

# CIL Seminar on Piracy

Current Developments and Legal Challenges in  
Southeast Asia and the Horn of Africa

25 May 2011

**International Efforts: capabilities and  
limitations from a legal perspective**

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# Overview of presentation

1. Piracy and Armed Robbery Against Ships
2. International Response to Somali Piracy
3. Legal Issues and Problems with respect to Somali Piracy
4. Terrorism Conventions and Somali Piracy
5. Conclusions

## Part 1

# Piracy and Armed Robbery Against Ships

# Jurisdiction in Areas under Sovereignty

- States have sovereignty in their ports, internal waters, territorial sea and archipelagic waters
- Attacks on ships in such areas are offences under the laws of the coastal State
- Attacks in these areas are classified by IMO and IMB as “armed robbery against ships”
- Only the coastal State has jurisdiction to seize ships and arrest “pirates” in these areas
- Most attacks on ships in SE Asia are armed robbery against ships

## Jurisdiction in areas outside sovereignty

- The high seas and the 200 nm exclusive economic zone (EEZ) are outside the sovereignty of the coastal State
- Ships on the high seas and in the EEZ are subject to the exclusive jurisdiction of the flag State – they cannot be boarded or seized without the consent of the flag State
- The piracy rules establish a permissive exception to the principle that ships on the high seas are subject to the exclusive jurisdiction of the flag State
- Most attacks by Somali pirates are “piracy”
- UN Security Council has extended UNCLOS piracy rules to the territorial sea of Somalia

# Definition Piracy in UNCLOS

101. Piracy consists of any of the following acts:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(i) on the high seas [or in an EEZ], against another ship or aircraft, **or against persons or property on board such ship or aircraft;**

(ii) against a ship, aircraft, persons or property in a **place outside the jurisdiction of any State;**

# Participation, Facilitation & Incitement

101. Piracy also consists of any of the following acts:

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

**Note: There is no provision in UNCLOS providing that “attempts” are also offences**

## 105. Seizure of a Pirate Ship

- On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, **or a ship or aircraft 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, aircraft or property, subject to the rights of third parties acting in good faith.
- These provisions are “permissive” – they give States “rights” but no “obligations”



## 103. Pirate Ship

- A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101.
- The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.

# Art 100. Duty to Cooperate

## *Duty to Cooperate in the Repression of Piracy*

All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.

## Part 2

# International Response to Somali Piracy

# Unprecedented Cooperation

- Somali piracy has triggered an unprecedented level of international cooperation.
- Initiatives include:
  - A.** IMO Actions
  - B.** Security Council Resolutions
  - C.** Bilateral Agreements on Jurisdiction over Pirates
  - D.** Contact Group on Piracy off the Coast of Somalia
  - E.** Djibouti Code of Conduct
  - F.** Coordinated naval patrols

# IMO Resolutions

- **Resolution A.1026 (26) (adopted 2 Dec 2009): “Piracy and Armed Robbery against ships off the coast of Somalia”**
  - Sets out measures to prevent acts of piracy and armed robbery against ships which require action by Governments and the maritime community
- **Resolution A.1025 (26) (adopted on 2 Dec 2009) “Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships”**
  - Provides Member States with a guide to facilitate the investigation of crimes of piracy and armed robbery against ships

# IMO Circulars

- **MSC.1/Circ 1302 (16 April 2009)**
  - Recommends that Governments and international organizations should advise ship owners, operators, masters and crew to accept the advice of the Maritime Security Centre (Horn of Africa) and the ICS and report the navigation route of their ship to the UK Maritime Trade Operations when in Gulf of Aden
- **MSC. 1/Circ 1334 (23 June 2009)**
  - Guidance to ship owners/operators, masters and crew on preventing and suppressing acts of piracy and armed robbery against ships

