Establishing an Effective Mechanism of the Jurisdictions over Piracy

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Abstract—Pirates are Hostis Humanis Generis, or enemies of all mankind. In recent years piracy frequently occurred off Somalia coast. The world transport is threatened by the piracy. The international community must find the way of how to effectively combat and punish acts of piracy. At present, the lack of long-term mechanism of the jurisdictions over piracy is responsible for the problem. First, the mechanism is based on the piracy concept and the piracy jurisdictions. United Nations Convention on the Law of the Sea (UNCLOS), as the Charter of Sea, is widely accepted by States. However, the definition and jurisdictions of piracy in UNCLOS are defective. The establishment of the mechanism depends on the improvement of piracy articles provided by the convention. Second, specifying the rules and judicial system which enforce and implement these jurisdictions is also a crucial part of the mechanism.

Index Terms—UNCLOS, piracy, jurisdiction, tribunal.

I. INTRODUCTION

Ocean is the most important shipping route in the world. About 80 percent of all global freight is shipped by sea, and some twelve to fifteen million containers are on the world's oceans at any given time. [1] Piracy is an old problem, but it revived over the past decade. Recently, Somali pirates have seriously jeopardized the safety of maritime traffic. In late 2008 and early 2009, pirates hijacked a Ukrainian ship carrying battle tanks and arms to Kenya, a Saudi tanker filled with crude oil, a chemical tanker, and numerous U.N. ships carrying international relief supplies. Pirates also fired on an American-owned cruise liner and even seized one of the few U.S.-flagged ships on the high seas. [2] With the tide of Somalia piracy, international community has to pay much more attention to anti-piracy and prosecuting pirates. The Gulf of Aden is located in the world's busiest crude oil sea lane. Somali pirates are enormously harmful to the world. States recognized that the extant international regime is insufficient to respond the piracy. The UN and states have cooperated to take the measures for the problem. There are gaps and overlaps in the provisions of the international agreements relevant to piracy. This will cause the plight of applicable law. Some legal measures are limited to given water, and some are temporary. The international community should establish a long-term and effective anti-piracy mechanism to prevent piracy. This mechanism is not only based on the integration among international law rules, but also based on the adoption of international law rules in the domestic law. Moreover, the specific tribunals that prosecute pirates should be introduced in this mechanism.

This piece of article consists of three parts. Part I describe the definitions of piracy in important international treaties, and discuss the contradictions among these treaties and between international law and domestic law. Part II outlines the jurisdictions over piracy, and explains the flaws in UNCLOS. Part III considers the specific tribunal that prosecutes pirates. The Conclusion is concerned with uniformity in the rules against piracy and the competent tribunal that fairly judge pirates.

II. THE DEFINITIONS OF PIRACY

Piracy jure gentium was defined in article 15 of the High Seas Convention1958 and reaffirmed in the United Nations Convention on the Law of the Sea (UNCLOS), 1982. The following definition of piracy is contained in article 101 of the 1982 UNCLOS:

“Piracy consists of any of the following acts:
1) Any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
- On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
- Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
3) Any act inciting or of intentionally facilitating an act described in sub-paragraph (a) or (b).”

The Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA) defines piracy in the Article 3. SUA includes all kinds of crimes at sea, such as hijacking, acts of violence, and terrorism and so on. SUA applies in territorial waters and internal water. [3] The Resolution A.1025 (26) adopted on 2 December 2009 at the 26th Assembly Session of the International Maritime Organization (IMO) includes piracy and armed robbery against ships. The Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP) follows the IMO bipartite definition of piracy. [4]

UNCLOS has been ratified by 166 parties, which includes 163 member states of the United Nations. [5] As of 2013, SUA has 161 state parties, which includes 159 UN member states. [6] ReCAAP has been signed by the Southeast Asia
States, which do not accede to SUA. The United States does not ratify UNCLOS, while it approved SUA. Somalia is a signatory of UNCLOS, but it is not a signatory of SUA. UNCLOS is regarded as customary international law, recognized by all over the world. SUA aims to counter terrorism. ReCAAP is the first regional government-to-government agreement to promote and enhance cooperation against piracy and armed robbery in Asia. [7] Compared to SUA provisions, the definition of UNCLOS has some shortcomings. Michael Bahar, a U.S. Navy piracy expert, pointed out three key problems with this definition of piracy: 1) The limitation of piracy to the high seas; 2) Confusion deriving from the "for private ends" provision; and 3) The two-ship requirement. [8]

