

Review

High seas high-ways: Safety and security

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In contemporary times, the subject of maritime security is no longer a traditional concern of naval forces but has evolved into a grave problem with cause and effect on shipping industry and states. The laws related to piracy, maritime terrorism and open registry system (flag of convenience) seem to be inadequate and even unclear. The security measures adopted by states under the directions of International Maritime Organization are having some contradictions to General Principles of International Law and hence, there lies a need to carry-out research with a view to bring out a thesis and anti-thesis to synthesise the State Sovereignty and the common interests of all. The research focuses on the major threats to maritime security.

Key words: Piracy, maritime terrorism, containerization, flag of convenience, ship security.

INTRODUCTION

In a globalised world, the economic development of a state is closely linked to the revenue outcome dependent directly on the safe transportation of import/export of goods. As the world economy demands, supply becomes indispensable, economical approach, invariably relates to volume of trade, the pivotal role of seaborne trade in the global supply chain will naturally expand (Review of Maritime Transport, 2009). Shipping accounts for over 80% of world trade by volume and transport 90% of the world manufactured goods. "Of the 7.109 billion tons cargo that was loaded onto ships, crude oil accounted for 1.856 billion tons in 2008. The dry cargo has also a sharp increase and accounted for 4.686 billion tons in the same year (Security in Maritime Transport, 2003: 6, 8)".

The Strait of Malacca remains the world's second-busiest commercial shipping lane after the Dover Strait. In 2011, total world oil production amounted to approximately 88 million barrels per day (bbl/d), and over one-half was moved by tankers on fixed maritime routes. By volume of oil transit, the Strait of Hormuz leading out of the Persian Gulf and the Strait of Malacca linking the Indian and Pacific Oceans are two of the world's most strategic chokepoints.¹ These trade flows regarded as lifelines to the economy of the states of the Indian Ocean Region (hereinafter referred as IOR).² As trade and energy are critical in influencing the geo-political strategies of a nation, any disruption in their flow can

cause disastrous consequences. Given the spiraling demand of energy from India, China and Japan, it is inevitable that these countries are sensitive to the security of the sea lines of communication and choke points of the region.

Unfortunately, along with this hype in traffic, intensity of threats, including piracy, maritime terrorism, drug trafficking, gun-running, human smuggling, pollution, accidents and inter-state conflicts, have also shown a proportional rise. Although "containerization" and "flag of convenience" (hereinafter referred as FOC) has created unique types of problems but piracy, maritime terrorism are the gravest threats to maritime shipping as they could impede the global trade and development. The research paper discusses these challenges in detail.

MARITIME PIRACY

The Piracy Reporting Center of the International Maritime Bureau, reported that incidents of piracy and armed robbery in 2010 reached 445, compared to 400 in 2009. These numbers have risen every year since 2006 (Hostage-Taking at Sea Rises to Record Levels, 2011). The Economic Costs of Maritime Piracy concludes that the global cost of piracy is at least 7 to 12 billion dollar per annum. The report found that the ransoms paid to Somali pirates have increased from an average of

\$150,000 in 2005 to \$5.4 million in 2010 (Bowden, 2010: 3, 9).

The maritime piracy is defined in Article 101, Part VII of the United Nations Convention on the Law of the Sea 1982, (hereinafter referred to as UNCLOS). It can be described as illegal acts of violence, detention, or depredation committed by the crew or passengers on board of a ship traversing the high seas, typically involving international waters. It is interesting to point out that the piracy provisions from the Geneva Conference on the Law of the Sea in 1958 were incorporated verbatim in Articles 100 through 107 of Part VII of UNCLOS 1982.³ The international law of sea piracy has thus remained static (Menefee, 2002: 312). Jurists have criticized the UNCLOS definition of piracy on the various grounds given below:

