e-RG

Electronic Resource Guide

International Piracy

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This page was last updated July 31, 2014.

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I. Introduction

The phenomenon of high seas piracy in the twenty-first century has produced a voluminous literature in a short period. Nonetheless, a number of key phases and trends can be identified. In the period 2004–2006 the major cause of concern for maritime piracy was in the Straits of Malacca and Singapore between Indonesia, Malaysia and Singapore. A number of factors contributed to the decline of piracy in this region thereafter. These included the Boxing Day tsunami of 2004 (credited with destroying many of the small craft local pirates relied upon),

peace in Aceh province and an increase in law-enforcement cooperation among the affected littoral states encouraged by the International Maritime Organization. Much of the "piracy" in this region actually occurs within territorial waters and is not therefore piracy in the strict international law sense.

From 2003-2004 onward, there was a significant increase in pirate attacks off Somalia. This form of piracy focused on hijacking vessels and holding the crews to ransom. The boom in Somali hostage-taking piracy resulted from several factors: the development of an efficient business model and supportive local infrastructure; a collapse in government and policing in Puntland, the region of Somalia where most piracy is based; and a shift towards the use of mother ships allowing Somali pirates to attack further out to sea.[1] This generated an unprecedented international response, seeing the deployment of numerous national and multinational naval missions to the region. The activities of Somali pirates, however, also proved highly adaptable. As the Gulf of Aden became better patrolled, Somali pirates proved themselves capable of capturing vessels far out into the Indian Ocean instead. Successful Somali pirate attacks rapidly escalated in 2009 before dramatically declining over the course of 2012 to reach negligible levels in 2013.

This rise and fall is attributable to a number of factors. International cooperation in response to Somali piracy has been remarkable. A variety of national and multinational missions patrol the high risk waters of the Indian Ocean, including missions organized under NATO and European Union. These efforts are informally coordinated by a number of processes, most prominently the multi-naval shared awareness and deconfliction (SHADE) meetings. Well-documented roles have also been played in the region by the Contact Group on Piracy off the Coast of Somalia, the United Nations Office on Drugs and Crime and the International Maritime Organization – among many others – in building coastal state law enforcement and prosecution capacity. Such efforts have increasingly led to direct engagement with the government of Somalia and authorities in various territorial entities within Somalia (principally Puntland and Somaliland). This probably represents the most concerted international effort to stabilize the country since the collapse of the Barre regime in 1991. A series of Security Council resolutions (stretching from resolution 1814 in 2008 to resolution 2125 in 2013) has provided a backdrop to these efforts. These resolutions have, inter alia, provided the legal basis for counter-piracy operations within Somalia's territorial sea and within its land territory.

[1] See: D. Guilfoyle, Somali Pirates as Agents of Change in International Law-making and Organisation, 1(3) Cambridge Journal of International and Comparative Law 81, 84 (2012).

Nonetheless, perhaps one of the most effective measures in curtailing the success of Somali pirates has been improved shipboard security. This has been promoted through the shipping industry itself with the cooperation of various other actors including the International Maritime organization. Measures to enhance shipboard security have principally taken the form of a document called Best Management Practices[2] which provides guidance on the means of making a ship more resistant to pirate attack. A related, and controversial, development has been the increasing use of private contracted armed security personnel to guard against pirate attack and (less frequently) the deployment of marines by a flag State to serve as Vessel Protection Detachments (VPDs). The use of VPDs sparked a major incident between India and Italy in the *Enrica Lexie* incident of 2012 when Italian marines shot Indian fishermen, having mistaken them for pirates.

With the relative decline of Somali piracy since 2012, there has been increasing interest in maritime violence and piracy off West Africa and particularly Nigeria. However, much of this activity occurs either in territorial waters or internal waters and is therefore not strictly piracy as defined by international law. The origins of much of maritime violence in the Gulf of Guinea lie with various insurgent and secessionist movements in Nigeria, and usually involve stealing cargoes from oil tankers rather than ransoming crews as hostages. (However, two Americans were kidnapped off the coast of Nigeria from an oil platform supply vessel in 2013.)

