



Legal and Political Quandary in the Securitization of the Gulf of Aden

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ABSTRACT

The use of the world's navies in the protection of the maritime stretch of the Gulf of Aden against Somali pirates has offered much impetus in the drive towards ensuring maritime security in that water course. But such successes have accorded consequences in the resolve of the pirates to record more successes evident in the spread of their activities into the high sea, use of arms and greater violence to compel ships to stop, as well as the grave danger that hostages are subjected to. The nature of Somali pirates as distinct from the traditional pirates known to international law and the challenges nations participating in the naval mission encounter in their effort to make the gulf safe for navigation, arresting and prosecuting apprehended pirates are posing great challenges to the entire securitization process amidst gaps in international law in this regard. This paper argues that a more effective measure in addressing piracy in the gulf would be a comprehensive diplomatic effort that takes into cognizance the myriad of the critical mass of issues within and outside Somalia which brought about and or are sustaining the unfortunate maritime security situation in the Gulf of Aden.

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1. Introduction

Piracy is a global venture that still occurs in South/East Asia and Indian Sub-continent (Bangladesh, Indonesia, Malacca Straits, Malaysia, Philippines, Singapore Straits, South China Sea, Vietnam, Arabian Sea, Indian Ocean - off Seychelles and Madagascar); Africa (Nigeria, Tanzania, Guinea, Ghana, Gulf of Aden, Somalia); South and East America (Brazil, Peru) (Oceans Beyond Piracy Project - Fact Sheet No5).

Indeed, Piracy is one of the oldest crimes on earth after murder and rape. Besides being a crime in almost all jurisdictions of the world and under international law, and being "one of the most widespread crimes, since attacks occur in nearly every sea and ocean", it is: A highly episodic crime, where base levels around the world are maintained but different regions periodically emerge as piracy hotspots. These hotspots tend to attract large amounts of international attention while consistent attack levels are ignored. That attention leads to a reduction of piracy in specific regions, only to have increased incidents emerge elsewhere. (Oceans Beyond Piracy Project - Fact Sheet No5).

The current pirate hotspot is the Gulf of Aden and is receiving the necessary international attention. However certain issues attendant to the securitization of the pirate infested waters of the Gulf of Aden raise many questions as regards the nature of maritime diplomacy, armed humanitarian intervention, international Military Corporation and international humanitarian law in the post-cold war era. These set the stage for a critical assessment of the appropriateness, justification, successes and challenges of the deployment of the world's most powerful Navies to protect a 2,000,000km² water way against a bunch of "rag-tag army of Somali youths, some barley in their teens, sailing in sometimes rusty mother ships and using skiffs and speed boats and armed with AK47s, hand and shoulder held rocket propelled grenades" (Odeke, 2011:2) since year 2009.

1.1. Theoretical framework

The theoretical framework for analysis here underscores the futility of Gunboat Diplomacy in tackling crimes committed by non-state actors. This is based on the understanding that in the absence of state authority to exert pressure on Gunboat Diplomacy is bound to be counterproductive. More so when it is being applied in an area where the citizens are disillusioned as to the intention of the international community and

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what possibly could be the advantage of a partial intervention that would rather address symptoms instead of causes.

The manner of maritime diplomacy as is being applied in the Gulf of Aden seems to be a clog in tackling the menace of piracy in that water course and is making nonsense of the whole maritime security protection effort and the deployment of Naval Platforms in the region, as well as aggravating the danger piracy poses to seafarers in that waters.

Potgieter (2008) observed that: The deployment of naval vessels to the region in an effort to enhance maritime security is in principle a good idea, but then there must a clear commitment, policymakers must give clear guidelines and a clear mandate to navies. Examples in military history abound of fiascos resulting from forces being deployed without clear strategic objectives and political commitment. The mere presence of a force and the application of firepower on its own are simply not enough. (Potgieter, 2008:18).

It is this noticeable absence of “clear commitment” by policymakers to “give clear guidelines and a clear mandate to navies” that is giving room for worries as to the chances of real success of the naval patrol in the Gulf of Aden as a diplomatic measure to addressing an international challenge.

