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Somali Piracy, International Customary Law, and the Dispatch of Japan's MSDF

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The high occurrence of pirate attacks off the coast of Somalia has prompted an increase in the number of nations planning to send naval units to fight them. In the Asian continent, India has become the first to sink a pirate vessel, South Korea has announced the deployment early in spring of the 5,000 ton-class KDX-II destroyer Gang Gam-chan, and China is sending two destroyers and a supply vessel. [1]

While these three countries have shown no qualms about deploying their navies in the Gulf of Aden, Japan has once more embarked on a painful debate on the legality of such a move, with the government looking for a legal basis on which MSDF units might be deployed and a number of commentators doubting this would be possible without either a constitutional amendment (or of the official government interpretation of the Constitution's war-renouncing Article Nine) or the passage of new legislation.

A third way out of this conundrum might be for Japan to rely on customary international law to provide a legal basis for naval deployment against piracy. The purpose of this article is to examine the customary international law rules on fighting piracy and to consider whether they might provide the necessary legal cover to the MSDF in the absence of new internal legislation, an amendment to the Japanese Constitution, or a change in its official interpretation by the Japanese government.

We therefore first turn our attention to the customary law of the sea rules on piracy.

Pirates were considered in ancient times to be *hostis humani generis*; that is, the enemies of mankind, the reason being that they posed a threat to maritime safety in a space not subject to the control of any single state, and where, therefore, anyone could and was actually expected to punish them. Furthermore, punishments against pirates, although dependent on country and age, tended to be rather strict, capital punishment being widespread, often carried out with a degree of publicity designed to maximize deterrence among those, especially sailors and members of other maritime guilds, who might be tempted to engage in what was and still often is a highly lucrative trade. When pirates attacking a ship were captured by their intended victims, they were liable to execution on the spot, without trial. The preferred method was hanging from the yardarm.



Of course, notions of on-the-spot justice are out of fashion these days, but we should not forget the extent to which the law on piracy informs modern-day notions of international justice. The concept of a pirate as someone subject to the potential jurisdiction of any state, on the basis of an universally agreed-on definition of a crime, believed to be so heinous as to merit a common treatment by all civilized nations, is the cornerstone upon which the fight against slavery, the definition of war crimes, and international cooperation against drug-dealing or child exploitation rests. It is also, of course, a precedent for international counterterrorism cooperation, although here a universal definition of the phenomenon is missing and it is often said that "one man's terrorist is another man's freedom fighter." [2] Sadly, terrorists are often employed in a role similar to, but not equivalent to, that of a pirate: privateers.

We can also point out, looking back into history, that a nation's willingness to engage pirates in the high seas has often been perceived as a test of character and a measure of ability and credibility in confronting foreign threats. The Barbary Wars, for example, were a watershed in US history, and the Chinese naval deployment off Somalia has been described by some commentators as a turning point in the Middle Kingdom's quiet ascent. [3]



USS Philadelphia in the Barbary Wars

What has survived of the classical international law on piracy? To start with, the notion of universal jurisdiction, the high seas not being under the rule of any single nation-state, warships of any flag can engage pirate vessels. [4] This is quite clear and does not merit much controversy, but two more difficult questions arise: first of all (and this is an open debate involving all maritime powers) what to do with the pirates? And second (and this is rather a Japan-specific concern), could combating piracy be somehow interpreted as falling within the concept of "collective self-defense"? Let's take a quick look at both.

It is clear that pirates can no longer be hanged without due process, and in many countries capital punishment itself is no longer in the statute books. Pirates detained on the high seas, for acts committed there, will not always be liable to punishment in the nation whose warship has arrested them; it will basically depend on the internal jurisdiction of that state. From an international law point of view there is no reason why such internal legislation might not provide for their trial and punishment; and, what is more, international law can to some extent be said to not only allow for the fight against piracy in international waters but even to impose a duty on naval powers to engage in it for the common benefit of mankind.

Of course, many countries balk at the prospect of trying pirates and have them serve sentences in their own prisons. An alternative might be extradition to their countries of origin, but this is not always possible for, among other reasons, fear of torture or execution. In the case of Somalia, the absence of a government effectively exercising control over its territory makes this a preposterous proposition.

