

FREEDOM OF NAVIGATION

- Rights and Duties of Flag States
- Piracy

Andrew Murdoch



Outline

I. Freedom of Navigation (FON)

A. The Freedom of the Seas/Historical Perspective

B. FON on the High Seas and EEZ

II. The principle of Flag State jurisdiction on the high seas and exceptions

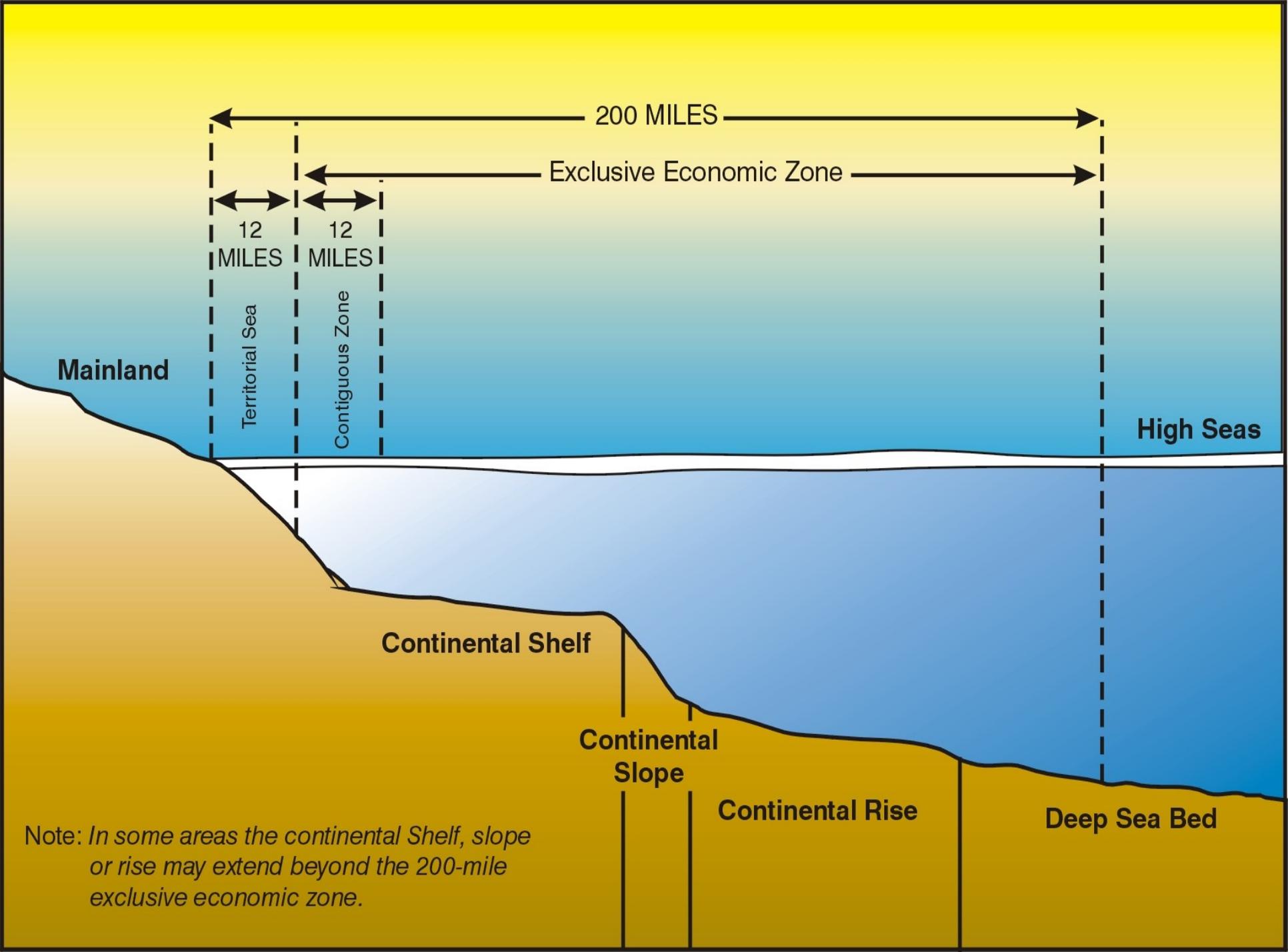
III. Piracy

Pre UNCLOS 1982

- State boundaries until late C20th
- Oceans free and open to all' (*Grotius*)
- Except territorial seas - commonly 3nm (projection of territorial control- cannon shot rule)
- Post WW2 extension of control over more of the sea
- 1958 Four Conventions adopted
 - Did not solve the issue of the width of the territorial sea. Therefore no clear rule was established on the boundary of the high seas

