

PIRACY AND THE LACUNAE IN UNCLOS

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Abstract

They can't stop us - we know international law.

- Jama Ali, a Somali pirate¹

The UNCLOS was signed on 10th of December 1982. It has been the governing convention as regards the laws of the sea since then. The UNCLOS sets out laws for piracy under Articles 101 to 107. Piracy has become a major threat to sea trade in the past decade. Somali pirates top the list in increasing sea crimes. This paper deals with the interplay of the UNCLOS and the challenges faced by it in the prosecution of pirates. Firstly, it focuses on the challenges faced by the UNCLOS and its incompetency to deal with the modern day piracy. Secondly, it deals with the other existing treaties and provides a comparison between them and the UNCLOS. The last part suggests reforms that should be made to the UNCLOS in order to make it more effective in curbing piracy.

Keywords: Piracy, UNCLOS, High Seas, Territorial Waters, Prosecution etc.

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¹ Kontorovich, Eugene. 2010. "A Guantánamo on the Sea: The Difficulty of Prosecuting Pirates and Terrorists". *California Law Review* 98 (1), California Law Review, Inc.: 243-75. <http://www.jstor.org/stable/20743970>

INTRODUCTION

The United Nations Convention on the Laws of the Seas was an agreement to create a universal law for the sea. It was made to define the rights and responsibilities of the nations with regard to the use of oceans. Today, 167 countries and the European Union are parties to the convention.² The Convention was an unprecedented attempt by the international community to regulate all aspects of the resources of the sea and uses of the ocean, and thus bring a stable order to mankind's very source of life. A serious threat to this was from the pirates, which was recognized by the UN in this convention thus dedicating sections 100-107 of UNCLOS to stop Piracy.

The UNCLOS has defined Piracy under Article 101. The definition reads as:

“(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, 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;

(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)”.*³

This article particularly focuses on piracy off the coast of Somalia. The problem started after the civil war in Somalia in 1980s after which the central government collapsed which left the coasts of Somalia unregulated and unguarded. Somalia was suffering from poverty and unemployment which pushed its people into Piracy which rendered huge sums in ransoms and was not a tough task as the naval presence in Gulf of Aden was very low. Thus piracy off the coast of Somalia became a big problem from 1990s and Somalia emerged as the hub of Pirates. UNCLOS being remarked as a Constitution for the oceans was the main statute which had to cope with it. This article further discusses how UNCLOS struggled against this challenge and how various other treaties and resolutions took place to amend the loopholes in it. Moreover this article includes some suggestions to improve UNCLOS so it may be able to cope against a similar situation in future.

² United Nation Convention on the law of the sea [1982]

³ United Nation Convention on the law of the sea 1982 Article 101

WHY UNCLOS IS NOT COMPETENT TO SUPPRESS PIRACY

Article 100 provides that the states should cooperate in repression of piracy to the fullest extent possible.⁴

Article 105 of the Convention provides to all states the power to seize and punish pirate activities on the high seas⁵.

There are however, several fundamental flaws in these definitions. Firstly, the definition of Piracy under Article 101 is out-dated and has seen no amendment since the signing of the treaty. It has laid down several requirements for the act to come under piracy which is not feasible considering the modern form of piracy.

The issues are as follows:

The Private Ends requirement: clause (a) of Article 101 clearly lies down that for an act to constitute piracy, it must be committed for private ends by the passengers or crew of a private ship.⁶ This essentially means that the activities committed by a state or activities of terrorists for political purposes may not be included in this definition. The private ends requirement was introduced for the first time in the Harvard Draft Convention. Oppenheim also wrote in favour of the private ends requirement stating that:⁷

“Private vessels only can commit piracy. A man-of war or other public ship, so long as she remains such, is never a pirate. If she commits unjustified acts of violence, redress must be asked from her flag State, which has to punish the commander, and to pay damages where required. But if a man-of-war or other public ship of a State revolts, and cruises the sea for her own purposes, she ceases to be a public ship, and acts of violence then committed are indeed piratical acts.”

Although this issue is widely contested, Commentators have argued differently on the subject matter.⁸ But there's no denying that the language of the provision does make prosecuting pirates an uphill task. It also provides them with an added advantage of claiming that their acts were not for private ends but politically motivated and escape liability. What constitutes private ends is itself a debatable matter. Recently, in the U.S. 9th Circuit judgement of *Cetacean v. Sea Shepherds*⁹, In this case, the Sea Shepherds were an international non-profit,

⁴ *ibid*, Article 100

⁵ *ibid*, Article 105

⁶ *ibid*, Article 101(a)

⁷ L. Oppenheim, *International Law: A Treatise*, Third Edn (1920-21), Vol. I, Sec. 273

⁸ Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, 40 Vand J Transnatl L 1, 11 (2007). Tammy Sittnick, *State Responsibility and Maritime Terrorism In The Strait of Malacca: Persuading Indonesia and Malaysia to Take Additional Steps to Secure the Strait*, 14 Pac Rim L & Poly J 743, 758 (2005).