The deployment of Navies to the Gulf of Aden appears to be in tandem with the understanding that “the traditional gunboat diplomacy can work if illegal acts are attributed to a specific state or group of states” (Potgieter, 2008:13). The absence of a state authority in Somalia is the foundation for the use of force against the pirates, but real success seems to be impeded by operational strategies, and legal constraints. The operational strategies include the absence of the ideal “collective security”, co-operation by navies, and regional governments; and sharing of information and responsibility at sea and on land; whereas the legal constraints revolve around issues of jurisdiction, proof of cases in courts, the doctrine of non-refoulement among others.

To adequately address the maritime security situation in the Gulf of Aden, there must be higher awareness on the need for maritime security by all including Somalis, regional cooperation with the international community to address issues relating to governance inside Somalia, piracy, harbour security, illicit fishing, illicit dumping of toxic waste, collaboration of participating Navies as against the current individual state Naval action running on severely limited budgets and a recognition that “international and regional cooperation may allow more to be done with less” (Potgieter, 2008:14).

2. Piracy in the Gulf of Aden

The Gulf of Aden is an important water way in world trade, providing transit for about 11 percent of the world’s seaborne petroleum, and ships plying the route as a shortcut between Europe and Africa through the ever busy Suez Canal, as well as for ships making longer voyages around South Africa’s Cape of Good Hope (Ploch et al., 2009). By her unique location in the Horn of Africa, and jutting out into the India Ocean, Somalia’s harbours and ports (Port Aden in Yemen, Port Djibouti City in Djibouti, and Ports Zeila, Berbera, and Bosaso in So-

malia) are naturally ports of call for ships and traders sailing the all-important trade route (Ploch et al., 2009).

Somalia is not new to the changing dynamics of international politics having been exposed to the machination of the British, French, Italian, and lately the Soviet Union, and the US. The state is but a victim of counterfeit diplomacy which the region and the entire African continent has been exposed to. The failure of Somalia’s romance with these giants to produce positive transformation for the Somali is the reason for the present maritime security situation in the Gulf of Aden and calamity experienced inside Somalia.

The maritime security in the Gulf of Aden even though has been said to be a lot better having reduced from 49 ships hijacks in 2010 to 12 ships hijacks in 2012 (see Table 1) has a direct link with the situation inside Somalia after all “Maritime Security is a key component of National Security” (Pmma - Gs Mount Pinatubo, 2008).

Table 1: Somali Piracy 2008 – 2012.

Year	2008	2009	2010	2011	2012 (Jan-May)	Total
Ships Attacked	111	215	219	237	21	843
Ships Hijacked	42	47	49	28	12	178
% Success Rate	38%	22%	22%	12%	20%	21%
Hostages	815	865	1016	470	188	3,356

Source: Maritime Piracy around the World Synopsis. Oceans Beyond Piracy Project – Fact Sheet 5: 2012.

The political history of Somalia indicates that Somalia has been raped repeatedly over the years by very many people and abandoned immediately after the romance ceased. Somalia was in a pristine state (Hirsch and Oakley, 1995:3), a world of “egalitarian anarchy” (Samatar, 1991:6) until the opening of the Suez Canal made the hitherto remote state attractive because of her natural harbour that where found excellent for mid-sea breaks and refueling. That led to the scramble for and consequent partitioning of this hitherto homogenous land into lots in the 1880s between Britain, France, and Italy and later on Ethiopia – which saw some Somalis domiciled in Djibouti (formerly French Somalia) and others domiciled in Ogaden Ethiopia and “set the stage for latter conflict in the horn” (Hirsch and Oakley, 1995:5).

At independence, the colony was not prepared for self-government - no unified, trained civil service, and no accepted political norms; civil administration in the north and south had inherited different European languages, culture, and administrative structure. The absence of any genuine assistance for its sustenance and survival from Britain led Mohammed Siad Barre to forge a relationship with the Soviet Union in search for arms to recover Ogaden and perhaps Djibouti.

