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# **ANALYSIS ON THE CONCERNS OF PRIVACY IN SOMALIA WITH RELEVANCE TO LAWS OF THE SEA**

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## **ABSTRACT**

In the recent past, maritime transport has become the core element of the world economy and any disturbance in world shipping can create more or less serious problems for the world economy, especially when there exist various world crises. The issue of maritime piracy pops up every few years, especially with the modernization of boats and weapons. The piracy activities have borne evidence that shipping safety in the Gulf of Aden and waters around Somalia should be considered as an international problem. The Attacks against ships that are sailing off the coast of Somalia have garnered international attention and has highlighted the existing piracy concerns and the same has been brought to the attention of the UN Security Council. The issue of Piracy has brought with it various issues and problems which also act as obstacles to the global community in the recent century and the same is especially witnessed in Somalia. There are complex reasons for the existence of Somali piracy, which makes it harder to provide safety of shipping in this region without a wide spectrum of action and international cooperation. The paper attempts to discuss the roots of piracy in Somalia, the development of these activities, and to provide an analysis on the effectiveness of the legal framework used to address the problem and steps that can be taken by the international community to provide safety and secure shipping in this region. The same would be done by attempting to analyze reports from international bodies such as the United Nations, International Criminal Court, as well as other relevant resources.

## INTRODUCTION

*“A pirate, under the laws of nations, is an enemy of the human race. Being the enemy of all, he is liable to be punished by all... But piracy, under the law of nations, which alone is punishable by all nations, can only consist in an act which is an offense against all. No particular nation can increase or diminish the list of offenses thus punishable.”*<sup>1</sup>

- Chief Justice John Marshall

One can recall the attacks on the ships carrying ‘boat people’ from the coasts of South East Asia where the pirates seemed to have ceased to be a common nuisance to the international community. The same was done by using the justification of the traditional practice of *hostis humani generis*, until the immense development of their activities that took place off the coasts of Somalia since the millennium, with more relevance to 2006.

Capturing ships and holding them as well as their crews hostage for ransom since the 1990s has been practiced by armed groups acting mostly in the territorial waters and claiming to protect Somalian fishing resources, which were in effect pillaged by the fishermen from foreign lands, and the coastal waters, which were converted into a dumping ground for toxic waste in the absence of a central government being able to enforce the laws of the land.<sup>2</sup> Taking advantage of the lack of an efficient and effective government, and with the connection with terrorist groups and with connection with the other political and armed fights going on in the state of Somalia, pirate activity then soaked in a growing number of people – including the fishermen who were experts in operating vessels- and the daringness of these activities just kept on increasing. Currently, it showcases an extremely dangerous menace to the ships and vessels passing through the Suez Canal and further proceeding on through the Gulf of Aden to the regions between the Horn of Africa and the Arabian Peninsula. These Somalian coastal regions, as well as the regions that exist to the south of Horn of Africa, piracy has shown an evident development, attacking ships and vessels even at a from distances even far off from the coast. The success in restraining vessels, ships, and its crews and in obtaining a huge amount of money as ransom, as well as their efficient and effective methods of managing the so obtained ransom money, have labelled many pirates as the *hostes humani generis* which is technically a *sub specie* of the Somalian pirates. The danger of passing

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<sup>1</sup> United States v. Ali, 885 F. Supp. 2d 17, 27 (D.D.C. July 13, 2012).

<sup>2</sup> Security Council, 16 Dec. 2008 (S/PV.6046 at 15).

through a main fulcrum of international maritime traffic being Suez canal, as well as the outrage awakened by the pirate attacks on ships carrying humanitarian supplies to the population of Somalia, have been incidental in alarming nations all over the world.

### ➤ Introduction To The Current Piracy Problem:

Piracy off the Somalian coast remains an issue with implications, generally for the international community and specifically for the Somali government. Irrespective of its genesis, piracy off the Somalian coast “has, in essence, become a lucrative, organized and attractive criminal activity undertaken for heinous ends.”<sup>3</sup> Although the number of people being held hostage by the Somalian pirates is in constant flux, the piracy crises implicates a number enduring issues: the protection of lives of the men, the maintenance of channels that facilitate international commerce, and continuing respect for the territorial waters of Somalia.