⁹ *Institute of Cetacean Research v. Sea Shepherds Conservation Society*, 43 ELR 20114, No. 12-35266, (9th Cir., 05/24/2013)

marine wildlife conservation organization. Their plea that they were acting in a noble cause and had no private ends was dismissed by the judge. The judge put it very succinctly that:

*“You don’t need a peg leg or an eye patch. When you ram ships; hurl glass containers of acid; drag metal-reinforced ropes in the water to damage propellers and rudders; launch smoke bombs and flares with hooks; and point high-powered lasers at other ships, you are, without a doubt, a pirate, no matter how high-minded you believe your purpose to be.”*¹⁰

Therefore, the problem this poses is that the term is very vague¹¹ and will be differently interpreted by various countries thus killing the universality factor of the provision.

The Requirement of two Ships: The definition states that the act must be done by the crew of a ship against another ship.¹² What this means is that piracy will only be committed if two ships are involved.¹³ The inclusion of the word another further narrows down the meaning as its inclusion means exclusion of acts committed by the ship members themselves. Thus, if pirates enter the ship as crew members and then take over the ship, it would not constitute piracy under this definition. Also, mother ships could release fast skiffs which could then be used for the act and it would still not constitute piracy under the UNCLOS provisions. However, the SUA Convention has taken progressive steps in this regard. The Convention provides that it is an offence under international law for any person on board a ship unlawfully and intentionally to seize or exercise control over that ship by force, threat, or intimidation; to perform an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of the ship; or to destroy or cause damage to a ship or its cargo which is likely to endanger the safe navigation of the ship.¹⁴

The high seas requirement: The UNCLOS defines only those acts of violence a piracy which are committed on the high seas.¹⁵ Article 86 of the UNCLOS defines high seas as:¹⁶

“All parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.”

This means that the acts committed in the territorial waters of a state or in the exclusive economic zone cannot be termed as piracy. Majority of acts committed by the Somali pirates

¹⁰ Ibid, The judge specifically cites the politically-motivated seizures of the Santa Maria in 1961 and the Achille Lauro in 1985 as acts that are often wrongfully described as piracy. See Kontorovich, E. (2013). *Yes, Sea Shepherd Engages in Piracy Under International Law - The Volokh Conspiracy*. [online] The Volokh Conspiracy. Available at: <http://volokh.com/2013/02/27/yes-sea-shepherd-engages-in-piracy-under-international-law/> [Accessed 8 Feb. 2016].

¹¹ Many Scholars have differed with such an interpretation of the “private ends” requirement. See Heller K, “Opinio Juris » A Response To Kontorovich And Gallagher About Piracy- Opinio Juris” (*Opiniojuris.org*, 2016) <<http://opiniojuris.org/2013/02/27/a-response-to-kontorovich-and-gallagher-about-piracy/>> accessed 8 February 2016.

¹² UNCLOS, Art 101 (a)(i)

¹³ Although many commentators have different views. See Samuel Pyeatt Menefee, *The New 'Jamaica Discipline': Problems With Piracy, Maritime Terrorism And the 1982 Convention On The Law Of The Sea*, 6 Conn J Intl L 127, 146-47

¹⁴ SUA Convention , Article 3

¹⁵ UNCLOS, Art 101

¹⁶ UNCLOS, Article 86

are committed in the territorial waters of Somalia.¹⁷ Therefore, the Somali pirates have not been prosecuted since there is an absence of a stable state in Somalia. Moreover the requirement of high seas in clause (c) of article 101 is unclear which deals with aiding the pirates thus benefiting the overlords who regulate the piracy from Somali land also they being in the territory of Somalia cannot be prosecuted by any other country. There is also an issue as to whether the acts committed in the Exclusive Economic Zones are piracy or not.¹⁸

The issue of jurisdiction: It is a well-accepted fact that pirates are *hostis humani generis* (enemy of mankind) but the main issue with regard to piracy is that nobody is ready to punish piracy. States have captured and then released pirates for they believe that if pirates are tried in their country, they will stay there forever¹⁹. Although the UNCLOS under Article 105 provides for a universal approach by giving each state the power to seize and punish²⁰ but states have not taken any steps in pursuance of it because Article 105 itself clearly states that prosecution is not an obligation upon the states.²¹ However, this is in stark contrast to what the drafters' commentary states "*any State having an opportunity [to take] measures against piracy, and neglecting to do so, would be failing in a duty laid upon it by international law.*"²² The commentary further goes on to cite the Harvard Draft Convention on Piracy which goes to the extent of saying that legal steps would be taken against a state that does not punish piracy.²³ The SUA Treaty is better in this regard as it obliges contracting states to either extradite alleged offenders or submit cases to their competent authorities for the purpose of prosecution.

