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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

SEA PIRACY

Background working paper

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Introduction

Sea piracy is one of the oldest international crimes¹ and has been an ongoing worldwide problem for several decades. It has become an increasingly danger for any company involved in shipping, making such types of activities potentially very risky indeed.²

Piracy rates will continue to grow becoming more and more violent in the world's heavily trafficked waterways as global economies demand high volume shipping. These types of criminal activities have raised the international community's attention as pirates have grown bolder over recent years and have increased their activity as the rewards have become greater. This is an even more pressing issue seeing as often some of the proceeds of piracy are being used to finance terrorism.

Although several military measures have already been put in place to counter piracy, it appears that piracy cannot always be eradicated by navies as the legal parameters for foreign militaries in domestic territorial waters of a sovereign nation are limited.

Curbing maritime piracy can lead to greater economic benefits for the whole world and it is thus essential that states co-operate and establish common ways to fight it.

Following Parliamentary Assembly Recommendation 1913 (2010) (Appendix II) several points regarding piracy and the different measures that need to be taken to tackle these issues were raised. These included:

- Need for a universal and precise definition of piracy;
- Promotion of better co-operation between member states and encouragement of better relations with other countries (mainly members of the United Nations Convention on the Law of the Sea (UNCLOS));
- Prosecution and detention of pirates;
- Protection of witnesses and victims;
- Preventive measures – Taking precautions against piracy;
- Promoting deterrence.

A. Defining Sea Piracy

The lack of a unified internationally recognised definition of sea piracy has led to problems related to qualification, detention and prosecution of sea pirates thus having an impact on the representation of the actual rate of maritime piracy. Therefore, a suitable definition should be found that would cover the multiple situations and multiple areas of the maritime zone. It has often been argued that attempts to tackle piracy through international law are being hampered by the lack of a consistent definition. Many countries therefore support the need for a clear, concise and unified definition that would be agreed upon and respected by most countries.

Countering piracy can take place under international, European and domestic law. The evolution of the number of attacks over the years and the nationality of the attacked ships and of the offenders are described in the first appendix.

1. International scale

Several international instruments address the problem of piracy, including the UN Convention on the High Seas (1958), the UN Convention for the suppression of Unlawful Acts against the Safety of the

¹ Andersen, Brockman-Hawe, & Goff, 2009, p.2

² [Explanatory memorandum, by Mrs Keles](#), Rapporteur at the Parliamentary Assembly- « [Piracy- a crime and a challenge for democracies](#) »- 1 April 2010

Maritime Navigation (SUA Convention -1988) (Appendix VII), and the UN Convention on the Law of the Sea (UNCLOS, also known as the Montego Bay Convention - 1982) (Appendix VI).

Currently, several countries follow or base their own legal framework (for instance the United Kingdom via the Merchant Shipping and Maritime Security Act³) on UNCLOS, which defines piracy as including:

- 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...
 - ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State.

There are however several difficulties with this definition:

- This definition is rather narrow, as it includes only action on the high seas and only action undertaken by one ship against another ship. UNCLOS seeks to distinguish between the high seas and a country's Exclusive Economic Zone (EEZ) and its territorial waters. For the purpose of public international law, and for the purposes of some countries' domestic law, piracy cannot be committed while a vessel is within a country's territorial waters, where the equivalent offence is classed as armed robbery. So forms of violence conducted in the territorial waters as well as without the involvement of two ships, such as, the violent taking control of a ship by members of its crew or passengers, even when the follow-up consists of holding the ship and its crew and passengers to ransom, are not included.
- This definition uses the term "high seas" without properly defining it. It can thus easily be misinterpreted.
- The definition provided by UNCLOS also fails to recognize that acts of violence from maritime marauders may include murder or rape without robbery.

The SUA Convention further expands on the judicial treatment of pirates. Its main purpose is to ensure that appropriate action is taken against persons committing unlawful acts against ships. The SUA Convention calls on Parties to make its enumerated offenses "punishable by appropriate penalties which take into account the grave nature of those offenses".⁴

The IMB (International Maritime Bureau) also offers a definition of piracy that consists in: "the boarding of any vessel with the intent to commit theft or other crime and with the capability to use force in the furtherance of the act"⁵. The IMB's approach of piracy is somewhat broader than the ones mentioned above. The definition is however not flawless. Indeed, its definition fails to distinguish between maritime robbery and piracy since it includes acts of interdiction and robbery that happen at port.

