Piracy and robbery at sea, a threat to international security?

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Acts of piracy and robbery at sea are often subjects of debate within the international community in the terms of how to contrast the phenomenon and prosecute the suspects. This is a phenomenon that so far has concerned mainly, but not exclusively, the offshore areas of the African Horn, Indonesia, Malaysia, the Philippines, Peru, Colombia, and Brazil (as per data released by the division of Commercial Crime Services of the International Chamber of Commerce).

Piracy: an international crime?

The elements that determine piracy and operations against it are set by the United Nations Convention on the Law of the Sea (UNCLOS), articles 101-105. It is generally accepted that these elements reflect customary law. The main aspects concern acts of violence, in any sort of form and shape, for private ends, from one vessel to another (Guilfoyle and McLaughlin, 2019). On these grounds, therefore, acts of hijacking of a vessel from one of its crew members or passengers is not considered piracy, as in the Achille Lauro case. Based on Re Piracy Jure Gentium by the Privy Council, a robbery itself is not a sine qua non element to define piracy: the attempt itself is enough to consider an operation an act of piracy. Another characteristic of piracy is that the element of animus furandi, intention to rob, is not required in itself as private ends may refer also to non-financial objectives. Another key element is that it has to be committed on the high seas. However, this element has been addressed differently, in an ad hoc manner, for the case of Somalia: the United Nations Security Council Resolutions (UNSCRs) 1864, 1851, 2383 allowed, for a restricted and renewable period of time, the seizing of pirates in the territorial waters of Somalia, should the need require it (Fink and Galvin, 2009).

Piracy cannot be considered an international crime, as the only similarity between the two concepts and type of crimes is that they are both subjects to universal jurisdiction. Any other elements are different. The former international judge Cassese (2013) clarifies that piracy is not an international crime as it does not possess the quality of shocking the conscience of mankind. The repression of this crime concerns the protection of trade and free navigation, not basic values of the international community.

Following these aspects, universal jurisdiction does not exist for piracy in terms of international crimes, but in terms of customary law and because it occurs on the high seas, away from state territorial jurisdiction. Since the legal prohibition of piracy appeared before contemporary international law developed, with its rights and duties, it did so because national law allowed its prosecution in domestic courts (as the alternative would have been lack of punishment for lack of jurisdiction), it is argued that it is national law that prohibits piracy, not international law.

Since international criminal tribunals prosecute crimes based on what their treaties and governing instruments prescribe, piracy is not prosecuted in an international tribunal as it has not been inserted in any international tribunal treaty.

The legal status of pirates

One of the issues the fight of piracy is confronted with is the status of pirates, considered by some as halfway between military combatants (in terms of civilians taking up arms to send away vessels that in their opinion destroy the country's assets and resources) and civilians. If this view is accepted, then the Third Geneva Convention (GCIII) would apply. Some commentators hold the opinion that the status of Prisoner of War (POW) should be granted, while others deny

it. Whatever is the choice, modern international law requires a certain standard of rights to be granted to the suspects, both in terms of detention and fair trial.

Faced with these issues on the high seas, the task becomes difficult to deal with, which often leads states to prefer a less difficult measure to implement by issuing policies where pirates are released after seizing the boat (Kontorovich, 2010). For what concerns detention, in many cases it may be longer than what is regularly accepted for ordinary proceedings due to the application of the principle of non-refoulement and for difficulties for ordinary legal courts to try cases as results of military operations.

Other controversies may concern the approach in judging the legality of target killings of pirates, in the case they are considered hostile civilians. Kontorovich (2010) developed an analysis and comparison between war on terror and anti-piracy operations. He concludes that, differently from the war on terror, anti-piracy operations have not undergone an intense political and legal debate within and among countries; also, differently from terror groups, pirates do not feel attached to an extremist ideology.

Piracy: prosecution and universal jurisdiction

The prosecution of piracy related incidents and crimes finds many challenges and difficulties on its way. Some of these challenges concern prosecuting the suspects in due time, prosecution by the flag state of the vessel that has been attacked (option very unpopular), irregular use of universal jurisdiction, the financial aspects of anti-piracy missions and prosecution, fear of European states of asylum requests by the suspects, the application of the principle of non-refoulement, and the regulations set by the European Convention on Human Rights (ECHR), the often choice made by the states to release the pirates after seizing the goods and the boats used for the misdeed (Guilfoyle, 2010). Alternatively, for incidents taking place in

the region of the African Horn, many states have signed agreements with Kenya to prosecute these suspects. The signing of this agreement, however, implies a substantial financial contribution to Kenya, but also the aspect that this type of solution is to be understood as temporary. The temporary nature of this measure has repeatedly been expressed by the government of Kenya as it retains the right to assess the situation regularly and decide to stop this practice should it evaluate it in its best interest.