Concerning the Japan-specific question, could the fight against piracy somehow be understood to fall within the definition of "self-defense" as the term is currently interpreted by the Japanese government, so that pirates on the high seas could be arrested by the Maritime Self-Defense Forces? If pirates are considered to be common criminals, then they are outside the scope of the Self-Defense Forces' constitutional and legal duty to defend the country in the event of armed aggression. However, duties can also be derived from international law. In addition, the Japan Coast Guard, in the exercise of police functions, could arrest them. This does not necessarily mean that following all such instances they could then be tried by a Japanese court, since it could be argued they had not committed any crime in Japan. On the other hand, depending on the precise provisions of Japanese internal legislation, they could be tried as long as their actions had some connection with Japan (for example, because they had attacked a Japanese-registered or owned vessel, or one with Japanese citizens on board) or be handed over to a third country.



The Japan Coast Guard

Fighting piracy without recourse to international law, relying instead only on Japanese internal legislation, poses the problem of defining which vessels are to be protected. This is difficult in view of today's complex maritime business, in which often a ship is registered in one country, owned by a company headquartered in another, insured in a third country, crewed by nationals of a fourth, employed to transport cargo owned by a company from a fifth, and so on.

Such an approach might also lead to a legal minefield: what if a non-Japanese vessel asked a MSDF ship to provide protection? Would that constitute collective defense, banned under the current official interpretation of Article Nine of the Japanese Constitution?

From a practical point of view, it is also necessary to note that an obstacle to the employment of the Japan Coast Guard to combat piracy off Somalia is the limited range and capability of its vessels, designed to operate near the shore and for limited periods of time. This is not to say that standard naval units are necessarily the best response to the pirates' fast, small craft, being too slow and bulky to effectively protect maritime traffic. Coast Guard units would be more suited for this purpose if they could operate from bases on the Somali coast, a possibility not being officially considered for the moment.



Indian navy captures pirate ship in Gulf of Aden, December 2008

An alternative has been put forward whereby Coast Guard personnel would operate on MSDF vessels, conducting arrests, without the MSDF actually handling detainees. This is the approach finally taken by the Japanese government. In the words of former Defense Minister Gen Nakatani, co-chair of the LDP-Komeito project team on piracy, "The main subject is the (Japan Coast Guard), but the MSDF will be dispatched because it is currently difficult for the Coast Guard to take (anti-piracy) measures in the Somalia coast area. But criminal justice and police procedures will be left up to the coast guard." [5]

The cabinet has approved a deployment in the Gulf of Aden, which might take place in March, on the basis of existing internal legislation, while pushing for a bill providing for explicit legal authority for the MSDF to conduct anti-piracy operations. Meanwhile, the Rules of Engagement under which Japanese units are

meant to operate are not clear, and the ships they are meant to protect are limited to those with some connection to Japan. [6]

Could, however, the Japan Coast Guard arrest pirates and protect non-Japanese vessels prior to the passage of the bill, or in case it was not approved by the Diet? Would actions going beyond the bill's provisions still be covered by international law? Some court decisions, in countries like Denmark, seem to contradict such possibility, since pirates captured on international waters have often been released on the basis of lack of jurisdiction by the state whose navy arrested them. However, piracy has never ceased to be an international crime, for such change to have taken place it would be necessary to either conclude an international convention to that effect (which has not been done) or for a new practice not to fight pirates to establish itself in states' actual practice. This latter possibility, in order to be considered an amendment to the customary international law on piracy would have to be accompanied by a change in its perception by states; that is, it would not be enough to stop prosecuting pirates, but this would have to be a direct result of countries believing that it was no longer lawful under international law to do so.

The reason is that custom as a source of international law is made up of two components, actual uniform and consistent practice by states, and a belief in the obligatory character of such practice. It is not enough for a custom to arise to observe a majority of sovereign states follow a certain practice; they must do so because they believe they are acting under a duty arising out of international law. This is called *opinio iuris sive necessitatis*. [7]

Another reason why we can claim piracy is still an international crime is that it is not a requirement of custom as a source of international law to be universally practiced by all states, as long as a majority does, and that those that do not fail to object. Although some countries have failed to effectively prosecute arrested pirates, none has claimed other states were breaching international law by doing so.

