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“UNRAVELING THE LEGAL SEASCAPE: A RIGOROUS EXAMINATION OF PIRACY LAWS”

AUTHORED BY - NANDINI KABRA

ABSTRACT

“We have a duty to protect the ships that proudly fly America’s flag—and our nation’s military is our partner in fulfilling that duty. A timid approach will not do. We need to take bold action to keep our seas and ship crews safe.” - Chairman John D. (Jay) Rockefeller, IV¹

The issue of piracy is being discussed globally. In the interdependent world of today, this crime has once more broken out in the marine sector, endangering lives, and economy. Extreme risk exists in the waters of Somalia and Nigeria, while Asian waterways continue to be of concern. Even the UN Security Council called piracy a danger to world peace and security. States do not act in a legal void while attempting to suppress piracy. The use of force at sea is governed by international law and national laws of nations, which set forth the parameters and requirements for having criminal jurisdiction against pirates. Numerous legislatures have started to change their traditions and change their regulations to battle exemption on the high oceans. Moreover, there is a developing need to close the "escape clauses made by the Unified Countries Show on the Law of the Ocean" to appropriately deal with robbery concerns and accomplish a harmony between the right to opportunity of route and the need to safeguard sailors' wellbeing. This essay tries to comprehend piracy and to point out the flaws of the current anti-piracy clauses included in international agreements.

KEYWORDS: Maritime piracy, UNCLOS, piracy law, public international law

¹ Key Quotes from Piracy on the High Seas Hearing, <https://www.commerce.senate.gov/2009/5/key-quotes-from-piracy-on-the-high-seas-hearing>, (last visited Sep. 22, 2022)

INTRODUCTION

“The area of public international law known as "international law of the sea" governs States and other subjects of international law's rights and duties surrounding the use and exploitation of the seas during times of peace². It differs from private marine law, which governs private individuals' rights and duties surrounding maritime issues, such as the carrying of commodities and maritime insurance³. With the establishment of the contemporary national State structure in the 17th century, the law of the sea was created as a component of the law of nations⁴. Historically, the world's oceans have had two important functions: first, as a method of communication, and second, as a vast storehouse of both living and non-living natural resources. Both responsibilities have promoted the creation of laws.⁵ The law of the sea and maritime roads have seen the most significant modifications of any area of international law during the past forty years⁶. Public order at sea is governed by maritime law, much of which is defined in the UN Convention on the Law of the Sea.”

“In international courts, conflicts between neighbouring coastal States may commonly occur over the definition of the maritime boundary, the extraction of minerals or other natural resources, the commission of any crime inside another State's territorial boundaries, etc. According to the norms of the international law of the sea or in accordance with precedents, which serve as an important source of international law, these conflicts are often settled by international courts or tribunals based on complaints made by the parties involved.”

“Pirates appear to be mostly fictional characters from novels or films. Elizabeth Nyman observes that, "In recent years, piracy has jumped once again from the pages of the history books onto the front pages of the newspaper. A phenomenon that was thought to have run its course by the early 1800s fifty years ago by many international legal specialists is resurfacing more and more often nowadays.”

“The main goal of this essay is to examine how the United Nations Convention on the Law of the Sea defines piracy legally (UNCLOS). As the paper's title implies, piracy will be evaluated

² Volume 2, Brown, E. D., The International Law of the Sea, (Oxford University Press 1994)

³ 3rd Edition, Churchill, R., & Lowe, A. V., The Law of the Sea, (Huntington, NY: Juris Publishing, Inc, 1999).

⁴ Volume 2, O'Connell, D. P., The International Law of the Sea, (Oxford: Oxford University Press, 1982).

⁵ Shaw, M. N., International Law, Cambridge, (Cambridge University Press, 1997)

⁶ 10th Edition, Starke, J. G., An Introduction to International Law, (New Delhi: Aditya Books, 1994).

through the lens of international maritime law, hence state and local laws will not be included in the research. In addition, rather than merely retelling facts or numbers, the writers strive to analyse and critically evaluate pertinent legal requirements.”

