

REDEFINING PIRACY IN TRANSFORMATIVE ERA – AN ANALYTICAL STUDY FROM HUMAN RIGHTS PERSPECTIVE

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Abstract

Piracy as understood from the expression '*Hostis humani generis*' i.e., enemy of mankind since classical era is a heinous crime. Despite the gravity of the crime and responsibility to prosecute the Pirates by every State has been established by the normative jurisprudence both under Customary and Conventional Law, States are reluctant to punish the offenders unless otherwise their national interests are at stake. Further the influence of human rights in the present contemporary era poses different challenges to deal with seafarers as well as pirates. Ultimately the modern piracy requires for more sustained efforts globally as the crime poses manifold challenges that requires multifaceted harmonizing approach.

Key words: Piracy – Universal Jurisdiction – Human rights - Pirates and Seafarers – Multidimensional approach

Introduction

“In an honest service there are commonly low wages and hard labour: in piracy, satiety, pleasure and ease, liberty and power a merry life and a short one shall be my motto.”

-Captain Bartholomew Roberts, aka “Black Bart,” N km Notorious pirate in the seventeenth century¹

Piracy in international Law stances great menace to the international community that affects nations across. The novel corona pandemic has well triggered the problem around Asia as it is reported that pirate attacks doubled during 2020 as it hit the global economy at large causing impoverishment. As referred by different scholars² piracy on the High seas is considered to be a pestilence that disrupts international navigation, trade, life and security of people justifying the concept of Piracy jure gentium. The subject seems to attract grave concern on humanitarian dimensions as well under international law as it even disrupts the

¹E. KEBLE CHATTERTON, THE ROMANCE OF PIRACY 183 (1915). Cf, Sandra L. Hodgkinson, Kevin M. Kelly, Thomas H. Van Horn & Gregory P. Noone, *Piracy: New Efforts in Addressing this Enduring Problem*, 36 TUL. MAR L.J. 65 (2011).

²Joseph M. Isanga, *Countering Persistent Contemporary Sea Piracy: Expanding Jurisdictional Regimes*, 59 AM. U. L. REV. 1267 (2010).delivery of humanitarian aid reaching Somalia.³The attention given by the international community either by the United Nations Security council through several resolutions or by norms prescribed under conventions like UNCLOS⁴, SUA Convention⁵and domestic laws of various States

brings to the forefront the sternness of the problems posed by the crime that still requires a more comprehensive and systematized approach.

The utter disregard shown by the pirates operating mainly the Gulf of Eden strongly conveys the lack of adhesiveness existing with the present legal frame work. The reasons listed out by different scholars⁶ point to the deficient law enforcement mechanisms constrained by jurisdictional perplexities and the absence of resolute will among the community of Nations to prosecute the pirates. As we talk about the legal framework the crime being categorised as international the normative jurisprudence cultivated by international law occupies the predominant place. The Custom and Treaties being formal sources of International law plays a vital role in the deduction of legally binding laws among horizontally positioned sovereign States under International law. Customary International law definition as reflected in UNCLOS⁷ has recognised piracy as a *jus gentium* crime and it has been subjected to Universal Jurisdiction.

As early in 19th century the United States Supreme Court has uttered in *United States v. Smith* that common law “recognises and punishes piracy as an offence, not against its own municipal code, but as an offence against the Law of Nations, as an offence against the universal law of society, a pirate being deemed an enemy of the human race.”⁸ Cheriff Bassiouni states that Universal jurisdiction over piracy is well established.⁹ The normative prominence of piracy is further fortified by the inclusion in UN Convention on the Law of Sea 1982 imposes an obligation on all the states to extend cooperation to the fullest possible extent in suppressing piracy on the High seas or in any other place outside the jurisdiction of

³Ved P. Nanda, *Maritime Piracy: How Can International Law and Policy Address This Growing Global Menace*, 39 DENV. J. INT'L L. & POL'y 177 (2011).

⁴United Nations Convention on Law of Sea Dec. 10, 1982, 1833 U.N.T.S. 397

⁵Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221 [hereafter SUA Convention]

⁶Sanga, J. M., ‘*Countering persistent contemporary sea piracy: Expanding jurisdictional regimes*’, 59(5) Am. U. L. Rev. 1267 (2010). p.1269

⁷United Nations Convention on Law of Sea Dec. 10, 1982, 1833 U.N.T.S. 397, Art.101.

⁸18 U.S. 153, 161 (1820)

⁹M.Cherrif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 136- 51 (2001)

any State.¹⁰ With this preliminary pointers over the topic the research paper would like to concentrate on the following sub-themes.