When the US “cut off residual economic assistance” because “Somali-flagged Merchant Ships were discovered delivering arms to north Vietnam”, Said Barre became excited. The excitement exaggerated his sense of military strength and potential soviet support and encouraged him to launch “war against Ethiopia in October 1977 in an effort to regain the Ogaden” (Hirsch and Oakley, 1995:6). However, Soviet’s military support to the Marxist regime of Mengistu Haile Mariam

during that war prompted Bare to eject the Soviet Military Advisors from Somalia. The Somali Army routed in the absence of anymore military equipment from Soviet Union or from anywhere. The collapse of Soviet-styled Somali Economy, unchecked corruption, and Clan based insurgency added to the turmoil and brought Somalia to its knees; the escape of Said Barre got the country to descend into civil war.

The US intervened on humanitarian grounds, but did not achieve much in ensuring that peace and order were restored as it did in her clinical intervention in Iraq, Bosnia, Panama, etc (the principle of neutrality in armed intervention, and respect for sovereignty was still intact then), and perhaps assist in composing a new Somali Central Government that will be acceptable to the warring parties.

This mismanagement of the conflict in Somalia was unfortunate, and no good reason has been offered to explain this error¹. Besides the US, no other country of the world was willing to send its men and materials to help save the situation in Somalia. But today almost all have their Navies stationed in the Gulf of Aden – a beneficiary of the chaos in Somalia – to protect their respective private interests.

Piracy in the Gulf is in protest to the abandonment of Somalia in time of need, and application of counterfeit diplomacy in the crises in Somalia at the outset. Somali piracy arose out of the need to survive, having lost their source of livelihood to war, and to superior fishing skills of fish thieves in the surrounding waters. The initial idea was for local fishermen in the coastal communities, who had no real weapons and no military expertise, to enlist local Somalia militias to garner capacity to defend their waters against unlawful foreign fishing companies who used arms against local fishermen. Unfortunately, the disengagement of about 1,500 Somali youths trained in the “use of sophisticated radio equipment, GPS, satellite phones, speed boats and mother ships, Internet resources to locate sea vessels, as well as boarding techniques” (Hansen, 2008) by private security companies (Hart and Co, and SOMCAN) (Marchal, 2011) mobilized by the Puntland Government between 1998 and 2005 to disarm “rouge militias”, provide security to reduce competition, ensure uninterrupted revenue from fishing in Somali waters – offered an impetus to the pirate enterprise. That saw Somali fishermen hijacking illegal fishing vessels.

Somali Piracy moved from survival to profit i.e. “secure a sizable ransom which is frequently delivered directly to the pirates on-board the captured ship” (Rotberg, 2010) by willing governments and shipping companies who prefer to pay ransom for the release of their vessels and crews because they consider that the sums demanded as ransom are relatively small compared with the value of a ship and its cargo (Chivers, 2010) - as well as the effort the countries would have put in to restore order in Somalia.

Currently, Somali piracy is an establishment and typed into three categories - subsistence pirates made up of “poor fisher-

men, engaged in piracy closer to the coast in order to survive” (Hansen, 2008:539); middle class pirates whose leader owns the boat used for operations but gets mid-level Somali businessmen from his clan to partake under a shareholding contract (Backhaus, 2010); and professional pirates run under a PLC arrangement where a fund raiser, taking advantage of the lapses in the naval commands, arranges funds from “professional pirates” (Hansen, 2010) “who may be off-shore, to fund large scale pirate missions” and is entirely profit-driven, outright criminality and employs a great deal of tactical knowledge and networks in her operations.

Nonetheless, the piracy and pirates in the Gulf of Aden is a hybrid: Indefinable under known rules of both customary and treaty international law due to its unique characteristics. It includes armed robbery at sea, kidnaping, hostage taking, general security, links to terrorism, money laundering and international organized crimes. Unlike old pirates, these started as armatures, sometimes under age and operating from a country with no islands, creeks or coves and instead hunting in the open sea, dressed in modern attires (Odeke, 2011:136).

