1988 SUA and 1979 Hostage even if they took place in the territorial sea of another State

Arrest & Prosecution

- No authority under 1988 SUA or 1979 Hostage to board ships & seize offenders
- The conventions apply only when the alleged offenders are present in the territory [or territorial sea] of a State Party
- Once alleged offenders are present in the territory of a State Party, it is under an obligation to take them into custody, and to either (1) prosecute them or (2) extradite them

Arrest & Prosecution

- Under 1988 SUA the master of a ship may deliver to any other State Party “any persons who he believes have committed a SUA offence”
- Therefore, if Kenya is a party to 1988 SUA and 1979 Hostages, warships who seize pirates in the territorial sea or EEZ of Somalia can deliver them to Kenya for prosecution and trial

Arrest & Prosecution

- 1988 SUA and 1979 Hostages also have provisions which make it possible to arrest and prosecute accomplices and leaders on land
- The conventions provide that a person commits an offence if they abet the commission of any offence or if they are an accomplice of a person who commits an offence

Conclusions

- Gaps and loopholes in the piracy provisions in UNCLOS are not the major problem
- The greater problem is that many States have not enacted legislation giving their national courts jurisdiction over piracy as provided in UNCLOS
- Another problem is that many States do have the political will to arrest pirates and prosecute them in their national courts

Conclusions

- The 1988 SUA and 1979 Hostages Conventions fill many of the gaps and loopholes in the UNCLOS provisions
- If all the States in a region ratified and effectively implemented 1988 SUA and 1979 Hostages it would give the international community another useful tool to combat piracy
- The existing international conventions can be supplemented by bilateral treaties when necessary

Thanks for your attention

Questions or Comments?

Email: cildir@nus.edu.sg

Web Page: www.cil.nus.edu.sg