



# Maritime Piracy: Nature, Impact and Legal Frameworks for Prosecution

Karen K. Clark<sup>1</sup>

Western Oregon University, USA

## Abstract

*Although recent cases of maritime piracy off the Somali coast have garnered a lot of media attention, little scholarly work has investigated the development of maritime piracy worldwide. This paper examines the legal framework that would allow for the prosecution of this international crime. Contemporary commissions of maritime piracy and their political, legal and economic contexts are reviewed in terms of how they affect the enterprise of private global shipping. The nature and impacts of this crime are reviewed. Finally, the reaction to this crime by the international community is discussed.*

Key Words: Maritime Piracy, Legal frameworks, Global shipping.

## Introduction

Maritime piracy is a form of larceny or grand theft and “one of the oldest international crimes” (Andersen, Brockman-Hawe, & Goff, 2009, p. 2). The 1982 United Nations Law of the Sea Convention (UNCLOS) defined it as “[a]ny robbery or other violent action for private ends and without authorization by public authority, committed on the seas...outside the normal jurisdiction of any state...without state authority, [with] private and not political intent” (page 61). Although acts of unlawful warfare and acts of insurgents and revolutionists have been defined as piracy by some national laws and by special treaties, they do not in most cases fall under the heading of piracy in terms of the law of nations. Classical piracy happens on the “high seas,” that is, not within the territorial waters of a nation-state. The IMB offers its definition: “the boarding of any vessel with the intent to commit theft or other crime and with the capability to use force in the furtherance of the act” (International Chamber of Commerce, 2004, pg 3). This definition, however, fails to distinguish between maritime robbery and piracy since it includes acts of interdiction and robbery that happen at port.

According to the domestic laws of various nations piracy may include any act on a ship that is not moored or anchored. But this definition is too broad. The UNCLOS definition puts piracy into a “high seas” context. Territorial water crime is a form of armed robbery. But it cannot be ascertained from IMB data how many of the reported piracy cases are

<sup>1</sup> Assistant professor, Department of Criminal Justice, Western Oregon University, 345. N. Monmouth Avenue, Monmouth, OR 97361, USA. Email: clarkk@wou.edu

armed robbery or the hijacking of vessels. According to Captain Pottengal Mukundan, Director of the IMB, a third definition specifies the seizure of a vessel that takes place in one body of water followed by the offloading of cargo in a second body of water. Mukundan calls this “shipjacking.” If a case occurs in more than one nation’s territory, then the country whose representatives apprehend the suspects must decide whether they have justifiable cause to remand the pirates or if they are required to repatriate them. The problem lies in the fact that often the country to which the pirates will be repatriated is unlikely to launch a criminal case against them.

The IMB, established by the International Chamber of Commerce in 1979, was founded to address maritime fraud. IMB officials noted that maritime piratical attacks were reported as far back as 1970. This led to the creation of the Regional Piracy Center, a specialized unit of the IMB whose purpose is to receive and monitor all reports of piracy.

In 1983, the Maritime Safety Committee (MSC), the International Maritime Organization’s (IMO) most senior technical body, addressed the issue for the first time, indicating that as piratical attacks had grown to such an extent that the situation was “alarming.” In April 1984 the MSC established definitions for piracy and armed robbery against ships. The Committee set up a reporting system and solicited reports on piracy submitted by member governments and international organizations on a consultative status. The goal was to determine locations of incidents and the scale of the problem.

The lack of precision in the IMB’s definition allows for disputes as to the actual rates of piracy. It is clear, however, that piracy has become an increasingly lucrative trade with each passing year. In 1996, 194 crewmembers were taken hostage by pirates carrying guns or knives. By 1997, that figure reached 400 (International Chamber of Commerce Report, January 1998). Regardless of which definition is applied, it is clear that maritime piracy has increasingly become a problem over the last thirty years.

Paradoxically, the issue of lack of precise definition is coupled with lack of literature on contemporary maritime piracy from a criminological perspective. The absence of a body of criminological literature on piracy has been indicated by Mueller and Adler.

We searched every conceivable library for an assessment of the problem of crime on the seas and for proposed solutions. Our search yielded many interesting books and articles, concerned with individual cases, incidents, epochs, and episodes. But world literature is devoid of any book that examines criminality on the oceans in its entirety...For reasons beyond our comprehension, explanation of crime has remained landlocked...Criminologists have neglected the criminality of that far greater portion of the world called oceans. Terrorism, once confined almost exclusively to land and air, stalks the waterways today. Insurance fraud, a minor risk in the past, appears to have increased tenfold in recent memory. Smuggling, always a problem on the oceans, has now turned deadly and so lucrative that it outstrips the sales volume of the world’s largest corporations. Espionage and sabotage on the waters have become daily events. The oceans, it seems are the New Frontier of the world’s mobsters, outlaws and pariahs (1985, pp.18-19).