The issue of Armed Robbery: The UNCLOS lacks in this regard. Armed Robbery at sea has not been defined in the Convention. The International Maritime Organization has Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery describes this crime as "*any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, within a state's internal waters, archipelagic waters and territorial sea*". The term includes inciting or intentionally facilitating such acts.²⁴ The advantage of including such a definition is that armed robbery can be committed even in the territorial waters of a state. With respect to armed robbery, the state in whose waters the armed robbery takes place prosecutes the offenders.

¹⁷ International Chamber of Commerce, International Maritime Bureau, *Piracy and Armed Robbery Against Ships, Report For The Period 1 January-30 September 2009* ("IMB October 2009 Report") 6-7 (Oct 2009).

¹⁸ T.A. Clingan, jr, *The Law Of Piracy*, in Eric Ellen, ed, *Piracy At Sea* 168-170 (1989)

¹⁹ M Schenkel 'High time for piracy tribunal,

²⁰ UNCLOS, Art 105

²¹ See Tullio Treves, *Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia*, 30 Eur. J. Int'l L. 399, 408 (2009); NATO Parliamentary Assembly, *The Growing Threat of Privacy to Regional and Global Security*, 169 CDS 09 E U 37 (2009), available at <http://www.natopa.int/default.asp?SHORTCUT=1770>.

²² Report of the International Law Commission to the General Assembly, 11 GAOR Supp. (No. 9) at art. 38 cmt.2, U.N. Doc. A/3159 (1956), reprinted in [1956] 2 Y.B. Int'l Comm'n 253, at 282, A/CN.4/SER.A/1956/Add.I [hereinafter Report of the Int'l Law Comm'n]. Ibid, note 1

²³ Harvard Research in Int'l Law, Draft Convention and Comment on Piracy, 26 Am. J. Int'l L. 739 (Supp. 1932)

²⁴ 2009 International Maritime Organization Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery, Part 2.2.1

CONCLUSION AND RECOMMENDATIONS

The UNCLOS is not up to task for eliminating piracy because of the abovementioned loopholes in it but it is argued that in 1982 piracy was in decline and therefore this issue was not very much focused on²⁵. But since after that piracy increased to new heights UNCLOS need some amendments to counter. Following are our recommendations:-

Firstly, the problem of private ends in the definition of piracy which gives a defence to an accused.

We recommend that the term private ends should be defined by UN so as to clear which acts will be considered as acts done for private ends and which are not. Or this term could be removed from UNCLOS as it is not mentioned in SUA convention. Article 3 of SUA convention describes the acts which will amount to be an offence if done intentionally. Thus there is requirement of term private ends in the definition of piracy.

Secondly, we recommend that the definition of piracy should not have the necessity of “against another ship or aircraft” what if a group of people captures the ship on which they are on-board it should also be considered as piracy, the SUA convention criminalises such act under article 3(1) and empowers the signing parties to take action against such act.

Thirdly, the question of piracy in a country’s EEZ must be cleared the municipal law of some states consider it as piracy while others don’t it is the responsibility of UN to clear this up. Moreover the requirement of high seas for piracy should be removed an inspiration can be taken from Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP) in article 1(2) of ReCAAP is defined “armed robbery against ships” which is almost exactly same as piracy but in territorial waters²⁶ which gives ReCAAP better effectiveness than UNCLOS regarding jurisdiction. The UN took some steps in this direction in form of UN resolutions 1816 which authorized nations co-operating with the Transitional Federal Government to take action, using “all necessary means” to “repress acts of piracy and armed robbery... within the territorial waters of Somalia”²⁷ and 1851 which authorized nations to “undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea”²⁸

But both of these resolutions apply only in Somalia, to counter piracy in a better way UNCLOS should either remove the requirement of high seas or include a provision like “armed robbery against ships”

²⁵ Yoren Gottlieb, The Security Council’s Maritime Piracy Resolutions: A Critical Assessment, Minnesota Journal of International Law

²⁶ Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia 2004 Article 1(2)

²⁷ S.C.Res. 1816, U.N. Doc. S/RES/1816 (June 2, 2008)

²⁸ S.C.Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008)

Fourthly, to counter the problem of prosecuting pirates we suggest for an international institution preferably International Criminal Court as it also deals with crimes against humanity under which piracy can be included moreover a pre-established institution will be better to deal with issue like piracy. In current situation where no country want to prosecute pirates unless it's their ship or their nationals in question an international platform for prosecuting pirates will be suitable or UNCLOS can introduce a provision like article 6 of SUA convention which states that if a state party seizes an offender either they should prosecute him or extradite him to the country whose flag was hoisted by the ship thus making it sure that an offender will be punished in every case.

The piracy off the coast of Somalia is in decline now and is almost considered as finished but it happened due to heavy deployment of Navies of various countries in Gulf of Aden and resolutions 1816 and 1851 of UN. But if piracy is to rise again in some other part of the world such as it is doing in South East Asia UNCLOS in its current form is still not competent to face it.