In terms of the principle of territorial sovereignty, state has the exclusive right to make laws on piracy within its internal water and territorial sea. Many states have their domestic legislations on piracy. For instance, China has no specific anti-piracy legislation but rather prosecutes piracy under its general Criminal Code. China’s general Criminal Code incorporates any crime that is defined in a Chinese-ratified international treaty. In contrast, Australia has incorporated all of UNCLOS’s piracy provisions into Part IV of its Crimes Act of 1914. Similarly, the United States has enacted the majority of the provisions from the SUA in 18 U.S.C. § 2280. [9] Some states do not even have national laws that criminalize piracy.

The definitions of piracy vary from convention to convention, state to state, and water to water. The different definitions come into the problem of the applications of laws. First, Overlapping provisions on piracy provided in these conventions will cause the conflicts among treaties. Despite the principle of lex posterior derogat priori, UNCLOS is acknowledged to be customary international law, otherwise other conventions are not. As far as the state joined in two conventions, the applications to different conventions will result in the conflicts of law. Once such state involving in a pirate case, it will be challenged by the choice of the application of convention. The same piracy may be identified as different crime in different member states. As far as the same piracy happened on high sea or territorial sea, it may be regarded as different crime. Second, the different crimes of piracy regulated in states result in the conflict between international law and national law. The piracy defined in UNCLOS restricts to acts on the high seas. Piracy occurs in different waters, with different legal consequences between international and national laws. If a third state party try the pirates transferred by other state under universal jurisdiction, it will face the problem of whether national law or international law will apply to the case. The conviction and sentence of pirates is determined by the applicable law.

It is difficult for the judge to judge a robbery on the high sea for political end or private end. The political end is related to a state’s internal affair. If the piracy is a crime of robbery and rebellion competing, any other judge, but the judge who is in the insurgency state, has the right to judge a crime for political end. Whatever the purpose, the danger of the plunder at sea is the same.

Because of the flaws in the definition of UNCLOS, it is necessary to amend it. On the one hand, the restrictions to piracy should be revoked, and the scope of acts identified as piracy should be widened; on the other hand, the definitions of piracy should be unified. The best way to resolve the conflict of laws is to make uniform law. First, the contracting states make sure the definition of piracy in national law should be consistent with the definition of UNCLOS. Second, these states should criminalize the acts of piracy in national law in order to prosecute pirates.

III. THE JURISDICTIONS OVER PIRACY

A. Territorial Jurisdiction over Piracy

Territorial jurisdiction refers to that the country has jurisdiction over persons and things within its territorial boundary. For the coastal states, the exercise of territorial jurisdiction is bounded by its territorial sea. Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines. [10] Territoriality is the principal ground for the exercise of criminal jurisdiction. The territorial concept encompasses not only crimes committed wholly on the territory of a state but also crimes in which only part of the offence has occurred in the state. [11]

Piracy most frequently occurs in the territorial sea. Pirates and pirate ship depend on supply provided by ports. It is the most critical for prohibiting piracy that coastal states exercise territorial jurisdiction. However, Somalia lacks a functional government. Pirates take advantage of the territorial waters to plunder passing ships. Pirate attacks succeed easily in the territorial waters without patrol. On the one hand, Somalia sovereignty can not be infringed; on the other hand, Somalia pirates prevail, and the other states cannot exercise territorial jurisdiction over piracy in Somalia territory. The Somali Transitional Federal Government (TFG) and other semi-autonomous regions within Somalia are actively engaging with antipiracy efforts. It also actively cooperated with UN action to combat piracy. The most direct cause for the plague of Somalia piracy is that Somalia maritime territory is beyond the control of the central government. Therefore, the U.N. Security Council intervened in the waters off Somalia waters to maintain order. This requires excellent balance Somali territorial rights and international public interest. The Security Council passed five such resolutions in 2008. The ultimate resolution, passed on June 2, 2008, invoked Chapter VII to allow Task Force vessels to:

1) Enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; and

2) Use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to suppress acts of piracy and armed robbery [12].