Most people believe the problem of maritime piracy was resolved around 1800 with the advent of modern navies and growing international cooperation. But evidence from a variety of regulatory agencies indicates that maritime piracy persists as a problem in certain waterways in the world. The term “maritime piracy” invokes images of Black beard and Captain Kidd terrorizing the high seas, flying the Jolly Roger, and sailing in square-rigged wooden vessels. Mueller and Alder’s, *Outlaws of the Ocean* (1985) remains

the most recent academic publication on contemporary maritime piracy written from a criminological perspective. Piracy has been largely ignored by those who study transnational organized crime, global economies, and international transport policies

Bulletins and reports are published by agencies such as the International Maritime Bureau (IMB) as well as the International Maritime Organization (IMO - a United Nations specialized agency that is responsible for improving maritime safety and preventing pollution caused by ships). Additionally, various popular magazine and news sources such as National Geographic, Cable News Network (CNN), and Agence France Presse (AFP) report individual cases but they fail to provide a broader understanding of current piracy trends. Analyses of various maritime agency reports are often contradictory. Some have claimed that the rates of piracy dramatically increased in the early 1990s, followed by a drop by the mid-1990s. Others claim that the rates have steadily increased over the past 15 years. The one consensus that prevails is that piracy is becoming more violent. Since definitions fail to provide an adequate foundation for an understanding of global piracy, the crucial elements of what causes, stimulates, and sustains piracy are seldom if ever addressed. Merchant vessels do not want states to interfere with practices that have occurred in the world's oceans for centuries. Accordingly pressure on weaker states' natural resources as aggravated by global economics encourages crimes such as piracy.

### **Piracy and Global Agencies**

Although there are many contemporary accounts of piratical attacks in the Gulf of Aden and the territorial waters of Somalia, piracy has been an ongoing worldwide problem for several decades. Captain Roger Villar of the Royal British Navy, who kept a log of all piracy attacks between 1980 and 1984, reports that maritime piracy reached an epidemic proportion with as many as twelve merchant ships being attacked each day in West Africa alone (Villar, 1985).

According to the Office of Marine Safety Council, a division within the United States Coast Guard National Maritime Center, nautical piracy is an international crime often overlooked because pursuit of the illegal drug transfer absorbs most monitoring resources (Report of Maritime Safety Council, 1992). Ruth Ling, a representative of the international satellite company, INMARSAT, which supplies monitoring devices for cargo freighters, claims that it is not a coincidence that the highest rates of piracy occur where they do. Nations that border the most dangerous waters use pirate ships as de facto navies (Grissim, 1997; Ling, 1997). By creating threats in portal waters pirates effectively erect a fortified barrier between land and the open waters and act as protection for the land without cost to the host nation.

This factor creates complications for cooperation between some nations and the international policing agencies. Attempts to control piracy have been particularly difficult due to several factors, including ambiguities of jurisdiction. There is no single nation that regulates maritime piracy, resulting in a lack of consistent or substantive serial data. Reporting is only carried out at the international level: namely, by the IMB. The IMB is limited as it is a world business organization that adjudicates international business disputes though the United Nations. This structuring and oversight limits the IMB's capacity for law enforcement.

Piracy was not taken seriously by law enforcement agencies until ship owners and seamen began complaining vociferously to international agencies. By the late 1980s the

Baltic and International Maritime Council (BIMCO), which represents seamen through labor groups), the Maritime Security Council (an international shipping organization created to work with the United States government to fight drug smuggling and address stowaways on commercial vessels), the United States Maritime Administration, the IMO, and the IMB all have expressed outrage about pirate attacks (Paritt, 1986; Beckman, 1999).

The agencies which may be called upon to assist in anti-piracy efforts are proving to be more of a burden than help. One writer notes:

The existence of the ASEAN [Association of South East Asian Nations] ironically enough, hinders rather than helps progress on the anti-piracy front. The organization is all about friendship and avoiding diplomatic spats, making it extremely difficult for Singapore and Malaysia to put pressure on the Indonesians. If governments cannot easily point the finger at each other, that in essence leaves the shipping industry to do so, or at least take the initiative (Beckman, 1999).