Post UNCLOS 1982

- Concept of High Seas is defined by exclusion of the coastal states sovereignty and sovereign rights/jurisdiction
- Whole space not including Internal Waters, TS, EEZ and archipelagic waters (Art 86)
- No state may appropriate any part of the high seas or otherwise subject it to that State's sovereignty (Art 89)
- Open to all States, whether coastal or land-locked (Art 90)



High Seas freedoms today (Art 87)

- Freedom of Navigation
 - Freedom of overflight
 - Freedom to lay submarine cables and pipelines, subject to Part VI (continental Shelf)
 - Freedom to construct artificial islands, installations and structures
 - Freedom of fishing, subject to conditions (conservation and management of the living resources of the HS)
 - Freedom of scientific research, subject to Parts VI (continental shelf) and XIII (MSR)
- **Today look at Freedom of Navigation**

Freedom of Navigation on the High Seas

1. Every State...has the right to sail ships flying its flag on the high seas (Art 90)
2. This freedom shall be exercised by all states with **due regard** for (Art 87):
 1. the interests of other States in their exercise of the freedoms of the high seas;
 2. and the rights under the Convention concerning the Area

Freedom of navigation within EEZ

- In the exclusive economic zone, all states, whether coastal or land-locked, **enjoy**, subject to the relevant provisions of the Convention, the **freedom of navigation and other lawful uses of the sea related to this freedom**, such as those associated with the operation of ships and compatible with the other provisions of the Convention. (art 58)

Limits of FON rights

Marine Scientific Research v Military Data Gathering/ Military Surveys

UNCLOS Article 246

“Coastal states ... Have the right to regulate, authorise and conduct marine scientific research in their exclusive economic zone and on their continental shelf.. ”

but UNCLOS Article 58 says

“In the exclusive economic zone all States enjoy ... the freedoms of navigation and overflight and other internationally lawful uses of the sea related to these freedoms”

Interpretation: Art 19(2)(j), Art 21(1)g), Art 40...

Survey for navigational safety

No commercial benefit from data



The Flag State

- Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag.
- Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship (Art 91)
- MV Saiga (no.2)



The Flag State

- Ships shall sail under the flag of one State only
- A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities...may be assimilated to a ship without nationality (Art 92)



Duties of the Flag State

- Every State shall maintain a register containing names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size (Art 94)



Duties of the Flag State

- Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, inter alia, to:
 - (a) the construction, equipment and seaworthiness of ships;
 - (b) the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments;
 - (c) the use of signals, the maintenance of communications and prevention of collisions

Duties of the Flag State

- Every State shall effectively exercise its **jurisdiction** and control in administrative, technical and social matters over ships flying its flag (art 94).
- Ships shall be subject to the **exclusive jurisdiction** of the flag State on the high seas.
 - Exceptions are established in the Convention or other treaties
- Any State may board and assert its jurisdiction over a ship without nationality

Criminal Jurisdiction - High Seas

- In the event of a **collision or any other incident of navigation** concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, **no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag state or of the State of which such person is a national.**
- No arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag State.
- The “Enrica Lexie” Incident (Italy v India)

Exceptions to the principle of flag State jurisdiction

- Measures under the Convention
 - Slave trading (art 99)
 - Piracy (arts 100-107)
 - Unauthorized broadcasting (art 109)
 - Hot Pursuit (art 111)
- Separate Treaties (e.g)
 - PSI/SUA
 - Drug Trafficking

Measures (under the Convention)

- Right of visit (art 110)
- Hot Pursuit (art 111)
(Use of force)



Right of visit (art 110)

- What is the right of visit

Usually it means the right to board and inspect the ship (for stated purpose)

- Who may exercise the right of visit

A warship (or a ship duly authorised clearly marked and identifiable as being on government service) may board a foreign flagged ship (not a warship or a government operated ship)

Right of visit (art 110)

- If there is **reasonable ground to suspect** that the ship is engaged in:
 - (i) Piracy
 - (ii) Slave Trade
 - (iii) Unauthorised broadcasting and the flag state of the warship has jurisdiction under art 109
 - (iv) Is without nationality
 - (v) Though flying a foreign flag or refusing to show its flag the ship is in reality of the same nationality as the warship.