This grant of permission into Somali waters lasted for six months and came with the provisional Somali government’s consent. While respecting territoriality of Somalia, the UN Security takes actions to fight pirates. The arrested pirates...
will be transferred to a third state to try. However, the resolutions only prevent piracy ad hoc. Somalia piracy may vanish until Somalia restore state functions and resume the exercise of territorial jurisdiction in the territorial water. The following problem to be solved is what law applies to prosecuting the pirates robbed in Somalis territorial sea. Somalis is a signatory of UNCLOS, but UNCLOS only cover high sea. UNCLOS is not effective in these pirates. Somalia does not accede to SUA, so SUA does not apply to the piracy either.

The status of the exclusive economic zone is special area, neither national territory nor high sea. The exclusive economic zone (EEZ) shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. [13] UNCLOS provides the coastal State right of hot pursuit in the EEZ. [13] The EEZ is extraterritorial area. UNCLOS does not entitle the coastal State territorial jurisdiction. It is not clear that the coastal State exercise what kind of jurisdiction over piracy occurred in the EEZ. We can not find answer that whether other states have right to capture pirates in the EEZ.

B. National Jurisdiction over Piracy

State has the right of jurisdiction over a person based on his or her nationality, regardless of his or her living at home or abroad [14]. Pirates are always considered to be non-state actors. The pirates who conducted on the high sea are presumed to be non-state actor in the light of universal jurisdiction over piracy in UNCLOS. Many pirates are in fact fishermen, and piracy is not a full-time job. For all other states, it is the most convenient way to transfer the pirates to their own states for trial. The obstacles, which Somalia exercise personal jurisdiction over the pirates, exist. First, regarding all other states, it is the most convenient way to transfer the pirates to their own states for trial. Because of Somalis as a failed state, this way is not plausible. Second, the personal jurisdiction over piracy is determined by the status of the pirates. It is difficult for the capturing states to identify the status of the pirates. The states should distinguish the pirates from refugees; otherwise they will confront human rights issues. For example, Britain reportedly instructed its ships not to capture pirates they encountered because they could claim asylum under EU human rights law once on board a British vessel, and certainly if brought to Britain for trial. If Somalia pirates are regarded as refugees, Somalia will not be allowed to exercise personal jurisdiction over them. The Convention relating to the Status of Refugees (CRSR) provides for the principle of non-refoulement [15]. A refugee's right to be protected against forcible return, or refoulement, is set out in the 1951 Convention relating to the Status of Refugees[16]. The compliance with the rule also results in many pirates with impunity.

C. Passive Personal Jurisdiction over Piracy

A state may claim jurisdiction to try an individual for offences committed abroad which have affected or will affect nationals of the state. The victims attacked by pirates include flag states, ship owners, crew members, and cargo from all over the globe. The state exercising passive personality jurisdiction over piracy may help protect he interests of the victims, and their loss may be compensated. For example, in 2009, a U.S. District Court tried a suspected pirate involved in the dramatic hijacking of the M/V Maersk Alabama. [17] In April 2010, American prosecutors charged eleven alleged pirates that, probably by mistake, made a ridiculous attempt to hijack two warships of the United States Navy. In May 2010, a Yemeni tribunal sentenced to death six pirates that killed two people during the seizure of an oil tanker, condemning six others to ten years’ imprisonment. In June 2010, a Dutch Court condemned five pirates who hijacked a Dutch vessel to five years’ imprisonment. [18] The states, which meet such jurisdiction, need to co-ordinate with their own navy or other states’ navies.

D. Universal Jurisdiction over Piracy

Universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction. Universal jurisdiction derives from Grotius in 1925 “War and Peace” - extradite or prosecute (aut dedere aut punier) [19].

The pirates always have been regarded as a public enemy of all mankind. Universal jurisdiction of pirates has become an international custom. Under the doctrine of universal jurisdiction, which for centuries applied only to piracy, any nation can capture and try pirates it finds on the high seas. Article105 of the Convention provides:

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

The provision provides states a basis for the exercise of universal jurisdiction. In practice, the capturing states based on universal jurisdiction take two methods to deal with Somalia piracy. One method is to set the pirates free, and the other method is to transfer the pirates to a third state, which is not connected with the case, for trial.

