Towards Legal Authority in International Piracy Cases

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Map: Locations of maritime piracy attacks reported 2007-2012.

Introduction: In recent years, stories of pirate attacks have permeated global news outlets. States and Multi-National Corporations (MNCs) alike are concerned about protecting cargo and sailors' lives. The epicenter of the piracy problem is the Gulf of Aden: the southern coast of the Arabian Peninsula and the coast of Somalia. Roughly 15% of the world's oil and 20% of global trade pass through this area annually. 80% of the commercial traffic through the Gulf of Aden is headed towards Europe. However, because the area has become so volatile, shipping costs have skyrocketed. Piracy endangers individuals and forces maritime insurance rates to escalate, often making maritime transportation unaffordable. It also provides a massive source of income—from extortion—strengthening Non-State Armed Groups (NSAGs) who challenge the authority of weak governments.

Piracy is defined in multiple sections of the UN Convention on the Laws of the Seas (UNCLOS). Beginning in 1998, the International Maritime Organization implemented a long-term anti-piracy initiative in an attempt to prevent armed attacks against ships. The project aims to foster regional cooperation to form localized counter piracy agreements. Most notably, the IMO

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supported the 2009 Djibouti 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 adopted in Djibouti by regional states which recognize the extent of the pirate threat in the region. In this agreement, signatories agree to fully cooperate with each other in compliance with international law in order to counteract piracy in the region. Although this agreement facilitates a high level of information sharing amongst signatories, some provisions such as interdicting suspect ships push the limits of international law.

Arming of merchant ships for self-protection—an obvious response—traditionally is an act of war under international law, posing enormous legal problems and risking peaceful relations between states. Similarly, prosecuting suspected pirates is extremely difficult because their crimes usually occur outside the jurisdiction of the armed forces responsible for apprehending them, because evidence is weak and prosecution cases hard to support.

The United Nations agrees that the ends justify the means in regional agreements such as these. However, the main provision in all IMO agreements is a universal commitment amongst all signatories that they will pursue the apprehension and prosecution of all those suspected of piracy. However, upon whose shoulders does and should these responsibilities fall? Some argue that it is up to the states intercepting suspected pirates whereas others argue that it is the responsibility of the victimized ships home port while still others believe the United Nations should take the reins.

Background: The main hot spot for maritime piracy is the Gulf of Aden, off the coast of war-torn Somalia. The heated conflict and rampant destitution, conflict, clan-ism and famine in Somalia combined with multiple refugee crises in surrounding states fuels the piracy problem. Piracy is the first growth industry in Somalia and, in the past few years, has net over three hundred million dollars.

In the past, individuals designated as international criminals were prosecuted by military tribunals and frequently executed or sent to prison and quickly forgotten. There was also a long period before the international took decisive action against piracy. Thus, spotty military responses followed by a long period of spotty naval reaction have only perpetuated the current problem.

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The United Nations Convention on the Law of the Sea (UNCLOS) is the international law which governs the high seas. Article 101 defines piracy as: "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, against another ship or aircraft, or against 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; (b) any act of voluntary participation in the operation of a ship or an aircraft with knowledge of facts making it a private ship or aircraft; (c) any act of inciting or of intentionally facilitating an act described in (a) and (b)."[1] Unfortunately, UNCLOS gives the international community as a whole little power to retaliate against pirates.

Current Situation: Attacks have stopped the dramatic increase they experienced in the late 1990's-early 2000's. However, attacks persist despite decreased media attention. Currently, there is no international legal authority. Although UNCLOS is in effect, there is little infrastructure in place to prosecute violations of these laws on the international stage. Therefore, all the burden of the responsibility is pushed on to the countries supporting naval patrols in waters affected by piracy. Although their actions are supported by UN resolutions, the UN has no forces to offer in support. Instead anti-piracy patrols are organized by the navies of member states of the European Union (Operation Atlanta), the North Atlantic Treaty Organization (Ocean Shield), and ad hoc coalitions (25 navies working together under Combined Task Force 151) . Patrolling has greatly reduced the severity of piracy attacks and ship seizures. But the problem remains unresolved. Donor countries and have less success attacking the root causes of piracy, especially underdevelopment and lack of political authority in Somalia, to resolve the overall problem.

States are reluctant to prosecute pirates domestically. Domestic judicial action clogs up judicial systems and increases the cost burden upon prison systems. Also, jurisdiction is seriously muddled as one state is attempting to prosecute non-citizens under a domestic law which may or may not be in place in the defendant's state of origin. These types of cases are also extremely high in priority and visibility, bringing typically unwanted media attention to national courts. Currently, for every one pirate captured and prosecuted, five are released.

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[1] UNCLOS, Article 101.

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International judicial action is possible, albeit extremely slow and difficult, is possible through the International Criminal Court (ICC). Unfortunately, legality in cases of piracy is a sea of muddled legality, particularly because there is no clear culprit in these situations. It is easy to blame individuals for their actions, but state instability may also be to blame. However, recent attempts to prosecute individuals in the US and other NATO states have focused solely on individual responsibility and have neglected the root of the problem: state collapse within Somalia and state instability in the Indian Ocean.

The ICC, however, only has explicit jurisdiction over states party to the Rome Statute, to which Somalia is not a signatory. Thus, is it even possible to prosecute Somali citizens within the ICC? This is but one jurisdictional issue regarding international prosecution of pirates.

Role of the UN: The United Nations has no legal authority to prosecute pirates. The UN's services are spread thinly out throughout the world. Although the UN's presence is felt in states across the globe, this body's power is extremely limited. Although SC resolutions carry the force of law, much of the responsibility for dealing with the piracy problem is pushed on to individual states and NATO. Because the United Nations is not a judicial body in itself, it is unable to have and maintain a strong legal stance against piracy. However, the question also become: should the UN even possess the ability to try and punish pirates. The International Court of Justice (ICJ) is not a legal avenue for prosecuting piracy, thus there are very few options remaining.