The problems revolving around piracy have far-reaching economic implications: an estimated forty percent of the global trade is moved through part of the Indian Ocean, and then around the Horn of Africa, and then into the Red Sea—which is a route that is rife with pirate attacks by the Somalian pirates. A report by the One Earth Future Foundation (OEF) states that Somali piracy costs fell somewhere between \$6.6 and \$6.9 billion in the year 2011.<sup>4</sup>

The reduction in the number of pirate attacks comes as a result of a multi-pronged effort from nations such as the United States, the UK, the EU, NATO, and also the international community—along with the private sector in general. The prongs of the effort mainly focused on several categories, which included diplomatic engagement, military power, legal enforcement, collaboration with the private sector, targeting pirate networks, and mostly the development of the government of Somalia.

### DEFINITION OF PIRACY:

The first international instrument setting forth a definition of the term piracy is the Geneva Convention on the High Seas of 1958,<sup>5</sup> which was further succeeded by the United Nations

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<sup>3</sup> Special Adviser on Legal Issues Related to Piracy off the Coast of Somalia, *Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia*, U.N. Doc. S/2011/30, ¶¶ 13, 43 (Jan. 24, 2011)

<sup>4</sup> Anna Bowden & Shikha Basnet, *The Economic Cost Of Somali Piracy*, 1 One Earth Found (2011).

<sup>5</sup> Article 15, Convention on the High Seas (Geneva Convention), 450 UNTS 11 (30 September 1962).

Convention on the Law of the Sea, 1982. The UNCLOS identically restates the definition established in its predecessor, according to which piracy consists of the following:<sup>6</sup>

- 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 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 an aircraft with knowledge of facts making it a private ship or aircraft;*
- c) *Any act of inciting or intentionally facilitating an act described in subparagraph (a) or (b).*

#### **ORIGIN OF SOMALI PIRACY ISSUE:**

Though piracy until recent times has been considered a relic of the past, it has returned in the Horn of Africa almost with impunity. Somalia in recent times has been considered synonymous with the phenomenon of piracy. Extremely powerful naval powers are united in their resolve in order to fight it all the way. One of the perplexing questions that arise is why the phenomenon of piracy has flourished in Somalia. There are a number of possible reasons that can be identified for the prevalence of the phenomenon of piracy.<sup>7</sup>

The Somali pirate's nature can be identified as to be in direct relation with the state's political environment, which, since the year 1991 has been ravaged by the civil war and wherein the government just occupies one portion of the entire capital. This issue is compounded by the geography of Somalia. About forty percent of the world exchange has to pass through the short straight line between the Arab Peninsula and the Horn of Africa. The volatile humanitarian crisis in the state of Somalia allows most of its citizens to conduct acts of piracy, which makes it almost impossible to enforce the laws efficiently.

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<sup>6</sup> Article 101, United Nations Convention on the Law Of the Sea (UNCLOS), 1833 UNTS 3 (14 November 1994)

<sup>7</sup> Dr Omer Elagab, *Somali Piracy And International Law: Some Aspects*, 24 A&NZ MLJ 59, 59-75 (2010).

Piracy is also considered to be funded by influential warlords from Somalia who hold strong influence over their respective regions of power; these warlords periodically finance and enjoy the rewards gained from the pirate attacks in the event of a productive hijacking and ransom gained. Pirates are generally active outside the coastal towns of the state of Somalia, where they can effortlessly dock their own skiffs and retrieve their stolen commodities and captives. Coastal towns of Somalia profit economically out of piracy proceeds and so they have very little reason to involve themselves in anti-piracy operations. The Somalian government has lost full oversight over a number of maritime regions where pirates are active and is unable to respond with piracy, any military activity to counter the same, or enforce the laws of the land.<sup>8</sup>

Primarily, the population of Somalia is mostly Sunni Muslims. Those who did not defect to other lands were forced to endure destitution, desertification, prolonged drought, and soil erosion. Most of the Somalis are nomads who seek out their meager livelihood from the flocks, but these natural disasters have wiped out major portions of their livestock, leaving them stranded with barely any alternative income to support themselves and their families. A small percentage of the population who are cultivators had to witness the drastic decrease of their yield of crops as the result of soil erosion, instability, and lack of fertilizers.