Two key reasons explain these state conducts. One reason is that states have no corresponding provisions for exercising universal jurisdiction. For example, Jurisdiction in the United States over a suspected pirate or act of piracy historically required some nexus. Even one of the United States’ first antipiracy statutes provided no jurisdiction for robbery at sea without links to U.S. territory or citizens. [20] The Danish Navy captured the flagship Absalon and detained ten suspected armed Somalia pirates who had attacked merchant ships that were not Danish. The Danish authorities had nowhere to take them because Denmark could only exercise national criminal jurisdiction if the pirates had attacked a Danish ship or Danish citizen. Instead, Denmark looked to other states to conduct the prosecution, but more complications arose, such as insufficient evidence for those states to convict. As a result, Denmark had no choice but to
release the pirates. The other reason is that the capturing states transfer the pirates to neighbor states; otherwise they transfer the pirates to their own municipal courts for prosecution. Considering the great expense and significant legal and logistical challenges in transporting pirates, evidence and witnesses to appear in their courts, few states would do so [21].

E. The Discussion

Several flaws in UNCLOS partly exacerbatethe rampant piracy. In contrasted with UNCLOS, SUA provides more provision.

First, the jurisdiction over piracy in UNCLOS only applies to the offense occurred on the high sea. The piracy occurred in the EEZ should be clarified. However, SUA applies in territorial water.

Second, UNCLOS only provides for universal jurisdiction, lacking other jurisdictions. Under SUA, a state has jurisdiction over an offense only if it is committed against a ship flying that state’s flag, in that state’s territory, or committed against a national of that state. The U.N. resolution inspires us to expand jurisdictions in UNCLOS. It says:

All states, and in particular flag, port and coastal States, States of the nationality of victims or perpetrators of piracy and armed robbery, and other States with relevant jurisdiction under international law and national legislation, to cooperate in determining jurisdiction, and in the investigation and prosecution of persons responsible for acts of piracy and armed robbery off the coast of Somalia.

If the provisions of jurisdiction in UNCLOS expand, member states which connect with piracy have rights to extradite pirates. It is possible to appear competing jurisdictions for pirates. Modern practice and theory suggests a state with some connection to the offender or conduct should prosecute over a state with no connection.

Third, the States Parties of UNCLOS should have a corresponding legislation of universal jurisdiction. When the third state which has no connection with piracy adjudicates the case, it should have the right to exercise universal jurisdiction, and it should have related criminal statutes to apply the case.

Finally, the principle of extradite or prosecute should be introduced in UNCLOS. The principle shall impose member state an obligation to prosecute or extradite. If the principle is effective among member states, it will end impunity for piracy. The third states shall prosecute the pirates under UNCLOS as the state prosecutes the pirates in the territorial sea. In this regard, SUA is superior to UNCLOS. SUA imposes an obligation to prosecute pirates on member states.

IV. THE TRIBUNAL FOR PIRACY

A. No International Organizations Have an Authority to Exercise Jurisdiction over Piracy

International Maritime Organization, IMO, is an intergovernmental international organization. The agency has issued a series of anti-piracy advice and guidance, and intelligence information about anti-piracy at sea. [22] International Maritime Bureau, IMB, is the branch of the International Chamber of Commerce; the agency has set up the center of piracy report, and released the pirates reports to help monitor and combat piracy. [23] Comité Maritime International, CMI, an international non-governmental organization, makes maritime rules unified. [24] Although these international organizations have no jurisdiction over piracy, they can provide evidence to the judiciary.

B. No International Tribunals Have Jurisdiction over Piracy

International Court of Justice (ICJ) is an agency of the United Nations. Under ICJ, only States may be parties in cases before the Court. [25] ICJ has no jurisdiction over piracy unless the piracy implicates the state of victims in diplomatic protection. The International Criminal Court (ICC), governed by the Rome Statute, is the first permanent, treaty based, international criminal court established to help end impunity for the perpetrators of the most serious crimes of concern to the international community. [26] ICC has jurisdictions over serious international crimes, including genocide, crimes against humanity, war crimes, and the crime of aggression. [27] The harmfulness of these four crimes for the international community is far beyond the crime of piracy. The International Tribunal for the Law of the Sea (ITLOS) is an independent judicial body established by the United Nations Convention on the Law of the Sea to adjudicate disputes arising out of the interpretation and application of the Convention. ITLOS has no criminal jurisdiction [28].