According to Kenneth Randall, dean of the University of Alabama School of Law and expert in international law, "Any country can arrest these guys and prosecute them at home, under domestic laws that apply. I'm actually surprised people think it's unclear. The law on piracy is 100% clear." [8] Furthermore, "international customary law going back hundreds of years had defined pirates as criminals who robbed and stole on the high seas. Because the crimes were committed in international waters, all countries have not only the authority but also the obligation to apprehend and prosecute them." [9]

It could therefore be argued that international law as currently understood might provide the necessary legal basis for the MSDF, or the Japanese Coast Guard, to arrest Somali pirates, and for Japanese courts to try them, without the need for new legislation, as well as to protect non-Japanese ships. This would not entail belligerence by the state since the target would be common criminals, and neither would it require an appeal to collective defense since Japanese naval forces would not be defending another state, but simply carrying out Japan's duties arising out of customary international law, which has not been modified by later treaties.

However, although such conclusion seems clear from the point of view of customary international law, the issues examined have many ramifications, and it would be wrong to treat them exclusively from a legal, law-enforcement, or military perspective. We shall therefore devote some attention to three aspects which are related to Japanese actions in the waters off Somalia: the implications for the country's position as a "peace nation" in light of Article 9 of her constitution, the connection between Japan's six year MSDF presence in the Persian Gulf and her reliance on oil from the region, and the social and economic roots of piracy.

Implications for Japan's position as a "peace nation" in light of Article 9

Although it can be argued that Japanese intervention in the Gulf of Aden does not require a formal amendment to Article 9 of her constitution, or to its official government interpretation, it is nevertheless clear that it is yet another step in what some observers have termed "normalization" of the country [10], meaning the incorporation of the use of military force into its foreign policy arsenal, and yet others have described in rather less positive or neutral tones, seeing it as an erosion of a carefully built image as a peaceful power [11]. Whatever position one takes in this debate, it must be noted that Japan has been able to appear before other countries as a "peaceful" nation, devoted to diplomacy and development, for the simple reason that others (chiefly the United States) have catered to her security needs.

The situation is akin to that in many European countries, which some years ago decided not to build any more nuclear stations ... and are major consumers of French nuclear electricity. A politically attractive compromise which is becoming untenable.

It is difficult to on the one hand promote a more autonomous Japanese foreign policy and on the other oppose a wider range of security and defense options open to Tokyo, although many proponents of the former are quick to dismiss the later. A necessary, if painful, examination by Japan of her recent history, might help to allay fears in neighboring countries that such evolution would risk a repeat of past events. This is something which Japanese leaders should undertake not as a result of foreign pressure, which in some cases is devoid of legitimacy and can even be counterproductive (particularly in the case of China), but, moral reasons aside, as a contribution to the country's national security. Although military capabilities are an important element in defense policies, so is their legitimacy, in the eyes of a country's public opinion and that of other nations.

It can also be argued that it would be good for any such change to be the result of an open debate, both within Japan and among her partners, rather than allow it to just "happen" incrementally as a result of seemingly unrelated steps in reaction to current events.

The MSDF Indian Ocean Anti-Terrorist Mission, Middle East Oil, and Somalia

The Gulf of Aden is of course not the only area where MSDF are being deployed, their presence in the Indian Ocean having already reached its sixth year. Although prompted by different phenomena, the two missions share a number of factors in common, among which:

- They imply the development of a capacity to engage in long-range patrols, and to work in conjunction with other navies.
- They are part of a multinational enterprise, which provides some cover against accusations of militarism by other countries. We could add that they take place far from Chinese and Korean shores.
- They sit astride the long sea lanes through which much of the oil consumed by Japan travels.

The latter is of course a major factor considered by Japan, and an added incentive for the presence of the MSDF. It is no secret that any risk of interruption to the supply of Gulf oil would be considered a major national security issue in Tokyo.

This is likely to remain a major factor for years to come, in spite of the possible development of alternative sources of energy imports which would shorten the sea lanes necessary to reach Japanese shores, such as Central Asia through pipelines traversing Afghanistan to the Indian Ocean, a possibility which is being considered by Tokyo.

Social and Economic roots of piracy

The anti-piracy operations being carried out in the Gulf of Aden (GOA), to which Japan has decided to contribute, are often accused of being a purely military enterprise which ignores the root causes of the phenomenon. Some voices claim that "the international community should extend to the GOA and Somalian waters the lessons from Southeast Asia. This means assistance to enhance political and social stability, economic development, as well as anti-piracy technology and training with the goal of indigenous control of the anti-piracy response" [12]. This position is basically correct, in the sense that although it is important to protect shipping in the Gulf of Aden by deterring pirates, the instability and underdevelopment prevalent on its shores must sooner or later be addressed.

