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LEGAL ASPECTS OF PIRACY AND ARMED ROBBERY AGAINST SHIPPING

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Introduction

As is the case of the expression “war against terrorism”, that of “war against piracy” betrays some legal misconceptions which have become too obvious in the case of the crisis of Somalia and the proliferation of piracy around the Gulf of Aden.

In Somalia, the non existence of effective coastal State jurisdiction and of appropriate legislation have evolved to create a situation where piracy, under normal circumstances a common crime, is becoming increasingly perceived as a war-like phenomena, to be counteracted by the concerted action of naval forces.

Initially, the main task justifying the intervention of navies under a NATO command was to ensure the delivery of food aid and other humanitarian assistance to people of Somalia within the framework of the World Food Programme. The intensification of piracy around a vital sea route along the Gulf of Aden has now led to an enlargement of military activities in the area.

Several countries not within the NATO alliance are also sending their war ships to protect their commercial interests, to protect commercial ships flying their flags. The reaction of the international maritime community has so far focused on demanding more effective military action. In response the Security Council endorsed military intervention in the high seas and with the consent of the Transitional Government of Somalia (TGS) authorized other States to enter the territorial sea of Somalia for the purpose of repressing piracy and armed robbery.

This display of military force has so far achieved a limited success due to the legal uncertainties regarding the extent to which warships can enforce coercive measures in order to suppress a common crime such as piracy.

Although the United Nations Convention on the Law of the Sea (UNCLOS) explicitly assigns to warships or other craft in Government service the task of seizing pirate ships, the law of some countries seems to impose constraints to military craft to engage in crime prevention outside the scope of acts of war. A further limitation arises out of the fact that many countries only allow warships to counteract piracy acts against ships flying their same flag. The reluctance of flag States to apprehend pirates is encouraged by the reluctance of countries ready to accept delivery of alleged offenders for the purpose of their prosecution.

The case of warships compelled to release alleged pirates due to lack of a proper legal title to hold them in custody illustrates the bewildering paradox of the exhibition of intimidating navy power and the ultimate weakness of this power to function as an effective deterrent. No matter how deterring the presence of naval forces may be, force alone is not enough to suppress piracy

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because, legally speaking, the international community is not fighting a *war* against piracy. What the international community is trying to do is to suppress a common crime and for this the usual legislation is needed to ensure detention, custody, prosecution and punishment.

All this happens in spite of the fact that the 1982 United Nations Convention on the Law of the Sea (UNCLOS) explicitly enables any State to establish universal jurisdiction, namely the right of *any* State to seize ships engaged in any act of piracy no matter the flag of the ship against which this act is perpetrated.

My view is that unless laws ensuring the prevention and prosecution of piracy are in place, no amounts of ships or weapons will be effective enough to discourage piracy. Force without law leads to nowhere. *Force* must therefore become *enforcement*, namely exercise of preventative and punitive action within a clearly defined legal framework.

Piracy and the law of the sea

Piracy is a common crime outside the scope of acts of war. Therefore, warships, even if designated by UNCLOS to suppress piracy in the high seas, cannot act “militarily” in the suppression of piracy, because they are not confronting regular combatants. They must rather play a police or coastguard role to catch criminals and put them into custody.

The sole fact that discussions on this issue still exist betrays a fundamental shortcoming in the implementation of the piracy provisions of UNCLOS. UNCLOS provides that seizure of pirate ships can be carried out by warships or military aircraft, or by “other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect” (article 107). The crucial problem here is that UNCLOS regulates the right, and not any obligation of States Parties to establish universal jurisdiction.

Against this treaty law background, it can be argued that the suppression of piracy is *also* an international duty. In accordance with widely accepted principles of international customary law pirates are *hostis humani generis*, enemies of all mankind. Cannot this universal jurisdiction relate not only to the right to establish jurisdiction but also to some sort of obligation to do so? Up to which point can a State detain a pirate ship found *in fraganti delicto*, confiscate the ship and the cargo and let the perpetrators go? If a State simply lets criminals go, cannot it be argued that this State is violating international customary law by omission, namely by not doing something it is entitled to do in accordance with UNCLOS? Although controversial questions such as this one inevitably call for equally controversial answers, it is through a healthy exchange of opposite views that international customary law (as reflected in UNCLOS) can be updated to face the new challenges posed by the proliferation of piracy and crimes at sea in general.

What prevents States parties to UNCLOS from adopting legislation enforcing universal jurisdiction?

The “constitutional” problems preventing the military from combating a common crime such as piracy in the high seas can, in my view, be easily solved by adopting special legislation carefully regulating the exercise by military of the power of police in connection with a crime occurring in the high seas, namely beyond the usual police jurisdiction of a coastal State. This special legislation would be of a restrictive kind. It would only be extended to the case of piracy on account of the fact that the right of the military to act is established in an international treaty.

A fundamental distinction: warships in non-military actions.

The need to distinguish between military and non-military action departs from the fact that military operations have “rules of engagement”. On the contrary, the Police never “engage” with common criminals in a way analogous to military operations.

