

Maritime Piracy and International Law *

By Professor Donald R. Rothwell

2008 saw an unprecedented upsurge in piracy at sea resulting in significant international efforts to suppress pirate attacks. The scale and frequency of the pirate incidents throughout the past year combined to create contemporary challenges for international shipping which have probably not experienced such significant threats to their operations since the disruption resulting from the 1956 closure of the Suez Canal. The events also called into account the international legal regime that deals with piracy and - somewhat inevitably in the current international security climate - drew comparisons with international terrorism.

During 2008, a gradual upsurge in pirate attacks occurring off the east African coast was observed, principally in the Gulf of Aden but also in the Indian Ocean off the coasts of Kenya and Somalia. More than 60 ships were seized by pirates off the Somali coast, and these attacks have continued into 2009.

Global attention was focused on these events in November 2008 with the seizure of the crude carrier Sirius Star some 450 nautical miles southeast of Mombassa, Kenya. An estimated US\$3 million cash ransom was delivered to the Somali pirates on board the vessel on 9 January 2009, many of whom later perished – along with much of the ransom money - en route to shore after abandoning ship.



A parachute dropped by a small aircraft is observed, in this U.S. Navy photo, as it drops over the MV Sirius Star Friday, Jan. 9, 2009, during an apparent payment via a parachuted container to pirates holding the ship. Somali pirates released the oil-laden Saudi supertanker after receiving a \$3 million ransom, a negotiator for the bandits said Friday. The ship owner did not confirm it. The MV Sirius Star, a brand new tanker with a 25-member crew, was seized in the Indian Ocean Nov. 15 in a dramatic escalation of high seas crime. (AP Photo/U.S. Navy, Air Crewman 2nd Class David B. Hudson)

Whilst recent events have thrown the spotlight on Indian Ocean piracy this is not a recent phenomenon. In response to an upsurge in pirate activity the International Maritime Bureau in 1992 established a Piracy Reporting Centre which since that time has been steadily tracking pirate activity around the world. Until recently, much of the focus has been upon Southeast Asian waters, especially in the Straits of Malacca and within the Indonesian Archipelago.

The United Nations Security Council responded proactively throughout 2008, adopting Resolutions that for the first time conferred upon maritime powers the capacity to enter Somali waters to conduct anti-piracy operations and to facilitate the prosecution of suspected pirates.

This unprecedented response by the UN has called into account the adequacy of firstly, the legal regime dealing with piracy and secondly, that of contemporary international efforts to suppress pirate attacks.

Piracy in International Law

Piracy has long held a place in international law. As contemporary international trade routes developed throughout the Seventeenth century, slow moving undefended ships were an easy target for pirates set on looting and plunder. Throughout the Nineteenth century a legal regime developed in response to the threat of piracy and customary international law evolved which made piracy in effect the first universal crime over which all states had the capacity to arrest and prosecute.

These developments in custom found their way into the modern law of the sea as it developed throughout the Twentieth century. The 1958 Geneva Convention on the High Seas, and then the 1982 United Nations Convention on the Law of the Sea (UNCLOS) ("the Convention") both outlined an international regime for the repression of piracy and effectively recognised universal jurisdiction on the part of all states to suppress pirate acts. The Convention - which now has 157 State parties - is generally considered to be reflective of customary international law.

Article 101 of the Convention defines an act of ship-based piracy as consisting of acts of violence or detention, or an act of depredation, committed for *private ends* by the crew of a private ship directed against another ship on the high seas, or outside the jurisdiction of any State. Piracy also extends to the operation of a pirate ship which is a ship used by persons for the purposes of committing pirate acts. This general definition of piracy is consistent with the common expression that a pirate is *hostis humani generis*: an enemy of all mankind. However, by limiting the definition to acts committed for 'private ends' any actions taken for political motives are excluded.

Thus the UNCLOS makes it clear that high seas piracy is illegal and that all states have a right to seize and prosecute those responsible for pirate acts on the high seas.

A crucial element of the UNCLOS definition of piracy is that piracy is an act which occurs on the high seas, which will also include the adjoining exclusive economic zone which extends from the edge of the territorial sea to 200 nautical miles. When piracy was first subject to regulation under the Law of the Sea, nearly all of the world's oceans were considered high seas. As such, a century ago nearly all violent acts at sea committed for private ends would have been characterised as piracy. However, under the new law of the sea as reflected in the UNCLOS, vast tracts of the world's oceans have now fallen under the sovereignty and

jurisdiction of coastal States. Under the UNCLOS, an act of piracy can therefore only occur beyond the limits of the territorial sea, which in most cases extends 12 nautical miles from the coastline.

One consequence of these developments is that the modern law on piracy has been significantly constrained so as to effectively fall into two categories: piracy on the high seas beyond the 12 nautical mile limit of coastal State jurisdiction and sovereignty; and pirate-type acts which occur within territorial waters, including the waters of archipelagic States such as Indonesia.