How to exercise the right of visit

“the warship may proceed to verify the ship’s right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration” (art 110(2))

Consequences

“If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained”
(art 110(3))

Further measure: Hot Pursuit

When may hot pursuit be exercised?

When a Coastal State has good reason to believe that the ship has violated its laws and regulations

Where may hot pursuit commence?

- When the violating ship or one of its boats are within the coastal State internal waters, territorial seas, archipelagic waters and contiguous zone and may go beyond if the pursuit is not interrupted.
- The rights also apply to violations in the EEZ and the continental shelf of coastal State laws and regulations adopted in accordance with the Convention.
- Constructive presence

Other conditions for hot pursuit

- Signal
 - pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.
- Arrest
 - Pursuit outside TS must be uninterrupted
- When does the pursuit cease?
 - ship enters the territorial sea of another State
- Who may exercise the right of hot pursuit?
 - Warships, military aircraft or ships and aircraft clearly marked and identifiable as being on government service and are authorized to do so
- Compensation
 - For any loss or damaged suffered

Arctic Sunrise - example

- Russia charged the Arctic 30 with hooliganism, based on the entry of some of them into the 500-metre zone prohibited for navigation.
- Boarding, seizure, and detention of a vessel in the EEZ on suspicion of such offences finds a basis in international law only if the requirements of hot pursuit are satisfied.
 - pursuit of the Arctic Sunrise had to commence while at least one of its RHIBs was within the 500-metre zone;
 - stop orders be given to the main ship that is to be pursued;
 - VHF radio messages did constitute a “visual or auditory signal . . . given at a distance which enables it to be seen or heard by the foreign ship”.
 - Action of RU vessel was not consistent with continuous pursuit, the final objective of which would have been to board as soon as possible, the pursued ship.

Hot Pursuit - example

- Australian – Toothfish cases (Viarsa)



The *MV Saiga* Case

International Tribunal  for the Law of the Sea



The *MV Saiga* Case

- *Saiga* (oil tanker) 28 October 1997, drifting at southern limit of Guinean EEZ waiting to supply gas oil to fishing vessels
 - Flagged to St Vincent and the Grenadines
- Guinean Patrol Boat fired on *Saiga*; Officers boarded and arrested the vessel, and steamed her to Conakry
 - Fired into *Saiga* (including bridge area) with solid shot from large calibre automatic weapons
- Master convicted in Guinea of importing diesel oil into the Guinean 'customs radius' in breach of Guinean law, and refusing to comply with directions of Guinean Navy
- Matter submitted to ITLOS

The *MV Saiga* Case

ITLOS Judgment (1 July 1999) (*Saiga No.2*)

- Use of force must be avoided as far as possible
- Where unavoidable, it must not go beyond what is reasonable and necessary
- Considerations of humanity must apply in the law of the sea, as they do in other areas of international law

The *MV Saiga* Case

- “These principles have been followed over the years in law enforcement operations at sea. The normal practice used to stop a ship at sea is first to give an auditory or visual signal to stop, using internationally recognised signals. **Where this does not succeed**, a variety of actions may be taken, including the firing of shots across the bows of the ship. It is **only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force**. Even then, appropriate warning must be issued to the ship and all efforts should be made to ensure that life is not endangered” (para. 156)

Drug Trafficking

- UNCLOS Art 108
 - ‘All States shall cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions’
- Recognizing general exclusive Flag State jurisdiction.
- Needs cooperation between States to combat drug trafficking using additional legal (bi/multi-lateral) framework

Drug Trafficking

- 1988 UN Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances
- Establish jurisdiction over Offences:
 - Committed in its territory;
 - Committed over its flagged Ships;
 - Over its nationals;
 - **Other flagged ships when authorized by the Flag State.**



Drug Trafficking

Article 17: if reasonable grounds to suspect that a foreign flagged vessel engaged in illicit traffic

- request confirmation of registry;
- if confirmed request authorization to take appropriate measures
- Flag State may authorize the requesting State to, *inter alia*:
 - Board;
 - Search;
 - If evidence found, take appropriate action with respect to vessel, persons and cargo on board.