1. Defining Piracy in Contemporary era
2. Nature, Scope and challenges of the Crime
3. To analyse the influence of Human rights law on crime of piracy
4. To review about the Indian Legal Framework on Piracy law with specific reference to Enrica Lexie
5. Conclusion

Nature, Scope and Challenges

In 1701, during pre-deliberation address to the jury in the trial of piracy of Captain William Kidd the quote made “I need not tell you the heinousness of this offence ... Pirates are called ‘Hostis humani generis’ the enemies of all humanity”¹¹

Mindful that, during this last century, millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity. Recognizing that such grave crimes threaten the peace, security and well-being of the world¹² it has been widely accepted that Cicero used the term ‘hostis humani generis’ that lays as a basis for denoting the crime as Piracy jure gentium meaning ‘enemies of mankind’.¹³ Maritime Piracy is considered to be a ruthless practice as it violates the person and property of the individual that impacts the shipping, global manufacturing and tourism industries.¹⁴ Somalia happened to be a dysfunctional and failed State and beset by the civil strife and famine that obviously resulted in poverty and a cowboy climate of violence. The government of Somalia lacks effective law enforcement and military operations against the influential warlords of Somalian Coast as well. The reports of International Maritime organisation¹⁵ points to the increase in the pirate attacks happening around the coast of Somalia, South East

¹⁰United Nations Convention on the Law of the Sea [hereafter UNCLOS] opened for signature Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994)] art. 100.

¹¹Rex v Kidd (1701) 14 How St Tr 123.

¹²Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) Preamble. Cf, Tamsin Paige, *Piracy and Universal Jurisdiction*, 12 MACQUARIE L.J. 131 (2013).

¹³Alfred P Rubin, *The Law of Piracy* (US Naval War College Press, 1988). See also, Milena Sterio, ‘*Fighting Piracy in Somalia (and Elsewhere): Why more is needed*’ (2009) 33 Fordham International Law Journal 372, 376; Cf, Tamsin Paige, *Piracy and Universal Jurisdiction*, 12 MACQUARIE L.J. 132 (2013)

¹⁴Lucas Bento, ‘*Toward an International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish*’, 29 BERKELEY J. INT’L L. 399 (2011).

¹⁵Milena Sterio, ‘*International Law in Crisis: Piracy off the Coast of Somalia*,’ Case Western Reserve Journal of International Law 44, no. Issues 1 and 2 (2011) p.292.

Asian region. One of the prime causative factors is the unfolding nature of globalization that intensified the trade that in turn emulsified Pirate activities. The lives and livelihood of the crew members are need to be protected by the governments of the Nations across so that free flow of goods are not disrupted.

Defining Piracy in Contemporary Era

This part of discussion focusses upon the change of circumstances that demands redefining Piracy and the meaning attributed by the International Law Commission under UNCLOS based on ‘animo furandi’ to the changed nature of crime of piracy in an era of transformative internationalism dominated by political objectives coupled with terrorism. Recent scholarly articles¹⁶ describe in terms of modern piracy and suggest for sustained efforts globally as it poses manifold challenges that requires multifaceted approach.

The customary law reflected definition provided by the UNCLOS¹⁷ provided in Geneva Convention on Law of Sea 1958 suffers with narrow and obstructive Constructions. The UNCLOS definitional constrictions refer to geographical area(High sea),¹⁸ involvement of two vessels(victim and aggressor

vessels)¹⁹ and the motive is private gain(financial disregarding political cause or identified with State entity).²⁰ Even the United nations acknowledged the normative inadequacy of the piracy provisions to the existing UNCLOS with several supplementing legally binding resolutions i.e., one such being to allow the member States to conduct antipiracy operations in Somalian territorial waters and to facilitate the prosecution of suspected pirates.²¹ Factors adding to the woe include the

¹⁶Paul R. Williams & Lowry Pressly, *Maritime Piracy: A Sustainable Global Solution*, 46 Case W. Res. J. INT'L L. 177 (2013).

¹⁷Art.101: - Piracy consists of any of the following acts: (a) any illegal act of violence, 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: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State.

Convention on the Law of the sea, Dec, 10, 1982, 1833 U.N.T.S.397.

¹⁸A Danish Cargo ship the M/V Danica White was hijacked by the pirates off the coast of Somalia in June 2007. American warship pursued the pirates but called the chase off once the Pirates entered the territorial waters of Somalia, as it lacked the essential authority under international law to proceed further. INT'L MARITIME ORG., REPORTS ON ACTS OF PIRACY AND ARMED ROBBERY AGAINST SHIPS: ACTS REPORTED DURING JUNE 2009 (MSC.4/Circ.138) 2 (Jul. 7, 2009), available at <http://www.imo.org/includes/blastDataOnly.asp/data-id%3D25980/138.pdf>.