A lively debate has also resurfaced in the literature as to whether political protestors can ever be considered "pirates". This was particularly prompted by the holding in *Cetacean Research Institute v. Sea Shepherd Conservation Society*[3] that violent actions on the high seas directed from one vessel against another can constitute piracy irrespective of motive.

II. Historical Context

One of the difficulties in discussing the history of the law of piracy is the lack of consistency in the use of the term, a question comprehensively studied by Alfred Rubin.[4] In short, there is little

[2] BMP 4: Best Management Practices for Protection Against Somali Based Piracy (2011), *available at* http://www.mschoa.org/docs/public-documents/bmp4_low_res_sep_5_2011.pdf.

[3] United States Court of Appeals for the Ninth Circuit, No. 12-35266, Amended Opinion of May 24, 2013, 107 AJIL 666 (2013), http://cdn.ca9.uscourts.gov/datastore/general/2013/05/24/12-35266_Amended_Opinion.pdf.

[4] Alfred P. Rubin, The Law of Piracy, revised 2nd ed., Brill (1998). The first edition was published in 1988 as volume 63 of the U.S. Naval War College International Law Studies, *available at* http://usnwc.edu/Research---Gaming/International-Law/New-International-Law-Studies-(Blue-Book)-Series/International-Law-Blue-Book-

consistency among the sources as to whether the term pirate is being used: as a mere term of rhetorical condemnation; to distinguish other legal categories (such as privateers or insurgents); to refer to a crime at international law; or to refer to a crime at national or municipal law.

At the beginning of the twenty-first century piracy is best considered a national law crime for which international law provides a permissive rule of jurisdiction. Certainly, the response to Somali piracy has been one of prosecution before national courts under modern statutory enactments. There has been no serious attempt to establish an international piracy tribunal. There has been some judicial interest at the national level in enquiring into the meaning of piracy at international law if only to examine the compatibility of national laws and prosecutions with the provisions of UNCLOS.[5] However, it appears generally accepted that the function of the international law of piracy is now to permit prosecutions by forum States lacking any conventional nexus to the crime rather than to directly criminalize conduct under international law in the manner of, for example, war crimes.

Historically, the picture is much more confused. Many treatments of the subject tend to conflate very distinct historical époques and practices without appreciating that the concept of piracy may have different meanings in different times or places. For example, while Cicero is often quoted for the proposition that "pirates are the enemy of all mankind" it is quite clear that in ancient Rome piracy was not a crime *per se*. It was, rather, a special branch of the laws of war. Similarly, the meaning of piracy in the 17th, 18th and 19th centuries was bound up in very different ways with the laws of war. Broadly, the question was one of state sanction. At a time before States generally had large standing navies, it was convenient for major powers to have a body of licensed privateers that they could incorporate into navies in times of war. Thus, a privateer was a state-licensed actor. It was a defense to a charge of robbery on the high seas (piracy) that one held a valid commission from a State (see, for example, *US v. Hutchings*[6] and *US v. Klintock)*.[7]

Codification efforts in the twentieth century were intended to impose some sort of order on the chaos caused by divergent expert opinion and the lack of jurisprudence resulting from the

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Articles.aspx?Volume=63 and http://archive.org/details/lawofpiracy63rubi.

[5] For example in *US v. Ali*, 718 F.3d 929 (D.C. Cir. 2013), the court held that the US assertion of jurisdiction over those who aid and abet piracy from within a State's territorial jurisdiction is permissible as it falls within the universal jurisdiction over acts of "intentionally facilitating" piracy granted under Art. 101(c), UNCLOS, *available at* http://www.cadc.uscourts.gov/internet/opinions.nsf/16778EF07896FFB085257B8700507F47/$file/12-3056-1440653.pdf.

[6] Brunner, Col. Cas. 489; 2 Wheeler, Cr. Cas. 543 (Circuit Court of Virginia, 1817).

[7] 18 U.S. 144 (1820), *available at* http://supreme.justia.com/cases/federal/us/18/144/case.html.

relatively few piracy cases decided before national courts. Broadly, this codification effort involved three phases. First, the League of Nations Committee of Experts for the Progressive Codification of International Law examined the question in 1926. Ambassador Matsuda prepared a brief set of draft articles (lacking footnotes or scholarly references) for discussion, which provoked numerous government responses and a brief debate in and report from the Committee of Experts itself, before the topic was dropped as not being of sufficient practical interest. The report nonetheless had an influence on the Harvard Research in International Law draft convention on piracy in 1932 (accompanied by a voluminous commentary consisting in the main of extensive quotes from commentators and primary sources).