Secondly, the income gap between the minority elite class and the poor class has widened drastically. In the country of Somalia, they have the freest liberated open market economy in the entire world, with no central bank system to control and regulate the money supply, or in order to set interest rates or control inflation. Economic policies are balanced on the basis of demand and supply. Those who have the resources and ideas galore are thriving entrepreneurs, who are minting tax-free profits, while the majority of the population can barely make both ends meet. The aid from international humanitarian organizations and the remittance from the Somali Dias pore Community keep the economy going.<sup>9</sup>

Thirdly, Somalia has the longest coast in comparison with other African nations but Somalis have never attempted to exploit the potential of their seas for a number of reasons. Those who tried to and ventured out to sea were outmuscled by illegal foreign fishing vessels and they depleted the fish stock in these territorial seas and polluted it by dumping toxic and nuclear

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<sup>8</sup> Hriti Parekh, *Somalian Pirates and the Law of the Sea: International Law in Crisis*, JURIST (October 7, 2020 11:30:14 PM), <https://www.jurist.org/commentary/2020/10/hriti-parekh-somalia-piracy/>.

<sup>9</sup> Raunek, *Causes of Maritime Piracy in Somalia Waters*, MARINEINSIGHT (February 16, 2021), <https://www.marineinsight.com/marine-piracy-marine/causes-of-piracy-in-somalia-waters/>.

wastes. Adversity pushed the Somalis to test and try out new ways for making money and former fishermen joined with the militia and unemployed youth and began to hijack vessels and demand ransom. This marked the beginning of piracy in Somalia.

Lastly, the existence of an Irresponsible Government, Unattended People, and lack of initiations for Eradicating Piracy. The state of Somalia has not had an effectively functioning central government for over two decades now. Their weak government is fighting with the insurgency in order to secure the capital and also is preoccupied with internal wars and foreign nations waging proxy wars. The pirates of Somalia looked over the most effective institutions in the nation. The money gained from the act of hijacking and piracy is often invested into the act of drafting out their next action plan. They effectively and efficiently out-muscle the regional government and offer a ray of hope to the unemployed youth of the country by paying them handsomely for helping them in piracy.<sup>10</sup>

#### **LAW OF THE SEA RULES ON PIRACY:**

The international law of piracy is dealt with under Articles 100 to 107 and 110 of the United Nations Convention on the Law of the Sea (UNCLOS). The very evidence that these Articles almost exactly resemble the Articles 14 to 22 of the Geneva Convention on the High Seas of 1958,<sup>11</sup> and that a few number of states, including the United States as well as nations such as Israel, Switzerland, and Venezuela, are not being legally bound by UNCLOS, but rather are bound by the Geneva Convention on the high sea, is clear proof that it entails, as a subject of either conventional law or of customary laws, these Articles express that the law as currently in force.

Three international organizations, that is the International Maritime Organization (IMO), the UN Office on Drugs and Crime (UNODC), and the Security Council; two intergovernmental organizations which are the NATO and the European Union; and one ad hoc collaboration,<sup>12</sup> i.e, the Contact Group on Piracy off the Coast of Somalia (Contact Group); both collectively and individually, have played key roles so far in attempts to suppress piracy off the coast of the state of Somalia.

#### **➤ Loopholes in the Application of the Legal Framework on Piracy:**

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<sup>10</sup> Id.

<sup>11</sup> Tullio, *supra* note 3

<sup>12</sup> Id.

Nonetheless, nations have encountered a number of challenges that have been exacerbated by the limited interpretation of the term “Piracy” in international law. The UN Convention on the Law of the Sea (“UNCLOS”), which is the global authority for dealing with maritime issues and disputes, describes piracy as:

“Piracy” consists of any one of the following acts:

- a) Any illegal acts of detention or violence, 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, person 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)<sup>13</sup>

The term piracy as defined under UNCLOS is considered to be more inclined towards customary international law. It provides a very interpretation of the crime of piracy in the following way.