2. National scale

Although many countries are party to the existing mentioned conventions, some have been rather proactive and have established a legal framework at a national level including several strategies in the fight against sea piracy. In a letter dated 23 of March 2012 from the Secretary General to the President of the Security Council, the UN presented a compilation of information received from Member States on measures they have taken to criminalise piracy under their domestic law and to support the prosecution of individuals suspected of piracy off the coast of Somalia and imprisonment of convicted pirates.

Denmark

Denmark has taken several initiatives to criminalise piracy under domestic law and to support the prosecution of individuals suspected of piracy and imprisonment of convicted pirates. Under section

³ Merchant Shipping and Maritime Security Act 1997

⁴ Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation: Article 5.

⁵ International Chamber of Commerce, 2004, p.3

183A (rev 1992) of the Danish Criminal Code, it is a punishable offence under section 260 to take control of or interfere with the manoeuvring of a ship by unlawful means.

Danish naval vessels have guidelines on how to handle cases that may result in the prosecution of pirates in Denmark. These guidelines contain specific directives on the collection of evidence and communication between authorities in order to ensure the suitable execution of a political criminal case dealing with piracy.

Denmark also has legislation regarding the prosecution and detention of pirates. It has also been very active in co-operating with other states and welcoming bilateral agreements in order to fight against sea piracy.

France

France has recently implemented Act No. 2011-13 of 5 January 2011 concerning measures against piracy and the exercise of national police powers at sea. The act amends the act of 15 July 1994 concerning modalities for the exercise of national police powers at sea, which already provides for means of action by the state against crimes committed at sea, such as illicit trafficking and illegal immigration. The new legislation adds a new chapter to that act, specifically addressing maritime piracy by referring to a number of offences relating to piracy that were already included in the Criminal Code but that have now been brought together in one instrument.

French courts, which had previously been competent only when the victim was a French national, now have quasi-universal jurisdiction under the new act. The French authorities can still decide whether or not to hold the trial in France, in accordance with Article 105 of the United Nations Convention on the Law of the Sea, which gives the courts of the State that captured the suspected pirates the option of prosecuting them but does not impose an obligation. The original legal framework has now been complemented with a specific procedure for the detention of persons suspected of crimes at sea, such as piracy and illicit trafficking. These persons are detained on the warships that captured them, but at that stage are still not subject to judicial proceedings in the strict sense.

Any French judicial proceedings begin only once the detainees have set foot on French soil and are brought before a French judge. Under the new procedure, the custodial judge takes action within 48 hours of the suspects' capture in order to confirm or modify the detention measures taken on the warship pending a decision on what is to be done with the suspects. The judge then monitors the conditions of detention until the suspects disembark. This feature is the salient point of the procedure established by the new act. This act will improve the legal framework for action to combat piracy at sea, particularly off the coast of Somalia. It specifies the conditions under which French forces may take action to counter the threat, as well as the modalities for prosecution by French judges. The act incorporates the principles set forth in the United Nations Convention on the Law of the Sea. By adopting this act, France is complying with the requests of various United Nations organs, in particular the Security Council, which have called on Member States to ensure that their legal framework facilitates effective action against piracy.

Russia

In Russia, piracy is defined under Article 227 of the Criminal Code as an assault against a maritime or other vessel with intent to capture the property of others and with the use of force or the threat of force. It is punishable by imprisonment from 5 to 15 years.

3. Summary

What possible future CDPC's work could focus on (in terms of a definition of piracy):

- * A universal definition of piracy;
- * Clarification of the meaning of the term "High Seas";
- * Clarification of the distinction robbery/piracy;
- * Finding an acceptable middle ground between a broad and a narrow definition;
- * The treatment of acts that do not fall under piracy;
- * Emphasis on co-operation between states.

