



Counter-Piracy Operations and the Legal Quagmire

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“Failure to prosecute persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia undermines anti-piracy efforts of the international community.”

Preamble, UNSC Resolution 2020¹

There has been a concerted global response to the piracy menace off Somalia. Although piracy exists in other parts of the world such as off the Niger Delta, the Indian Sub-continent, and the Malacca Strait, the world took serious notice of this problem in September 2008, when Somali pirates hijacked a Ukrainian freighter MV Fania carrying tanks, anti-aircraft guns, and other heavy weaponry before releasing it in February 2009 after receiving a ransom of 3.2 million dollars. During the same period, MV Sirius Star, a super tanker carrying more than \$100 million in oil to the United States was hijacked and released also after receiving a ransom. Soon, within a year there was a significant increase in piracy incidents off the coast of Somalia.

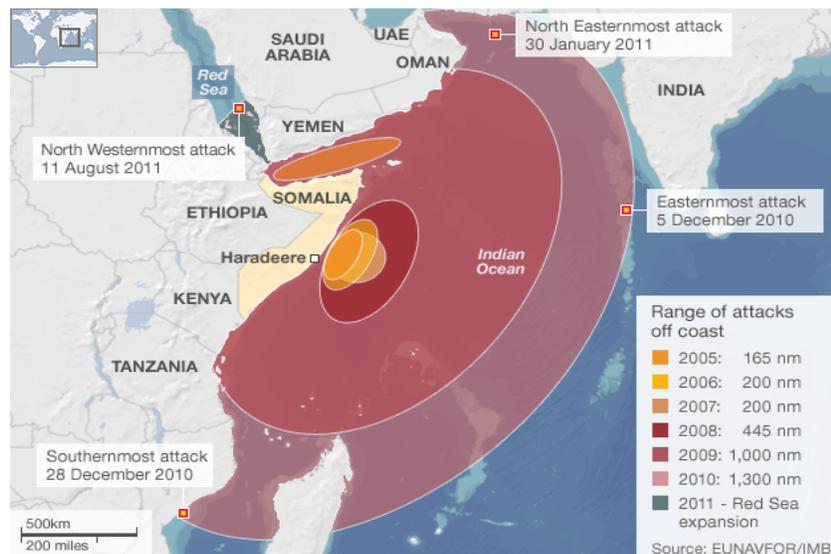
The response of the global powers was immediate. The United Nations passed four resolutions on piracy; the US led Combined Task Force CTF 151, the European Union, and NATO deployed multilateral counter-piracy forces; and China, Iran, India, Japan, Malaysia, South

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Korea, Russia, Saudi Arabia and Yemen contributed their naval resources operating under their respective national command to the international counter-piracy efforts.² This is understandable as more than 3.3 million barrels of oil are transported through the Bab-el-Mandeb Strait, representing 30% of the world's oil supply.³ An important factor in this regard is Somalia's proximity to busy shipping lanes. Approximately 22,000 ships per year traverse the Gulf of Aden.⁴ The free movement along these critical shipping lanes is a major economic importance to the international community.⁵

As per the International Maritime Bureau's (IMB) Piracy report of 2011, there were 439 worldwide piracy attacks in 2011, more than half of which have been attributed to Somali pirates operating in the Gulf of Aden, the Red Sea, the Arabian Sea, the Indian Ocean, and off the coast of Oman.⁶ Other piracy hotspots for 2011 included the coast off Nigeria and Benin in West Africa, and Southeast Asia, near Indonesia.⁷ A recent UN Report states "piracy continues to pose a serious threat, noting that while the number of hostages in captivity has decreased to 197 individuals as on 19 March 2012, as compared to 250 in November 2011, the number of hijacked vessels has gone up to 13 in March 2012 compared to 10 in November 2011; total incidence of attacks also remain high, with 36 reported so far in 2012, seven of which have been successful."⁸ Consequently, the total cost of global piracy over the last decade has been exponential. According to a recent study by One Earth Future, the economic cost of piracy could be high as 12 billion USD a year.⁹