“The article is broken up into six relatively brief sections, each of which focuses on a crucial UNCLOS provision. Sections 3-5, which discuss the definition of piracy, the "private objectives" requirement, Criminal Jurisdiction, and, ultimately, the "two-vessel" requirement, contain important aspects. Introduction, historical context, and conclusions make up three further sections.”

OBJECTIVE OF STUDY

“Understanding the pirate provisions under the maritime laws of UNCLOS and the restrictions on these provisions is the goal of this article. The subject will cover the following topics: the definition of piracy in relation to the requirements of the UN Convention on the Law of the Sea. The limitation of the provision about private ends, jurisdiction, and enforcement are other factors that need to be considered. Additionally, this essay outlines the global history of piracy.”

LITERATURE REVIEW

- **“International Law of the Sea: An Overlook and Case Study - Arif Ahmed”**

“The main goal of this piece of academic study is to present a succinct review of international maritime law with a focus on its origins and legal structure. About the various marine zones, this research also aims to highlight the civil and criminal culpability, jurisdictions, rights, and duties of the coastal governments. This study also defines the guidelines and limitations for using these maritime zones in the context of various treaty provisions on the international law of the sea, where various adjudicated cases are also presented and thoroughly examined regarding their facts, problems, conclusions, and justifications.”

- **“Maritime piracy operations: Some legal issues - Mazyar Ahmad”**

“The legal concerns in the maritime pirate operation are addressed in this essay. This essay discusses and emphasises some legal concerns that a state may have when battling maritime piracy. This exercise will aid in our identification of the crucial issues that require international and regional discussion among states, which would result in changes to their domestic laws to improve the anti-piracy regime. The following legal

topics were covered in this essay: Private characters, prosecuting pirates who have been caught, and enforcement.”

- **“The Law of Contemporary Sea Piracy” - John Kavanagh**

“This article explores international and Australian laws related to piracy and evaluates their suitability to address the traditional act of piracy that still takes place today. We will look at the sources of the law and how domestic and international law interact.”

- **“International Law Regime Against Piracy - Lawrence Azubuike”**

“This essay discusses how, although being obvious to international law experts, the application of international law to an individual may not be obvious to a state's typical citizen. This is one of the factors contributing to the ongoing debate about the legitimacy of international law. This topic is serious, as shown by the symposium's title, "International Law as Law." These laws and guidelines regarding piracy are ancient. And in this instance, the author has restricted himself to piracy as it pertains to waylaying or otherwise interfering with ships, as opposed to the other definition of pirate, which is the unlawful use of someone else's creation or produce.”

- **“Maritime Piracy and Limitations of the International Law of the Sea”**

“The analysis of the legal concept of piracy as stated in Article 101 of the United Nations Convention on the Law of the Sea is the main goal of this essay. As the paper's title implies, state and local laws are not included in the research since the problem of maritime piracy is only looked at from the standpoint of international law of the sea. Rather than recounting in-depth details of events relating to maritime pirate instances or presenting data reflecting the scope of this phenomena, the writers seek to understand and critically examine pertinent legal requirements.”

- **“Prevention and repression of piracy and armed robbery at sea - Mr. Yacouba Cissé”**

“Creating draught articles on the prevention and suppression of piracy and armed robbery at sea may be the goal of this topic. Draft articles would continue to be the appropriate format for the Commission's work if it becomes obvious as the issue develops whether it is one that calls for the creation of a new convention. However, the outcome might be altered to "conclusion" or "guidelines" if it turns out that the subject is best handled as straightforward advice to States for the fulfilment of current international commitments.”

HISTORICAL BACKGROUND

“For thousands of years, in fact for as long as ships have sailed the oceans and if there has been international maritime trade, piracy has been a persistent issue. In the present era, piracy is universally condemned, but this does not mean that this has always been the case. At first, piracy was partially accepted and encouraged⁷. Powers hired pirates to annoy and assault the trade ships of other states⁸. In that sense, nations saw pirates as a tool in their armoury. This was especially evident in the conflicts between England and Spain and between England and France in the 17th century. One author observes that pirate was seen as the best means to strike one is opponent and conceal the sword, comparing the crimes of piracy in those days to state-sponsored terrorism today. Some nations trained pirates.”