# IMO Action Circulars

- **MSC. 1/Circ 1333 (26 June 2009)**
  - Recommendations to Governments for preventing and suppressing piracy and armed robbery against ships
- **SN/1/Circ. 281 (3 August 2009)**
  - Urges governments to advise ships flying their flag to use the Internationally Recommended Transit Corridor when transiting the Gulf of Aden
- **MSC.1/Circ. 1335 (29 Sept 2009)**
  - Best Management Practices developed by the industry providing advice and guidance on specific measures to be implemented when navigating off the coast of Somalia

# Security Council Res 1816 of 2 June 2008

- Determined that incidents of piracy off the coast of Somalia constitute a threat to international peace and security
- Authorized states co-operating with the TFG in the fight against piracy, for which advance notification has been provided by the TFG to the UN SG to:
  - Enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea
  - Use, within the territorial waters of Somalia in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery



## SCR 1851 of 16 Dec 2008

- **Ship-rider Agreements:** Invited all relevant states to conclude special agreements or arrangements with countries willing to take custody of pirates in order to embark law enforcement officials (ship-riders) from the latter countries to facilitate the investigation and prosecution of persons detained as a result of anti-piracy operations,
  - provided that advance consent of the TFG is obtained and such arrangements do not prejudice the effective implementation of SUA
- **Co-operative Mechanism:** Encourages establishment of an international cooperation mechanism to act as a common point of contact between states, regional and international organizations involved in the fight against piracy

## Contact Group on Piracy off Coast of Somalia

- Established pursuant to SCR 1851 of 16 Dec 2008
- Voluntary, ad hoc international forum which brings together countries, organizations and industry groups to facilitate discussion and coordination of anti-piracy efforts
- 45 countries and 7 international organizations
- Contact Group meets quarterly at the UN with its inaugural meeting taking place in New York on 14 Jan 2009
- It has four Working Groups which meet regularly around the world to develop and implement national counter-piracy policies and programs

# Coordinated Naval Patrols

- **EU Operation: Operation Atalanta**
- **NATO Operation: Allied Protector and Ocean Shield**
- **Combined Maritime Forces' Combined Task Force 151**
  - **International Naval Task Force set up to combat piracy off the coast of Somalia consisting of naval ships from about 20 countries including the US, UK, Canada, France, Pakistan, Netherlands and Singapore**

# Djibouti Code of Conduct

- **Multiple States with legitimate interests should liaise and coordinate to facilitate rescue, interdiction, investigation and prosecution**
- **Provides for “Ship-Riders” or “Embarked Officers”**
- **Each participant intends to review its National Legislation to ensure that there are:**
  - 1. adequate laws to criminalize piracy and armed robbery against ships**
  - 2. adequate guidelines for the exercise of jurisdiction, conduct of investigations, and prosecution of alleged offenders**

## Part 3

# Somali Piracy – Legal Issues and Problems

## Arrest of “mother ships”

- If a foreign warship suspects that a ship in the EEZ of Somalia is a “mother ship” intended to be used for acts of piracy, the warship could exercise its right of visit under Article 110
- The warship could verify the flag, and if flag cannot be verified or if it is not flying a flag, the warship could board the ship to check its papers
- If armed men and skiffs are found on board, it could determine the mother ship is a pirate ship and seize it
- Is piracy under UNCLOS to intentionally facilitate an act of piracy

## Seizure of "skiffs"

- If a foreign warship encounters a skiff in the EEZ of Somalia which contains armed men and ladders or grappling hooks for boarding vessels, it could exercise its right of visit if:
  1. the skiff is flying no flag
  2. the skiff is suspected of being a pirate ship
- May be able to seize the pirate ship and confiscate or destroy the weapons and equipment
- Difficult to charge the persons aboard the skiff for acts of "piracy" if not seen in the act of attacking a ship

# Seizure of hijacked vessels

- If a vessel is hijacked by pirates and remains under their control, it is a pirate ship
- On the high seas or in any EEZ, foreign warships have right to seize the “hijacked ship” and arrest the pirates
- However, foreign warships normally do not interdict and board hijacked ships because of other factors:
  1. Safety of crew members, ship and cargo
  2. Issues of liability for death or damage
  3. Interests of other stakeholders - flag state, owner, operator and States whose nationals are crew members