Some law enforcement agencies seek “to inhibit or prevent accurate reporting” (Paritt, 1986). Debate over jurisdiction also introduces complications regarding reporting. Narrow waterways are often claimed by more than one nation and, these waterways may be located where national boundaries are disputed. Given these factors, it is unclear if the rate of reporting is increasing or if actual rates of piracy have increased. Furthermore, piracy has consistently taken place in areas where territorial waters are in dispute leading to ambiguities of jurisdiction such as the Straits of Malacca. Areas that are heavily pirated are those in which there is substantial trade route traffic and global shipping demands on the resources of the littoral states are high. This creates an environment in which legal, political, and economic pressures to promote trade and transfer exceed the need to arrest and detain a solitary vessel that only threatens a very limited number of ships.

In 2007 there were 263 acts of piracy reported to the IMB's Regional Piracy Center. Of those incidents 43 occurred in Indonesian waters while 31 occurred in territorial waters of Nigeria and 31 took place in Somali waters. “In 2003, the IMB received 121 reports of actual or attempted attacks in Indonesian waters - more than Somali pirates carried out in East Africa [in 2008]” (Williamson, 2009). The focus on Somalia detracts from overall global analysis of piracy trends.

### **Somali Piracy in 2009**

A review of a couple of well documented cases that took place in Somali coastal waters provides insight as to how piracy presents itself in the African region and the media and political reactions to it. In April of 2009 pirate attacks became front page news when an American ship captain, Richard Phillips of *M/V Maersk Alabama*, was taken as a hostage by a group of Somali pirates (Mazzetti & Otterman, 2009). Although the global media thoroughly covered the event as a novel story, this was not an uncommon occurrence according to ship owners, cargo insurers, transportation crews, or academics studying or attempting to study piracy during the last twenty years. The media, as a commercial enterprise whose goal is to solicit advertisers and consumers, greatly exaggerated or misrepresented this act of piracy. Unfortunately, several crucial elements not mentioned in the vast amount of media coverage included the absence of legal standing by the United States or members of the United Nations in Somali waters. The news media asked for

responses by so-called experts in the Federal Bureau of Investigation (FBI). This indicated how skewed perceptions of legal reach have become in current political climate. The FBI, the largest domestic policing agency, has no jurisdiction outside of the United States. In a report issued by CNN, President Barack Obama sought to apply U.S. pressure to reduce piratical attacks. Obama stated:

To achieve that goal, we're going to have to continue to work with our partners to prevent future attacks. We have to continue to be prepared to confront them when they arise. And we have to ensure that those who commit acts of piracy are held accountable for their crimes (Crowley et al., 2009, para 10).

Missing from the media reports was the reason for the sudden jump in piracy attacks in Somali waters. Somalia has the longest coastline in eastern Africa and has a developed history of fishing. In the twenty-first century as populations worldwide increased, the Somali fishermen found more and more pressure being placed on their natural resources, by fishing vessels operating well outside of their territorial waters and into the waters of Somalia. Technologically advanced fishing trawlers from Korea, Japan, Norway, and other developed maritime nations were fishing in Somali waters as the fish stocks in their own jurisdictions have depleted. The Somali fishermen who used antiquated nets and small wooden boats were unable to compete, thus causing a resource and trade crisis in a country without alternatives. As a result, the Somali fishermen began to attack vessels off their coast; thus the spike in piracy in the Gulf of Aden. What started as unorganized rebellion against larger, wealthier ships by downtrodden and desperate fishermen became a source of organized bandits and global crime. Nations whose vessels have been attacked did not address this resource allocation problem and instead began a campaign to suppress the violence. The legal ramifications of this endeavor only aggravated an already complicated circumstance.

Piracy is not a crime that is tried at the International Criminal Court (Andersen, Brockman-Hawe, & Goff, 2009). In part this allowed the United States government to respond to the *Maersk Alabama* with violent reaction. The United States government's refusal to become a signatory to the International Criminal Court is based on an attempt to prohibit the prosecution of United States service members by non-American courts. By creating rules that the United States cannot legally enforce, but that they act upon regardless, government representatives attempt to expand and overextend the jurisdiction of American domestic law. American journalists defend the position of the United States by declaring that "experts in the region say that in the long run, Somalia has to change -- and be changed -- and that Somalis must be convinced that the pirates they see as heroes protecting their coastline are actually thugs who are preventing their country from receiving aid" (Crowley, 2009, para 27). While American media reports have been critical of the Somali pirates, they have failed to acknowledge the historical context in which the United States used what was then termed "privateers." These were privately hired seafarers authorized to capture hostile ships and their cargoes as well as to act in reprisal against a foreign subject or ship (Travers, 2007). Both the British and later the American government entered into many such agreements in order to impede the Spanish Armada operating along the coastline of the Atlantic Seaboard in the eighteenth century (Thrower, 1980).