Firstly, piracy has to take place in the high seas. If pirates belonging to Somalia hijack a vessel in Somalia’s territorial seas, the attack will not be counted as piracy as per the UNCLOS. Therefore, although patrolling countries can be granted permission to access territorial waters of the state of Somalia in order to deter pirate attacks, if attacks occur in those waters, they would anyway not be regarded as attacks of piracy as per the International Law.

Secondly, an attack by the pirates must include two vessels or ships: ie, one of the victim’s and another of the aggressor’s. This explanation can cause chaos or be problematic in certain circumstances where pirates attempt to board the vessel belonging to the victim at its previous

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<sup>13</sup> *Supra* note 11.

port of entry, and then hijack the vessel in the high seas, later on. In such situations, even though the hijacking would mostly resemble piracy, it will not be considered as piracy.

Thirdly, it is necessary to commit piracy for private purposes. If pirates happened to be related to any political cause or if they were acting on behalf of a particular state agency, their acts would not amount to piracy under international law.

Correctly, the taking of control by the hijackers who had disguised as passengers on the *Santa Maria* ship, which was portuguese based and also on the Italian cruise ship named *Achille Lauro* in 1985, which had extensive coverage by press, were not regarded to be piracy.

Apart from the loopholes and drawbacks prevalent within the statute, a major issue lies with the applicability of the statute in itself. The Convention (UNCLOS) is drafted and veiled in soft legal language. The implementation of these laws depends on the member states. In simpler words, the law is not legally binding. A lot of countries have tied up with regional partners like Seychelles, Kenya and Mauritius and have attempted to capture and prosecute the Somalian pirates in the courts of these regional partner nations. In addition to this, the United Nations has also set up a Piracy Contact Group, which basically is a group of state representatives that would meet a number of times in a year and would work in order to find solutions to the piracy issue in Somalia.<sup>14</sup> The UN Report has also recommended the creation of a Somali extraterritorial tribunal to be set up in the neighboring state of Tanzania that would strictly apply the laws of the state of Somali but, for security purposes, would be headquartered outside the territory of Somalia.<sup>15</sup> Although this approach of the UN initially seemed quite appealing, it was met with criticism and opposition from the people of Somalia and hence, it could not be implemented.

### **ROLE OF THE SECURITY COUNCIL IN COMBATING SOMALI PIRACY:**

With Resolution 1816 of 2 June 2008 and the other resolutions that followed it, especially the Resolutions 1846 of 2 December 2008 and the resolution 1851 of 18 December 2008, the United Nations Security Council has embarked on a mission to cope with the growing alarm caused due to pirate activities off the Somalia coast. It has taken certain measures within the framework of Chapter VII which aims at fixing the loopholes of the limitations of the above

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<sup>14</sup> Parekh, *supra* note 13.

<sup>15</sup> *Id.*

mentioned rules of the international law, to the extent that their application to the circumstances at hand is concerned.

Paragraph 7 of Resolution 1816 holds the vital element down in it. It deals with the limitation and restrictions concerning the definition of piracy to acts perpetrated on the high seas. This element is that certain states are authorized to:

- 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;
- 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.<sup>16</sup>

The basic effect of these provisions are to make the guiding principles and regulations in the international law regarding piracy on the high seas which can be made applicable also to territorial seas, *inter alia* allowing pursuit from the high seas into these waters, and clarifying that nations acting under these rules within Somalia's territorial waters may make use of 'all necessary means'.

#### ➤ **Limitations Of UNSC Resolutions:**

Although the main effect of the Resolution 1816 and the following resolutions is to extend both *ratione materiae* as well as *ratione loci* of the scope of the international law rules related to piracy, the United Nations Security Council has formulated the appropriate and relevant resolutions with utmost caution. It has introduced numerous limitations which make the adoption of the provisions less revolutionary than they might appear, and seem to aim, in particular, at fending off possible criticism of the Council playing the role of 'legislator'.

Firstly, the authorization provided is limited *ratione temporis*. Resolution of 1816 and 1851 limits to the period of six months the validity of the authorization it introduces; extended up to the period of 12 months, post the adoption of Resolution 1846.

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<sup>16</sup> Tulio, *supra* note3.