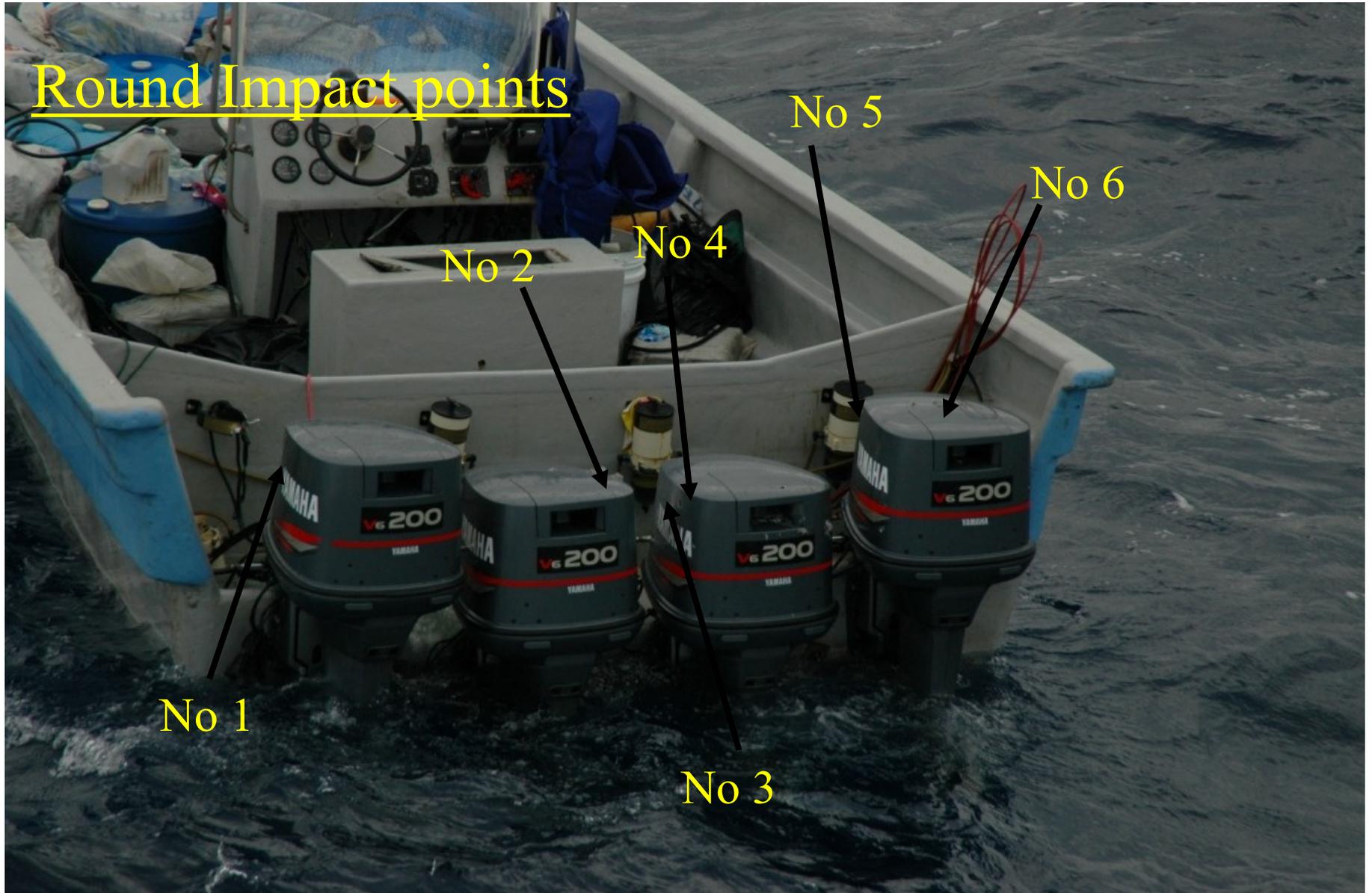
Started disposing of phones & small amounts of cargo