Additionally, Americans have a well established history of making criminals and thugs into heroes. Iconic dimensions are given to criminals such as Jesse James, an ex-confederate soldier who violently robbed “Union” banks in Minnesota after the Confederacy had lost the Civil War. In contemporary accounts, John Gotti, a member of an organized crime family, has been heralded as a good citizen in his community and was able to deflect prosecution due to his popularity. The list of American athletes who have been convicted of crimes such as drug use and sales, sexual assault and abuse and yet retain their popularity and lucrative contracts is long. So too Somali pirates have captured the imagination of citizens throughout the world.

According to a report published by Vanity Fair in April of 2008, Somali pirates had taken over a French registered luxury cruise vessel named *Le Ponant*. Ten Somali pirates armed with Kalashnikovs boarded *Le Ponant*, then steered the vessel south 400 kilometers along the Somalia coast (Spurrier, 2009). The pirates demanded a ransom from the ship’s owner. The French Navy, which monitored the hijacked vessel, did not take action due to the government’s belief that “the safety of the crew could not be guaranteed” (AFP, 2009).

The Somali pirates had established a pattern. “Pirates now realize that hijacking a ship for human cargo is far more profitable and less risky than dealing with illegal goods” (Burnet, cited in Williamson, 2009, para 26). In contrast to the *Maersk Alabama* incident in which members of the United States military shot and killed four Somali pirates, the French Navy was able to liberate the hostages of *Le Ponant* by means of discussions between the pirates and the ship owner with the permission of Somali authorities, and without the involvement of state funds. This made for a happy ending but for legal scholars it created murky waters because the money that was paid to the pirates came from the ship’s owner, a French corporation named CMA CGM that relied on its insurance company to fund the ransom.

According to the Paris-based *Intelligence Online* the insurer of *Le Ponant* was the now-notorious American company A.I.G. This was private money, floating free of national constraints, and it could be spent quite legally on ransom. To be clear about the rules that apply: extortion is illegal everywhere, except when it is construed as taxation; the payment of extortion, however, is legal, unless it is construed as bribery (Lanewiesche, 2009, p. 153).

The story of *Le Ponant* did not make it into the American media. Partly this was due to the fact that pirate attacks off the coast of Somalia had become commonplace. In addition, American media by 2008 had already turned away from extensive coverage of the wars in Iraq and Afghanistan and become focused on domestic and financial issues including the election of President Obama. Although Americans have a deep fascination with crime, the many layers of jurisdictions, domestic histories of war torn overseas nations, the complexities of transnational shipping and the forms of fraud in the trade and transport of global commodities and goods, had failed to capture the American imagination. But with the portrayal of pirates as thugs on frontiers of lawlessness, limited attention was directed to piracy. Unfortunately, long term solutions will not come from such a perspective. The well established shipping and commodity transfer companies as well as their insurers prefer being outside of the jurisdictions of nations as much as the pirates do. As Langewiesche (2009) has written:

One of the ironies of the concern being shown is that the shippers being provided with naval protection are the very same people who for years have made a mockery of the nation-state idea. They know that whatever pirate tolls they pay will always pale in comparison with the taxes that would be imposed if global law and order ever actually prevailed. But there is little danger of that. In its place a convoy system has been instituted for crossing the Gulf of Aden. CMA CGM has ordered its cargo ships to use it when practical. The company runs about 65 transits a month. Because of an increase in crew pay, insurance, and other piracy-related costs, the company has imposed a \$23 surcharge on every standard-size container that it takes through—amounting to a quarter-million dollars for each trip by the largest ships. Given the margins built in, and despite the need for the occasional payout, this means that CMA CGM, its insurers, and its crews are profiting from Somali piracy. Other shipping companies are, too. By nature they are adaptable. If the navies would just sail away, they would devise their own methods to get through, maybe at still-higher cost, and probably at calculated risk, but almost certainly without violence (p. 187).