C. Current Practices of Trial for Piracy

As mentioned above, a few cases of piracy have come before the court of capturing states. Almost all pirates have been transferred to the third state court. In 2006, the United States sent a group of pirates captured by the USS Churchill to Kenya for trial in a closely watched test case. [29] Hereafter, Kenya signed agreements with the US, Britain, the EU, Denmark, Canada, and China whereby it will detain and try suspected pirates in its courts in Mombasa. As of October 2009, Kenya was host to about 123 piracy suspects, ten of whom have been tried and sentenced. Because of Kenyan overburdened judicial system, a similar agreement has been signed with the Republic of the Seychelles. Mauritius and Tanzania also have announced their willingness to prosecute pirates.

D. The Discussion

An ideal forum for a piracy trial is concerned by some jurists. The national versus international debate arouses. Some scholars argued that national court is the appropriate forum for a piracy trial. The trial in nearby state is optional not only for collecting evidence but also for taking into account the ideological background of pirates. Other scholars proposed international tribunal, and three forms of tribunal have been advised. A suggestion is to establish permanent International Piracy Tribunal with special piracy jurisdiction. [30] The two approaches are to use the current international tribunals. One is to expand ICC jurisdiction to piracy, [30] and the other is to expand ITLOS to piracy.

Due to the problems of judicial system, national courts
have been criticized by some scholars. On account of two reasons, the commentators claim that international tribunal has some advantages over national tribunal. First, it is a question that national court has sufficient capacity to adjudicate Somalia pirates. The massive Kenyan caseload and Kenya’s inexperienced legal system are reviewed. While Kenya’s legal system is superior to that of many of its neighbors, it still has a huge backlog of cases and rampant corruption. Kenyan prisons are at best grossly overcrowded. [30] Second, the problem of human rights during the proceeding attracts more attention. The defendants alleged that they were tortured and denied religious privileges by their captors. [31] Some commentators have criticized Kenya for failing to treat suspect pirates humanely and for denying them the kind of rights associated with fair trial processes.

Although the trial in African court can not meet all requirements of a favorable judicial system, it is the most feasible and economic way. If international tribunal has the jurisdiction over piracy, more legal challenges would be encounter. The establishment of a new international tribunal spends needs time and fund. Some states have financed Kenya millions dollars to try piracy cases. It is not necessary to build another similar tribunal. International tribunal is based on international treaty. The states involving in piracy may not accede to the treaty. For example, the Rome Statue provides: The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute. However, the United States and Somalia have not signed ICC. The obstacle cannot be overcome. ITLOS has jurisdiction over any dispute concerning the interpretation or application of the Convention, and over all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal (Statute, article 21). Criminal tribunal and civil tribunal are two completely different independent systems. Two types of cases can not be tried by a court. ITLOS is close to civil tribunal or arbitral tribunal.

                 Compared with international tribunal, national tribunal has a few advantages. First, almost all states have their own appellate criminal court. Appellate Court decreases the likely errors in trial. It is fairer for the defendants. Second, the offenders will be jailed after they were convicited. International tribunal is not equipped with prison system. Finally, some states in African are Islamic, and their legal systems reflect homology. It is easier for nearby state court to respect the language and traditions and religious of pirates.

The prosecution of pirates in national tribunal is effective in fighting against piracy. On the basis of the IMB’s statistics, in 2008 successful attacks have been 38 percent of the attempted ones, while in 2009 the percentage has decreased to 22 percent. [32]The state based on universal jurisdiction to prosecute pirates must deal with two issues. The provisions of universal jurisdiction should be regulated in its municipal law. Regardless of conviction or jail sentence, the state should equally treat Somali pirates with its domestic pirates.

An international fund for anti-piracy should be found, which fill the cost of trial. The fund is composed of governments’ aid and merchants’ premiums. The merchants can buy the insurance of Somalia piracy.

V. Conclusion

In order to effectively counter piracy, it is necessary to establish a comprehensive mechanism of jurisdictions over piracy. As far as UNCLOS, it is necessary to renew the provisions of piracy. The goal is achieved through amendment to the provisions or additional UNCLOS protocol. Either way requires the adoption of States Parties. The definition of piracy should be applied to a wider range of sea. State can exercise more types of jurisdiction over piracy to avoid pirates’ impunity. By contrast, the trial in national tribunal is more efficient and expeditious. States can cooperate to solve the problems of national tribunal.

REFERENCES


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