All crew remained fwd after first MST Round Fired
until LEDET arrived



Round Impact points

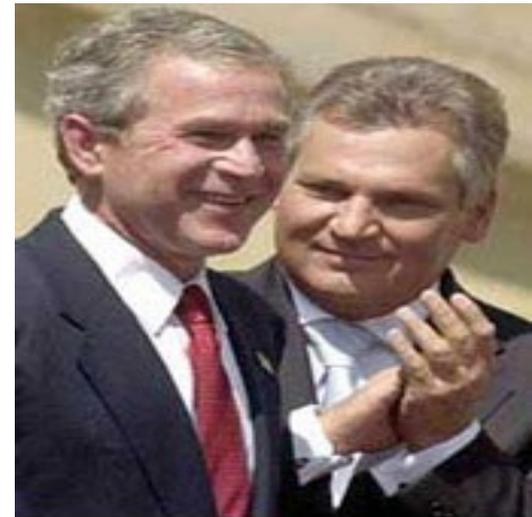


MV So San (2002)



The Proliferation Security Initiative: 'Specific Action'

- Not to transport or assist in the transport of WMD
- Boarding of own vessels in own internal waters and territorial seas or high seas, if reasonable ground for suspicion
- Consider providing consent to boarding of own vessels
- Measures against foreign vessels in own sea areas, including contiguous zone
- Measures against foreign aircraft in national airspace



Polish President Aleksander Kwasniewski, right, applauds President Bush after his speech at the Wawel Castle in Krakow, Poland, May 31, 2003, announcing the Proliferation Security Initiative. [AP/WWP photo]

2005 SUA Protocol, Article 8bis

Reasonable grounds to suspect that the ship or a person on board the ship has been, is or is about to be involved in the commission of an offence, if Party desires to board,

- (a) it shall request that the first Party confirm the claim of nationality, and
- (b) if nationality is confirmed, the requesting Party shall ask the flag State for **authorization to board and to take appropriate measures with regard to that ship which may include stopping, boarding and searching the ship, its cargo and persons on board, and questioning the persons on board** in order to determine if an offence is being or is about to be committed, and
- (c) the flag State shall either: (i) authorize, (ii) conduct the boarding itself, (iii) conduct the boarding with the requesting Party; or (iv) decline to authorize.

Migrant Smuggling

2000 Protocol against the Smuggling of Migrants by Land, Sea and Air

“A State Party that has reasonable grounds to suspect that [flagged vessel] is engaged in the smuggling of migrants by sea may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures with regard to that vessel. The flag State may authorize the requesting State, inter alia:

- (a) To board the vessel;
- (b) To search the vessel; and
- (c) If evidence is found that the vessel is engaged in the smuggling of migrants by sea, to take appropriate measures with respect to the vessel and persons and cargo on board, as authorized by the flag State.

Migrant Smuggling

2000 Protocol against the Smuggling of Migrants by Land, Sea and Air

“A State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is **without nationality** or may be assimilated to a vessel without nationality may board and search the vessel. If evidence confirming the suspicion is found, that State Party shall take appropriate measures in accordance with relevant domestic and international law. “ (Art 8(7))

Migrant Smuggling

UNSCR 2312 (2016)- Chapter VII - Authorises

- Inspection on high seas of vessels reasonably suspected of being used for migrant smuggling from Libya (7)
- Seizure of vessels used for migrant smuggling (8)
- use of all measures commensurate to the specific circumstances in carrying out activities in full compliance with international human rights law, as applicable (10)



Other Legal Authorities

- UNSCR – maritime embargo
 - Trump freedoms of navigation, flag state control and coastal state jurisdiction. E.G:
 - UNSCR 665 (1999) - Iraq
 - UNSCR 1973 (2011) – ARMS /2146 (2014), 2292 (2016), 2362 (2017) OIL Libya
 - 1846 (2008), 2444 (2018) - Somalia
- Belligerent Rights- Laws of Naval Warfare
 - E.g. Blockade
 - E.g Belligerent warships have a right to visit and

Part III - Piracy

- **Duty to cooperate:** ‘all States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State’ (art 100)
- falls short of duty to investigate and prosecute