¹⁹Anindita Pattanayak & Kartikeya Dar, 'Addressing Piracy through the Indian Legal Framework', 8 NALSAR Stud. L. REV. 1 (2013) p.6.

²⁰Joseph M. Isanga, 'Countering Persistent Contemporary Sea Piracy: Expanding Jurisdictional Regimes', 59 AM. U. L. REV. 1267 (2010), p.1283.

²¹S.C. Res. 1851, 6, U.N. Doc. S/RES/1851 (Dec. 16, 2008) (The resolution allowed the states and regional organisations to cooperate for ending piracy off the coast of Somalia and take all appropriate measures to suppress piracy); S.C. Res. 1846, 10(a), U.N. Doc. S/RES/1846 (Dec. 2, 2008) (States were authorised to enter the territorial waters of Somalia to suppress the acts of piracy); S.C. Res. 1844, U.N. Doc. S/RES/1844

traditionally built concept of sovereignty that prevented the entry into the territorial waters of Somalia as the UNCLOS²² categorically attested the twelve nautical miles rule. Existence of this legal situation inadvertently encouraged the pirates to achieve their score of ransom and piracy persisted with impunity. The international and domestic²³ criminal legal regime currently in place lacks a comprehensive outlook to properly hold pirates responsible.²⁴ In this regard absence of India's domestic legislation has resulted in acquittal of pirates in the famous case of M/V Alondra Rainbow. The Mumbai High court acquitted all the accused due to the absence specific legislation. The ship is registered in Panama belonging to Japanese Owners and it was hijacked in September 1999. Jurisdiction was assumed by India for prosecution within a month as it was captured by Indian Coast Guard and Navy. Pirates were tried and convicted by the Mumbai sessions Court and convicted under various sections of IPC. But everything went in vain as the court has acquitted the pirates.

Since 2008, the counter - piracy measures adopted by the international community include reliance upon the SUA Convention as it adopts a comprehensive and inclusive definition of maritime violence. The *Achille Lauro* incident in 1985 paved the way for the adoption of SUA Convention as the Palestinian terrorists posing as passengers on an Italian cruise ship later held the ship's crew hostage and murdered one of the passengers a Jewish-American and threw him overboard. The accused in that case could not be prosecuted under the UNCLOS due to the existence of two ships requirement. This lacuna was filled by the SUA Convention that brings in 'erga omnes' obligation on the State parties to proceed and establish a number of criminal offenses associated with pirates and armed robbers. It further promotes jurisdiction of States on active personality principle if the person "seized, threatened, injured, or killed" is a national of that State and when the act is intended to compel that State to do or abstain from doing any act.

(Nov. 20, 2008) (Measures to stop the transfer of money by the UN member States if they suspect Piracy acts are involved); S.C. Res. 1838, 2, 3, U.N. Doc S/RES/1838 (Oct. 7, 2008) (U.N. member states were called on to assist in the fight against

piracy on the high seas off the coast of Somalia); S.C. Res. 1816, 7, U.N. Doc. S/RES/1816 (June 2, 2008) (This resolution authorized the states to enter the territorial waters of Somalia for the purpose of repressing the acts of Piracy). Cf, Milena Sterio, 'International Law in Crisis: Piracy off the Coast of Somalia', 44 Case W. Res. J. INT'L L. 291 (2011) p.295.

²²United Nations Convention on the Law of the Sea, arts. 2, 3, Dec. 10, 1982, 1833 U.N.T.S. 397.

²³K Zou, New 'Developments in the International Law of Piracy', 8(2) Chinese Journal of International Law 323, 344. Cf, Anindita Pattanayak & Kartikeya Dar, 'Addressing Piracy through the Indian Legal Framework', 8 NALSAR Stud. L. REV. 1 (2013) p.2.

²⁴The municipal laws determine how the pirates will be punished and not international law when a pirate is captured on the high seas outside the territory of a particular State. However the absence of specific domestic legislation to prosecute pirates resulted in failures. Eugene Kantorovich, Opinion, 'Invoke Universal Jurisdiction to Prosecute Pirates Worldwide', NAT'L L.J., May 11, 2009, at 17.

