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LEGAL ASPECTS OF USE OF INTERNATIONAL MARITIME FORCES TO FIGHT PIRACY

ABSTRACT

The paper deals with current problems related to pirate activities in the oceans and seas towards the end of the 20 and the beginning of the 21 centuries as well as to law regulations which allow for use of international maritime forces to fight piracy at high seas and littoral waters. The analysis of hitherto solutions allows stating that in the case of piracy carried out in territorial and internal waters as well as in harbors (these are currently the main areas of pirate activities) use of international forces is impossible (illegal). The author suggests considering to change the present stalemate through modification of the 1982 Convention being in effect or through adopting appropriate international strategies based on agreements and declarations by individual states. The paper underlines the key role and significance of maritime countries in fighting piracy.

Piracy is probably as old as the seafaring itself and they have both been interconnected. They have accompanied each other for many centuries across all the seas of the world. The view on piracy and its moral status have varied with passing time and it has been defined in different ways. The most common is the word pirate, derived from the Latin *pirata* which comes from the Greek word *peiran* which means to try ones luck at sea. The French use the word *forban*, derived from the expression *horse du ban* – an outlaw. The English use the term *sea robber* which has the same meaning as Dutch *zee-roovers* [1].

The main objective of the sea robbers used to be the wish of taking someone else's property or capturing people with the aim of selling them or getting a ransom. They were very seldom directed by political objectives and this feature clearly separates „classical pirates" from the contemporary organisations and people who are involved with political terrorism or who break international law in other brutal ways.

The history knows periods of particular intensity of piracy but there are also centuries in which that activity almost dies out. So it is with geographical regions –

in ones piracy has existed for centuries up till now, in others it once flourished but then was stopped and has never returned.

Piracy and pirates survived up to our days and currently they still constitute a menace but the methods used by them place them closer to gangsters and terrorists than to the brave and free „knights of fortune" of days gone by. On the basis of the methods and internal organisation we can even talk of their procedure as of sea banditry.

Up till recently the most active pirate gangs were those in the Far East, in the region of Central America and the Western Coast of Africa. Nowadays the trouble has spread to almost the whole coast of southern Asia and waters surrounding the continent of Africa and both Americas [2]. The pirate gangs are better and better organized. They have their own informers and spies, they intercept documents sent by post, use faxes and computers and have well hidden bases and hideouts. These gangs are equipped with modern devices (super fast boats, radar, night vision devices, radio stations) and even try to build mini submarines [3]. They are equipped with modern weapons, from machine guns to missiles.

What is important to our further considerations is that their area of activity in different regions has also changed. Formerly it was limited to the open sea, while nowadays the „traditional" areas are waters of gulfs and bays, territorial waters, ports and harbors. In the mentioned areas over two hundred attacks are reported every year (in the nineties) in the years 1995 – 1999 during attacks on ships 1170 members of there cruise were kept as hostages, while only in 1998, 160 crew members were killed and 67 reported missing [4].

Most coastal states fight piracy on territorial waters by asistance of the navy, coast guard or other units. In many cases the mentioned forces cooperate, but there is a direct connection between the possibilities of those forces and the level of danger. Therefore, we may ask the question whether there is a possibility of an international intervention in order to fight piracy, especially in territorial waters and waters controlled by archipelagic states.

According to the United Nations Convention on the Law of the Sea of 1982 (LOS Convention) the duty to cooperate in the repression of piracy is limited to the high seas and other places outside the jurisdiction of any state (art. 100). Moreover, art. 107 (ships and aircraft which are entitled to seize on account of piracy) limits the types of ships-and air-craft that might be used to fight piracy to warships, military planes and other ships or aircraft that can be easily identified as being on government service. Articles 105 and 106 inform about possible consequences of stopping a pirate craft without the required authorization.

We can remark that although there is the requirement in cooperation in fighting piracy at open sea, that does not necessarily mean stopping a pirate unit on international waters. The intervention in that area is voluntary and according to the LOS Convention all the units should carry proper signs, which does not seam to refer to warships. Art. 107 rules out the usage of Q-ships and art. 106 underlines the responsibility of the involved state when an alleged pirate ship is taken without adequate grounds. This responsibility refers to the state the flag of which the taken ship was carrying (that does not apply to the crew and people representing charter). However, that does not solve the problem when the ship belongs to a pirate syndicate and raises several different flags, breaking the art. 98 (duty to assistance) of the LOS Convention. It can be treated as a ship is without nationality according to art. 110 (right to visit), but from the theoretical point of view any intervention against such a ship could make it being recognized as being carrying one of these flags.

The definition of piracy in art. 101 refers to activities, voluntary participation or instigation to lawless acts of violence, taking over a craft or robbery committed for personal reasons by the crew or passengers of a private ship or a plane and carried against another sea or air craft, against people or possessions („property") on board, and – which is very important – committed on high sea or a place out of jurisdiction of any country. That arises the question whether taking over a ship, cargo, passengers and a crew on territorial waters, straits used for international sea trade or archipelagic waters matches the definition of piracy. Moreover, art. 101(a)(ii) refers only to offences against a ship, a plane, people or property (does not mention any others). As we may suppose the problem lies in an inadequate, too narrow a definition of the place of a pirate act (localization of the attack) and a limited choice of the object (aim) of the attack.