UNCLOS established the International Tribunal on the Law of the Seas (ITLOS) to deal with issues which arise regarding the interpretation and enforcement of UNCLOS. It is possible that the judicial power of this body could be extended to include the criminal prosecution of pirates. However, as of yet, there is no infrastructure for this to occur.

Country Positions: States such as the US and China which have major shipping industries are particularly affected by the permeation of piracy on the high seas. The United States has already shown willingness to domestically prosecute pirates that attack American ships and crews. For example, there was a high profile case in Norfolk in which Somali men were accused, tried and convicted of crimes relating to the capture of the *Maersk Alabama*. This case, while celebrated in the United States, remains an exception internationally; pirates rarely are so obliging in making themselves legitimate targets. The US has been a major naval power in the

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Gulf of Aden in the attempt to curb piracy. European and East Asian countries (including Japan and South Korea) also have been active. Latin American countries have sent naval vessels also. China has sent ships to that area, although it has not been as active. However, the People's Liberation Army Navy (PLAN) of China has become increasingly active in escort missions in the Gulf of Aden. The PLAN has deployed ships to protect Chinese shipping vessels which import the majority of China's energy resources.

Egypt is an integral player in the battle against piracy due to its jurisdictional control over the Suez Canal. The majority of the world's shipping passes through this area to reach the Mediterranean Sea. Egypt's shipping industry and national security have both been negatively impacted by piracy in the Red Sea and in the Gulf of Aden. Shipping through Suez has also been negatively impacted, a financial blow to Egypt. Thus, Egypt has no choice but to take swift action to combat this problem in order to preserve its national interest. Cairo has shown a trend of acting with the UN and other international states. However, if these actions are not sufficiently successful, Egypt is likely to take unilateral action. However, Egypt has lacked decisive action although it has shown willingness in the past to act militarily. In the wake of the Arab Spring, however, the government has been particularly preoccupied with domestic issues and has neglected the piracy issue, pushing it off on other states and the UN.

Indonesia is the second highest affected by piracy in the world. The strait between Malaysia and Indonesia sees nearly 30 percent of global shipping and about half of the region's oil shipments, thus it is a huge target for pirates. Recently, Indonesia is taking steps to arrest and try pirates who are attacking shipping through the region. Thus, it is logical to assume that Indonesia is willing to take unilateral steps to fight piracy in the region to eliminate economic and security threats to Indonesia, Malaysia, Singapore and other states throughout and around the South China Sea.

Finally, pirate attacks are encroaching further and further towards India. As a candidate for possible promotion to a Permanent Security Council position, India's stance on piracy is important to consider. In 2012, China reached out to both India and Japan, singling these two states out for the desire of increased maritime cooperation to combat piracy in the Indian Ocean. India has expressed its concern for endangered freedom of the seas. However, Indian interests are focused more upon China encroaching even closer to its maritime borders. India has been cooperating with the EU in the Gulf of Aden in an effort to escort trade ships through the region.

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Recommended Resources:

Maritime Security and Piracy - International Maritime Organization
http://www.imo.org/OurWork/Security/Pages/MaritimeSecurity.aspx

Maritime Piracy – Wikipedia
http://en.wikipedia.org/wiki/Maritime_piracy

UNCLOS Full Text – United Nations
http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm

Federal Judges in Norfolk Wrestle over Definition of Piracy – Wavy.com
http://hamptonroads.com/2010/11/federal-judges-norfolk-wrestle-over-definition-piracy

Prosecuting pirates in national courts: US v Said and piracy under US law – Blog of the European Journal of International Law (EJIL)
http://www.ejiltalk.org/prosecuting-pirates-in-national-courts-us-v-said-and-piracy-under-us-law/

Shooting Fisherman Mistaken for Pirates: Jurisdiction, Immunity and State Responsibility – Blog of the European Journal of International Law (EJIL)
http://www.ejiltalk.org/shooting-fishermen-mistaken-for-pirates-jurisdiction-immunity-and-state-responsibility/

Contemporary Maritime Piracy in Southeast Asia – Studies in Conflict and Terrorism (link to abstract and to download text)
http://www.tandfonline.com/doi/abs/10.1080/10576109808436055

Pirate Jurisdiction : Fact, Fiction, and Fragmentation in International Law – One Earth Future Foundation
http://oneearthfuture.org/images/imagefiles/Piracy Jurisdiction - Pemberton.pdf

Maritime Piracy and International Law – The Beacon: Forum for International Issues
http://the-beacon.info/countries/africa/maritime-piracy-and-international-law/

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Fighting the Somali Pirates: The 'Shipriders Agreement' Breakthrough – The Jurist: Legal News and Research
http://jurist.law.pitt.edu/forumy/2009/01/fighting-somali-pirates-shipriders.php

Countering Persistent Contemporary Sea Piracy: Expanding Jurisdictional Regimes – American University Law Review
http://digitalcommons.wcl.american.edu/

IMB Piracy and Armed Robbery Map 2012 – International Maritime Bureau
http://www.icc-ccs.org/piracy-reporting-centre/live-piracy-map/

International Criminal Court – Wikipedia
http://en.wikipedia.org/wiki/International_Criminal_Court

Barriers to Prosecution: The Problem of Piracy – Civil-Military Fusion Center
https://www.cimicweb.org/Documents/CFC Anti-Piracy Thematic Papers/CFC_Anti-Piracy_Report_Prosecution_Aug_2011_FINAL.pdf