Hitherto international law had taken cognizance of pirates as Buccaneers (Young, 2005:1-33) and or Privateers (Someone, 2007) described as “one-eyed fellow (with patch on the other eye and a parrot on his shoulder), a sword wielding and rum drinking outlaw, unshaven and bizarre dressed with plundering for selfish and private motives” (Odeke, 2011:136).

However, Somali pirates have built “support among clan elders, officials, and intellectuals” and have an: Entrepreneurial approach to the use of ransoms. The key beneficiaries invest locally or regionally and do not spend their resources exclusively on the sumptuary celebration of their feats. This contributes to strengthening their popular legitimacy and the sympathy of the public (Marchal, 2011).

Therefore, while they are called pirates by the international community they are regarded as heroes and defenders of Somalia maritime interest. Besides making their loots available to their kinsmen, they also offered a counter model to Shabaab activists, enjoy life in an epicurean manner, thereby encouraging the dream of many youngsters - to marry very early and leave Somalia with a genuine visa to settle overseas (Marchal, 2011).

This irreconcilable image of the Somali pirate, the hybrid nature of their activities, the gaps in international law and the method of intervention are making caricature of the whole naval mission in the Gulf of Aden. These issues are manifesting in the trial of pirates caught in the act, as well as those that offered themselves willingly to be arrested by the intervening Navies, the reluctance of neighbouring states to continue to participate in the criminal prosecution of pirates, and most recently the adoption by NATO countries of the “catch and release” (Sterio, 2012:111) method of piracy control by the intervening navies or Russian method of releasing pirates in “a tiny boat in the middle of the Indian ocean, with no food, water, or navigation devices” (BBC News, 2010; Saoirse, 2010).

Meanwhile, emerging piracy trends are raising suspicions that some pirates’ attacks may be phantom attacks arranged by ship owners - or Professional pirates (Hansen, 2008) who invest huge sums of money and provide other logistics in piracy en-

¹ Some writer have argued that the non-successful armed intervention by the international community in Somalia was as a result of the fact that it was the first of its kind after the end of the cold war

terprises using advanced networks and syndicates both “within Somalia and the wider Diaspora” (Rotberg, 2010) to abdicate liabilities and or in return for huge cuts from ransom.

In his critique of the current practice in the armed intervention in the Gulf of Aden, Kraska (2009) observed agreeing to an extent with Christoffersen and Buckley that “until regional and bilateral agreements are executed, along with more structured coordination, disposition and logistics issues associated with persons picked up during counter-piracy operations will persist”. His argument is that since: Piracy prosecutions involve cases with suspects from one country and witnesses and victims from others. The vessel likely is registered in yet another state, and is transporting cargo owned by corporations from one or more additional countries. In addition, the flag state of the warship that conducts the interdiction could be from a distant state and on a deployment in the region (Kraska, 2009:197-216).

Therefore, coordination on Somali piracy disposition and logistics should go beyond the current ad hoc approach to an institutionalized collaboration and “work to develop a single regional counterpiracy center that can coordinate and deconflict naval operations” (Kraska, 2009:197-216).

3. Securitization of The Gulf of Aden

This is a result of the failed state situation in Somalia. However, many issues in international law (humanitarian, customary and treaty) are arising from the securitization option to the maritime security situation in the Gulf of Aden.

The Navies running the waters of the Gulf are from different nations – with different standards of human rights, training, code of conduct, operational strategies, budgets, and objectives. These pose great challenges to the success of the entire securitization efforts. Certain events in Somalia and off Somalia (treatment of pirates, captives, conduct of rescue exercise, patrol patterns, indiscriminate shooting etc.) have raised issues as to whether peace operations are not “proper soldiering” (Potgieter, 2008:13). Indications are that “unmotivated, poorly trained forces with flawed objectives can lead to disaster from a peacekeeping and humanitarian point of view” (Pugh, 1999:87), as a sense of worth, pride and spirit de corps is removed from peace operations.

These account for the absence of coherence in the naval operation that leaves all the naval units in the area all to themselves except for issues of avoiding clashes amongst the participating Navies and offending other countries in the region as well as other participants diplomatically which the professional pirates have capitalized on to perpetrate their dastardly acts.