# Jurisdiction to try pirates

- Article 105 assumes pirates will be prosecuted and punished in the courts of the arresting State
- There are often problems prosecuting pirates because of a lack of evidence, witnesses, etc that they committed an act of piracy
- UNCLOS does not require States to establish jurisdiction over piracy on the high seas or in an EEZ
- UNCLOS does not require States to extradite or prosecute pirates present in their territory
- UNCLOS has no provisions on mutual legal assistance in the prosecution of pirates

# Constraints on Warships

- **Some warships operating in the Gulf of Aden have legal or policy constraints on the use of their warships and personnel to combat piracy in Somalia:**
  - 1. Restrictions on use of military personnel engaging in law enforcement activities**
  - 2. Restrictions on use of force in boarding and arresting vessels**
  - 3. Restrictions on deployment of special forces**
  - 4. Limits on delay in bringing arrested persons before a judge**

# National Laws on Piracy

- Many States have not updated their domestic legislation on piracy after ratifying UNCLOS
- States may not have an offence against piracy in their penal code
- The definition of piracy in the penal code may differ from the definition in Article 101 of UNCLOS
- National legislation may not give the Courts jurisdiction over acts of piracy on the high seas or in the EEZ by foreign nationals against foreign ships

# Flag States and Shipowners

- **Flag States and shipowners continue to ask the international community to provide more protection and they complain when seizing States fail to arrest or prosecute**
- **Flag States have an interest in punishing pirates who attack ships flying their flag, but few flag States volunteer to prosecute pirates arrested by coalition warships**
- **Shipowners and operators should agree to provide witness and evidence at their expense to assist in prosecutions**

## Part 4

# UN Terrorism Conventions and Somali Piracy

# 1988 SUA Convention

- Hijacking of a vessel by force or intimidation is an offence under 1988 SUA even if it took place in territorial sea
- Once the alleged offender is present in the territory of a State Party, it is under a legal obligation to take the alleged offenders into custody and to either prosecute them or extradite them
- 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”
- No authority under SUA to board ships and seize offenders – SUA applies only when the alleged offenders are present in the territory of a Party

# 1979 Hostages Convention

- Convention applies to the offense of direct involvement or complicity in the seizure or detention of, and threat to kill, injure, or continue to detain a hostage, whether actual or attempted, 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
- Provisions on establishing jurisdiction, taking offenders into custody, obligation to extradite or prosecute, etc, same as SUA
- As in SUA, jurisdiction to prosecute is dependent upon the presence of the offenders in the territory

# 1999 Terrorism Financing Convention

- Offence to provide funds knowing that they will be used to commit a offence under 1988 SUA (hijacking a ship) or 1979 Hostages (taking hostages for ransom)
- Terrorist motive or purpose not required
- Would be useful tool to go after persons who have funded Somali piracy



## Part 5

# Conclusions

## Conclusions on Somali Piracy

- Failure to deal firmly with pirates from outset encouraged the rise in Piracy
- Somali Piracy has highlighted the weaknesses and gaps in the UNCLOS piracy regime, which gives States “rights” to arrest and prosecute pirates, but no “obligations” to do so
- Lack of political will in many countries to arrest and prosecute the pirates
- Regional courts seem to be the only viable solution but laws must be updated
- UN Terrorism conventions also be utilized

## Conclusions on National Legislation

- **Definition**: Piracy as defined in article 101 of UNCLOS should be a crime punishable by severe penalties
- **Seizure**: Warships should have authority to seize pirate ships and arrest pirates in areas outside the territorial sovereignty of any State
- **Universal Jurisdiction**: Courts should have jurisdiction to try persons who commit acts of piracy outside the territorial sovereignty of any State, even when such acts are committed by foreign nationals against foreign ships.
- Piracy laws are important because they are the only legal basis for seizing pirates outside of the territorial sea

# Thanks for Your Attention

Any Questions ?

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