To that end, the international law on piracy does not apply to incidents occurring within a coastal state's adjacent waters. The effect of this is that predominantly it has been left to those countries that have been faced with offshore pirate-type attacks and incidents of sea robbery within their jurisdiction to utilise their own criminal justice systems to police and patrol their waters and ultimately enforce their criminal laws through prosecutions. As a result, a somewhat uneven legal regime has developed which is dependent upon the capability of and consistency in the fulfilment of these functions by directly affected States.

The international community retains its rights of regulation and enforcement of 'traditional' acts of piracy on the high seas, rare as they may be given the developments in the law of the sea and maritime crimes: very little true high seas piracy actually takes place. The vast majority of global pirate attacks take place within relatively enclosed waters within the territorial sea of the adjacent coastal State, and therefore within the responsibility of the relevant coastal State. However, not all States have an equal capacity to ensure maritime security within their waters and this is highlighted by the current situation in Somalia.

Contemporary Anti-Piracy efforts and the United Nations Response

Somalia has been a matter of ongoing concern for the Security Council since the early 1990s. The UN has been working with the Transitional Federal Government (TFG) in the failed State in order to bring about a restoration of law and order not only within Somalia itself but also in relation to its territorial waters.

Mindful of the growing incidence of pirate attacks in waters off the coast of Somalia since 2005, in June 2008 the Security Council adopted Resolution 1816 which directly sought to address the threat posed by Somali piracy. Recognising the incapacity of the TFG to interdict pirates and secure offshore shipping lanes, and that pirate attacks were a threat to international peace and security in the region, the Security Council authorised States acting in cooperation with the TFG to enter the territorial waters of Somalia to undertake enforcement actions against piracy and armed robbery.

In taking this unprecedented action, the Security Council was recognising the reality of Somalia's inability to provide maritime security within its own waters and the need for the international community to effectively undertake 'national-type' policing and enforcement operations within Somali waters. Resolution 1816 was effectively renewed on 2 December 2008 with the adoption of Resolution 1846 which extended the international community's mandate for a further 12 months.

In response to these developments, the European Union launched Operation Atlanta in December 2008 to combat piracy off the coast of Somalia, with NATO handing over its UN-requested counter-piracy operation named 'Allied Provider' to

the EU on 14 December 2008. Other States offering support include Russia, Malaysia, India, Iran, China, Turkey, South Korea, and Singapore.

Another significant step was taken by the UN Security Council with the adoption of Resolution 1851 on 16 December 2008 which authorises 'shiprider' agreements to facilitate more effective law enforcement capability. The Resolution also permits the international community to operate not only within Somali waters but also within the land territory of Somalia which is used to plan, facilitate or undertake acts of piracy and armed robbery at sea.

Following Resolution 1851, then US Secretary of State Condoleezza Rice announced that the US was creating a 'Contact Group on Somali piracy' so as to establish a mechanism for the sharing of intelligence, coordination of activities, and co-operation with partners in the shipping and insurance industries.

These initiatives reflect the growing body of opinion that piracy is intrinsically linked to the economic and political crisis in Somalia. Albeit limited to the particular situation in Somalia, these measures also represent some of the most extensive maritime security powers conferred upon States to deal with piracy in the modern Law of the Sea era.

Legal Challenges

Despite significant, unprecedented moves by the international community to address the growing threat posed by maritime piracy, considerable legal challenges remain. It is clear that the current legal regime is not comprehensive with respect to the enforcement of either international law or domestic criminal law against those responsible for pirate attacks.

The jurisdiction of a State over acts of piracy is based upon nationality or territoriality. That is, there must be a genuine link between the State and the ship, or between the State and the waters on which the offences take place. Unless Somali courts are willing and able to conduct prosecutions, the responsibility for enforcement will predominantly fall upon those members of the international community whose ships are currently patrolling off the coast of Somalia. The ability of a State with a ship in Somali waters to apply and enforce its own laws with respect to piracy and sea robbery will depend on whether the pirate ship or the pirates have the nationality of that State, or the degree to which the national law of the enforcing state makes piracy a universal crime which can be subject to arrest and prosecution anywhere throughout the world.

Resolution 1851 reiterated that the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Navigation ("the SUA Convention") provides for parties to create criminal offences, establish jurisdiction, and accept into their custody those persons responsible for piracy. The SUA Convention was a response to the highjacking of the Italian cruise ship, Achille Lauro, in the Mediterranean which resulted in the death of one passenger.

Whilst the SUA Convention makes it an offence if a person "seizes or exercises control over a ship by threat or use of force thereof or any other form of intimidation", enforcement relies upon the traditional jurisdictional bases of nationality and territoriality.