B. Prosecution

Certain issues related to prosecuting individuals linked to activities related to sea piracy:

- States are often reluctant to prosecute. It is not easy to identify pirates and it is particularly difficult to prove that the acts were committed ;
- Jurisdiction/ Legal issues;
- Nowadays, pirates rarely end up in court: in most cases, even when they could be apprehended, they are left free.

1. Evidence: Proving Piracy

One of the main problems in prosecuting pirates is the lack of sufficient evidence. If a pirate is caught in the act of capturing a ship, this is an easy case to prosecute. However, other attempt situations may raise difficult questions regarding finding evidence of activities related to piracy especially if different countries have agreed upon different definitions and legislations. Some acts may thus not fall under a so-called act of piracy that needs to be criminalised whereas some may. For example, a local vessel may engage in multiple activities such as piracy, fishing and smuggling and when the ships are apprehended, the crewmen on board claim that they are not pirates. One must then decide whether there is sufficient evidence to take these individuals into custody.

It has been suggested that there should be a new definition of the crime which is comparable to the crime of possession of burglary tools. In the case of piracy, one could criminalize the possession of a rocket-propelled grenade ("RPG") in a vessel. In other words, one could make it a crime to possess the characteristic tools of piracy. This would help to close the obvious gap: when one cannot prove piracy, one may be able to prove possession of piracy tools. Even so, some weapons may be seen as more characteristic for self-defence while at sea, and thus some evident problems would remain.

Since the implementation of the EU anti-piracy operation Atalanta, the number of attacks has not decreased but the number of successful attacks has been reduced. During the first semester of 2011, one in 14 attacks were successful whereas in 2010 one in four attacks were successful.⁶ However, on the other hand, the amount of ransom demanded by the pirates has increased. In 2008, the average ransom was between \$500 000-2 million and in 2009 this figure appears to have increased.⁷

2. Criminal procedure : Detention and Trial

Piracy is defined by every nation as a crime. When an act is defined as a crime, a trial will be held to determine whether the individual apprehended for such an act is guilty as a matter of both fact and law.

A complication arises over the legal status of pirates once they are captured by foreign naval forces in their own territorial waters. Under French law, for instance, a captain may apprehend and hold pirates but only a judicial authority can arrest and detain them for trial. In many cases, the pirates are not brought onto warships but are left in their own vessels without being allowed to depart. Some countries which are parties to the UN conventions have a more limited capacity to combat piracy lawfully given the restraints of their own domestic laws.

What sentences are given to the pirates?

As we have previously mentioned, there is no universal legislation regarding piracy and the sentence concerning the pirates depends on the applicable law.

Here we can examine 2 examples regarding French ships which were attacked.

⁶ « Piraterie maritime : autant d'attaques mais moins de réussite pour les pirates », Laure Constantinesco, 27/06/2012, TV5 Monde

⁷ United Nations Office on Drugs and Crime Report, Chapter 9 Maritime Piracy, page 199

- The Carré d'As case: the Carré d'As was attacked by Somali sailors who kidnapped a French couple. The pirates were condemned to 4-8 years in prison.⁸

- The Ponant case: The Ponant was attacked by the "Somali Marines", one of the most powerful groups of pirates. They kidnapped 30 crew members. The hostages were released after the payment of a ransom and 6 pirates were captured. Following the trial, where 3 of the pirates continuously protested their innocence, 2 were acquitted, while the others received sentences ranging from 4 to 10 years.

3. Co-operation between states

The challenge of locating and sustaining jurisdictions willing and able to prosecute piracy suspects and detain private convicts persists. To date, some of the legal and law enforcement challenges have been addressed through the establishment of bilateral agreements. Some agreements define procedures for the detention, transfer and prosecution of captured pirate suspects.

The benefits of European and international co-operation are becoming visible in some parts of the world, with for instance a sustained reduction of attacks in the Strait of Malacca, and with increasing evidence of the willingness of naval forces to intervene when piracy occurs.

