

World Oceans Day 2010 - Our oceans: opportunities and challenges

Roundtable discussion on the United Nations Convention on the Law of the Sea  
fifteen years after its entry into force

INTERNATIONAL COOPERATION TO COMBAT PIRACY  
AND ARMED ROBBERY AGAINST SHIPS

*By Robert Beckman*\*

UNCLOS provides the basic legal framework for international cooperation to combat piracy. The UNCLOS rules on piracy apply only to attacks on ships in maritime zones outside the sovereignty of coastal States, that is, on the high seas and in the Exclusive Economic Zone (or EEZ). The piracy rules are an exception to the general principle that ships on the high seas are subject to the exclusive jurisdiction of the flag State. Warships of all States have the right to board pirate ships and arrest pirates on the high seas, and all States have the right to prosecute and punish pirates according to their domestic laws. However, States have no obligation under UNCLOS to either arrest or prosecute pirates.

The UNCLOS rules on piracy do not apply to attacks on ships in the territorial sea. Therefore, the IMO classifies attacks on ships in the territorial sea as “armed robbery against ships”. Only the coastal State has the authority to arrest and prosecute persons for “armed robbery against ships” in its territorial sea or in archipelagic waters.

The distinction between piracy and armed robbery against ships is critically important in most parts of the world. It is less important in the case of Somalia because the UN Security Council has created an exception for Somali piracy. Acting under Chapter VII, the Security

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Council has given States cooperating with the Transitional Federal Government of Somalia the same rights in the territorial sea of Somalia that they have in the EEZ and on the high seas. In other words, because of the exception made by the Security Council, all attacks on ships off the coast of Somalia are treated as piracy.

There are three major problems that the international community is having in combating piracy off the coast of Somalia.

The first problem is that the Rules of Engagement only permit the arrest of persons who are caught in the act of attacking a ship. They are not permitted to arrest “mother ships” or skiffs containing persons with weapons such as AK 47s and RPG launchers unless they find them actually engaged in an attack on another ship.

The second problem is that States with naval forces in the region do not have authority under their domestic legislation to prosecute the pirates they apprehend. Some States have no legislation making piracy as defined in UNCLOS an offence under their laws. Some States have national legislation which gives their courts jurisdiction over piracy only when their State has a “link” to the attack, such as when the ship attacked is flying their flag or is owned by their nationals, or when the crew members are their nationals.

The third problem is that the prosecution and trial of pirates is often constrained by constitutional and human rights safeguards, and by difficulties in proofing their case against the pirates beyond a reasonable doubt.

I have two major criticisms of the efforts of the international community to date.

First, one of the reasons the Somali pirates have the support of some of the local communities in Somalia is that they justify their actions as a response to illegal, unregulated

and unreported fishing by foreign fishing vessels in the exclusive economic zone of Somalia. I fail to understand why the UN Security Council has not specifically ordered all States to prohibit fishing vessels owned by their nationals or flying their flag from fishing in the EEZ of Somalia.

Second, in my view the international community is making a serious mistake by treating the attacks only as “piracy” under UNCLOS. Almost every attack on a ship by Somali pirates is not only piracy under UNCLOS. It is also an offence under the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) because it involves seizing or exercising control over a ship by force. It is also an offence under the 1979 International Convention against the Taking of Hostages (Hostages Convention) because it involves the holding of members of crew hostage for the payment of ransom. Finally, it is also an offence under the 2000 UN Convention on Transnational Organized Crime (UNTOC) because it involves criminal activities by organized criminal groups.

The use of SUA and Hostages Conventions would be useful tools in combating Somali piracy for three reasons. First, they impose obligations on States Parties to take offenders present in their territory into custody, and to either extradite or prosecute them. Second, they also apply to attacks within the territorial sea. Third, they impose an obligation on States Parties to afford one another the greatest measure of co-operation in connection with criminal proceedings to prosecute the offenders.

The 2000 UNTOC would be a useful tool to combat Somali piracy because it would enable States Parties to initiate proceedings against accomplices based in third countries, such as persons who fund the pirates and who launder the ransom payments.

Thank you for your attention.