As can be summarised from the aforesaid, the military operations in the Gulf of Aden have not made a significant difference to the piracy menace. In fact, there has been a transformation in the pirate activities. The international efforts off the Gulf of Aden and the re-routing by ships have resulted in the pirates moving further away from the Somali coast in search of their booty. Pirates using the hijacked merchant vessels as "mother ships" now have an extended reach of more than 1000 nautical miles from the Somali coast as shown in Figure 1 (as close as 150 nautical miles from the Indian coast), off Seychelles and the Maldives, and further south along the East African coast, off Kenya, Madagascar, and Mozambique.¹⁰



Expansion of Piracy Operations – 2005 to 2011¹¹

“Current naval operations can protect shipping vessels only to a certain degree. Deterrence should be a combination of credibility and visibility. Although the current naval operations in the area provide the visibility through their presence in the region, credibility is severely lacking.”¹² This is due to the quintessential legal quagmire that the navies deployed in antipiracy operations find themselves. There is uncertainty as to where the apprehended pirates are to be transferred for investigation and prosecution of their crimes. Even if the aforesaid is known, the conviction of the pirates is not guaranteed. Thus, the navies resort to the “catch and release” modus operandi.¹³ Approximately 50-60% of pirates captured by the deployed naval ships are released.¹⁴ There have been instances where freed pirates have been caught again, proving that the existing operations are not a deterrent. For a military action of the current scope to be sustained and successful, it must be complemented by judicial action. As a majority of the suspects are freed without being prosecuted, the risk/benefit ratio is too low to act as a deterrent.¹⁵ To make a difference in the risk-benefit analysis, more prosecutions are a necessity.¹⁶

Counter-piracy operations, being carried out by the world navies in the Gulf of Aden, should not be linked to the final solutions on land and allowed to drag on endlessly. If the ongoing naval operations are to act as a deterrent and bring any desirable end to the menace, there has to be sustained focus on the prosecution of the pirates.

This paper will address the existing legal scenario in which the counter-piracy operations in the Gulf of Aden are being waged. While discussing the challenges to the prosecution of the pirates, the paper will suggest how to provide legal impetus and more teeth to the counter piracy operations being undertaken off Somalia by the navies of the world.

The Existing Legal Quagmire

The international laws of piracy are enumerated in Articles 100 to 107 and 110 of the United Nations Convention on the Law of the Sea (UNCLOS).¹⁷ While Article 101 -107 lays out the definition, jurisdiction, and obligations of member states seeking to pursue, capture, and prosecute maritime pirates,¹⁸ Article 105 provides for the actions that may be taken by warships of all states against a pirate ship. Art 105 states “on the high seas, or in any 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 imposed, and, may also determine the actions to be taken with regard to the ships, aircraft, or property, subject to the rights of third parties acting in good faith.”¹⁹

The aforesaid articles of UNCLOS have inherent limitations with regards to the restrictions of definition of piracy to “private ends,” the geographical restrictions of piracy to the high seas; issues of reverse hot pursuit; the “two ship” requirement and the lack of a mandate for states to adopt domestic counter-piracy laws to meet international commitments.²⁰ Moreover, as incidents of piracy have increased, the UN passed resolutions to negate the limitations within the UNCLOS and also provide more credibility to the counter-

piracy operations. UN Resolution 1816 (passed in 2008) allowed states which were cooperating with the Somali Transitional Federal Government (TFG) to use “all necessary means” to repress acts of piracy and armed robbery at sea.²¹ This resolution was strengthened by Resolution 1838 (October 2008), which allowed states with naval vessels and military aircraft to enter Somali territorial waters in pursuit of pirates.²² Soon after, in December 2008, Resolution 1851 called on all states and organizations to establish a mechanism for international cooperation in combating piracy off the coast of Somalia and to enhance the capacity of relevant states in the region to combat piracy through legal action. The resolution also invited states and organizations to establish special agreements or arrangements with regional countries willing to take custody of pirates and prosecute them.²³