China’s experience in the securitization effort in the Gulf of Aden identifies the challenges the disjointed naval operations under the concept of “naval nationalism” (Christoffersen, 2009) are open to. China’s official policy on Somalia piracy “closely parallels the UN’s position, and reflects an emphasis on comprehensive security instead of the use of warships” (Christoffersen, 2009:2) – which is the UN’s kind of compre-

hensive security approach to Somalia. As observed by Christoffersen (2009), China’s kind of comprehensive security is one that “would address the root causes of piracy – poverty, lack of economic development, and threats to environmental security by commercial overfishing that has forced Somalian fishermen into piracy”.

One gap in the securitization effort became visible in October 2009 when China faced “a long stand-off that would be a definite loss of face and loss of legitimacy domestically” (Christoffersen, 2009:16) because China could not mount an immediate rescue of its own to rescue her ship “the De Xin Hai” hijacked by Somali pirates because China’s PLA-N ships stationed in the Gulf of Aden were far from the De Xin Hai. A situation that would have been averted were all the nations involved in the anti-piracy operations in the Gulf working in concert with clarify defined areas of responsibility and better coordination (Christoffersen, 2009:16) (Buckley, 2009:22).

On the issue of the impact of international humanitarian law on the securitization effort, arguments are that if not for international humanitarian law (1984 Convention Against Torture, the 1966 International Covenant on Civil and Political Rights, the 1950 European Convention on Human Rights – which placed positive and negative obligations on states to ensure that individuals’ rights are protected at all times), the international community would have taken decisive military action and crushed the Somali pirates, both at sea and their networks ashore (Lennox, 2008). Nevertheless, by virtue of international humanitarian and human rights laws and certain UNSC resolutions on Somalia UNSCR 1918, UNSCR 1851, S.C. Res. 1851, SC Resolution 1897 etc., Navies are constrained to act in a quick and decisive manner to achieve the desirable result in bringing to an end the piracy brouhaha. Therefore, “whilst the international community has assembled an impressive array of maritime power, this has achieved little more than contain the levels of piracy. It may also have made pirates more violent and more professional” (Reid, 2011:4).

The implication is that while “counter-piracy efforts make attacks more difficult; pirates are becoming more aggressive and increasingly likely to use weapons to get vessels to stop” (Reid, 2011:4 -5). Interestingly, the incident of Somali pirates firing at ships to stop rose from 39 in 2008 to 114 in 2010 (IMB, 2010b). Included in this figure are about twenty attacks using rocket propelled grenades (RPG) some of which were against oil or chemical tankers (Hourel, 2010). Besides increasing application of violence, use of hostages as human shields, and extending areas of operation to other criminal activity, pirates (professional) have also studied the patrol patterns of the naval warships and adapted their tactics accordingly, and seem well versed in the legal and political limits that are constraining the efforts of Western warships to stop them (Lennox, 2008).

Budgetary constraints pose great challenges to military success in combatting piracy in the Gulf of Aden. Granted that the naval armada in the Gulf have collectively made some remarkable success in the fight against pirates by disrupting 411 out of 706 pirate operations encountered in 2009: 269 pirates arraigned for prosecution – 46 jailed, and 11 killed (Rotberg,

2010), but analysis indicate that the available warships are too few to cover the span of waters wherein ships are at risk of attack (Lennox, 2008), and absence of corporation among participants make the warships even fewer and efforts less effective.

In view of the forgoing, (Lennox, 2008) suggested that maritime forces in the Gulf should be empowered to conduct supporting operations ashore Somalia. But there is this apprehension by contributing Governments, emanating from the behaviour of Somali pirates (increased use of violence against ships, crews, hostages, prolonged detention of hostages, and non-release of hostages even after ransom has been paid) that extending the naval operations onshore Somalia could engender an escalation in violence against merchant shipping as pirates seek revenge (Stockbruegger, 2010).