“From the sixteenth through even the nineteenth century, several nations either actively supported or employed pirates or outlawed piracy. Typically, the state promoted piracy against the enemy during times of war while outlawing it during periods of relative calm. States suffered the consequences of this dual standard. Frustrated, the decommissioned pirates focused their ire on both their former state sponsors and other people. They attacked any vessel without hesitation as a result, which may be how they grew to hate all people and even civilization itself. Nearly all the imperial powers signed the Declaration of Paris in 1856, perhaps drawn together by the threat that piracy posed to all of them. All types of piracy, privateering, and official support were outlawed by the Declaration. The Declaration appears to have confirmed an international ban on piracy and marked the end of governments' ambivalence regarding it. Additionally, it appeared to put an end to any nations' prior selfish motives for supporting piracy. However, it did not in any way address the other conceptual issues related to making piracy criminal. The most important of these ostensibly unanswered questions is: What does piracy mean?”

DEFINITION OF PIRACY

“Throughout the ages, the legal meaning of piracy has changed. According to Kelly, "the horrific character of the conduct [of piracy] traditionally meant that pirates were subject to universal jurisdiction, but what defines the act itself has ranged from simple theft at sea to, recently,

⁷ John Peppetti, Building the Global Maritime Security Network: A Multinational Legal Structure to Combat Transnational Threats, 55 Naval L. Rev. 73, 87 (2008).

⁸ Michael Bahar, Attaining Optimal Deterrence at Sea: A legal and Strategic Theory for Naval Anti-Piracy Operations, 40 Vand. L. Transnat'l L. I, 12 (2007).

violence at sea that includes engaging in acts of political protest." The recent tendency of using a broad definition of "violent assaults at sea" is desirable since it may accommodate a wide range of behaviour in a wide range of situations. However, the results of such a strategy run the risk of repeating earlier instances where political expediency was valued above due procedure.⁹

“According to Article 101 of the UNCLOS, piracy is defined as any unlawful act of violence, detention, or depredation perpetrated for private benefit against another ship on the high seas or otherwise outside the territorial authority of any state by the crew of a private ship. This provision's wording was chosen as a result of compromise; as a result, it is incoherent and imperfect. According to O'Connell, the wording is both tautologous and unclear because it refers to "illegal acts of violence" without specifying what specific sorts of violence constitute piracy¹⁰.

It is obvious that the phrase "illegal acts of violence" might lead to some confusion. One may wonder within what legal framework the conduct in issue must be considered "criminal."¹¹ The courts of the state that seizes a pirate ship must decide whether this is criminal in the absence of a global agreement that defines the idea¹². However, there is no uniformity in the prosecution of pirate accused by sovereign governments. According to some studies, only a small number of governments have passed thorough anti-piracy legislation that incorporate a structure for exercising universal jurisdiction over pirate assaults. One may further inquire as to whether there is a discernible distinction between the terms "acts of violence" (plural) and "act of depredation" (singular). A single murder committed at sea would not be considered piracy if these words were taken literally. However, rather than any particular sorts of activities that pirates conduct, it appears that the core of piracy is the rejection of all forms of authority. A definition that is satisfactory "must expressly exclude all acts by which the authority of the State is not openly or by implication repudiated" is what Hall insists is necessary. He asserts that since the specificity of piracy is its rejection of State authority, it is not limited to depredations or acts of violence.¹³”

“As Jonathan Bellish points out, ship theft is only one aspect of contemporary maritime piracy.

⁹ Kelly, M.J., *The Pre-History of Piracy as a Crime & Its Definitional Odyssey*, 46, 25–42, (Case Western Reserve Journal of International Law, 2013)

¹⁰ Volume 2, O'Connell, D. P., *The International Law of the Sea*, (Oxford: Oxford University Press, 1982).

¹¹ Middleton, R., *Piracy and Legal Issues: Reconciling Public and Private Interests*, p. 28-29, (Conference Report, Chatham House, 2009)

¹² Nandan, S.N., Rosenne, S., (1995); Volume 3, *United Nations Convention on the Law of the Sea: a commentary*, 1982; Dordrecht: Martinus Nijhof, p.201

¹³ Hall, W.E., *A Treatise on International Law*, p. 302, (Oxford: Clarendon Press, 1924).