The convention obligates as well the principle of '*Aut dedere Aut Judicare*' i.e. the State on whose territory the alleged offender is present either to prosecute or extradite to the State that has established jurisdiction. The Universal jurisdiction clause in UNCLOS that attests the jus gentium nature of the crime of piracy lacks clarity with respect to transfer of pirates by unwilling states who capture the pirates to prosecute due to the politically as well as logically challenging nature of prosecution that involves time and high cost expenses. With the above noted shortcomings, the law making treaty like UNCLOS has to be read along with the broader interpretations laid in other international law sources like Conventions, resolutions passed by the Security council and General Assembly of the United Nations so that it results in effective counter piracy operations by the international community of nations. It would be self-defeating if the definition does not include a broader purview with the primary object being safety of transit at sea. The modern piracy substantially differs from its historical counterpart as it has adapted to new normal developments based on technical, political, economic, and social.

Human Rights: Pirates v. Seafarers - A Triangle Paradox

The seafarers are considered to be the unsung heroes of the global economy as they are connected to the uninterrupted free flow of goods throughout the international supply of chain. This in turn brings in the correlative duty of protection to be afforded to them by entities connected therewith. Since the business model generating profits through ransom has made the pirates cruel and violent thereby they inflict lethal pain on the seafarers. It acts as threat to their lives, ill treatment, torture and right to privacy that emphasises the necessity of this research paper to move to the core area of the influence of human rights on piracy. The increasing violence on the sea farers due to the highly adaptive and improved modus operandi of the pirates include both physical and mental distress. It amounts to grave violations of normatively established human rights in modern international law e.g., Torture has been accepted as jus cogens norm that establishes '*erga omnes*' obligation upon the States²⁵ to monitor and enforce internationally assumed obligations under different human rights treaty regime so that they do not extradite any person whose rights will be put at stake in the requested state.

²⁵ Soering v. United Kingdom 161 Eur.Ct.H.R.(ser.A)(1989)

The notion that pirates are humane captor and treat hostages well has been proved incorrect as the sufferings depicted by the hostages of *Le Ponant, Asphalt Venture*²⁶ brought the traumatic tales of tortuous acts at the hands of pirates by the sea farers that is covered under the Convention against Torture.²⁷ It would be relevant to notice that the United Nations Organisation as one of the human rights actors in International law has not recognised the violations of rights of seafarers until 2011. In 2011 it was

acknowledged that Somalian pirates ‘systematically tortured’²⁸ the seafarers that could open the leeway for the flag state to exercise jurisdiction.

The UNCLOS provisions could not support effectively with the existing provisions even though it has established definitional elements of Piracy jurisdiction. The 1982 treaty addressed the hardships of traditional seafarers but not from the human rights perspective. But the gradual transformation era influenced by human rights law allowed for broader interpretation so that the flag states are bound to comply with the norms imposed by human rights treaties and the analogical jurisprudence developed by the European Court of Justice.²⁹ But the nuances of Human rights jurisprudence are scary as it acts as a double edged weapon as it views pirates as individual protected under its broad umbrella. A combined reading of UNCLOS along with human rights treaties, Security council resolutions, judgments of European court of justice of the latest opens up the new era of jurisdictional link so that flag States obligations are established firmly. The flag states have to consider and implement preventive measures that the victims are under their jurisdiction for the purposes of human rights.

European Court of Justice and Analogical Jurisprudence

The European court of Human rights even though not ruled on maritime piracy, in *Finogenov case*³⁰ held that Russia have duty to take specific measures and prevent the attack if there exists a ‘real and immediate risk to life’ to the members of the crew. The contemporary case is *Medvedyev and Others v. France*³¹ where the pertinent question referred was in the context of anti-piracy operations. The applicants raised dispute over

²⁶ Sofia Galani, ‘Somali Piracy and the Human Rights of Seafarers’, 34 NETH. Q. HUM. Rts. 71 (2016).

²⁷ UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <https://www.refworld.org/docid/3ae6b3a94.html>.

²⁸ UNSC Resolution 1976 (2011) preambular paragraph. The first reference to the safety of seafarers and other persons was made in the UNSC Resolution 1950 (2010) without any further call for action.

²⁹ Sofia Galani, ‘Somali Piracy and the Human Rights of Seafarers’ 34 NETH. Q. HUM. Rts. 71 (2016), p.79.

³⁰ *Finogenov and Others v Russia*, App nos. 18299/03 and 27311/030 (ECtHR) 4 June.

³¹ App. No. 3394/03 [GC], ECHR 2010.

deprivation of liberty under Art.5(1) of the European Convention on Human rights and the germane question the European court was to answer whether the United Nations Convention on the Law of the Sea 1982 provided the sufficient legal basis for the arrest and detention of the applicants. The obiter dicta of the court affirmed the existence of legal basis under UNCLOS itself. With respect to anti-piracy operations the judgment portrayed that Art.5(3) of the ECHR does not impose obligations on the European States to transfer by air, pirates who are captured thousands of miles far away from the competent judicial authority.

