Piracy off the coast of Somalia: A case study in the application of the provisions of UNCLOS

Definition of Piracy

- According to Article 101 of UNCLOS, piracy consists of any of the following acts:
  (a) 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:
    • (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;
  (b) 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;
  (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

Piracy – Main Features

- An act constitutes piracy as defined in article 101 of UNCLOS, if it is:
  - An illegal act of violence or detention
  - Committed for private ends
  - Against another ship, aircraft, persons or property on board
  - Committed on the high seas or in the EEZ (article 58(2))
  - Also includes facilitation and incitement
- Article 103 – Defines “pirate ship”
- Should be distinguished from “armed robbery against ships”
Enforcement (Piracy)

- Article 100 (Duty to cooperate)
  - “All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.” (Art. 100)

- Article 105 (Universal jurisdiction)
  - “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.” (Art. 105)

Enforcement (Piracy)

- Article 110 (Right of visit)
  1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:
    - (a) the ship is engaged in piracy; […] (d) the ship is without nationality; or (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.
Right of visit (cont’d)

2. In the cases provided for in paragraph 1, the warship may proceed to verify the ship’s right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained. […]

Safeguards (Piracy)

• Article 106 - Liability for seizure without adequate grounds
• Article 107 (Ships and aircraft which are entitled to seize on account of piracy)
  – "A seizure on account of piracy may be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect."
• Other provisions of International Law, including UNCLOS, continue to apply

Armed Robbery against Ships

• Coastal State sovereignty over the territorial sea
  – Exclusive jurisdiction
• Right of hot pursuit onto the high seas
  – Article 111
Other relevant instruments

- SUA Convention
- International instruments covering specific crimes other than piracy and armed robbery
- Security Council resolutions
- General Assembly resolutions
- IMO Instruments
- Regional Instruments
- Industry best practices

2008 Map of Piracy and Armed Robbery Attacks

Piracy and armed robbery off the coast of Somalia
Piracy off the coast of Somalia

• Facts and figures (2009)
  – 114 Actual or attempted attacks reported
  – 29 vessel hijacked (42 in 2008)
  – 478 crewmembers taken hostage (815 in 2008)
  – Estimated $80,000,000 ransoms paid
  – Use of “mother ships”, automatic weapons, RPGs, etc.
  – Increased cost of shipping, insurance
  – Potential for increased instability in region, potential environmental damage

The new face of piracy

Current Challenges

• Apprehension of offenders
• Prosecution of offenders
  – National legislation
• Punishment of offenders
• Burden-sharing
• Sustainability of solutions
• Addressing the political situation in Somalia
International response

- Security Council resolutions 1814, 1816, 1838, 1846, 1851
- Resolution 1816 of 2 June 2008 (renewed by res. 1846)

- Decides that for a period of six months from the date of this resolution, States cooperating with the TFG in the fight against piracy and armed robbery at sea off the coast of Somalia, for which advance notification has been provided by the TFG to the Secretary-General, may:
  - (a) 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
  - (b) 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 repress acts of piracy and armed robbery.

International Response (cont’d)

- Military (naval) cooperation
  - EU Operation ATALANTA
  - Combined Task Force 151
  - Other States (Japan, China, Russia, India, etc.)
- Legal and Political Cooperation
  - Djibouti Code of Conduct
  - Contact Group on Piracy off the Coast of Somalia
  - IMO Maritime Safety Committee
  - Bilateral agreements and arrangements
- Industry Best Practices and other measures
- Capacity-building
- Addressing root causes (AMISOM)

Prosecution

- Challenges to prosecution
  - Lack of national legislation
  - Lack of jurisdiction under national law
  - Lack of political will
  - Lack of capacity
  - Practical difficulties
- Examples of prosecution
  - Seizing States
  - Coastal States in the region
    - Bilateral agreements
  - Flag States
Role of DOALOS

- Monitoring
- Reporting to the General Assembly and other bodies
- Provision of advice and assistance to States and intergovernmental organizations on the uniform and consistent application of the provisions of UNCLOS

Thank you for your kind attention!