"Historically, all maritime piracy took place at sea when the pirate ship approached, boarded, and looted the victim ship before sailing away. Today, Somali piracy, which accounts for more than half of current international assaults, resembles an organised crime gang more than Captain Jack Sparrow's exploits. Instead of just plundering the target ship, Somali pirates capture a sizable merchant ship and take its cargo and crew hostage, demanding ransom payments that, in 2011, were on average \$5 million."¹⁴

"One may conclude by saying that sovereign states ultimately determine how effective the international legal system is in combating piracy. To effectively combat maritime piracy, all governments must accept their responsibility to participate in the cost of prosecuting pirates. To achieve this, all states must first enact the required domestic legislation making maritime piracy illegal."¹⁵

CURRENT ISSUES OF INTERNATIONAL LAW PERTINENT TO PIRACY

"The International Maritime Organization (IMO) Code and the SUA Convention were adopted to fix the flaw in the UNCLOS definition of piracy. The UNCLOS concept of piracy has solidified over time and gained increasing acceptance. Although some nations have implemented the UNCLOS concept in their domestic legislation, many have not, which is now causing a problem with the definition of piracy. For instance, Indian domestic law makes no mention of piracy, which has either caused procedural delays during trials or prevented efficient prosecution of pirates who have been arrested."

"Cooperation is necessary for the prevention of maritime piracy. In order to minimise the capacity of pirates to operate on the seas, States should, as part of the execution of these commitments, address the factors that encourage piracy. The Commission may examine preventative strategies that have been effective in other fields of international law in order to advise States on how to carry out these commitments of prevention."

¹⁴ 15, Bellish, J., A High Seas Requirement for Inciters, and Intentional Facilitators of Piracy Jure Gentium and Its (Lack of) Implications for Impunity, p. 122, (San Diego International Law Journal, 2013).

¹⁵ 86, Dutton, Y.M., Maritime Piracy and the Impunity Gap: Insufficient National Laws or a Lack of Political Will? 1111–1162, (Tulane Law Review, 2012).

“The “Private Ends” Requirement”

“The definition of piracy has been the subject of great debate, as was previously indicated. The definition of "private ends" under UNCLOS article 101, subsection (a), is the first area of disagreement. The question of whether the term just eliminates actions taken with governmental support or if *animo furandi* is still a necessary component of crime, so excluding politically motivated actions like piracy, is at the heart of this dispute. In addition to arguing that *animo furandi* is no longer essential and that "private objectives" was employed so that actions of hatred and retaliation were also encompassed by the definition, the ILC draughts have also been used to argue that acts done with a political motivation cannot constitute pirate¹⁶. Thus, the UNCLOS definition, which states that pirates must be acting for private gain, excludes the possibility of piracy with other goals, such as terrorism or political purposes.”¹⁷

“The law of the sea has been focused with the topic of theft in piracy since historically, pirates have engaged in loot for acquisitive objectives and violence against people has only been a secondary goal¹⁸. The UNCLOS definition, however, blatantly rejects this conventional idea. It does this by introducing the concept of "private ends," which encompasses motivations other than purely selfish desires for money, such as behaviours driven by sentiments of hatred or retaliation. In other words, this definition does not need the existence of *animus furandi*, the purpose to rob.”¹⁹.

“Because of the contrast between true piracy and state-sponsored privateering in the 16th and 17th centuries, the need that piracy be undertaken for personal gain has existed ever since.²⁰. Article 101 of the UNCLOS precludes conduct with political or public purposes by restricting the definition to acts performed for private ends. This raises the issue of whether the apprehended pirate might successfully defend himself in court using this justification, such as by saying that he acted in the interests of the general welfare. By the way, Islamic terrorists frequently use this as a form of defence. Therefore, it is important to distinguish between acts of violence or theft done by legitimate pirates and others, such as environmentalist organisations fighting to

¹⁶ 12, Paige, T., Piracy and Universal Jurisdiction, 145-146, (Macquaire Law Journal, 2013)

¹⁷ XXVII, Dowdle, P., A Dire Need for Legislative Reform, p.629, (Pace International Law Review, 2015).