The interception and searching of the ships on the suspicion of pirate attack not only raises issues under Article 8 (Right to Privacy) of the ECHR but attracts other provisions as well like article 2&3. In *McCann and Others v. United Kingdom*³² the court held that deprivations of life must be subject to most careful scrutiny especially where deliberate lethal force is used against the suspects (IRA) taking into consideration not only the force used by the agents of the State but all the surrounding circumstances such as planning and control of action. Even though this case is related to terrorists acts of Irish

Republican Army the same analogical jurisprudence could be applied for Piracy as well. The test ‘more than absolutely necessary’ prescribed by the court could be very well applicable to Piracy cases as the overt kind of action happened in cases like *Enrica Lexie* (Italy v. India)³³ where life of individuals put under peril. The positive obligation to rescue the hostages was established in *Finogenov and Others v. Russia*³⁴ as the court expressed ‘a duty to take specific preventive action arose only if the authorities knew or ought to have known at the time of the existence of a real and imminent risk’. This other way implies that a dilemmatic situation is created both in terrorist and piracy attacks if the military has got previous knowledge about the attack and fails to prevent the situation then issue could arise under article 2 of ECHR as well.

Indian Legal Framework On Maritime Piracy

The Anti Maritime Piracy bill, 2019 was introduced by the Indian Parliament with the aim to promote safety and security for India’s maritime trade as well as protection to crew members. The bill has incorporated the international legal framework UNCLOS into law. The case of *MV Alondra Rainbow*³⁵ alarmed the need for a comprehensive domestic legislation to deal

³² 21 ECHR 97 GC

³³ Italy v India, 24th July 2015, ITLOS Reports

³⁴ 18299/03 and 27311/03, Judgment 20/12/2011.

³⁵ Operation Alondra Rainbow happened during 1999 gave a great stimulus to Indo-Japanese relations and to international maritime cooperation in general. See, Operation Alondra Rainbow began as a routine interception at sea but within a few hours the situation had acquired serious international implications. The Print, Admiral

with the crime of Piracy. The panama registered ship belonging to Japanese owners was hijacked by pirates and they were captured by the Indian Coast Guard. India assumed jurisdiction under the different sections of the Indian penal code. However the acquittal of pirates by the Mumbai High Court on the ground of lack of jurisdiction has brought the shortcomings of British archaic law and colonial penal code. The inaction on the part of the Government by not bringing comprehensive maritime piracy legislation to deal with different crimes is viewed strictly as a lackadaisical approach by the Parliamentary standing committee on external affairs. India as a Global leader is under an ‘erga omnes’ obligation to enact the domestic legislation so that it takes part in its international venture to combat piracy related crimes. Transporting up such legislation alone will provide the legal basis for the prosecution and punishment of persons committing acts of piracy and also ensure the safety and security of India’s maritime trade as well as safety of vessels and the crew members.

Conclusion

The key issues to be addressed by the bill looks gloomy for the reason as it is apathetic in its approach not taking into consideration the changes needed to be addressed for transformation as required to address the problem in its true sense. The core glitches raised in international arena for the multifaceted approach needed to be addressed for the composite nature of crime of piracy. As pointed above the unholy alliance between Piracy and Terrorism requires for a sustainable global effort to tackle the crime. In essence the bill provides for the punishment of mandatory death penalty where inconsistent approach prevails in India

even for the offences committed in India under the yardstick of '*rarest of rare cases*'. The Indian Supreme court decisions on mandatory death penalty also did not support the legislative bill as the court has ruled mandatory death penalty violates article 14 and 21 of the Indian Constitution. Further the European Court of Justice has developed extensive jurisprudence in extradition related cases that the fundamental rights of the individuals are not to be violated both by the requesting and requested States.

The positive inclusion in the bill are extension of jurisdiction adjacent and beyond Exclusive Economic Zone. Furthermore, the nuances of the crime of Piracy poses numerous jurisdictional mystifications in spite of the international, regional and national initiatives taken by the international community. The Concept of modern piracy as depicted by different jurists and scholars during this contemporary era squirms more with the influence of Human

Sushil Kumar, 21st September 2019. <https://theprint.in/pageturner/excerpt/when-indian-navy-helped-catch-japans-stolen-ship-and-what-vajpayee-did/294520/> visited on 28/11/2019.

Rights Jurisprudence as it mirrors only from individual human rights perspective despite the soberness of the crime. Balance has to be struck between the prevention of crime on the one hand and human rights of seafarers and pirates on the other where we lack a comprehensive jurisprudence.
