Piracy, Navies and the Law of the Sea: the Case of Somalia

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Abstract
This contribution concentrates on the legal aspects of piracy and tries to explain some of the practical problems which modern navies experience in their fight against piracy and maritime violence off Somalia. The UN Law of the Sea Convention of 1982 provides a traditional though largely deficient set of rules for control and counter measures. Modern legal instruments such as the SUA Convention of 1988 as amended, recent resolutions of the UN Security Council and regional treaties try to fill the loopholes. Against this background the paper discusses e.g. the law of boarding and investigation of suspicious vessels, the arrest and penal prosecution of criminals and the right of self-defence in case of an imminent attack. The international mandates and the national rules of engagement in which the navies operate reflect these ambiguities that result in a loss of momentum. After all piracy is not an act of war, but a crime. In conclusion a political solution on land is indispensable as the navies and coast guards can only fight the symptoms and not the causes of crime and unrest in a failed State.


Piracy is rearing its ugly head again. According to current reports of the International Maritime Bureau (IMB) Piracy Reporting Centre in Kuala Lumpur1 the year 2008 ended with a new record of nearly 300 reported acts of piracy and armed robbery posing a serious threat to the lives of seafarers, the security of the maritime transport industry and the safety and security of coastal States. Despite massive naval efforts in the Gulf of Aden piracy continues in 2009 at a high level and an expanding geographical scope to include large parts of the North-Western Indian Ocean. Piracy attacks around the world doubled in the first six months of 2009 to 240 from 114 compared with the same period in 2008. The rise in numbers is due almost entirely to pirate activities off Somalia with 130 attacks and 31 hijackings. The vast expanse of the oceans is an ideal hiding place for all kinds of illegal activities. But before giving an overview of existing international legal instruments in the fight against piracy we have to make clear that maritime violence is also a political problem.

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1 The International Chamber of Commerce (ICC) is operating the International Maritime Bureau (IMB), based in London, with its Piracy Reporting Centre (PRC) based in Kuala Lumpur/Malaysia. The annual report 2008 of the IMB lists 293 acts of piracy, 889 seamen taken hostage, 11 killed and 21 missing; for past and subsequent reports see: www.icc-ccs.org.
1 Piracy in a Political Context

A “pirates’ paradise” like the Gulf of Aden can only develop when weak States (“failed States”), lawless societies, political disorder and impoverishment of the populations coincide. The chaos on land is fueled by political and economic instability and the proliferation of weapons. Consequently there is no coastal State control over adjacent seas. When it is impossible to earn money decently, then the unemployed fisherman may become a pirate and the jobless teacher an interpreter for ransom negotiations. Even more so, it may be argued, the poor fisherman of Somalia may turn into a pirate when he sees foreign fishing fleets exploiting the living resources of the 200 mile zone of Somalia, including its rich tuna stocks, while unidentified vessels are dumping illegal waste. It is from these origins that piracy off Somalia turned into real big business of organized crime. Anarchy on land easily leads to piracy at sea.

The community of States, including the UN, the African Union and not to forget the rich Arabian oil states allowed chaos to develop in Somalia for over 18 years now. Today the world is confronted with the consequences of bad governance and the international shipping community has to pay the bills. In other words: a political solution on land has to be found to eliminate piracy. Unfortunately, so far no political concepts are at hand. Navies and coast guards can deal only with some of the worst manifestations. They cannot solve the basic problem.

Moreover, piracy is part of a larger problem which can best be named “maritime violence”. Although this term is not (yet) established in international law, it illustrates a growing variety of illegal acts at sea including piracy, armed robbery, slave trade, illegal migration, trafficking in human beings, illicit drugs, international terrorism, transnational organised crime, illegal movement of nuclear, chemical, biological and materials as well as illegal disposal of waste at sea.

Readers should be aware that the United Nations Convention on the Law of the Sea (UNCLOS), in force since 1994 and binding upon 158 parties, is largely regarded as the “constitution of the oceans”. Unfortunately, the section on piracy is full of gaps regarding counter-measures and other security aspects. Domestic law may offer some rules for these crimes under the criminal and police codes of individual States but national law cannot cope with the international dimension.

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4 UNCLOS member states are 157 States and the European Community, see: Law of the Sea Bulletin no. 68, 2009: 1.

5 For the text and current developments of UNCLOS, see: www.un.org/Depts/los/index.htm (accessed 15 September 2009); all articles mentioned hereinafter without further indication are articles of UNCLOS.