While considering the possibility of using international forces in fighting piracy on international waters we should take into consideration articles 110 and 111 (law of the hot pursuit) of the LOS Convention, which are vital for our analysis. The first one talks about the right of visit all the ships apart from the ones that enjoy full immunity according to articles 95 and 96 of the LOS Convention, the other about the right of hot pursuit.

Art. 110 mentions the right to visit in case there are sensible clues to a suspicion that a ship is engaged in piracy, and also predicts a compensation for all losses and damages that might occur if the suspicions turn out to be wrong. We may assume that art. 110 safe guards the activity of international sea forces in fighting piracy at high sea, allowing more initiative than the Nyon Agreement, which re-

quires specific proofs. That could create unclear situations as far as what kind of proofs would apply.

Art. 111 mentions the right to pursue when the authorities of an involved country have satisfactory reasons to suspect that a ship has violated the laws of regulations of that country, and has to be started while the alien ship or one of its boats is on the territorial waters, archipelago waters, territorial sea, or the contiguous zone of the pursuing country. It can be continued outside the territorial waters only if it has not been interrupted. We can also note that as far as the contiguous zone (art. 33 of the LOS Convention) the exclusive economic zone and continental shelf the right of hot pursuit only applies in case of violation of laws to protection of which the zone has been established or the laws or regulations of the involved country which correspond with the LOS Convention. Moreover, the right of hot pursuit is invalid in the moment the pursued ship enters the territorial waters of its own country or the territorial waters of a third country.

When analyzing the art. 111 we may assume that, after considering art. 58 (2) and (3) (rights and duties of other states in the exclusive economic zone), there are possibilities of fighting piracy by International Maritime Forces (IMF) at open sea. However, art. 111 (3) should be changed or suspended on the basis of the IMO convention on lawless acts against the safety of sea trade (Rome 1988) or on the basis of agreements of the states (a regional organization) forming the IMF.

The usage of IMF gets complicated in the legal aspect when they operate on coastal waters [5]. LOS Convention guarantees the sovereignty of a coastal state over these waters. Art. 19 allows unharmed innocent passage through the mentioned area, but it is subjected to a series of limitations. Art. 25 (3) states the right of the coastal state of its security. Art. 27 and 28 define the rights of the coastal state with reference to merchant ships, whereas art. 30 – 31 refers to warships and other government ships operated for non-commercial purposes. The mentioned articles also apply to archipelago states, but art. 52 (2) (right of innocent passage) suggests that such a state, in specific situations (eg. pirate menace), is allowed to temporarily suspend the innocent passage of alien ships, if such suspension is vital for its security. Art. 53 – 54 of the LOS Convention contain regulations concerning rights of archipelagic sea lanes passage.

The conclusion which can be drawn from the mentioned articles is that it is not possible to take any steps to fight piracy without violating the rights of the coastal state and taking the risk of sanctions predicted by the convention. Any intervention in the mentioned areas would be only possible on the bases of additional agreements between involved countries.

As experience shows, the usage of IMF on fighting piracy on coastal waters would be limited by definition. Moreover, the probability of such action rises when the coastal states along important sea trade routes do not react to possible dangers or simply do not have the means to react and safeguard sea trade in the area of their jurisdiction [6].

MODIFICATION OR IMPROVEMENT OF THE LOS CONVENTION CAN BE A WAY TO CREATE LEGAL BASES FOR IMF INTERVENTIONS AGAINST PIRACY

Art. 311 (3) (relation to other conventions and international agreements) states that: „Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention".

The mentioned article implies that in order to modify or suspend the LOS Convention first we must get negative answers to the following questions:

- Do the current regulations assure an effective achievement of the LOS Convention goals?
- Do they have influence on the compliance with the basic foundations of the LOS Convention?
- Do they not violate the rights of specific countries and the ways they carry out their duties?

Art. 41 of the Vienna Convention (Vienna 23 May 1969) allows modification of international treaties between different countries, if such a modification is stipulated in the treaty and does not influence the way other parts can execute their rights or fulfil their duties.

The answers to the presented questions may vary and to question two we would probably get a positive answer. Therefore it would be advisable to take into account the opinions of countries where the problem of piracy on their territorial and home waters is the greatest, and where LOS Convention articles on fighting piracy

cannot be applied. From the practical point of view it would be useful to carry out discussion on the modification of the LOS Convention in three groups:

- Sea powers and countries with the greatest number of ship owners;
- Coastal countries of medium size involved in sea trade;
- Small coastal countries and countries without access to the sea which are involved in sea trade [7].