The Harvard Research in turn influenced the International Law Commission's draft articles on the high seas, initially produced by special rapporteur J.P.A. François. These draft articles were largely reproduced in first the Geneva Convention on the High Seas 1958 and then the UN Convention on the Law of the Sea 1982. While the latter is now generally accepted as stating the applicable customary international law as regards both the definition of piracy and the extent of permissible action by States to repress it, looking to the work of the ILC (or the Harvard Research, or the League of Nations) for the original meaning of the terms used may often be an exercise in frustration because the intended meaning of the key terms may vary between codifiers. That is, it is not always apparent that each successive codification effort fully appreciated the intentions of previous codifiers or the choices or distinctions made. Any codification effort, in particular, has to be understood against the legal controversies of the day which obviously vary greatly over time. Nonetheless, any historical analysis of the treaty texts usually begins with these sources.

III. Treaties

Several treaties with wide international acceptance have relevance to piracy:

International Convention against the Taking of Hostages (1979)

http://www.un.org/en/sc/ctc/docs/conventions/Conv5.pdf

UN Convention on the Law of the Sea (1982), articles 58(2), 100-107, 110

http://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm

Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988) and its 2005 Protocol

http://www.un.org/en/sc/ctc/docs/conventions/Conv8.pdf

The consolidated text of the 1988 SUA Convention as modified by the 2005 Protocol is available at:
https://www.unodc.org/tldb/en/2005_Cons_Version_Conv_and_Prot_Maritime_Navigation.html

IV. United Nations

Unless otherwise noted, all documents in this section may be found at:

http://www.un.org/depts/los/piracy/piracy_documents.htm

A. Security Council Resolutions

Since 2008, the UN Security Council has adopted a number of resolutions that relate to international piracy. The most relevant resolutions: (Note – Resolutions 2018 and 2039 address piracy in the Gulf of Guinea; the remainder deal with piracy off the coast of Somalia)

1816	2 Jun 2008
1838	7 Oct 2008
1846	2 Dec 2008
1851	16 Dec 2008
1897	30 Nov 2009
1918	27 Apr 2010
1950	23 Nov 2010
1976	11 Apr 2011
2015	24 Oct 2011

2018	31 Oct 2011
2020	22 Nov 2011
2039	29 Feb 2012
2077	21 Nov 2012
2125	18 Nov 2013*

* http://www.un.org/en/sc/documents/resolutions/2012.shtml

B. Statements of the UN Security Council President:

S/PRST/2010/16 25 Aug 2010*

S/PRST/2012/24 19 Nov 2012

* http://un.org/en/sc/documents/statements/2010.shtml

C. Letters from the UN Secretary-General to the Security Council:

S/2011/30 25 Jan 2011

Attachment: Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia

S/2012/45 19 Jan 2012

Attachment: Report of the United Nations Assessment Mission on Piracy in the Gulf of Guinea

S/2012/177 26 Mar 2012

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Attachment: Compilation of Information from Member States on Measures They Have Taken to Criminalize Piracy

D. Reports of the UN Secretary-General:

S/2010/394	26 Jul 2010
S/2010/556	27 Oct 2010
S/2011/360	15 Jun 2011
S/2011/662	25 Oct 2011
S/2012/50	20 Jan 2012
S/2012/783	22 Oct 2012*
S/2013/623	21 Oct 2013