This perhaps explains the current strategy of containing: the threat to a level which can be tolerated by the international community. Arguably, this is being achieved but the cost effectiveness of the strategy is questionable and may not be sustainable in the current financial climate. The most likely outcome is that naval forces committed to future counter-piracy operations will reduce at a time when more individuals are being drawn to piracy (Reid, 2011:9).

Incidentally despite the buildup of naval forces in the region, pirate activity continues to increase (IMB, 2010:47). Monetary gains in the absence of any alternative within Somalia, and or the possibility of arrested and prosecuted pirates being transported to Europe to start a new life under the international law doctrine of non-refoulement are propelling more people to enlist in the Somali pirate cult.

It is therefore being suggested that piracy ought to be seen as “a dynamic activity mutually dependent on global economic development, government policies, corporate strategies and actions of regional and local players” (Reid, 2011:6). In which case any “assessment of future trends must therefore include an analysis of the security dynamics within Somalia and the relationship between pirates and other key actors” (Reid, 2011:6). Hopefully, an understanding of the security dynamics within Somalia, the relationship between pirates and other key actors and applying corresponding actions will put paid to piracy in the Gulf of Aden.

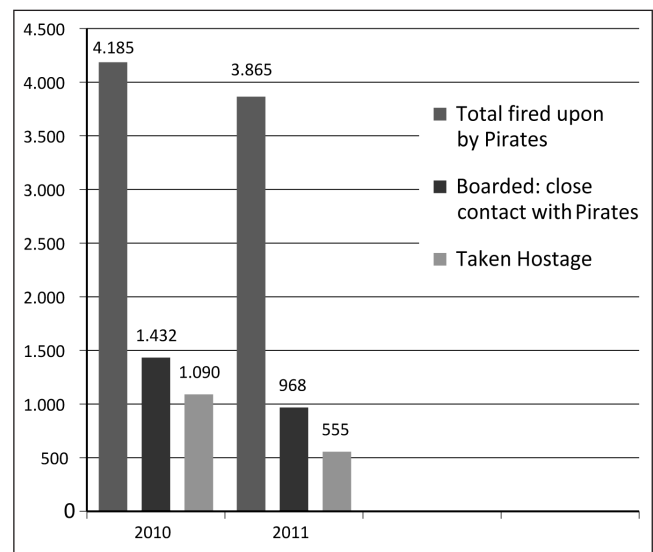
4. Naval deployment – an assessment

The presence of the world's Navies in the Gulf of Aden has significantly reduced piracy (see Table 1). The number of seafarers subjected to armed attacks decreased in 2011 by 8% from the previous year. The most notable change was a 50% decrease in the number of seafarers kidnapped by pirates and taken hostages. There were 2,895 seafarers subjected to weapon-fire in these unsuccessful attacks. In this scenario, pirates fired assault rifles and RPGs at both their place of work-

the bridge-and their living quarters (International Maritime Bureau and Oceans Beyond Piracy, 2011:6) (see Figure 1).

But these have brought about some other challenges and consequences. For instance even though the number of successful pirate attacks have reduced (See Figure 1), there is a rise in the hostage deaths, duration of captivity, increase in violence, increased regional cost, confusion as to the identity of pirates², use of hostages as human shield, death of pirates, (International Maritime Bureau and Oceans Beyond Piracy, 2011:6), and non-release of hostages even after payment of ransom because of their nationality.

Figure 1: Seafarers attacked in 2010 compared with 2011.



Source: Made out from Figure 2, “The Human Cost of Somali Piracy, 2011” (22nd June 2012), International Maritime Bureau and Oceans Beyond Piracy.

Somali pirates held 1,206 people hostage in 2011. This number represents 561 people captured in 2011 and 645 people who were taken captive in 2010 and remained in pirate hands for some or all of 2011. The fact that 645 people were taken in 2010 and remained hostage in 2011 highlights the large number of attacks in late 2010, and increase in the average length of time to negotiate the ransom, and in some cases, stalled negotiations. The victims are citizens of more than 47 countries, the vast majority of which are from Asia - especially the Philippines, China, and India (International Maritime Bureau and Oceans Beyond Piracy, 2011:7).