We may assume that as refers to the open sea, the LOS Convention proper articles would require minor changes only, referring to a broadened (changed) definition of piracy. A proposal of defined international actions in case of a strategic pirate menace in those regions would also be needed. In case of EEZ and territorial seas, a limited application of the LOS Convention articles on piracy should be taken into consideration. To postulate such changes might be regarded today as some form of „heresy", but it is worth to consider whether such solutions are not better than theoretical jurisdiction on some territorial waters. IMF can be created on the bases of existing military alliances (NATO, ASEAN), regional organization, bilateral agreements or military cooperation programs. It is obvious that it might be difficult to reach a consensus on the mentioned issues with medium sized and small coastal states (especially the developing ones), as they tend to be oversensitive with regard to their sovereignty, lacking at the same time the means or resources to fight piracy on waters under their jurisdiction [8].

Another possible scenario would be to include some amendments of stipulations on piracy on the basis of art. 312 or art. 313 of the LOS Convention and use the procedures it allows. Taking as the point of reference the date 16 November 1994, when the LOS Convention came into force the conference on amendments on piracy cannot take place until 16 November 2004, but we may suppose that point 2, art. 312 should get the approval of most countries. A simplified procedure according to art. 313 is also possible. It allows to accept amendments without calling up a conference after the Secretary – General of the United Nations had sent notes to all the interested countries. In practice however, such a procedure seems to be doomed to failure as any country can put its veto within twelve months from the date of sending the note, which automatically means that the amendments have been rejected.

There is also the possibility of applying art. 311 (2) (3) of the LOS Convention in case of regional agreements on fighting piracy, and also art. 310 in case of a single state when it wants to broaden the range of means used in

fighting piracy. The IMO conference of 1988 on counteracting lawless activities against the security of sea trade also apply to piracy although the terms used here do not appear in the LOS Convention. We may assume that the terms „piracy" and „assault at sea" are equivalent and do not require an exact semantic analysis. That implies the necessity of IMF intervention in case when the security of sea trade is violated or endangered.

The current regulations of international law, especially the LOS Convention cause that the usage id IMF forces to fight piracy on international and coastal waters is not very probable and may not take place (especially in case of territorial waters). Including any amendments or modifying the Convention do not seem probable at the moment, although are possible in a longer perspective. The most promising solutions would be bilateral and multilateral agreements between countries in regions where the intensity of pirate attacks (assaults at sea) is high. The attitude of coastal states and their good will in fighting piracy on waters under their jurisdiction are of utmost importance. An agreement between the country of the ship's flag (the owner of the ship) and coastal countries on the issue of using IMF forces is especially important as it helps to strengthen their own sovereignty, safety and economic development. Nowadays two solutions are possible: an agreement to use IMF forces to fight piracy, or lack of activity which would be considered a setback. It seems that just accepting some „anti-pirate" solutions would prevent some of the attacks of these sea gangsters. Moreover, as long as piracy is still a cultivated procedure, using International Maritime Forces to fight it, may be a logical and effective solution.

NOTES

[1] Z. Skrok, *The World of the Sea Pirates* (in polish), Gdansk 1982, p. 5.
[2] S. P. Menefee, *Trends in Maritime Violence*, Surrey (UK), Alexandria (USA) 1996, pp. III – VI.
[3] „Time", September 18, 2000, p. 34.
[4] ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships*, Annual Report: 1st January 31st December 1998 (1999), p. 3, table 1.
[5] „The Coastal Waters" mean here: territorial seas and archipelagic waters.

[6] In practice, very often many of the local governments support the piracy activity under the pressure of the black mail the sea gangsters syndicate or itself participate in gains.
[7] These „hierarchy" of the States according to: D. L. Larson, M. W. Roth, T. I. Selig, *An Analysis of the Ratification of the UN Convention on the Law of the Sea*, „Ocean Development and International Law", 1995, vol. 26, p. 293.
[8] S. P. Menefee, *Foreign Naval Intervention in Cases of Piracy: Problems and Strategies*, „The International Journal of Marine and Coastal Law", 1999, vol. 14, no 3, pp. 366 – 367.

STRESZCZENIE

Artykuł pt. *Aspekty prawne użycia międzynarodowych sił morskich w zwalczaniu piractwa* odnosi się do aktualnych problemów działalności piratów na wodach wszechoceanu u schyłku XX i na początku XXI wieku oraz regulacji prawnych zezwalających na użycie międzynarodowych sił morskich do zwalczania piractwa na wodach morza pełnego oraz na przybrzeżnych obszarach morskich. Analiza dotychczasowych rozwiązań prawnych pozwala stwierdzić, że w przypadku uprawiania piractwa na wodach terytorialnych, wewnętrznych oraz w portach (są to obecnie główne obszary aktywności piratów) użycie międzynarodowych sił morskich jest niemożliwe (nielegalne). Autor proponuje rozważyć zmianę obecnej sytuacji „patowej" w tym zakresie poprzez modyfikację obowiązującej konwencji o prawie morza z 1982 roku lub poprzez przyjęcie odpowiednich strategii międzynarodowych opartych na umowach i deklaracjach poszczególnych państw. Artykuł podkreśla kluczową rolę i znaczenie państw nadbrzeżnych w zwalczaniu plagi współczesnego piractwa.

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