Under the auspices of the International Maritime Organization (IMO), nations developed the 1988 Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA) and the 2005 SUA Protocol, which entered into force on July 28, 2010. These two treaties provide ample additional authority for states’ parties to interdict piracy and collaborate in the detention, extradition, and prosecution of piracy suspects. The 1988 SUA Convention sets forth the rule that all nations have an obligation to prosecute or extradite individuals suspected of ship hijacking.²⁴

Piracy is the first crime in international law to be subject to “universal jurisdiction,” which gives any state authority to assert jurisdiction over an act, regardless of the nationality of the perpetrator or the victim, and regardless of where the act took place.²⁵ Universal jurisdiction developed in response to the crime of piracy because it has no fixed geographic location and transcends national boundaries.²⁶

Pragmatically looking at the international laws on piracy, it appears enough jurisdictions are available to take on piracy prosecutions. However, the plethora of laws and resolutions haven’t done much to improve the piracy prosecutions or for that matter the desire of most states to apprehend the pirates and prosecute them. As per a UN Security Council Report of 22 February 2012 on piracy off Somalia, only 20 States worldwide were prosecuting, or had prosecuted, a total of 1,063 piracy suspects since 2006 of which 900 have been in 11 states within the region.²⁷ This is quite meager and can hardly be called a deterrent to the piracy menace off Somalia.

The reasons for the lack or reluctance to prosecute pirates are multifold. “Many nations lack sufficient domestic legislative authority, law enforcement capability, or judicial institutions and prison facilities.”²⁸ Moreover, most states, which are actively involved in the counter piracy operations, have not been able to incorporate it into their domestic laws and continue to try the “piracy” cases under their respective domestic laws. A case in point is China, which has no specific antipiracy legislation and prosecutes piracy related cases under its general Criminal Code.²⁹ India’s legal system is grappling with the absence of a specific provision to deal with piracy in the Indian Penal Code, especially in the backdrop of the Navy apprehending well over 100 Somali pirates on the high seas in recent months.³⁰ The presence of “child pirates” among those apprehended has further complicated matters.³¹ India has been taking recourse to

booking pirates, under provisions like rioting, trying to damage government property and attempt to murder, as well as, Unlawful Activities Prevention Act and the Arms Act.³² The Indian government has tabled a draft antipiracy law in the Parliament which seeks to fuse provisions in the Indian Penal Code (IPC) with the UNCLOS, to effectively prosecute sea brigands with stiff sentences.³³ However, the same is yet to be ratified and implemented.

Other issues, which inhibit states from prosecuting the pirates, are political and procedural.³⁴ The naval units (even those forming part of a Combined Task Force) take actions in pursuant of their national command orders, which cater to their respective national concerns. For example, the Portuguese Navy will only arrest pirates when Portuguese nationals or ships are involved. The United Kingdom has not been arresting pirates of certain nationalities because its asylum laws might allow the offender to remain in the country indefinitely after trial.³⁵ The other European nations taking part in the counter piracy operations have similar concerns, too, which keep them from arresting the pirates. There have been issues of unavailability of Somali interpreters, which further complicates and delays the proceedings. Fear that the detained pirates may invoke the basic human rights law which would complicate the trials and prolong the prosecutions also are other factors considered by the naval ships involved in counter-piracy operations.³⁶

It is prudent that the apprehended pirates are not released if the counter-piracy operations are to have any credible deterrent effect. The Somalis are mostly clan based, and the pirate groups are generally from the same village. A clear message to the pirates that all pirates being apprehended at sea are being taken as prisoners and not being released will spread fast within the Somali community. This will add to their cost benefit analysis and may dissuade a majority of them from piracy.