Accordingly, the expression “rules of engagement” should either be replaced by a more suitable one or used with extreme care in a context essentially different than the one governing the performance of military operations at sea. Only in this way will it be possible to avoid ambiguous legal interpretations regarding the action warships should take against pirates. It should be extremely clear that in this last case engagement means something different than “engagement” in hostilities in a war like situation. These hostilities would inevitably consist of actions where crew members would be combatants or contenders. If imprisoned, they would not be prosecuted in connection with common crimes. They would be either exchanged against prisoners taken by the contender or set free after the end of the conflict. In other words, when at war, the flag State of a warship cannot “establish jurisdiction” to individually prosecute prisoners with regard to their sole participation in the war effort.

The situation is different in the case of piracy. Calls for warships to do their job and “shoot if necessary” frequently disregard the fact that pirates cannot be treated as if they were combatants in a war like action. The occurrence of repetitive and spectacular acts of piracy and conflict zones and in the presence of war fleets of different countries to counteract these acts may evoke similarities with war but still this is not a war situation. Pirates are individuals acting for private ends and should be treated as common criminals.

These distinctions are essential to address another important issue, namely the features of the use of force or coercion. In the case of war, engagement leads to an equal status between contenders while in the case of piracy this equal status does not exist. Coercion in the case of piracy, including the ultimate use of weapons, is not related to a situation where both players are in a similar position.

Warships must therefore take measures of enforcement with a care similar to that employed by the police in connection with any normal crime. Punishment will come as a result of prosecution, not as a result of hostile confrontation. At war, punishment has a collective character. In piracy you are always punishing individuals. For this reason, warships must act as policemen and ensure that all rights of the alleged offender are preserved. Warships are not taking prisoners in the case of piracy. They are detaining and keeping into custody alleged offender in connection with criminal offences, which it is to be expected are properly typified in Criminal Acts or criminal codes. Warships can never, ever release an alleged offender. This is a matter for a Court.

There is in my mind no doubt that the public relations campaign undertaken by pirates at present aims precisely at abolishing this distinction and to elevate their actions to an expression of a just war fought as a result of the hardship inflicted upon the communities they are part of by the situation of civil war in Somalia. In this regard, the Somali crisis confronts the international community with the difficult task of ensuring that the task of prevention and punishment of common crimes can also be upheld within the context of a war like situation. Even under such circumstances, common criminals such as pirates must be carefully distinguished from combatants engaged in the fight for political power in Somalia.

Detention, prosecution and extradition. The different regimes established by UNCLOS for piracy and SUA in the case of crimes other than piracy

UNCLOS establishes that the arresting warship may not only seize the pirate ship, arrest the persons and seize the property on board. The court of the state which carried out the seizure may decide upon the penalties to be imposed, and may be also determine the action to be taken with regards to the ship, aircraft and property.

Being UNCLOS a framework treaty mainly without self-executing regulations, it does not contain detailed procedural regulations on how to detain and prosecute pirates. However, it gives the right to the State seizing a pirate ship to arrest the persons and seize the property on board. It further authorizes the courts of the seizing State to decide upon the penalties to be imposed, and to determine the action to be taken with regard to the ships, aircraft or property (article 105).

UNCLOS and the 1988 SUA Convention

In view of the lack of modern and UNCLOS related anti-piracy legislation in many countries, enforcers throughout the world are suggesting the application of an IMO prosecution or extradition treaty which defines several categories of criminal offences at sea, namely the 1988 Convention on the Suppression of Unlawful Acts against the Safety of Navigation (otherwise known as “the SUA Convention.” In its article 3 (a) SUA obliges parties to prosecute or extradite as appropriate any person who seizes or exercises control over a ship by force or thereat thereof or any other form of intimidation. Several countries have indicated that they have difficulties to apply it to cases of piracy on account of the different historical background and treaty law features of UNCLOS and SUA.

The case of Governments unable to detain and prosecute pirates due to gaps in their legal system somehow reminds us of the *Achille Lauro* in 1985. Then, terrorists managed to evade punishment due to legal loopholes. It was in order to fill these loopholes that the SUA Convention was adopted in 1988. The SUA drafters departed from the premise that the piracy was a crime already legislated in UNCLOS. Accordingly, they intended to typify offences other than piracy in particular terrorist acts in a new global convention. However it is clear SUA not only regulates an international regime to ensure appropriate punishment of terrorist acts, but can also be applied to other criminal offences at sea not necessarily related to terrorism.

In terms of treaty law a comparison between UNCLOS and SUA indicates the following different features

- UNCLOS is a framework treaty which regulates only the *right* to establish in connection with cases of piracy;
- On the contrary, Parties to SUA are *obliged* to establish jurisdiction, albeit only in some cases, because SUA regulates multiple, rather than universal jurisdiction. SUA Parties are obliged to establish jurisdiction principally when unlawful acts are perpetrated against their ships, in their territory or by one of their nationals. In other cases SUA regulates facultative jurisdiction, for instances: States *may* establish jurisdiction in connection with acts resulting in death or injury of their own citizens, or if the crime was committed to oblige this State to do or abstain from doing any act.