It seems that any effort to stem piracy in Somalia will have little effect on piracy worldwide. The United States military under the auspices of the United Nations was able to confront the Somali pirates in the case of the *Maersk Alabama*. Member states of the United Nations granted themselves authority to interdict in the territorial waters of a single nation in order to contain what has been claimed to be a menacing world problem. “By January 2009, an estimated thirty ships were patrolling an area of about 2.5 million square miles. More than a dozen countries - including Russia, France, the United Kingdom, India, China, and the United States - had sent warships to the Gulf of Aden to deter pirates” (Hanson, 2010, para 11). In most regions where piracy takes place, the piratical attacks occur in waterways heavily patrolled by strong nations. If Somalia had been a strong nation, the presence of the United States military in its waters would have been an act of war. And while navies of various countries have recently been deployed off Somalia’s coast, they have been required to take on law enforcement rather than military activities. There are legal implications for a foreign state that uses its military to threaten civilians that are committing robbery in the jurisdiction of their own country. Furthermore, despite the higher rates of piracy in Southeast Asia, the countries who have participated in anti-piracy patrols in Somali waters have not sent anti-piracy patrols to that Asian region. The ambiguities of piracy definitions and global reactions to limited piracy venues leads to a discussion of legal issues that address the possibility of crime reduction and prosecution.

### **Legal Issues**

The UN Convention on the Law of the Sea 1982 (UNCLOS) addressed the parameters of jurisdiction and defined offenses. But like all UN treaties and conventions, it could be enacted only if the signatory states adopt similar worded statutes as domestic legislation. In 1988 the United Nations created the Suppression of Unlawful Acts against the Safety of Maritime Navigation Convention (SUA). A key difference between UNCLOS and SUA is that SUA requires nations to accept individuals suspected of committing piracy as defined by “seizing control over a ship by force.” UNCLOS allows for warships to be used to combat piracy but specifically states that they are acting “in a policing rather than a purely military role when doing so.” While many countries have become signatories to the UNCLOS, few have created domestic laws that duplicate or

reflect UNCLOS and even fewer have incorporated the language and legal parameters of SUA into their domestic law.

Based on precedent established in 1924 in the case of the Canadian registered *SS I'm Alone*, a vessel that was boarded outside of the territorial waters of the United States by American government officials for the purpose of interdicting alcohol smuggling, the parameters for appropriate amount of force to be employed to lawfully seize and arrest a ship at sea were established. Currently, anti-piracy patrols and interdictions are operating under UN Security Council resolutions: 1816, 1838, 1846 and 1851. These resolutions, which were passed in 2008, allow cooperating states to pursue and capture pirates in Somali waters with the "stipulation that consent must first be received from the Transitional Federal Government of Somalia" and that the UN Secretary General must be notified (Middleton, 2009, p. 3). The resolutions specifically reference the assistance of the European Union and NATO in supporting piracy suppression in Somali territory. Aside from the specific focus on Somalia, much of the legal parameters of these resolutions reflect previously established legal agreements. The use of warships to arrest pirates and the authorization for the pursuit of pirates in their own territorial waters is a reflection of agreements between the United States and various Caribbean nations that has been employed to combat narcotics smuggling.

Even with newly approved resolutions, complications in applying international treaties and laws arise. On November 18, 2008, an Indian warship, *Tabar*, sank a suspected pirate ship. The ship, a Thai-registered fishing trawler named *Ekawat Nava 5*, was a recently hijacked vessel with hostages on board. By international treaty, this ship was therefore, not a pirate ship. When the *Tabar* sank the civilian fishing vessel, the Indian government was engaged in combating hostage taking, not piracy. According to Chatham House, a non-partisan think tank based in England, "Naval vessels should have a different approach to ships once pirates have taken hostages. The action taken by the *Tabar* would not have been legal in the UK, for example" (Middleton, 2009, p. 4).

A furthering complication concerns the legal status the pirates have when they are captured by foreign navies in their own territorial waters. Under French law, a captain may apprehend and hold pirates but only a judicial authority can arrest and detain them for trial. In many cases, the pirates are not brought onto warships but are left in their own skiffs without being allowed to depart. The question then becomes, at what point are the pirates under control of a military? Some countries, which are parties to the UN conventions, have more limiting capacities to combat piracy lawfully given the restraints of their own domestic laws. Denmark and Germany can prosecute pirates only if they have threatened national interests or citizens. The legal ramifications of international treaties have been contained in the cases that address piracy in Somalia. But these legal ambiguities set the stage for complications when piracy takes place in the territorial waters of a stronger state.

## Conclusion

Worldwide piracy rates will continue to fluctuate in heavily trafficked waterways as global economies demand high volume shipping. Piracy cannot be eradicated by navies as the legal parameters for foreign militaries in domestic territorial waters of a sovereign nation are limited. Even under the auspices of U.N. Articles, navies are bound by their own legal restrictions and the laws of war when interfacing with civilian seafarers. While traveling under military escort a German-registered tanker was seized by pirates in the

Gulf of Aden (AFP, 2009). The actions taken by military forces impede regional and diplomatic resolutions as well as prosecutions. Additionally without support and participation of those in the shipping industry, reducing piracy through military patrols is unlikely to generate long term results.

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