Case Study: Piracy off Somalia



Preparation for Piracy: Pirate camps



Pre-attack phase: whaler and skiff

Whaler towing attack skiff



Loading off-shore



Pre-attack phase: fast attack skiff

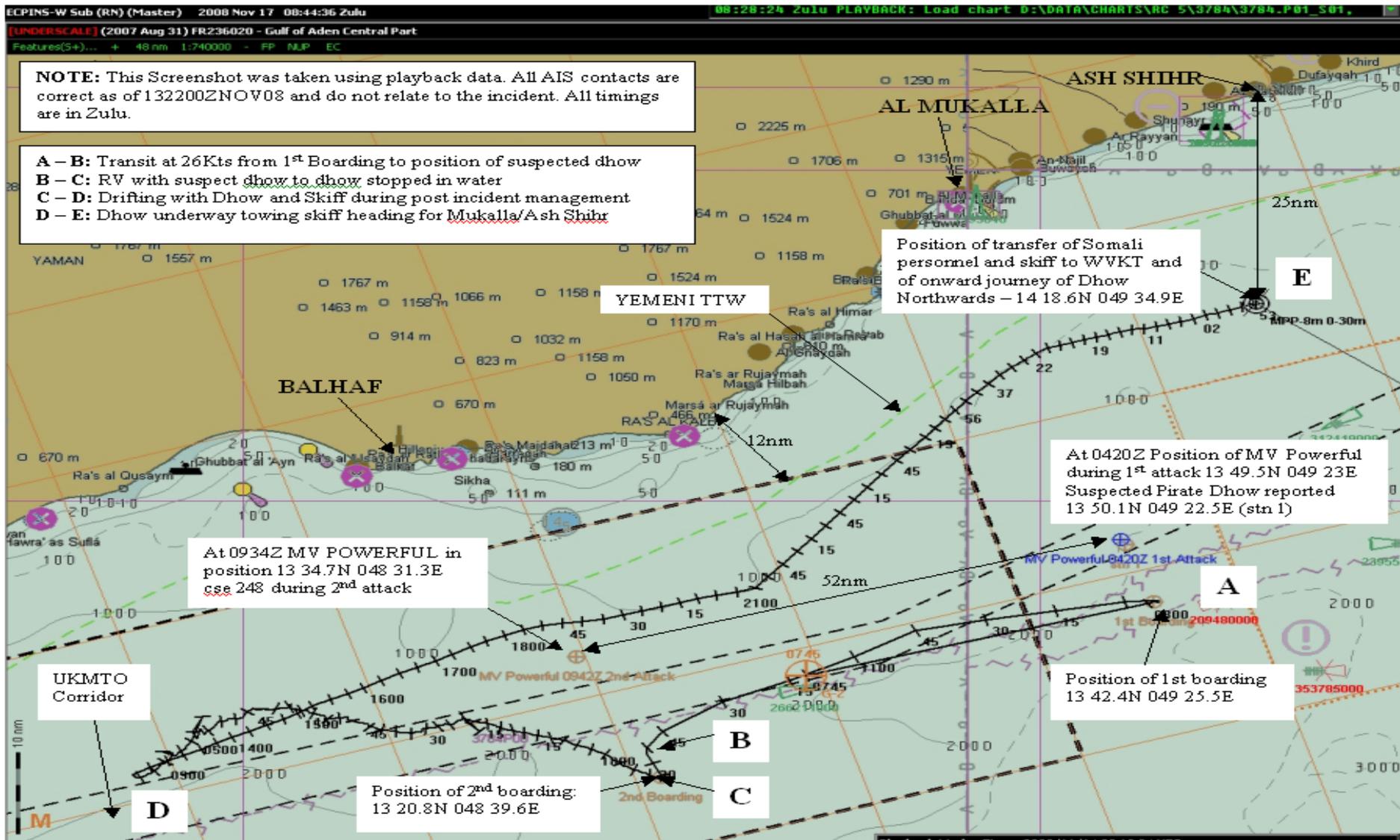


Pre-attack phase: Pirated dhows used as mother ship



Crew remain on board as hostages

Case Study



(AM) ATTACK ON MV POWERFUL











(PM) ATTACK ON MV POWERFUL









Suspects held on own vessel pending disposition decision



Evidence preservation and collection



Transfer to warship



Detain on warship



Transfer to land



Remand prison



Investigation and Prosecution



UNCLOS Drafting Background

- Provisions in UNCLOS (Arts 101 - 107) almost identical to the 1958 Convention on the High Seas (HSC) (Arts. 14-21).
- Limited attempts at the 3rd UN Conference on the Law of the Sea (1973-1982) to change them were unsuccessful, presumably because of general satisfaction with them and piracy not a major issue at the time.
- Arts 14-21 HSC largely the same as the ILC's draft articles (1956). Therefore in analysing UNCLOS still useful to refer to ILC Commentary.