1. Like its predecessors,⁴ UNCLOS describes piracy as a private rather than a political act. The "private ends" requirement appears to exclude attacks by maritime terrorists and arguably, environmental extremists, from being piracies, because of their "public nature (Menefee, 2002: 311)." Hence there is a need to redefine UNCLOS in tandem with the present needs and necessity of the state. Economy being the backbone of any country's stability, deciphering the same straight away impairs a situation of crisis, which is more a political act than a private one.
2. The "high seas requirement" prevents foreign warships from investigating or capturing potential pirate ships while they pass through a host of State's waters. It appears as if, pirates are provided license to attack on commercial shipping within the territorial seas of states where patrolling of Naval forces are insignificant or yet to develop to counter the high sea hooligans. It has estimated that less than one in five incidents of maritime violence would qualify as high seas piracy (Stiles Ethan, 2004).
3. Further, the plain reading of this Article excludes crew seizures or passenger takeovers of vessels, from the crime of piracy, as only a single ship would be involved in such cases. Paradoxically, a multiple number of actions involving physical force or restraint or custody are indispensable to define piracy, nevertheless an isolated incident is sufficient to attract piracy (Stiles Ethan, 2004). Redefinition in the lines of the above would suffice to determine at the outset, whether the act is piracy.
4. The most appropriate reason for the increase in piracy attacks is that crews cannot resist against armed pirates equipped with machine guns and explosives as they cannot carry arms while in territorial waters.

The present law allows pirates a safety zone and there is a need to amend the UNCLOS to balance the host state's sovereignty and the international shipping community's need to safe sailing. Laws are not static. With the change

of time and needs of society, it changes its color as the law exists on the theory of the welfare of the people.

MARITIME TERRORISM

The first major maritime terrorist attack took place on January 22, 1961, when the Portuguese cruise ship SANTA MARIA was captured by a Portuguese rebel group in the Caribbean Sea off the coast of Venezuela (Day, 1962). The rebels were protesting against the brutal dictatorship of Antonio Salazar. However, it was ACHILLE LAURO incident that awoke the United Nation's International Maritime Organization (hereinafter referred to as IMO) to the threat of maritime terrorism. Soon after the incident, the IMO Assembly adopted a resolution calling on its Maritime Safety Committee (hereinafter referred to as MSC) to develop "detailed and practical technical measures, including both shore side and shipboard measures, which may be employed by Governments, port authorities and administrations, ship owners, ship operators, shipmasters, and crews to ensure the security of passengers and crews on board ships."⁵ On September 26, 1986, the MSC issued a Circular entitled "Measures to Prevent Unlawful Acts against Passengers and Crew on Board Ships."⁶ Implementation of the Circular, though, was voluntary and its recommendations were largely ignored by governments and ship operators.

Maritime security has assumed a new dimension in the post 9/11 era. The fight against this old and persistent issue has received a boost with the backing of the international community, particularly the United States. While the search for terrorists and their personification continues on land, at sea the international community is hunting for terrorist ships, known as the "phantom fleet." The main idea is to prevent terrorists from escaping via the sea or terrorizing the marine arena (Observer International, 2001). Rupert Herbert-Burns defines maritime as "the deliberate exploitation of fear through violence or the threat of violence in the pursuit of political change, in the maritime domain (Rupert and Lauren, 2004)." After the medium of air was used by terrorists, there is strong apprehension that the terrorist can use the maritime mediums to disturb the world peace. Targeting through maritime way is comparatively much easier than others. The November 26, 2008 attack on Mumbai has also shown that terrorists can operate with impunity traversing the sea. Therefore, maritime authorities worldwide are afraid of terrorist attacks on ships, ports and cities (CRS Reports for Congress, 2005).

The containerization of cargo has made sea traffic an indispensably cost effective link in the global supply chain. However, containerization has also made the world economy particularly vulnerable to terrorism and the proliferation of weapons of mass destruction. The importance of container security to maritime terrorism

was realized after the discovery of the terrorists hiding inside a well-equipped shipping container in 2002.