Although a common misconception among civilians, sometimes dispelled by experience working with the armed forces [13], is that military officers ignore social and economic factors and place excessive confidence in force, those involved in anti-piracy operations in the Gulf of Aden harbor no such illusions. It is here that Japan's extensive experience in foreign development could come in useful, not as a replacement, but as an integral part of stabilization efforts in the region, and not as an exception to multilateral efforts to combat piracy, but working in conjunction with other nations. However, in order to lead such a reconstruction effort, Japan must avoid accusations of "checkbook diplomacy", which would only result in a diminished political stature and the resulting inability to decisively influence resulting policies, and in order to do so the MSDF's presence in the waters off Somalia is a political imperative.

Notes

[1] On the Indian dimension: "India's decision to send INS Tabar to the Gulf of Aden to protect Indian shipping was triggered by the hijacking of a Japanese ship with largely Indian crew and the emotional criticism by the families of the crew of the seeming Government inaction. It was a tactical move taken in a hurry without much thought being given to the development of a strategic maritime security architecture in the region to protect the region against piracy as well as maritime terrorism, in concert with other affected countries. The development of such a mechanism needs attention." B. Raman, "Active Defence Of Indian Shipping Against Somali Piracy: International Terrorism Monitor," Paper No. 470, South Asia Analysis Group, November 21, 2008. For the Korean and Chinese angles: "ROK Anti-Piracy Operations", NAPSNet Daily Report, Nautilus Institute, November 21, 2008; and Leo Lewis, "Beijing Ends 500 Years of Tradition As It Sends the Navy Out to Attack Pirates", The Times Online, December 27, 2008, respectively.

[2] It must be noted that the League of Nations adopted in 1937 a convention against terrorism, which never entered into force, and that thirteen international agreements against terrorism have been concluded up to date, and a general convention has been discussed. See "UN Action to Counter Terrorism," and Omer Elagab and Jeehaan Elagab, International Law Documents Relating to Terrorism, New York, Routledge-Cavendish, 2007.

[3] For a historical overview of the Barbary Wars, see Gregory Fremont-Barnes, Wars of the Barbary Pirates: To the Shores of Tripoli: The Birth of the US Navy and Marines, Oxford, Osprey Publishing, 2006. On China, see Cesar Chelala, "China Plays Maritime Chess," Japan Times, January 22, 2009.

[4] Although it is not the subject of this article, United Nations Security Council Resolution 1846 to Address the Acts of Piracy and Armed Robbery off the Coast of Somalia, adopted on December 2, 2008, must also be noted. See also Eugene Kontorovich, "International Legal Responses to Piracy off the Coast of Somalia," [American Society of International Law, Vol 13, 2](#), February 6, 2009.

[5] Masami Ito, "Ruling Bloc Sets Stage for Antipiracy Mission," Japan Times, January 21, 2009.

[6] Michael Penn, "MSDF Somalia Anti-Piracy Mission to be Launched Soon," Shingetsu Newsletter No. 1265, January 29, 2009.

[7] ¹/₄ In the Lotus case (France v Turkey) it was held that usage is not the same as custom.

[8] Jeffrey Gettleman, "Pirates Outmaneuver Warships Off Somalia," New York Times, December 15, 2008.

[9] Ibid.

[10] Christopher Hughes, "Japan's Re-Emergence as a "Normal" Military Power", [Adelphi Papers](#), Volume 44 Issue 368 & 369, London, Routledge, 2004.

[11] Michael Penn, "Somali Pirates and Political Winds Drive Japan to the Gate of Tears," The Asia-Pacific Journal, Vol. 4-2-09, January 20, 2009. Updated version available [here](#).

[12] Mark J. Valencia and Nazery Khalid, "The Somalia Multilateral Anti- Piracy Approach: Some Caveats", NorthEast Asia Peace and Security Network, Nautilus Institute, February 12, available [here](#).

[13] Thomas E. Ricks, "Emma Sky, British 'tree-hugger' in Iraq who learnt to love US military", The Times Online, February 21 2009, excerpt from "The Gamble: General Petraeus and the untold story of the American surge in Iraq 2006-2008", Books First, 2009, available [here](#).

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