A 2005 Protocol has substantially expanded the scope of the SUA Convention to include acts of maritime terrorism, including what may be termed 'political

piracy'. However, the focus of the adjustments has not been acts of 'common' piracy or robbery at sea and there remain important jurisdictional loopholes with respect to the pursuit of any criminal charges where non-nationals or non-state vessels are involved.

In this regard, some of the international legal challenges that have confronted the global efforts to bring terrorists to justice are not dissimilar. Both areas have raised issues concerning proscriptive and enforcement jurisdiction, and the political will on the part of States to take such action. That the SUA Convention arose out of a maritime terrorist act, and the 2005 SUA Protocol was a direct consequence of efforts to strengthen the law in this area as a result of the 2001 terrorists attacks upon Washington and New York, highlights the initiatives which have been undertaken in this area, but importantly they relate to only certain types of violent incidents at sea. Piracy, conducted without political motive, will not in most instances meet the SUA Convention definitions.

Whilst the intervention of the Security Council through its various Resolutions has gone some way to resolve these jurisdictional loopholes, there remain gaps which are compounded by a lack of political will on the part of some members of the international community to engage in law enforcement. One particular gap is that the Security Council's responses only deal with the situation in Somalia and do not extend to pirate attacks that may take place off adjacent coasts such as Kenya, or in other parts of the world.

Possible Legal Solutions

What then are the possible legal solutions? First, a significant restoration of law, order and governance in Somalia is needed with a view to eradicating those conditions which have conspired to allow piracy to flourish. To that end, the ability of the international community via a UN mandate to effectively provide maritime security along the Somali coast will go some way to addressing the current threat.

Second, a more comprehensive legal regime dealing with threats to maritime security is essential. The regime would need to balance the recognition of universal jurisdiction on the part of all States to deal with persons responsible for such acts against the inherent right of State sovereignty. The current situation in Somalia is unique and this goes some way towards explaining how the UN has been able to go so far with its recent initiatives.

Nevertheless, all States need to have the capacity under international law to prosecute persons who perpetrate acts of violence against foreign ships in all settings, except within the internal waters of other States. Counterbalanced against this however is that while States may be prepared to offer their military support to ensure the safety and security of shipping lanes, the reality is that - as has occurred in Somalia - some States will be reluctant to seek to prosecute the offenders either because their legal regimes are inadequate or for political considerations.

Some new initiatives are being explored to address these issues. On January 16 the United States and United Kingdom signed agreements with Kenya allowing for the transfer of suspected pirates to Kenya for trial. These arrangements are designed to facilitate prompt detention and transfer of suspected pirates to the Kenyan criminal justice system. In mid-February, US naval forces in the Gulf of Aden detained more than a dozen suspected pirates who will in effect become the test case for the effectiveness of these new arrangements.

Third, these events raise the question of whether the time is now ripe to consider the creation of a specialist international criminal tribunal to deal with pirates.

With the Security Council recognising the threat to international peace and security posed by piracy and sea robbery, and being prepared to respond to the challenges by utilising its Chapter VII powers, it becomes a short step for the Council to establish an ad hoc 'International Piracy Tribunal'. Such a Tribunal would be able to prosecute individuals responsible for acts of piracy under UNCLOS or crimes against international shipping as envisaged under the SUA Convention. All States would have a mandate to ensure not only the safety and security of the waters adjacent to Somalia but also to detain, arrest and extradite suspected pirates for committal on trial before the Tribunal.

Such an initiative would resolve the particular difficulties encountered in law enforcement in Somalia and would provide the international community with a better option than failing to prosecute suspected pirates. Unlike the ad hoc tribunals for Rwanda or Yugoslavia, the International Piracy Tribunal would be relatively inexpensive to operate. Prosecutions would also be less complex as the evidence required to support a conviction would be similar to that of domestic criminal trials unlike that which applies in complex international criminal trials in cases such as war crimes. Accordingly, the trials could be conducted relatively speedily.

This would only be a temporary solution and whether there is a need for a permanent International Piracy Tribunal, or whether the Rome Statute of the International Criminal Court could be modified to clearly confer piracy jurisdiction would require further detailed legal and political consideration.

Conclusions

The latter part of the Twentieth century saw the international crime of piracy overshadowed by the growing attention accorded by the international community to the problem of impunity in relation to genocide and crimes against humanity. Through a combination of circumstances, especially arising as a result of the collapse of effective governance and policing mechanisms within some coastal States, piracy has been allowed to thrive in certain situations.

To date, the response of the international community to this threat has been rather haphazard. A more coordinated approach is warranted, with a view to the resolution of the legal issues identified herein. To this end, the International Law Commission may see fit to revisit the definition of piracy. However, there are other options open to both individual States and the international community.

Recent events have made it clear that piracy and threats to maritime security can no longer be ignored. The development of a robust and universally applicable legal regime to deal with the problem ought to form an essential part of any effective response.

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