* http://www.un.org/en/sc/documents/sgreports/2012.shtml

V. International Maritime Organization

Piracy and Armed Robbery against Ships

Unless otherwise noted, all documents in this section may be found at:

http://www.imo.org/OurWork/Security/PiracyArmedRobbery/Pages/Default.aspx

A. General Guidance

MSC.1/Circ.1233	15 Jun 2007
CL2933	23 Dec 2008

MSC.1/Circ.1302	16 Apr 2009
MSC.1/Circ.1332	16 Jun 2009
MSC.1/Circ.1334	23 Jun 2009
MSC.1/Circ.1333	26 Jun 2009
SN.1/Circ.281	3 Aug 2009
Res.A.1025(26)	18 Jan 2010
MSC.1/Circ.1390	9 Dec 2010
CL3164	14 Feb. 2011
CL3180	17 May 2011*
Res.MSC.324(89)	20 May 2011
MSC.1/Circ.1404	23 May 2011
MSC.1/Circ.1339	14 Sep 2011
Res.A.1044(27)	20 Dec 2011
MSC.1/Circ.1444	25 May 2012
CL3394	15 Aug 2013

* http://www.un.org/depts./los/piracy/circular_letter_3180.pdf

B. Private Armed Security

Circulars of the Maritime Safety Committee providing interim guidance on the use of privately contracted armed security personnel:

MSC-FAL.1/Circ.2	22 Sep 2011
MSC.1/Circ.1405/Rev.2	25 May 2012
MSC.1/Circ.1406/Rev.2	25 May 2012

MSC.1/Circ.1408/Rev.1	25 May 2012
MSC.1/Circ.1443	25 May 2012

Responses by States to questionnaire on requirements related to privately contracted armed security personnel.

C. Long-Range Identification and Tracking (LRIT) Information Distribution Facility (IDF)

A secure satellite-based system for tracking ships.

D. Piracy Reports

Monthly reports on acts of piracy and armed robbery against ships.

E. Djibouti Code of Conduct

Code of Conduct Concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden; adopted 29 Jan 2009.

F. Code of Conduct for West and Central Africa

Code of Conduct concerning the prevention of piracy, armed robbery against ships and illicit maritime activity; adopted 25 Jun 2013.

VI. National Legislation

For a database on national legislation maintained by the United Nations Division for Ocean Affairs and the Law of the Sea, see:

http://www.un.org/depts/los/piracy/piracy_national_legislation.htm

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VII. National Court Decisions

The United Nations Interregional Crime and Justice Research Institute (UNICRI) maintains a database on maritime piracy cases in domestic courts:

http://www.unicri.it/

VIII. Contact Group on Piracy off the Coast of Somalia

The CGPCS was established 14 Jan 2009 pursuant to UN Security Council Resolution 1851 to coordinate actions to prevent piracy off the coast of Somalia. It includes over 60 countries and organizations.

http://www.thecgpcs.org/

See the New York Declaration, signed by members of the CGPCS 9 Sep 2009.

IX. Oceans Beyond Piracy

OBP is a project of the One Earth Future Foundation, a non-profit organization in the United States. It seeks to develop a response to maritime piracy through stakeholder involvement.

http://oceansbeyondpiracy.org/

X. International Chamber of Shipping

An international trade association for merchant ship owners and operators.

http://www.ics-shipping.org/

XI. International Chamber of Commerce

The ICC's Commercial Crime Services (CCS) includes the International Maritime Bureau, which manages the IMB Piracy Reporting Centre.

http://www.icc-ccs.org/piracy-reporting-centre

XII. ReCAAP

The roles of the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP) Information Sharing Centre, Singapore, include exchanging information among Contracting Parties on incidents of piracy and armed robbery as well as support for capacity building efforts of Contracting Parties and for cooperative arrangements.

http://www.recaap.org

XIII. Other Documents

Council of Europe Parliamentary Assembly Resolution 1722, adopted 28 Apr 2010: Piracy – A Crime and a Challenge to Democracies

http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/ERES1722.htm

House of Commons Foreign Affairs Committee Report on Piracy off the Coast of Somalia, 20 Dec 2011

http://www.publications.parliament.uk/pa/cm201012/cmselect/cmfaff/1318/1318.pdf

Second Istanbul Conference on Somalia Final Declaration, issued 1 June 2012

http://mfa.gov.tr/the-second-instanbul--conference-on-somalia_-final-declaration_-1-June-2012_-istanbul.en.mfa

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Final Statement of the Second High-Level Public-Private Counter-Piracy Conference, issued in Dubai 28 Jun 2012

http://piracy-law.com/2012/06/29/in-brief-second-international-counter-piracy-conference-concludes-in-dubai/

Last updated July 2014

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