Piracy

- **Duty to cooperate:** ‘all States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State’ (art 100)
 - ILC commentary on draft of art 14 (HSC): any state having an opportunity of taking measures against piracy and neglecting to do so would be failing in an international duty. However, a State “must be allowed a certain latitude as to the measures it should take to this end in any individual case”
 - falls short of specific legal obligation to investigate and prosecute



Piracy: definition (art 101)

Piracy consists of any of the following acts:

(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 or aircraft;

....

(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).

Acts of Piracy

'Re 1: an 'illegal act of violence or detention, or an act of depredation'

Re "illegal". No criteria identifying when an act is illegal. Presumably this would be governed by national law.

Re "act of violence". Any minimum threshold level of violence?

No definition/guidance as to depredation.

Therefore dictionary definition: plunder, robbery.

Acts of Piracy

Re 2: "committed for private ends"

No definition of "private ends" or guidance as to its meaning in drafting history.

Two approaches:

- narrow. Act only for private ends where no political motive.
- broad. Act for private ends unless by recognised insurgents or approved by state. Supported by *Castle John v Babeco* (Belgian Cour de Cassation, 1986): members of Greenpeace who boarded two Dutch vessels protesting against discharge of noxious wastes did so for private ends and thus were pirates. Broad view also supported by policy: possible to exercise universal jurisdiction over terrorists engaged in piratical acts.

Acts of Piracy

Re 3: "by the crew or passengers of a private ship or aircraft"

Private ship = any ship that is not a warship or government ship

ILC rejected possibility of piracy by warships or government ships because of their immunity.

However, where the crew of a ship has mutinied and taken control of that ship, it is assimilated to a private ship for the purposes of piracy (UNCLOS, Art 102)

Acts of Piracy

Re 4: "directed against another ship or aircraft"

- Virginia Commentary (VC) says for an aircraft to be a victim, it must actually be on the surface of the sea, e.g. floating seaplane.
- VC states that victim ship/aircraft must be private. No support for this in the text and drafting history, and not desirable on policy grounds. Recent State practice also contrary to this assertion.
- Arctic Sunrise: *Prirazlomnaya* was a "Fixed Platform" and not a ship.

Acts of Piracy

Re 5. On the high seas or "in a place outside the jurisdiction of any State"

- Art 58(2) UNCLOS provides that Arts 88-115 (which include piracy provisions) apply in EEZ if not incompatible with EEZ regime. No such incompatibility. Therefore, piracy can be committed in EEZ.
- "outside the jurisdiction of any State" = terra nullius. In practice only terra nullius in (parts of) Antarctica.

Criticisms of the UNCLOS definition of piracy

The UNCLOS definition of piracy has been criticized as being too narrow:

It does not cover illegal acts committed against a ship by some of those on board, e.g. *Achilles Lauro* incident (1985).

Originally some force in this criticism, but such acts now covered by Convention for Suppression of Unlawful Acts against Navigation (SUA), 1988. not initially widely ratified, but now has ca.160 parties.

It is limited for private ends. This criticism has force if the narrow approach is taken. In any case, the lack of certainty as to it's meaning may be criticized.

Limitation to the high seas? Potential conflict with the coastal state. Is this only an issue in respect of enforcement jurisdiction and not prescriptive jurisdiction.

Practice of relying on UNCLOS definition of piracy

- IMO Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships
- ReCAPP, 2004
- Djibouti Code of Conduct, 2009
- Recent prosecutions (US, Kenya)
- Recent transfer arrangements
- Suggests general satisfaction with the definition
- supports definition now customary international law

Acts of Piracy

Piracy consists of any of the following acts:

(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 or aircraft;

....

(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).

