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International cooperation in combating modern forms of maritime piracy: Legal and policy dimensions

Gottlieb, Y.

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1

INTRODUCTION:

EXPLORING INTERNATIONAL COOPERATION IN COMBATING MARITIME PIRACY

1.1. THE NEW-OLD THREAT OF MARITIME PIRACY

Incidents of piracy off the coast of Somalia, which rapidly escalated between 2005 and 2011, caught the international community somewhat off guard: Though attacks of piratical nature never really disappeared and the piracy phenomenon continued to be addressed by countries as well as international bodies such as the United Nations General Assembly (UNGA),¹ the threat of maritime piracy to the international community as a whole was not considered major in comparison to other contemporary challenges.² Most piratical attacks reported at the turn of the 20th century occurred in territorial waters while the ships were at anchor or berthed, and many amounted to nothing more than petty theft.³

¹ The UNGA addressed maritime piracy in its annual reports on Oceans and the Law of the Sea - cf. Oceans and the Law of the Sea: Report of the Secretary-General U.N.C.L.O.S. 56th Sess., U.N. Doc. A/56/58 (2001), para. 174-223 [“UNGA 2001 Report”]; see also the discussion of this report in Leticia Diaz and Barry Hart Dubner, *On the Problem of Utilizing Unilateral Action to Prevent Acts of Sea Piracy and Terrorism: A Proactive Approach to the Evolution of International Law*, 32 Syracuse J. Int'l L. & Com. 1, 24-26 2004-2005.

² Cf. ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 28 (2d ed. 2008) (referring to piracy as “a practice that was widespread in the seventeenth and eighteenth centuries, and has recently regained some importance, albeit limited to one area of the world-East Asia”); Sulakshna Beekarry, *Assessing Current Trends and Efforts to Combat Piracy*, 46 Case W. Res. J. Int'l L. 161, 161-162 (2013) (quoting Cassese and adding that “Discussion on the subject [of piracy] was scarce. Other well-known textbooks on international law had at best half a chapter devoted to the law relating to piracy as part of a discourse on the international law of the sea”).

³ UNGA 2001 Report, *supra* note 1, para. 177 and 179 (mentioning as an example India, which stated that 90 percent of the reported incidents along the Indian coast related to petty theft).

Consequently, and despite near universal membership of the 1982 United Nations Convention on the Law of the Sea (UNCLOS)⁴ and its status as representing customary international law,⁵ many countries – including Somalia - did not have proper domestic legislation to implement the piracy section of the Convention.⁶ Similarly, international or regional mechanisms to counter piracy were not fully developed. For example, it was not until 2004 that the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in

⁴ United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

⁵ See discussion *infra* Part 2.1.

⁶ See U.N. Secretary-General, Report of the Secretary-General on Specialized Anti-Piracy Courts in Somalia and Other States in the Region, U.N. Doc. S/2012/50 (Jan. 20, 2012) (discussing the assistance provided to the various regions of Somalia in the process of enacting new anti-piracy legislation). On the lack of adequate legislation in other countries see Asian-African Legal Consultative Organization [AALCO], *The Law of the Sea*, ¶ 21, AALCO/52/Headquarters (New Delhi)/2013/SD/S2, available at <http://www.aalco.int/52ndsession/lowofthesea2013.pdf> (“UNCLOS does not require that States enact domestic anti-piracy laws, nor does it provide model laws that States can use should they wish to enact legislation for combating piracyrelatively few states have anti-piracy laws in place and where such laws existed there appears to be a lack of harmonization between these laws.”); S.C. Res. 1918, U.N. Doc. S/RES/1918 (Apr. 27, 2010) (“Noting with concern... that the domestic law of a number of States lacks provisions criminalizing piracy and/or procedural provisions for effective criminal prosecution of suspected pirates”); Robert C Beckman, *Issues of Public International Law Relating to Piracy and Armed Robbery against Ships in the Malacca and Singapore Straits*, 3 Sing. J. Int'l & Comp. L. 512, 518, 1999 (indicating that one problem in combating piracy is that “Many states do not have legislation making piracy on the high seas or in the EEZ an offence under their laws. If pirates enter their ports after committing acts on the high seas or in the EEZ, such states have no power under their domestic laws to arrest and prosecute the pirates”); Beekarry, *supra* note 2, at 162 (“Piracy-specific legislation...was virtually non-existent then [where attacks off the coast of Somalia began]. In many countries, a country's criminal code or merchant shipping legislation would contain a few provisions on piracy elaborated in the abstract and never put to the test. Further, not all states had incorporated UNCLOS into their domestic legislation, and even fewer had incorporated the Suppression of Unlawful Acts Against the Safety of Maritime Navigation Convention 1988”) and at 163 (stating that “While piracy was defined in UNCLOS, there was a lack of national laws designed to implement the powers of international law” and providing as an example a 2008 case in India where suspected pirates were charged for trespassing and armed robbery rather than for piracy).