¹⁸ Volume. 2, O’Connell, D.P., The International Law of the Sea, P. 967, (Oxford: Oxford University Press, 1982).

¹⁹ Nandan, S.N., Rosenne, S., (1995); Volume 3, United Nations Convention on the Law of the Sea: a commentary, 1982; Dordrecht: Martinus Nijhof, p. 197

²⁰ Bento, L., Toward an International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish, p. 119, (Berkeley Journal of International Law, 2011).

safeguard the maritime environment or national liberation movements looking for a political solution. Their actions are occasionally characterised by piracy. Therefore, there are still certain "grey zones" that make it challenging to distinguish between an action taken for "private reasons" and an action taken to further some political objective. The practise of certain rebel organisations, which rob or seize a ship and hold the crew for ransom as a fundraising plan to support their political operations, is a good illustration of this"²¹

“The Almezaan”

“In one instance, off the coast of Somalia, private security personnel on board a cargo ship owned by the UAE shot and killed a pirate who tried to attack the ship. Later, captured pirates and their boat were taken into custody by a Spanish vessel. The warship's captain ordered the captured pirates to be freed. Due to the lack of a suitable jurisdiction, this event generated concerns regarding the law's applicability to the private security guards' actions, particularly with reference to the incident's investigation. This was the first instance in which a pirate from Somalia was slain by private security personnel.”

“Criminal Jurisdiction with Respect to Piracy at Sea”

“Of course, prevention is not always possible, and there will continue to be instances of piracy, prompting questions about how to penalise those responsible. Long considered a crime punishable by any State, even if that State has no connection to the pirates, their victims, or the scene of the crime, piracy is now recognised as such. Indeed, for a very long time, states and mankind have seen pirates as their adversaries (*hostis humani generis*). As a result, the first type of universal criminal jurisdiction is the exercise of national jurisdiction against pirates by any State, which forbids pirates from seeking asylum in any State regardless of their relationship with it.”

“Even yet, it is unclear what exactly falls inside this type of universal criminal jurisdiction when it comes to piracy. The Commission may conduct an analysis of the concept of "piracy" included in the Law of the Sea Convention of 1982 to assist States in establishing and exercising national criminal jurisdiction. Additionally, it might be determined if States are required to create such jurisdiction under either conventional or customary international law as opposed to whether they

²¹46, Kelly, M.J., *The Pre-History of Piracy as a Crime & Its Definitional Odyssey*, p. 378, (Case Western Reserve Journal of International Law, 2013).

are merely entitled to do so at their discretion.”

“National Criminal Laws on Sea Piracy are Adopted and Harmonized”

“Considering the findings drawn above, thought may be given to the precise steps that States should or may take within the framework of their domestic criminal laws in order to establish and exercise jurisdiction over those who are allegedly responsible for maritime piracy. The adoption and harmonisation of national laws by States in this area may be encouraged by such measures, allowing for a more effective global enforcement system and better interstate cooperation.”

“Some States might be permitted to use their domestic criminal laws based just on their acceptance of the 1958 or 1982 Conventions, or even just on customary international law.²² However, it is likely that in most countries, such bases would be insufficient, necessitating the adoption of national statutes that criminalise piracy. *Nullem crimen, nulla poena, sine lege*, which literally translates to "no crime, no punishment, without law," may be the guiding premise behind this need for national legislation. The rise of violent maritime pirate crimes in 2008 off the coast of Somalia in the Indian Ocean and in the Gulf of Guinea bordering the Atlantic Ocean showed that numerous States from all continents lacked any domestic piracy law. France's involvement in the *Ponant* case is one example.²³ France had to release the Somalian pirates it had captured since, at the time, there was no national statute designating piracy as a crime, and French general criminal law was insufficient to make piracy activities justiciable in a criminal court. France was not, however, alone in this sense. Currently, most of the African States lack legislation against piracy or have obsolete laws in this area compared to current international law.”²⁴