Piracy - 'Pirate Ships'

- A ship...is considered a pirate ship...if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101 [or] if the ship...has been used to commit any such act, so long as it remains under the control of the persons guilty of that act. (art 103)
- A ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. (art 104)



Right of visit (art 110)

- If there is **reasonable ground to suspect** that the ship is engaged in:
 - (i) Piracy
 - (ii) Slave Trade
 - (iii) Unauthorised broadcasting and the flag state of the warship has jurisdiction under art 109
 - (iv) Is without nationality
 - (v) Though flying a foreign flag or refusing to show its flag the ship is in reality of the same nationality as the warship.

Piracy - enforcement powers

- On the high seas every State may **seize a pirate ship** or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and **arrest the persons and seize the property on board**(105)

Piracy - enforcement powers (compensation and use)

- Where the **seizure** of a ship or aircraft on suspicion of piracy has been **effected without adequate grounds**, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft for **any loss or damage caused by the seizure** (106)
- A **seizure** on account of piracy may be carried out **only by warships** or military aircraft, or **other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.** (107)

Use of force

- Use of reasonable force if necessary in self defence and the defence of others
- Use of firearms against the imminent threat of death or serious injury - no other way to avert the threat



Piracy - UNSCR authority

Res.1814,1816,1838,1846,1851,1897,1950, 2020, 2077, 2184, 2246, 2316, 2383, 2442 States... cooperating with the TFG in the fight against piracy and armed robbery at sea off the coast of Somalia, for which advance notification has been provided by the TFG to the Secretary-General, may:

- (a) Enter into 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; and
- (b) **Use, within the territorial waters of Somalia, in a manner consistent with such 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 at sea; (OP 10, 1846)**

Piracy - UNSCR authority

Res. 1851 (OP 6)

... *decides* that for a period of twelve months from the date of adoption of resolution 1846, States and regional organizations cooperating in the fight against piracy and armed robbery at sea off the coast of Somalia for which advance notification has been provided by the TFG to the Secretary-General may undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea, pursuant to the request of the TFG, provided, however, that any measures undertaken pursuant to the authority of this paragraph shall be undertaken consistent with applicable international humanitarian and human rights law;

Pirate business model

PIRATES EXTENDING LADDER DURING APPROACH

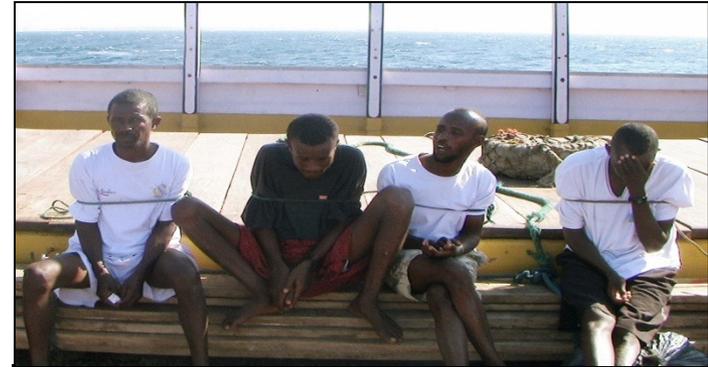


What to do with captured pirates?

- Universal jurisdiction - hierarchy
- Disposition practice to date

Disposition: Prosecution by capturing warship

- Some limited practice
- Issues/problems
 - domestic enforcement powers/capability
 - compliance with applicable human rights law
 - Transit via third States



Disposition: Prosecution by third State

- The **courts of the State** which carried out the **seizure** may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith. (105)
- MOU/Treaty transfers
- domestic law/evidential sufficiency
- compliance with human rights



Shaping the response to piracy: shipping industry

- Commercial interests/crew interests
- Best Management Practice (BMP 5)
- Crew welfare (duty of care)
- Witness support to prosecutions



Shaping the response to piracy: shipping industry

- Private Armed Security teams/VPDs
- Guidance



Shaping the response to piracy: ransoms



Evolving Situation

- From March 2012 to March 2017 no merchant vessel successfully attacked by Somali pirates;
- March-April 2017 – 6 successful attacks, involving hijacking for ransom of ships and dhows;
- no successful attacks in 2018;
- Continued piracy attempts demonstrate underlying conditions fuelling piracy have not yet changed and that piracy networks are still very much active.
- Combined presence of naval warships, the implementation of the *Best Management Practices*, the presence of armed guards on ships; building Somalia policing and coastguard capabilities best means to deny opportunities and deter attacks;

UNSG (Oct 2018 report)

Conclusions/Questions