To counter these threats, the IMO Assembly adopted a novel resolution calling for “Review and Enhancement of Measures and Procedures to Prevent Acts of Terrorism Threatening, the Security of Passengers and Crews and the Safety of Ships (G.A. Res. 924(22), U.N. GAOR, 22nd Assembly, 2001).” After months of negotiation, state parties to the International Convention on the Safety of Life at Sea (hereinafter referred to as SOLAS Convention)⁷ adopted the ISPS Code.⁸ The ISPS Code and related amendments to the SOLAS Convention mandated that state parties enforce security plans and enhance security measures for covered ships engaged in international commerce and the port facilities servicing the covered ships.⁹

It is noteworthy that these initiatives attempt to defy the conventional zero-sum game between the increase in trade and heightened security. However, questions ought to be raised about the compatibility of these (recently adopted) maritime security measures with pre-existing international laws, particularly World Trade Organization trade norms, and also with the general law of the sea. The later resolution is not legally binding in comparison with the earlier one, as they have not been ratified by many leading countries (Developed and Developing).

The SOLAS and ISPS Code regulation demand a heavy investment of capital, time, planning and administrative oversight. In order to be eligible for International Ship Security Certificate (ISSC), a ship requires undertaking several measures. For that reason, the implementation of ISPS Code provisions is sluggish in developing countries.

The World Trade Organization (WTO) system is known for lowering the tariffs and other trade obstacles. At the same time, the implementation of these security requirements on foreign ships and ports may have the effect of burdening free trade. However, in WTO framework, national security is always a legally acceptable exception but WTO bodies have not settled trade disputes concerning the appropriate scope of the exception. Failure to examine thoroughly the legality of maritime counterterrorism measures in light of WTO obligations would be a grave mistake. Otherwise, the WTO framework may become less relevant in international law, especially as counterterrorism rises in political and legal priority that may erode the international consensus and efforts to fight terrorism.

After all the discourses, it seems that there is a greater need to ensure harmonization between counterterrorism laws and WTO rules.

THE FLAG OF CONVENIENCE

The term “flag of convenience” is used to describe the

flag of a country hoisted by a vessel owned by a citizen of another country, when that flag is hoisted for avoiding taxes, more stringent regulations, or more difficult registration processes of the vessel owner's country (Anastasia, 1997). In the current maritime legal framework, the flag state is responsible, at least to some extent, for controlling and operating of a vessel (Martin, 1988). The FOC states are notorious for shirking their responsibilities to ensure the safety and legality of their vessels at sea (Carmen, 2005). Anonymity provided by FOC's is attractive to owners because they want to limit their liability as best as possible by hiding behind the corporate veil. The reports have indicated that a number of ships are under the control of terrorist groups (Mintz, 2002).

The empirical evidence shows that FOC vessels are more prone to illegal fishing activity, pollution, illegal cargoes, the transport of terrorists, accidents at sea, and illegal acts all of which indicate that they are not regulated with sufficient scrutiny. The process is only facilitated by the lax registration requirements of FOC registries, which allow for the easy renaming, repainting, and re-registration of vessels with forged documents (Caitlin, 2007).

Perhaps a “genuine link” between the vessel and the flag state as mandated by international law would remedy the situation. The genuine link requirement is already in place but is simply not being enforced. Article 5 of the Geneva Convention and Article 91 of UNCLOS both require a “genuine link” between a vessel and its country of registration (Becker, 2005). There is a pressing need to find out the way by which the “genuine link” requirement could be enforced. Though this area requires exclusive research, the same cannot be wished away with as the same forms the nebulous link to the present research.

CONCLUSION

It can be said that though a maritime oceanic thread binds the littorals together, maritime cooperation and maritime issues have not attained the importance they deserve. In order to deter a terrorist attack, the ship owners and port authorities must learn from past and develop a strong security plan that meets requirements of the present. Otherwise, the funds generated by frauds, ransoms paid and other illegal activities of terrorists and criminals will be used to further their illegal actions. It allows the maritime criminals to acquire more sophisticated weaponry and develop better strategies.

The main reason for the increase in pirates' attacks is that crews cannot resist against armed pirates equipped with machine guns and explosives. The international community should allow them to carry the proper equipment and the training to use them effectively. For

that purpose, an amendment must be made in the UNCLOS. It will provide safe passage for commercial shipping. Under UNCLOS, a state's vessel may seize a pirate ship on the high seas, but cannot chase it into the territorial waters of a foreign state. Pirates take advantage of this provision by remaining close to the territorial waters, attacking a ship, and then fleeing to the borders of the territorial sea if a foreign ship should come upon them. The foreign warship would have to obtain permission in advance from the host state to pursue the pirate ship into the host state's territorial waters, and the pirate will use any delay to disappear. The present law allows pirates a safety zone, and states must amend the UNCLOS to keep a balance between state sovereignty and safe transportation.