The principles that govern universal jurisdiction allow the prosecution of crimes which have taken place out of the territory of the state that launch the prosecution procedure. The prosecution of misdeeds under this legal institution is always accompanied by problems related to collecting evidence, along with challenges related to the enactment of domestic laws and statutes that govern universal jurisdiction and international related offences. These issues apply to piracy as well.

International law has considered pirates as hostis humani generis, enemy of mankind, based on the fact that they do not differentiate targets on the grounds of nationality, as such they feel free to hit any vessels they consider viable, thus jeopardising the commercial exchanges between all countries.

The prosecution of piracy under the principles of universal jurisdiction undergoes the same issues that prosecution of international crimes faces. To this extent, taken aside its peculiarities, it does not represent a case completely different from the ones that concern the prosecution of international crimes under universal jurisdiction.

For what concerns the situation in the Gulf of Aden, the United Nations Security Council (UNSC) authorised the use of force against pirates even in sovereign Somali territory. The legal commentator Kontorivich (2010) reports that the political debate about how to confront piracy

has been vast and extensive, to the point that Condoleeza Rice, former US Secretary of State, during a session of the UNSC in 2008, denounced that the problem was not the rules or lack of, but political willingness to act accordingly.

In conclusion, the legal tools to combat piracy are universal jurisdiction, the UNCLOS (art 105), which, however, states the lawful possibility of acting against pirates, but it does not set compulsory clauses to follow. A careful reading of art 105 also raises questions about the permissibility of universal jurisdiction in cases covered by the article as the legal history of the conventions leads to the conclusion that proceedings by third parties are precluded. Eventually, the principles of universal jurisdiction by third parties are covered by custom and state practice.

The ambiguity of this article leads to some comparisons with other cases where universal jurisdiction has been applied. In these terms, we are confronted with cases similar to the Habre case for crimes against torture: Belgium requested Senegal to extradite Mr Habre, former president of Chad, who had found refuge in Senegal. Senegal refused to grant extradition, and on the principle of aut dedere, aut judicare, it should have started a proceeding against Mr Habre. This did not happen, the International Court of Justice (ICJ) found Senegal contravening the convention. Eventually, an agreement was found between the African Union (AU) and Senegal, where the AU assisted the country in the establishment of a way to put Mr Habre to trial, who was then eventually convicted in 2016.

This case though raised the question that if states could escape their treaty obligations almost without real effects and consequences, do these obligations really work any better than the principle of universal jurisdiction? Eventually, the statement made by Ms Rice proved to be true: what lacks is the political willingness to act.

Suppression convention: a solution better than universal jurisdiction?

A suppression convention does not create obligations by itself: a state will have to implement its principles in domestic law in order to respond to the requests of the convention itself. The path to follow requires the creation of the crime in domestic law; establishment of the jurisdiction for the state to prosecute the offence, which in most cases will apply principle of territorial and nationality jurisdiction (mainly active, but sometimes also passive); set up of rule and guideline framework concerning cooperation and extradition, but also to establish the punishment. Some conventions may also insert the principle of *aut dedere aut* judicare, if felt necessary.

Other elements of treaty law are that they do not define in detail the principles and elements of *mens rea* and *actus rei*, but leave to the national legislator to decide on them. This brings the problem of uniformity of rules among the countries that signed the convention. In most cases, the disparity of elements applied to the offences may create problems in the way states can cooperate between them.

In terms of suppression convention, a tool available is the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention), which covers acts both on the high seas and in the territorial waters. This convention also makes the jurisdiction mandatory: refusing to arrest pirates, but releasing them after seizing the boat, is considered a contravention of the convention. While states have been keen on recognising universal jurisdiction for international crimes, they have been slow on acting on the same principle against piracy. It therefore follows the question that if states are unable to prosecute cases of piracy, considered as robbery at sea, a crime deemed to be easier to prosecute than international crimes, what is the real future of universal jurisdiction? This comes especially in

light of the fact that those who commit international crimes are most likely to be protected by state officials, making the use of universal jurisdiction even more difficult.