Ongoing Initiatives

UN Security Council Resolution 1851 (2008) encouraged the establishment of an international forum to broaden and deepen counter-piracy cooperation, and more than 60 states and international organizations are now part of the Contact Group on Piracy off the Coast of Somalia (CGPCS).³⁷ The CGPCS, comprising four working groups has helped in developing shipping industry best management practices and implementing regional maritime security cooperation.³⁸ The CGPCS Working Group 2 has also assisted in forming a legal framework for the transfer of convicted pirates from prosecuting states in the region (such as Kenya and Seychelles) to Somalia, to serve their sentences in the U.N. Office for Drugs and Crimes (UNODC) constructed prison opened at Hargeisa, Somaliland, on November 22, 2010.³⁹

The Djibouti Code of Conduct (DCOC) signed by Djibouti, Ethiopia, Kenya, Madagascar, Maldives, Seychelles, Tanzania, Yemen, and representatives of the Somali transitional authorities in Djibouti on 29 January 2009 is another positive initiative.⁴⁰ The DCOC envisaged three information sharing centers in Dar-es-Salaam, Mombasa and Sanaa, which have been operational since the first half of 2011 and have been actively collecting and disseminating piracy related information.⁴¹

The UK and Netherlands are funding a Regional Anti-Piracy Prosecutions Intelligence Coordination Center (RAPPICC) in the Seychelles to build regional capacity in prosecuting inchoate crimes such as conspiracy, incitement and attempts to commit piracy.⁴²

UNODC's Counter Piracy Program has been providing support to regional countries agreeing to undertake prosecutions. The agency has also been carrying out extensive training programs for the police, prosecutors, judges and prison personnel in Kenya, Seychelles, Mauritius and Somalia.⁴³ UNODC Counter Piracy Programme has also facilitated prison transfer agreements for Seychelles with Somaliland and Puntland and pirates convicted in Seychelles are being transferred to the U.N. Office for Drugs and Crimes (UNODC) constructed prison in Hargeisa, Somaliland.⁴⁴

The Way-Ahead – A Difficult Path to Tread But Feasible Solutions

Prosecution of Apprehended Pirates in the Courts of Neighbouring States in the Region

The most obvious and logical solution would be the prosecution of the apprehended pirates in Somalia. However, until the security scenario and the rule of law improves in Somalia, this looks highly unlikely. Looking at the legal quagmire and the consequent challenges, pursuing prosecution of the apprehended pirates in the courts (specialized piracy courts or domestic courts) of the immediate and willing neighboring states appears to be the most likely and workable approach towards ensuring maximum piracy prosecutions in the immediate future.

This is in line with the UNSC resolution 2020(2011) on the establishment of specialized anti-piracy courts in Somalia and other states in the region.⁴⁵ States such as Kenya, Seychelles, Mauritius, and Tanzania have shown their willingness to cooperate in this endeavour. Somalia's neighboring states such as Kenya, Seychelles, Tanzania, Madagascar, Mauritius, Mozambique, Zambia, Uganda, and Ethiopia have been severely affected economically due to piracy.⁴⁶ Therefore, keen to see an end to this menace, these states have shown initiative to host the piracy trials.⁴⁷ Local prosecution projects have already taken shape in Kenya, Mauritius and Seychelles, among other countries in the region.⁴⁸

It may be argued that the states in the region are constrained by limited capacity and resources to make a meaningful contribution to contain piracy.⁴⁹ Moreover, the prosecution efforts will be undermined if large numbers of perpetrators are transferred to an inefficient and overloaded judicial system.⁵⁰ Seychelles has been insisting on carrying out only the prosecution of the pirates and asked for the transfer of the convicted prisoners to jails outside Seychelles. However, under the prevailing scenario, specialized piracy prosecutions within the area appear to be the most workable solution rather than trials taking place thousands of miles away and that too under domestic laws, which are not yet ready to try pirates. This is a more amiable solution than having a specialized Somali Tribunal in a neighboring state recommended by a UN Special Advisor to the Secretary General Jack Lang.⁵¹ The aforesaid recommendation

