

"PIRACY AT SEA. THE CASE OF SOMALIA"

For countless years mankind has seen almost regular hostility acts by unknown forces against cargo and fishing vessels. The history of piracy is one of the oldest phenomena of the outlaw sea. The actions from pirates often served the interests of belligerent powers in all ages, from the ancient times to the XVIII century. The pirates at sea used to display their attacks under no established flag, though the ruling nations did not ever succeed in preventing such warlike actions for reasons of different kind. Yet, the private world of the insurance business protected the merchants against such surprising events at sea. The insurance policies and the British Marine Insurance Act of 1906 took exception of the acts carried out by "thieves", "robbers" and "pirates". Together with the risk so-called "takings at sea", these were differentiated from hostile acts and of war risks perpetrated by people without known home or nationality and operating on board of vessels flying the flag of no enemy. Throughout the XX century the Governments paid definite attention to the control and defence of their coastline, and as result the activity of the pirates ceased to sweep across the oceans and got confined to areas of shelter, however still numerous, the best known of which are the Malacca straits, southern China and Vietnam, the access to the Gulf of Aqaba and the Gulf of Aden, particularly the coasts of Somalia and Djibouti.

The International Law was motioned to combat the piracy by the United Nations along the past century. The sequence on the legal response to piracy may best outlined as follows:

- **1958** : the Geneva **CONVENTION ON THE HIGH SEAS, 29.04.58**. A call was made to the Member States for the repression of piracy in the high seas or in any other place not subject to the jurisdiction of a Member State. Every State may seize a pirate vessel or aircraft but outside the territorial waters of another State (Arts.14 and 19).

- **1982:** the **UNCLOS II CONVENTION, Montego Bay**. All the States must cooperate in the repression of piracy at sea. The first definition of "piracy": *"every unlawful act of violence or of restraint or every act of predation committed with a personal intent by the crew or the passengers of a private vessel or aircraft against a vessel or an aircraft in the high seas or against persons or goods on board thereof; against a vessel or aircraft, persons or goods located in a place not subject to the jurisdiction of any State. Every act of voluntary participation in the operation of a vessel or aircraft with knowledge of facts that would give such vessel or aircraft the character of pirate. Every act intended to induce the above acts as defined to be committed or intentionally facilitated"*. Such a broad definition stands as a pillar for successive legislation setting a pattern for a pirate behaviour to be. (Arts.100-102).

- **1986: IMO RESOLUTION 26.02.86 under MSC/Circ, 623/Rev. 1. IMO-MS/Circ. 443.** Recommendations to Governments for the prevention and repression of piracy acts. The States were urged to prepare Plans of Action specifically designed and to provide instructions to all ships flying their flags to that effect. The coastal States must adequate their infrastructures and operational means in order to render such plans effective. The leading criterion was laid down that all ships must take measures of protection against pirates by themselves and that Owners must assume their responsibilities for sending the ships to navigate in dangerous zones. Certain measures were recommended.

- **1988:** Following to and as a consequence of the incident of the cruiser "Achille Lauro" in 1985, the IMO adopted the **CONVENTION FOR THE REPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF NAVIGATION** (best known as the **SUA CONVENTION**). International rule and principles were agreed and adopted toward the detention, process, extradition and prosecution of all crimes committed at sea. The States are required to investigate all piracy incidents wherever these may occur.

- **1991 and 1993: IMO RESOLUTIONS A.683 (17) of 6.11.91 and A.545 (13) of 17.11.93.** Mandate on adoption of measures, coordination between Governments, information on incidents and notices to the navigating ships.
- **2002: IMO RESOLUTION XI-2/6. AMENDMENTS TO SOLAS CONVENTION 1974.** It required all ships to be provided with a ship security alert system, according to a strict timetable that will see most vessels fitted by 2004 and the remainder by 2006. When activated the ship security alert system shall initiate and transmit a ship-to-shore security alert to a competent authority designated by the Administration, identifying the ship, its location and indicating that the security of the ship is under threat or it has been compromised. The system does not raise any alarm on board the ship, so it cannot warn pirates having boarded the ship. The ship security alert system is capable of being activated from the navigation bridge and in at least one other location.
- **2005: U.N. RESOLUTION 59/24 of 4.02.05.** The United Nations made a special call to all world nations for the adoption of the SUA Convention, for cooperation with the specific technical measures adopted by the IMO and for enacting domestic rules so to reach a common legal framework to the repression of incidents brought about by pirates at sea (section 50).
- **2005: IMO RESOLUTION A.979 (24) of 23.11.05** on Somalia. The States were asked to take measures for making the acts of the pirates fail and for obtaining the release of the kidnapped ships.
- **2007: IMO RESOLUTION A.1002 (25), of 19.11.07** on Somalia. Further alert on the situation of the Somali waters. The States are required to make sure that the ships have due advice before entering into navigation near the Somali coast and that they avoid hazardous areas; that the vessels are adequately fit to respond to an attack; that the vessels set out contact points for launching calls for aid and guidance

and that all acts of piracy learned of be investigated in detail and attempts in relation thereto.