Asia (ReCAAP),⁷ the first regional agreement on cooperation against piratical acts, was adopted. Cooperation on maritime security in East and West Africa hardly existed.

The spike in Somali piracy attacks after 2005-2006, peaking in 2010-2011,⁸ and the new “business model” it introduced, namely hijacking for ransom, surprised and alarmed the international community. From eight successful hijackings of ships worldwide in the year 2000,⁹ the number increased to 49 in 2008 and 53 in 2010,¹⁰ thereby endangering the lives and well-being of many seafarers. The first and second order costs¹¹ associated with Somali piracy have been significant, estimated in 2013 by the World Bank as causing up to \$18 billion loss to world trade each year.¹² Maritime piracy has disrupted transport and trade flows as well as other

⁷ Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia, Nov. 11, 2004, (entered into force Sep. 4, 2006) [hereinafter “ReCAAP”]. See further discussion on this agreement *infra* Chapter 4.

⁸ Oceans Beyond Piracy, *The Economic Cost of Somali Piracy 2012*, P. 7, available at http://oceansbeyondpiracy.org/sites/default/files/ecop2012final_2.pdf (“[p]irate attacks and hijackings steadily increased from 2005-2011, with the number of hijackings peaking in 2010 and the number of overall attacks peaking in 2011”); United Nations Conference on Trade and Development [UNCTD], *Maritime Piracy – Part I: An Overview of Trends, Costs, and Trade Related Implications*, para. 2, available at http://unctad.org/en/PublicationsLibrary/dtl1tb2013d1_en.pdf (“Over 2006–2010, piracy incidents rose by 86.2 percent worldwide, with the number of actual and attempted attacks moving up from 239 in 2006 to 445 in 2010. The rapid escalation in piracy activity off the coast of Somalia since 2006 has particularly startled the international community, with piracy incidents in East Africa (off the coast of Somalia/Gulf of Aden/Indian Ocean) exceeding those in some of the traditional global hotspots of piracy such as Indonesia, Malaysia, Singapore and the Philippines”).

⁹ UNGA 2001 Report, para. 178.

¹⁰ UNCTD, *Maritime Piracy – Part I*, *supra* note 8, para. 8.

¹¹ First order costs are distinguishable from second order costs because they are spent specifically on piracy rather than arising indirectly as a result of piracy. An example of a first order cost is a ransom payment, while second order costs include reductions in trade or tourism – see Oceans Beyond Piracy, *The Economic Cost of Somali Piracy 2012*, *supra* note 8, P. 8.

¹² See the World Bank report discussed in Chapter 3. Other reports provided lower (though still very significant) estimates, cf. the report of Oceans Beyond Piracy, *The Economic Cost of Somali Piracy 2012*, *supra* note 8, P.7

economic activities such as fisheries and energy production, and has threatened the safety of navigation and delivery of humanitarian aid.¹³

Against this backdrop, the international community had to rapidly engage and treat the reemerging piracy threat as a priority. Within a relatively short time span, leading international and regional bodies such as the United Nations Security Council (UNSC) and the European Union became heavily and directly involved. Navies from various countries were quickly dispatched to the seas off the coast of Somalia, operating individually or as part of task forces. New cooperative arrangements were formed and regional and bilateral agreements were concluded. The combination of those initiatives resulted in a significant drop of Somali piracy attacks, practically eliminating, at the time this dissertation is being finalized, the threats of hijacking of ships in that region.¹⁴

This dissertation explores various dimensions of the international cooperation in combating modern maritime piracy. What have been the main legal and policy challenges posed before the international community's undertakings? How can the endeavors and initiatives of the international community in combating piracy be characterized? Did they follow the classic paradigms by which States and international bodies have traditionally confronted threats or did they deviate from past practice and create a new paradigm for international cooperation? And to

(estimating the overall cost of piracy to the global economy in 2011 at \$6.6 - \$6.9 billion, and in 2012 between \$5.7 and \$6.1 billion).

¹³ UNCTD, *Maritime Piracy – Part I*, *supra* note 8, para. 5.

¹⁴ In 2014, the International Maritime Bureau (IMB) reported that it received information on 11 incidents in the area off the coast of Somalia or the Gulf of Eden. In 2015, it reported on no incidents in that region – see, respectively, ICC-IMB Piracy and Armed Robbery against Ships 2014 Annual Report, P. 19, available at <http://www.hellenicshippingnews.com/wp-content/uploads/2015/01/2014-Annual-IMB-Piracy-Report-ABRIDGED.pdf>; ICC-IMB Piracy and Armed Robbery against Ships 2015 Annual Report, P. 17, available at <http://www.hellenicshippingnews.com/wp-content/uploads/2016/02/2015-Annual-IMB-Piracy-Report-ABRIDGED.pdf>.

what extent can the lessons learnt be applied when addressing other forms of criminality or, more generally, new threats with international ramifications? These are some of the questions examined in this dissertation.