Against these complexities, legal certainty can only be achieved on the basis of an adequate implementation in national law of *both* UNCLOS anti-piracy provisions and the SUA treaties. At most, SUA should be considered as complementing UNCLOS, never as replacing it. The gaps left by the multiple jurisdiction established by SUA should be filled by provisions implementing the universal jurisdiction established by UNCLOS. Moreover, clear national legislation should be enacted in cases where SUA offences are dealt with by “antiterrorist” Courts, so as to indicate that punishment in accordance to article 3(a) of SUA can also apply to piracy cases regulated in

UNCLOS. Although UNCLOS and SUA may be read together in connection with certain acts of piracy, they remain two different treaties which should be incorporated into national law as different regimes addressing piracy from different angles. The successful application to acts of piracy of both UNCLOS and SUA depends on a coherent national legislation capable of acknowledging their distinctions and regulating the way in which they can work together. In this regard, it is important to note that some procedural provisions of SUA impose concrete regulations on the obligation to prosecute, detain, put into custody, and prosecute or extradite criminals, including pirates.

Universal jurisdiction does not mean universal Courts

The aim of empowering national courts to establish universal anti-piracy jurisdiction is frequently counteracted by the opinion that universal jurisdiction should be preferably exercised by an international court.

In modern times this question was exhaustively addressed after the Second World War. The decision to establish an international tribunal in Nüremberg to try Nazi war crimes was mainly inspired not by the features of the crimes committed but by the fact that the alleged offenders could not be prosecuted and punished by the Courts of the State they were citizens of, since this State was under occupation and accordingly could not establish jurisdiction. It should be noted that since then, international courts have been established mainly to judge war crimes or crimes against humanity committed during war like situations and not in connection with “common crimes”. Alternatively, many states have established universal jurisdiction entitling their courts to prosecute and punish offenders alleged to have violated human rights, no matter their nationality and the place where these violations occur.

Against this background, it seems obvious that the best way of combating piracy is by authorizing national courts to establish universal jurisdiction, rather than by resorting to an international tribunal which would, by its very existence, blur the characterization of piracy as a common crime, not as a war like one. This alternative has found its way in many domestic legal orders.

Conclusion

Why I am insisting so much in the question of universal jurisdiction? This question can only be answered with further questions: What is the purpose of bringing warships to the coastal areas of the Horn of Africa if States are not legally equipped to enforce universal jurisdiction to detain and prosecute alleged pirates or at least to transfer them to another country able and willing to establish jurisdiction? How effective can in the end be this congress of warships of different nations some of them more interested in protecting their own commercial ships rather than in joining a common effort to effectively implement widely acknowledged rules of international law in a coherent and concerted way? As it happens with all military operations, their purpose is to solve a crisis and not to establish a permanent *status quo*. Military operations cannot replace a law that can only work if permanently enforced by effective patrolling once warships are called to different regions to solve other international crisis. In this regard it is not superfluous to recall here that UNCLOS not only authorizes warships but also other ships in government services to suppress piracy in the high seas². Undeniably coastal States are the most able to perform these tasks in the sea area adjacent to their territorial sea.

² For the purposes of combating piracy the Exclusive Economic Zone is assimilated to the legal status of the high seas (see UNCLOS, article 58.2)

A crucial dilemma at the core of the present legal deficiencies preventing a more decisive action to suppress piracy relates to the procedural steps following the arrest of pirates. In general flag States are reluctant to keep alleged criminals on board; and port States are also reluctant to accept delivery of these alleged criminals, no matter what their crime may be. In the case of piracy, the universal right to establish jurisdiction sometimes seems to work against the aim of ensuring that pirates do not escape prosecution. Flag States of warships may feel that if they manage to arrest pirates then they may be obliged to keep them into custody and prosecute them, even in connection with incidents that did not consist of attacks to ships flying their same flag. Port States would also be frequently reluctant to accept delivery of alleged offenders and put them into custody.

In any case, both flag and port States should use the principle of universal jurisdiction at least to prevent the escape of alleged offenders. In practice, the inexistence of adequate legislation on piracy too frequently compel states to let alleged offenders free on grounds that, no matter the universal jurisdiction regulated in UNCLOS, their domestic law does not implement any duty to prosecute.

In spite of the fact that the sole existence of universal jurisdiction would theoretically make unnecessary compulsory rules on extradition, I submit that proper extradition mechanisms should also be enforced in the case of piracy. Warships of any country should be able to detain and put pirates into custody in connection with crimes committed against ships of other flag States in the knowledge that these flag States will ultimately accept extradition. An alternative would also be extradition to the country the pirates are nationals of.

The fall back position would necessarily be that if no state accepts an alleged criminal the government holding him or her into custody should proceed with prosecution and punishment. The SUA Convention contains clear provisions to this end and it is in this regard that its application can usefully complement UNCLOS. The very features of piracy as a crime against mankind should be enough to justify the obligation of any State not to let pirates escape. So, countries would still be somehow apprehensive at the prospective of having to prosecute somebody in connection with crimes not directly affecting their interests, but apprehensions would be less justified if a robust legislative body of regulations is in force in order to enable an adequate interplay among countries involved in connection with the possibility of prosecuting or extraditing alleged criminals.