had a number of compelling legal complications against it including its legality vis a vis the Somali constitution.⁵² Moreover, an international Somali court appears to be a non starter as Somalia TGF has not been in favor of such a court being established to be used against her citizens.⁵³ Experience of other international courts has shown that the whole process is expensive and takes years to set up.⁵⁴ An international court is required when there is no structure in place for dealing with a given crime. For piracy prosecutions, there are innumerable national courts and what is required is more capacity building for the regional courts and more willingness by the respective nation states.⁵⁵ Continued support needs to be provided in the form of financing, training, monitoring and oversight extending not only to the prosecutions and trials of suspected pirates, but also the transfer, investigation, security, procurement, and infrastructures as well as pre-trial and post sentence detentions.⁵⁶

The prosecution of pirates in different piracy courts within the region will significantly increase the piracy prosecutions. As per a UN estimate, the regional states being supported by UNODC Counter Piracy Programme would be able to conduct up to 125 piracy prosecutions involving 1250 suspects per year which is significantly higher than the total number of pirates prosecuted globally todate.⁵⁷

The varied option for prosecution in different states also provides redundancy in case some states back out of piracy prosecutions due to national compulsions. Such situations are highly likely. A case in point is Kenya which refused to accept any more suspects on 30 March 2010 because of the high cost of trials and the disruption to its judicial system and acceded once again only after intense diplomatic pressures.⁵⁸

Shifting the Prosecutions to Somaliland and Puntland on a Progressive Basis

Another significant step would be to shift the prosecutions to Somaliland and Puntland on a progressive basis. Presently, only Somaliland and Puntland have a relatively stable security environment. In pursuit of independent statehood and federal status respectively, authorities in both of the places have shown significant interest in supporting the fight against piracy. Under the circumstances, it would be prudent for the UN and other concerned states to engage with the authorities of Somaliland and Puntland to work out the modalities to conduct prosecutions of Somali pirates in Somaliland and Puntland. However, financial and technical assistance to improve their respective judicial infrastructure and resources need to be provided to them. UNODC and UNDP have been taking initiatives in this regard and this needs to continue.

Formulation of Guidelines and Common Laws on Piracy

Another fundamental requirement is the formulation of guidelines and common laws on piracy. Differing legal frameworks among the different states create a variety of definitions and penalties for piracy, and this lack of uniformity in piracy laws interferes with the effective prosecution of pirates.⁵⁹ The absence of a standardized set of laws has also seen varying punishments being handed out to the convicted pirates. For example, in 2009 a Dutch court

sentenced five Somali men to five years in prison for attacking a Dutch Antilles-flagged cargo ship in the Gulf of Aden whilst a Mombasa court on 19 April 2012 sentenced 11 Somalis to a 20-year jail term for attacking a French naval ship, a relatively similar offense. To date, no international legal framework exists that establishes clear guidelines for the prosecution and punishment of pirates.⁶⁰

UNCLOS does not establish a practical framework to prosecute and punish pirates.⁶¹ SUA also does not mention trial procedures or establish penalties for its defined offenses.⁶² The UN in concert with IMO should clearly define piracy and frame a common set of rules regarding the conduct of the piracy operations and actions to be taken on apprehension of the pirates. It should also provide guidelines for assisting the states in streamlining and incorporating piracy related crimes in their respective domestic laws. Standardized terms of punishments for various piracy related crimes also merits attention. Presently, no such clear cut guidelines exist.

The UN passed Resolution 1897 in November 2009, and Resolution 1918 in April 2010 both called on the states to criminalize piracy under their domestic laws and urged them to consider the prosecution and imprisonment of captured pirates.⁶³ However, the UN should exert more pressure on the member countries to amend their criminal code to enable prosecution of the pirates. Kenya and Seychelles are amongst the very few states which have incorporated amendments and additions to their respective domestic laws.⁶⁴ Belgium, France, Netherlands, Seychelles, Spain, and United Republic of Tanzania has established universal or quasi-universal jurisdiction to prosecute piracy suspects.⁶⁵

UN Led Coalition for Counter-Piracy Operations

Piracy is a major global concern and thus provides an ideal opportunity for the navies to work together. The naval forces deployed in the region have been cooperating with regard to information sharing. However, a more centralized approach towards the common goal would give the operations more teeth. In this regard, the need for a consensus on a UN Led Counter-Piracy Operation merits attention. Piracy is a globally significant issue, so the UN is the ideal body to head the counter-piracy initiatives and formulate appropriate guidelines.