International tribunals and courts: a viable option to prosecute acts of piracy?

The debate on how to prosecute suspects of committing the acts of piracy and the best judicial location to do this has often focused on whether instituting an international piracy court or not. The debate is born out of the fact that different challenges exist for the present system, currently based on trials in the state that has arrested the suspects or in the temporary role played by Kenya in assisting in the prosecution of pirates (as expressed above).

The advantages of instituting an international court are a higher willingness to bring to justice suspects; uniformity and a single set of rules applicable to all countries, and eventually conformity with international human rights law: the way this happens would depend on the form that is chosen, whether through a UNSCR based on chapter VII of the UN Charter, or treaty based. In the case of a court set by the UNSC, the court might have the advantage of being granted primary jurisdiction, which would mean applicable to all UN member states, with the mandatory requirement to cooperate with the court in the provision of evidence and witnesses.

In the case of a treaty-based solution, instead, the court would enjoy the powers that the signatories of the treaty would be ready to grant them - an example of this could be the direction towards the signatories (not non-member states, unless these states clearly affirm the willingness to subdue its jurisdiction on the matter to those of the court) to provide evidence and witnesses. However, in realistic terms, a court established under Chapter VII of the UN Charter is an option unlikely to be considered as piracy is hardly to be considered an attempt to the peace and security of the international community. On top of these considerations, the option is not really popular among the international political fora.

Since piracy is often regarded as robbery at sea and hostage taking, a question arise: are these situations serious enough to trigger the creation of an international court? The answers to this question are not likely to be affirmative.

When evaluating the option of an international court for piracy, the issues to address would be the definition and the geographic limits of the jurisdiction - being piracy a crime subject to universal jurisdiction, states should negotiate the amount of state powers (linked to universal jurisdiction over piracy) to be conferred to the court.

In the case of a treaty-based solution, the court might end up with limited powers, in the sense that it would work only on cases that involve member states, either in terms of nationals or vessels. On these terms, its action would be curbed and could even become ineffective as the chances that it would have far fewer incidents to prosecute than expected at the moment of setting up the convention cannot be discarded.

Other questions to be asked would concern the real willingness of states to contribute financially to an institution that prosecutes pirates: most likely, many of the world's states would not be willing to contribute. Historically, international courts prove to be expensive, and, from an exterior perspective, they do not always deliver as expected: on these grounds, based on past experiences, the political willingness to invest on such a project would be far less than expected.

Summing up the above, the disadvantages of an international court against piracy are the financial aspects it involves, which should rely on the regular payments by each member state. This concern is part of the debate that has surrounded the financial aspects of other international tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and ultimately the International Criminal Court (ICC). Other sources of discontent of this option would be the postponement of cases

while the court is set or as consequences of appeals; doubts about its ability to enhance domestic judicial systems (as expected in the cases of hybrid or internationalised courts and tribunals, as it will be expressed below); reliance on the cooperation of states as the convicted should still be imprisoned somewhere, therefore the difficulties in finding states willing to host these convicted individuals would represent a great effort.

Other options to explore would concern the institution of mixed or hybrid courts, with an international character that would include a mix of national and international judges, prosecutors, and defence attorneys. In order to work, these types of options should rely on international fundings, but also deliver results in terms of support to domestic endeavors, assistance in the development of a better national strategy in prosecuting these crimes, and development of local expertise.

Advantages of this option, however, would include easier access to evidence and witnesses, less expensive trials, as opposed to setting up a new court from scratch. At the same time though, disadvantages would still include the political will to contribute financially and difficulties, in case of convictions, in finding states willing to host pirates for the expiation of the sentence. It has been suggested that these courts could be empowered with an international prison, but still political willingness to set it up and provide prison management personnel would be required.

In conclusion, an international tribunal would not be the best solution available. The option of international support to domestic proceedings would work better (Cryer et al., 2019), despite the challenges that could be faced. In these efforts, the support set by the international community is a key aspect. This support would help to overcome the difficulties mentioned above. The states would then have the options to set special courts to deal with piracy or to

prosecute through regular channels, a general set of rules that should be absorbed and implemented by national judicial systems, rules that would also appease the needs and fears of the ECHR member states, procedural guidelines to solve the problems of collective evidence that would allow a judge to jump to informed conclusions about a piracy case. Whether states would prefer the route of special courts or ordinary courts, the issue of expertise would represent a main one to be addressed and solved, with the support of the international community becoming particularly important.

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