As another example, the EU anti-piracy operation Atalanta was launched to counter sea piracy. This project unites multiple states in the fight against maritime piracy. It was established in accordance with the EU Council Joint Action 2008/851 and EU Council Decision 2008/918, on 8 December 2008. The operation was in support of Resolutions 1814, 1816 and 1838 which were adopted in 2008 by the United Nations Security Council (UNSC). This operation has now been extended until December 2014. The operation has several goals including: the prevention and repression of acts of piracy and robbery off the Somali coast, the protection of vulnerable shipping and the monitoring of fishing activities off the coast of Somalia.⁹

The European Union has also been fighting sea piracy in several other ways.

For instance, the *Critical Maritime Routes Programme*, which was set up in 2009, has focussed on the security and safety of essential maritime routes in areas affected by piracy to help to secure shipping and trading lines of communication. Its long term goal is to improve maritime governance.

The European Development Fund set up the *Regional Maritime Security Programme* (MASE) in 2010, which aims to develop legal and infrastructural capabilities for arrest, transfer, detention and prosecution of pirates. It hopes to strengthen the regional capacity to mitigate financial flows and minimise the economic impact of piracy.¹⁰

The *EUCAP NESTOR CSDP mission* is intended to support the maritime capacities within the framework of the Common Security and Defence Policy. This new mission, beginning in summer 2012, will have two main aims: firstly, to reinforce the maritime capacities of Djibouti, Kenya, Tanzania, and the Seychelles and secondly to reinforce the state's rule of law in the Somali regions of Puntland and Somaliland.

4. What are pirates' rights?

As mentioned in Doc. 12193 on Piracy – a crime and a challenge for democracies (April 2010) of the Parliamentary Assembly, a legitimate issue arises concerning what rights should be granted to the suspected pirates while they are kept in custody and on what legal basis they should be held. Should the suspected pirates have access to legal assistance, to an interpreter, to the asylum procedure?

⁸ France Info, mercredi 30 novembre 2011, par Mikaël Roparz.

⁹ European Union Naval Force Somalia – Operation Atalanta.

¹⁰ Piracy, the curse of maritime transport, European Commissions' role in managing financial development instruments

The nature of the pirates' right to trial and procedural as well as legal due process rights varies from nation to nation. In some legal systems the pirates' right to trial is a mere formality. However, in other nations such as the United Kingdom a piracy trial gives the accused substantial due process rights.

C. Protection of victims and witnesses

In recent years, the lack of protection of victims and witnesses of sea piracy has come to the fore. The availability of witnesses for trial is a necessity but also a problem especially in legal systems where an affidavit is not sufficient proof at trial. Many witnesses and victims have proven to be reluctant in reporting crimes or participating in the prosecution of pirates for fear of retaliation. Providing some forms of protection to vulnerable people is thus an important step in countering piracy.

D. Preventive Measures

Measures such as those highlighted by the International Ship and Port Facility Security (ISPS) Code involving the use of satellite tracking systems (ShipLoc) combined with a better watch keeping, a naval presence able and prepared to undertake rapid pursuit supported by intelligence gathering procedures, can minimise the effect of attacks by pirates. Also, an important area where improvements can be made is in the way in which the Ships Security Alert Systems (SSAS) operate. Typically, these send a warning message to the Flag State and to the owners' office. A study carried out by the S. Rajaratnam School of International Studies at Singapore's Nanyang Technical University, concluded that an efficient system would entail more detailed warning messages being sent, and that these should go directly to coastal states and also to naval vessels in regional security operations, and to local and international co-ordinators. A further recommendation was for a code to be injected into a vessel's Automatic Identification Systems (AIS) messages, to alert nearby coastal states and vessels, particularly naval forces. Meanwhile, ship owners can also be proactive by maintaining a robust attitude towards security simply by taking precautions such as we have outlined, by co-operating with organisations and especially by promptly reporting any incidents.

However, preventive measures at sea, although necessary, are the last line of defence. It is doubtful that terrorism and piracy at sea will ever be fully eradicated, but real and sustained progress towards that objective needs even greater co-operation between nations, the full commitment of ship owners, and concentrated action in the countries from which piracy occurs.

Conferences and discussions should, in this respect, be encouraged. The aim of the latter is to build awareness of the prevailing threat from sea piracy, promote further co-operation including in the crucial area of extending more support to seafarers and their families who become victims of piracy and support capacity development among regional states especially Somalia to present viable national responses to threats of off-shore piracy.