A comprehensive and coordinated approach to tackle the problem effectively can be arrived at if the UN took over the overall coordination of the anti-piracy forces. A need for such an arrangement was also made by India in the UN calling for a comprehensive counter-piracy strategy including naval operations by UN led counter-piracy forces.⁶⁶ Regional states and states which currently are operating under their respective national command orders would be more amiable to work with UN. If given the charge of the military efforts, the UN will be able to leverage its economic and the political efforts that it has been pursuing thus far through the UNODC Centre for Piracy, UNDP and the CGPCS.

The U.S. has thus far resisted from committing her military assets for UN Peacekeeping. The EU and NATO have ships under their respective commands deployed on counter-piracy missions. However, this piracy is affecting the freedom of navigation on the seas, and the

security provides an ideal opportunity for the nations to come together for the common good. The units operating under the UN Flag would also ensure relatively lesser hurdles in handing over the pirates to the regional countries involved in piracy prosecution. Bilateral arrangements and extradition treaties need not be worked out by individual states while working under the UN Flag. This is true especially in cases where the participating states do not have any bilateral agreements with the regional nations for handing over the pirates for prosecution. Navies of South Africa, Tanzania, and Mozambique, which have recently begun coordinated counter-piracy patrols as part of the South Africa Development Community (SADC) Maritime Security Strategy, can also be brought under the UN led coalition forces. This arrangement would allow the naval units to operate more effectively within the UN purview and not get stonewalled by the unfavorable domestic laws on piracy. A UN led coalition will ensure that the naval assets committed by states for counter-piracy operations are utilized effectively without the clash of national interests and concerns.

Conclusion

There is no quick fix solution to the piracy problem. While solutions for the problems are being sought on land, this will be long drawn. A two-pronged approach comprising sustained counter-piracy operations at sea along with relentless judicial action against the apprehended pirates is the only likely solution to overcome the piracy menace off the coast of Somalia. A conducive atmosphere allowing seamless coordination of anti-piracy operations involving deployment of the naval assets and unhindered arrest of the pirates and their transfer to neighboring states for prosecution in the regional piracy courts is the need of the hour. This is possible only if all states partaking in the counter-piracy operations agree to operate under a single authority such as the UN. It would maximize the naval efforts in counter-piracy operations. The UN, using its organizations such as the UNODC and the UNDP, should, in turn, work out a comprehensive strategy to support the regional courts. The UN in consultation with IMO and CGPCS should also strengthen and streamline the international laws with regard to piracy.

The judicial actions need to be matched to the naval counter-piracy operations in progress off Somalia to ensure any meaningful success against piracy. A proactive and cooperative role by the regional states neighboring Somalia in the fight against piracy is most essential. Their willingness to prosecute pirates in their respective domestic courts or specialized piracy courts is needed not only for the good of the global common but is critical for the regional security and their respective national interests. It is equally incumbent on all the states having a stake in the freedom of navigation at sea and regional security to work on their domestic laws and infuse their judicial systems to effectively take on the prosecution of the apprehended pirates.

It is an excellent opportunity for the UN to take the lead in the fight against piracy. It has the capacity and the necessary wherewithal to meet the challenges and only needs the requisite mandate to set the agenda. Considering the results so far along with the challenges ahead, the U.S., EU, and the other states with considerable stakes in the regional security and

security of the international sea lanes should support the UN whole-heartedly, both militarily and economically in its endeavor to find a lasting solution to the piracy menace off the coast of Somalia.

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