“As a result, certain States' basic criminal laws might not be enough to pursue offenders and suppress piracy. To guarantee that criminal processes are accessible for prosecuting pirates, explicit law on piracy offences or at the very least a vague reference to marine piracy in general criminal provisions may be required. Additionally, national prosecutors and judges frequently lack the technical and legal expertise needed to deal with this crime effectively. This crime is unique and may need special guidance to comprehend the elements that must be proven as well as the kinds of evidence required to meet those elements. Although ratifying the Convention on

²² Dutton, “Maritime piracy and the impunity gap,” p.1143–44

²³ Mahinga, Jean-Grégoire, “L’affaire du *Ponant*,” 7 *Revue de droit des transports* 10 (2008); Philippe Chapleau & JeanPaul Pancraccio, *La piraterie maritime: Droit, pratiques et enjeux*, p. 106–107 (Paris: Vuibert, 2014)

²⁴ United Nations Division for Ocean Affairs and the Law of the Sea. *National Legislation on Piracy*.

the Law of the Sea is a necessary legal action and the clearest indication of nations' willingness to be bound by international law, it is insufficient for the efficient implementation of states' commitments. The Convention on the High Seas, which is still in effect for six nations, and customary international law pertaining to piracy are both subject to this remark. In other words, a state cannot only rely on the fact that it is a party to one of the two pertinent treaties or on customary international law to criminalise pirate actions. Although the legal foundation to combat piracy has previously been established by international law, nations' national legislation is required for the criminalization of piracy. Even if the legal foundation to combat piracy has previously been established by international law, nations' national laws are still required for the criminalization of piracy.”²⁵

“Along with a lack of national legislation and certain outdated national laws against piracy, there is also the issue of pirate law harmonisation. National laws of certain States only define maritime piracy as crimes performed on the open seas, whereas laws of other states only define it as crimes committed within their territorial sea or exclusive economic zone.²⁶ In an ideal world, States' laws combating piracy in all places outside of the territorial waters would be the same or comparable.”

“The “Two-Vessel” Requirement”

“The two-vessel requirement is another contradiction in the concept of piracy. On the one hand, subparagraph (a)(i) of Article 101 of the UNCLOS states that an assault against "another" ship is required for the attacker's action to be covered by the definition of piracy. On the other hand, any assault on "a" ship is considered piracy under subparagraph (a)(ii). If the last clause were to be taken literally, challenges made by a ship's crew against their own master may be included by the definition of the Convention. However, it is fair to say that the one-ship scenario was not meant to be included in the pirate definition and that it is not covered either, especially considering the travaux préparatoires. Remember that a ship on the high seas is exclusively within the authority of its flag state, as stated in Article 92 of the UNCLOS. As a result, local law, not international law, should be applied to any act committed against a ship travelling the high seas. It is obvious that internal ship seizure would not qualify as piracy under this criterion. Without a

²⁵ Anna Petrig & Robin Geiß, Piracy and Armed Robbery at Sea: The Legal Framework for Counter Piracy Operations in Somalia and the Gulf of Aden, p. 140–44, (Oxford: Oxford University Press, 2011).

²⁶ United Nations Division for Ocean Affairs and the Law of the Sea

differentiation, piracy and mutiny/hijacking would be the same. The fact that Article 100 requires all states to combat piracy and that "there are evident political dangers in demands for the delivery of persons who seize ships internally, as well as in the interference of foreign nations in the event" are additional arguments in favour of the two-vessel requirement of Article 101."

CONCLUSION

"As a result of modern piracy's increasingly deadly currency, it is no more an issue of antiquity or historical curiosity. The current international regime on the matter is not entirely inadequate. There are two main recommendations, though. First, a more forceful response by the UN Security Council will address the immediate issue and at the very least halt the situation by discouraging pirates. Second, combining the international definition of and prohibition against piracy with an effective legal system, preferably within the confines of the international criminal court, will result in a more long-lasting and effective solution. States would have a suitable alternative venue if they are unable or unable to prosecute pirates in their home nations thanks to the simplification of the legal system. The international community would thus recognise that piracy is a criminal offence by providing an international definition and ensuring an appropriate forum, and this will subsequently ensure that piracy is treated as an international criminal offence, which it is, and create awareness of the contempt and condemnation with which mankind views piracy."

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