1.2. THE OVERARCHING QUESTION AND A ROADMAP

The overarching question addressed in this dissertation is the following: "What are the primary legal and policy characteristics of the counter-piracy paradigm employed by the international community to combat modern forms of maritime piracy?"

To identify those characteristics, the chapters in this dissertation, which partially consist of articles previously published,¹⁵ explore a number of questions and dilemmas that arose in the context of curbing modern maritime piracy.

As a benchmark for the discussion, the first chapter examines the **definition** of piracy under the governing international instrument, namely UNCLOS, and the various interpretational dilemmas it poses, as well as the definition of acts of piratical nature committed in territorial waters, typically referred to as "armed robbery at sea".

The second chapter examines the **duty to cooperate** in the repression of piracy under international law, including the legal origins of the duty and its guiding principles. It further explores a more specific obligation within the general duty to cooperate, namely the duty to share relevant information that can assist in preventing piracy attacks and in facilitating prosecution of suspected pirates. In that context, the second chapter also discusses the main challenges associated with information sharing, and proposes solutions to meet them.

¹⁵ Chapters 2, 3, and 4 were published in different journals (as indicated in each chapter), and were updated and edited for the purpose of finalizing the dissertation.

Continuing from the general discussion of the piracy definition and the duty to cooperate, the third chapter analyzes the **specific involvement of one international body – the UNSC** – in combating maritime piracy. The analysis focuses on the set of piracy resolutions adopted by the UNSC, and examines their main features. It identifies the piracy resolutions as a possible new category of Chapter VII resolutions where criminal activities of ordinary-law nature are addressed as the main subject-matter of the resolutions. It concludes that the reference in the piracy resolutions to the on-going situation in Somalia served the UNSC merely as a vehicle to respond to the severe consequences of Somali piracy to international navigation, trade, and safety upon the high seas through the use of Chapter VII powers. The analysis further examines the use of the piracy resolutions to address shortcoming in the legal framework of existing international law relating to piracy as well as to engage various actors from different domains in this field, notably from the private sector.

The fourth chapter examines **the interrelation between an international and a regional response to maritime piracy**. To that end, it studies three models that have been employed to address maritime piracy in different regions: the South-East Asia and the Caribbean model; the Somali model; and the Gulf of Guinea model. The study concludes that although maritime piracy has had severe international implications, in essence it has remained a local or, at most, regional problem, rather than a transnational or global criminal activity. Consequently, the counter-piracy initiatives should focus on a tailored regional approach, supplemented, as needed, by the support of the international community.

The fifth chapter focuses on the **pragmatic, efficiency-driven approach** espoused by the international community in combating piracy off the coast of Somalia. It illustrates the application of this approach through discussing the developments that took place with regard to

two main aspects: the legal framework and the institutional landscape related to maritime piracy. The analysis points to both the benefits and the shortcomings in adopting this approach.

The dissertation concludes with an **overview of the main features of the counter-piracy paradigm** as applied in particular to address the Somali piracy menace. It submits that this paradigm marks an important step in the evolution of international law and, more specifically, in the creation of a new international governance model, which comprises of a plethora of both state and non-state actors and is based on collaboration through non-hierarchical structures, seeking pragmatic solutions and challenging traditional practices that have governed international relations in the past. It further argues that while the Somali piracy phenomenon can be viewed as *sui generis* and the success in combating Somali piracy can be explained by the unique circumstances of the situation, the lessons learnt can and should serve to address piratical activities elsewhere and, more generally, other challenges posed to the international community.

1.3. METHODOLOGY AND SCOPE

The dissertation applies a conventional doctrinal legal research method. This method involves examining the primary legal instruments governing the field of the study such as conventions and resolutions, case law, policy documents (such as those presented to United Nations bodies), and academic literature. Though references are made to national legislation and national court decisions, the dissertation focuses on aspects related to international law and international cooperation rather than on a particular jurisdiction or a comparison between the manners in which different jurisdictions have addressed the piracy threat.

The perspective adopted in this dissertation is primarily a legal one, but, where appropriate, policy considerations are mentioned and assessed with a view to identifying the

main characteristics, challenges, and shortcomings of the international governance regime created to combat maritime piracy.

Since most recent endeavors by the international community to curb piracy have been directed at the area off the coast of Somalia, much of the discussion in this dissertation is dedicated to those undertakings. Nonetheless, this study is not limited by a geographical scope. It is neither structured along geographical delimitations (high seas-territorial waters) nor is it confined to regional boundaries. Accordingly, parallels are drawn between the threats and the counter-piracy activities in different regions, and the conclusions and lessons learnt are guided by an international perspective.

Finally, the observations and conclusions reached in the various chapters of this dissertation naturally concern the field of maritime piracy. Yet, they can potentially serve to critically examine the modalities employed by States and organizations to combat other forms of criminality as well as to analyze modern regimes of international and regional cooperation.