Secondly, the scope of these resolutions is limited *ratione loci* as resolution has stated that the authorization provided ‘applies only with respect to the situation in Somalia’.<sup>17</sup>

Thirdly, the resolutions make a request that activities undertaken pursuant to the authorizations they set out ‘do not have the practical effect of impairing or denying the right of innocent passage to the ships of any third State’.<sup>18</sup>

Fourthly, the resolutions affirm that the authorization that they contain ‘shall not affect the rights, responsibilities or obligations of member States under international law, including any obligations or rights under the convention of Law of the Sea in regards any other situation or in establishing the customary international law’.<sup>19</sup>

### RECOMMENDATIONS:

Major maritime nations are required to support and deliberate to hold a wider view of UNCLOS as well as customary law, at the same time establish that the international law does not explicitly preclude capturing nations from sending pirates to third parties for the purpose of trial, or by being dependent on certain agreements, like the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and certain other anti-terrorism treaties, which do not draw limitations with respect to capturing states from initiating trial in their respective courts. The most optimal solution to this issue, for now, is to proliferate patrols in the Indian Ocean and then to capture the pirates and prosecute the captured pirates in the courts of the regional partners, in return of which these partners could be given monetary assistance from these countries. At the end of the day, Maritime Nations need to ensure that these pirates do not become *hostis humani generis* of the modern-day.<sup>20</sup>

The present measures of retributive or preventative nature that aim at combating the piracy issue in Somali, such as the naval patrols, or freezing of the assets of the pirates, or by putting forth strict sanctions on ship owners who yield away to ransom, fails to provide a finality to the issue or a long term solution to the same. Therefore, there is an immediate need for a comprehensive strategy in order to tackle the problem at its very root causes. Keeping the

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<sup>17</sup> SC Res. 1816, at para. 9; SC Res. 1846, at para. 11.

<sup>18</sup> SC Res. 1816, at para. 8; SC Res. 1846, at para. 13.

<sup>19</sup> *Supra* note 19.

<sup>20</sup> Parekh, *supra* note 11.

same in mind, capacity-building initiatives like the IMO's Djibouti Code of Conduct should be appreciated and encouraged.

## CONCLUSION:

Piracy is a crime according to the international law and the same has also been defined and further conceptualized in several international instruments, chief among which is the UNCLOS. Modern-day piracy, currently thriving in the state of Somalia and spreading to other regions of the world as well, is a serious threat to all naval states, their ships, vessels and crewmembers, and also their cargo.<sup>21</sup> Pirates currently operate like terrorists they go after any and every prey that they estimate is easy to capture, irrespective of the nationality of the vessel or its crew members.<sup>22</sup> Thus, they carry out their activities in a supranational sphere, as a global threat to all the countries and a lingering menace on all navigable waters. Moreover, a danger looms that pirates might be linked to other terrorist groups.<sup>23</sup> All nations, and particularly those with a significant naval presence, have to undertake serious efforts in order to fight piracy in Somalia and to make sure that the same does not reemerge in other lawless regions as well. Pirates are to be fought in a comparatively more methodical way which is more serious and includes: routine capture, prosecution, and sanctions in the courts of piracy-fighting nations. Ergo, to accomplish these established goals, the piracy fighting nations should rely on anti-terrorist conventions and treaties as a legal basis for the battle against the phenomena of piracy and continue to co-operate and aid in the struggle against the Somali, and other, pirates as well. Finally, piracy-fighting nations may have to undertake extra efforts in order to rebuild Somalia and in order to ensure that such a lawless situation does not arise in other regions of the world. In fact, piracy is considered to be like terrorism, thrives in disordered nations, war-torn nations, and impoverished regions. Thus, the best long-term solution in order to tackle piracy may be for the developed state's commitment to aid and reestablish a functioning order in developing states and failed states, such as Somalia.

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<sup>21</sup> Douglas R. Burgess, Jr., *Hostis Humani Generi: Piracy, Terrorism and a New International Law*, 13 U. MIAMI INT'L & CoMP. L. REV. 293, 298 (2006).

<sup>22</sup> Douglas R. Burgess Jr., *The Dread Pirate Bin Laden*, LEGAL AFF 32, 32-33 (2005).

<sup>23</sup> Niclas Dahlvang, *Thieves, Robbers, & Terrorists: Piracy in the 21st Century*, 4 REGENTJ. INT'L L. 17, 17-18 (2006).