The fact that majority of hostages (invariably ships attacked) are from countries other than the US, UK, France, Russia [Philippines (17%), China (9%), and India (8%)] is a clear indication of the understanding by pirates of the disunity and unevenness of the naval forces in the Gulf of Aden.

However, in recent times, issues arising from the handling of apprehended pirates have given room for contemplation on whether or not the Navy option is indeed a success. The current predominant practice in handling apprehended pirates is tagged the “catch-and-release” method. This trend is developing fast because many of the countries that have their Navies in the Gulf of Aden are gradually developing cold feet as far as prosecution of pirates is concerned. It is estimated that about

² The use of local vessels causes confusion over pirates posing as fishermen e.g. two Indian fishermen were killed by Italian marines aboard the *MV Enrica Lexie* in 2012 on suspicion of being pirates.

90 percent of “suspects pirates” apprehended by the patrolling Navies are released almost immediately without trial or botched trial such that the “practice [of catch-and-release] has now become the rule and judicial prosecution the exception” (Lang, 2001:21).

The reasons advanced for this recent developments are traceable to law and practice of international human rights law. They include issues of jurisdiction, the difficulty of proving a case, immigration, the operation of the doctrine of non-refoulement, the United Nations Convention on the Law of the Seas among others.

JURISDICTION = international law permits any state to try any pirate it apprehends in the High Sea even if the state has no direct connection with pirates crime (Article 105 of the United Nations Convention on the Law of the Seas). However, the venue for such a trial is becoming an issue in jurisdiction. The current trend is to look for a state outside Europe to try pirates apprehended/arrested by the UK. Reports have it that the United Kingdom has arranged a prosecution procedure whereby “suspects pirates” apprehended by UK Navy are handed over to states in the Gulf of Aden (Seychelles, Kenya, Tanzania) for trial. On the conclusion of the trial, the convicts are then returned to a territory in Somalia (in line with an agreement made at the London Conference on Somalia between President James Michel and Somaliland President Ahmad Mohamed Silyano) (Somaliland) to serve their prison terms founded on sentences pronounced in accordance with “UNODC-established penal facilities” (“Seychelles Hands Over Pirates to Somaliland” (Somalia Report, 2012) in prison facilities established with the support of the UNODC).

This arrangement as beautiful as it may be has some inherent challenges. Primarily it offends the international law doctrine of non-refoulement Farmer (2008:2-43); Douglas (2010:152); Kontorovich (2009); Treves (2009:405); Treves (2009:12-13); Article 33 1951 Refugee Convention. More so, international law has no provisions for trials by third-party-states. Within its universal jurisdiction over piracy provision, it contemplated only trial “in the courts of the State which carried out the seizure” (The United Nations Convention on the Law of the Seas -Article 105) without consideration for any reasons for which a state that arrested a pirate would rather desire to prosecute the pirate in any other jurisdiction (for purposes of cost).

Other intrinsic elements in jurisdiction herein are judicial and penal capacity, human rights records of the “third-party-states”; security at trial venues, willingness to continue with such an arrangement³, possibility of reprisal or pressure by pirate gangs, and/or limited prison capacities of “third party state”.

DIFFICULTY OF PROVING A CASE = traditionally, proving cases of crime is difficult. The difficulty usually arises from the level of prove in criminal cases which is beyond reasonable doubt. This is even worse in circumstances where the available evidence is circumstantial, or issues of capacity of the offender

to commit a given offence and or face trial for such an offence are present or witnesses are difficult to procure.

In the case of Somali pirates a lot of obstacles in this regard exist. The peculiarity with the trial of Somali pirates is that they rarely fit into traditional definition of pirates. They are usually not caught in the act. Most often they are arrested because they are found in the High Sea in possession of weapons suspected to be capable of being used for attacks on ships or equipment suspected to be capable of being used in boarding ships. Ordinarily, these do not amount to any crime. Besides many pirates are known to throw incriminating equipment in their possession over board upon sighting approaching Navies, and claim to be ordinary fishermen when accosted by Naval Forces.