- **2008: IMO RESOLUTION 1816, of 2.06.08.** Following to the kidnapping of the Spanish fishing vessel "Playa de Bakio", the IMO took an enormous step forward by asking the States to set their naval forces into alert near the coasts of Somalia and by authorising such military seaborne units to enter the Somali waters for capturing the pirates but with the permission of the TFG (Transition Federal Government) of Somalia and by notice to the Secretary General. Such extraordinary measure was allowed during a period of 6 months (now extended to 12 months and with the open permission of the TFG). No information of the results is yet available.

The above outline would show how the U.N. has gradually moved to address the problem of piracy at sea stemming from the UNCLOS II first international law outfit on piracy. There is no doubt that certain unquestionable golden rules were all along established, namely:

- the acts of pirates must be repressed by all States.
- the jurisdictional waters are inviolable and must be respected.
- all States must cooperate and investigate these incidents.
- all States must adopt domestic laws and take measures to unify universal action and means.
- the States must prepare their vessels and crews for resisting piracy.
- all vessel's Owners must be responsible for the risks prevailing in dangerous zones. The ships must not navigate into areas bound for piracy assaults or attacks.

- the States are not responsible for the failure of their Owners and ships to comply with the recommendations and with the adoption of technical measures.

The dramatic rise of piracy in the regions of the Niger river and of Somalia in the last three years may show that international laws do not suffice, that international action may be energetically required and, indeed simultaneously, that Owners and ships do not obey strictly, or at all, the IMO guidelines and recommendations. Moreover, the shipping trade to and from such risky zones and the fishing activities within or nearby have not stopped and do not seem to be any likely to in the forthcoming future, simply because the business behind, no matter that lives are exposed, seem to justify the payment of heavy ransoms, the loss of valuable time, the high demurrage claims, and the hire of private brigades of negotiators and the recruitment of mercenary troops (Blackwater?) for fighting the pirates.

The uprising continues by blowing the crisis up in the face of Governments, which cannot act in the defence of their nationals without breaking the international laws and which are not to be made responsible by the merchantable routes chosen by those at sea, no matter their exposure and the insurance cost.

The case of Somalia since 1993 is somewhat special. After the American intervention the country was piece-meal divided by the so-called "war lords". There followed heavy strife among them but the UIC (Union of Islamic Courts) emerged as a group determined to afford their controlled areas certain stability. Somalia is split in four main portions today, namely, Somaliland and Puntland, autonomous, in the North; the Central and Southern region are placed under the control of the UIC mostly. The remainder is in the hands of the TFG, whose power is little still being the recognized as Somali Government.

The UIC liberated the cargo ship "Vessham I" from the hands of pirates in November 2007. While the waters of Somaliland were slightly quiet during the last ten years, the Puntland showed instability forcing the regional

administration and the TFG to recruit security agencies. The locations of Eyl, Mudug, Galguduud and Harardhere are particularly active on piracy. In the southern section, the area of Kissmayo is dominated by the so-called "Alliance of the Juba Valley" of the chief Barre Hiiraale, though it gave up to the control of the UIC in the fall of 2006. The picture evolves continuously due to the confrontation among the various "war lords" and groups, to whom some foreign powers give financial support or ammunitions. The U.S. have always opposed to the rule of the UIC in Somalia. France, USA, Holland, Germany and Pakistan participate into the "Task Force 150" for securing a watch and patrolling of the Somali coastline and many of their actions have been successful.

The crux of the issue remains with the penetration into the territorial waters as far as the very shelters of the pirates. This cannot be achieved unilaterally because Somalia is a sovereign State, Member of the U.N., and the aforesaid international law principles must prevail. It is only with the mandate of the U.N. that a breakthrough into the Somali ports (like Eyl) may be attempted. Resolution 1816 just provides for it as long as the State of Somalia so consents to. The weakness of the TFG in that country sets a question mark insofar foreign military forces might be drowned into a civil war and the pirates might fly off again. There is always a risk of miscalculation with foreign intervention unless the pirates can be first isolated and hit right where they are found. We must wait and see the results of Resolution 1816. It is a matter of real test to the International Law doctrine of no trespassing domestic waters and of freedom in the high seas. The test case involves an exceptional rule and, much to the concern of many, runs over the traditional view that the States should not be responsible, neither pay or combat, for the acts of their national shipowners and fishing industrials. Somalia will tell.

On the side of the commercial activities, a number of legal issues are being raised by the hijackings of ships and the questions are already set in front of us, namely, as follows:

- Arming the crews would be legal?

- Are payment of ransoms legal?
- Are the costs relating to ransoms and others necessary for releasing the ships recoverable from insurance or are they otherwise allowable in General Average?
- How hijacking is to affect time charter hire payments and voyage deviation?
- Is hijacking to operate as an exculpatory exception under contracts of carriage by sea?
- Safe port warranties and war risk clauses, how would they play together in the Master's decision?

These are examples of sensible points of issue threatening a rather busy navigational route (Gulf of Aden). Guidelines may not be always available where the International Law position is evolving rapidly, where little co-operation can be expected from the local authorities and where trade cannot wait for no-surrender type of solutions.

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