The UNCLOS copied the piracy provisions of the United Nations Convention on the High Seas, which the United Nations drafted in 1958 when piracy was not a major concern. It has proven to be obsolete and inchoate to face the modern challenges. States must amend the law relating to piracy in accordance to meet the demand of present time. To continue this fight, the States should also pursue bilateral agreements to allow the navies and coast guards to board vessels, especially those flying flags of convenience. The coastal states must be encouraged and possibly given assistance to protect shipping and eliminate safe havens.

Eliminating safe havens may also require consistently tough sentences to pirates and terrorists. Technological measures like use of satellite tracking systems should be encouraged. Again, insurance companies should encourage the use of anti-piracy devices by passing on savings to cooperative ship owners in the form of lower rates. All parties, including ship crews, ship owners, territorial states, and foreign states must cooperate to protect commercial shipping and sea-lanes. Pirates are *hostes humani generis* and respect only the superior force, so states and ships must fight together. Force subdues to greater force, unorganized forces subjects to the organized force, these are universal theories tested by time and verified by history time and time again. Hence, the conclusion of the research marks the hypothesis that if you are organized, you survive.

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ENDNOTES

¹ The Strait of Hormuz is the world's most important oil chokepoint due to its daily oil flow of almost 17 million barrels in 2011. Flows through the Strait in 2011 were roughly 35 percent of all seaborne traded oil, or almost 20 percent of oil traded worldwide. More than 85 percent of these crude oil exports went to Asian markets, with Japan, India, South Korea, and China representing the largest destinations. The Strait is deep and wide enough to handle the world's largest crude oil tankers, with about two-thirds of oil shipments carried by tankers in excess of 150,000 deadweight tons.

² The Indian Ocean Region consists of 56 littoral and landlocked nations. It accounts for 65% of strategic raw material reserves, 31% gas and more than half of the world's oil exports. The region is the largest producer of rubber, tea, spices, and jute. The region has diverse economies and systems of governance. The fact shows the importance of IOR that one third of the world's populace resides here in a quarter of the world's land mass. This region has seen the maximum number of conflicts post the cold war and is considered the hub of global terrorism.

³ The 1958 Geneva Convention on the High Seas defined piracy as follows:

(1) Any illegal acts of violence, 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:

- (a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
- (b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(2) 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;

(3) Any act of inciting or of intentionally facilitating an act described in sub-paragraph 1 or sub-paragraph 2 of this article.

The next development in piracy law occurred when the United Nations adopted the Convention on the Law of the Sea 1982 (UNCLOS). The UNCLOS provisions on piracy are incorporated almost unchanged as they were in previous convention 1958.

⁴ The Geneva Conference on the Law of the Sea in 1958.

⁵ Measures to Prevent Unlawful Acts Which Threaten the Safety of Ships and the Security of Their Passengers and Crews, U.N. IMO, 53d Sess., Res. A.584, Annex 14 (1985) (Adopted Nov. 20, 1985, the measures prevent unlawful acts which threaten the safety of ships and the security of their passengers and crews).

⁶ Measures to Prevent Unlawful Acts Against Passengers and Crews On Board Ships, U.N. MSC, 53d Sess., IMO Assembly Res. MSC/Circ. 443, Agenda Item 24 at 17.3, Annex 14 [hereinafter Measures] (1986).

⁷ International Convention for the Safety of Life at Sea, Nov. 1, 1974, 32 U.S.T. 47, 1184 U.N.T.S. 278 (amended May 2002).

⁸ International Ship and Port Facility Security Code and SOLAS Amendments 2002, IMO Publication Sales Number I116E (London 2003) [hereinafter referred as ISPS Code]. (The ISPS Code and related maritime security measures were adopted as amendments to the Safety of Life at Sea Convention at a Diplomatic Conference of Contracting Governments to the SOLAS Convention (London, 9-13 December 2002).

⁹ ISPS Code, Art. 1.