Part of the difficulty in proving that “suspect pirates” are truly pirates is in securing witnesses. Piracy prosecutions: involve cases with suspects from one country and witnesses and victims from others. The vessel likely is registered in yet another state, and is transporting cargo owned by corporations from one or more additional countries. In addition, the flag state of the warship that conducts the interdiction could be from a distant state and on a deployment in the region (Kraska, 2009:197-216).

Besides, most of the competent and compellable witnesses are difficult to bring to attest in courts or have their testimonies recorded for onwards transmission to court. This difficulty may be as a result of fear, absence of logistics (finance), language barrier, and the fact that most of the appropriate witnesses are seamen who are always on the move.

Another part of the difficulty is that exhibits recovered from the arrested pirates must be properly handled, typed and preserved by the capturing authority, shipped back to the trial forum and dutifully presented in court. Others include securing willing persons to offer translation services to the court.

THE DOCTRINE OF NON-REFOULEMENT = developments in a few successful prosecution of pirates are pointing towards a direction most states are finding difficult to accept. The application of the doctrine of non-refoulement makes it imperative to withhold ex-convict pirates from leaving the state in which they were tried, convicted (or acquitted) and perhaps served their prison terms - this explains the rationale for the recent adoption of “third-part-state” in pirate prosecution and also the “catch and release” approach to Somalia pirate crackdown. Under this doctrine, it is forbidden for a person who has successfully served his term in prison to be released to go back to the same situation that warranted his committing crime to be exposed to committing the same crime for which he has been punished again.

Based on the forgoing many states are apprehensive that prosecuting “suspect pirates” within their jurisdiction would mean permanently relocating or rather accepting ex pirate convicts as citizens. It is for this reason that most states, UK in particular, are quick to either bring the pirates back to Somalia, under a pre-arranged agreement, for trial or unconditionally release them.

WEAPONS POSSESSION AND USE ON THE HIGH SEAS = the presence of the Navies in the Gulf of Aden is adding impetus to the argument as to the regime of Weapons

³ At the outset of this “third-party-state” trial arrangement, Kenya was in the forefront of receiving pirates arrested by other states, but could not sustain it beyond one year. The reasons for that cancellation are still not in public domain.

possession and use on the High Seas, the relevance of allowing seamen bear arms when the waters are protected by troops, and the use of military action against pirates.

At the moment it appears that the standard in this respect is not defined or at best restrictive. The “current draft guidelines in circulation, following the laws of many nations, only allow the use of lethal force when facing imminent danger to life or limb” (Kontorovich, 2012).

Somali Pirates are not soldiers or insurgents, and are not involved in wars, therefore are ordinary civilians within the confines of international law, so ought not to be dealt with aggressively in military fashion except on apprehension of immediate danger to self-defense.

However, the presence of Navies in the Gulf of Aden has not guaranteed the absence of attack on ships. Instances have been reported of Navies of a country turning the other way when ships of states other than theirs are being attacked. What seems to deter the pirates are ships that are armed. But it appears that the traditional understanding of the doctrine of “self-defense”, which assumes that there will be police response, is impeding reality i.e. that such expected police (or naval) response in times of need for self-defense has some limitations on the high seas. Yet lives are at stake and the EU and US Naval Forces in the Gulf of Aden are expected to be operating within the confines of the “old” rules in matters that are beyond those rules, whereas states like Russia, Iran are going beyond the limits of customary international law in dealing with pirates by adopted more aggressive measures.

5. Conclusions

It is doubtful, in view of recent developments, that securitization of the Gulf of Aden will ensure maritime security in that gulf. The victory that may be won by the navies in the Gulf of Aden will be unsustainable, the successes in combating Somali piracy will be short leaved if the political situation in Somalia is not brought under control and a functional central government reestablished. The Somali government would be in a better position to get the scavengers in the Gulf of Aden back on track – this is because of the perception of Somalis of the supposed pirates as saints and martyrs of Somalia.

Using force against the pirates in the Gulf of Aden while the political situation in Somalia remains unresolved and the surrounding waters scavenged by foreigners will only strengthen the resolve of the Somali youths to enlist more force in their quest to defend their fatherland.

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