Treating a symptom or curing the illness? Somalia behind the scenes of piracy

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Abstract:

Maritime piracy along the Somali coast is a current topic. Nowadays the Gulf of Aden and the Horn of Africa are two of the four danger zones threatened by pirates. The number of the attacks has been increasing since the 80's. As for maritime piracy in general, we must admit that it is a well regulated field of international law, but as it can be noticed in connection with Somalia, the rules referring to piracy cannot be applied perfectly in practice. Therefore the International Maritime Organization considered the question to be important enough to deal with it.

The situation in Somalia is unique as its motivation is quite different due to its history and current problems. In consequence of the piracy affecting Somalia, the aid of the World Food Program cannot be delivered to its destination –affected by incredible drought- which can lead to humanitarian catastrophe as Somalia is one of the countries which are the most dependent on aid. It must also be mentioned that as an effect of piracy, the Somali currency lost 80 % of its value.

Though the United Nations took measures to stop piracy along the coast of Somalia they only meant a treatment of the symptom but not a cure for the illness.

The aim of the study is to highlight the current situation of Somalia by summarizing its history so as to give reason for the ongoing piracy along its coast. Thus in connection with the topic the concept of 'failed states' cannot be evaded which theory and relevance in international law is intended to be refuted by this study.

Keywords:

International law, state, failed states, maritime piracy, Somalia

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The illness: the summary of the history of Somalia

Somalia is located on the Horn of Africa and originally the Portuguese colonized it. At the end of the 19th century some other states intended to share the area thus Somalia was born by the union of British and Italian colonies in 1960, but nowadays it has fallen apart and the different areas (Somaliland, Puntland, Jubaland, Southwestern Somalia and Galmudug) are ruled by warlords and clans.

The Soviet Union supported Somalia in the first times but in 1974, when the Ethiopian emperor failed, Somalia made an attack against Ethiopia in order to invade an Ethiopian region which has a Somali population. Therefore the Soviet Union started to support Ethiopia in throttling the Somali offensive so they turned to the United States.

Dissident groups started to be organizing and in the 80's they took the power in some regions by bursting out a revolution.

In 1989 the United States broke off its relations with Somalia emphasizing that human right are not respected by the state. Therefore Somalia (and some other African states) was left alone by the developed countries.

The collapse of the state happened between 1991 and 1995 when the warlords took the power from Siad Barre* but at once they started to fight against each other which led to a humanitarian catastrophe and many inhabitants suffered from starvation.†

In 1991 Somaliland declared its independence and meanwhile Puntland was also governed independently by the local party.‡

In consequence of the above mentioned events the United Nations decided to intervene and send peacekeeping forces (UNOSOM I.) and aid to the region.

The Security Council decided to send peacekeeping forces and assure that the aid could be sent to its destination via airlift.

Notwithstanding this humanitarian intervention did not succeed on the one hand because of the lack of the necessary capacity on the part of the peacekeeping forces to deliver the aid and maintain the order, on the other hand because of the clans which started to fight against these peacekeeping missions.

At the end of 1992 the USA set up the United Task Force which –with the second mission (UNOSOM II.) –was empowered by the Security Council to

* NATO Parliamentary Assembly, 169 CDS 09 E rev – The Growing Threat of Piracy to Regional and Global Security http://www.nato-pa.int/Default.asp?SHORTCUT=1770 (26. 04. 2010.) p. 3.

† *Peter Haldén,* Somalia: Failed State or Nascent States-System?, FOI Somalia Papers: Report 1. C: H: Swedish Defence Research Agency Stockholm, 2008., p. 28.

‡ *Ábel Ravasz*, Kalózkodás Szomáliában: Puntland és a bukott államiság, in :Kül-Világ, V. évf., 2008/3-4., C: H: Kül-Világ Alapítvány, Budaörs, 2008, p. 90.

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take any kind of necessary measures. This mission had some positive effects regarding the order in Somalia but in the end it ended up in a failure.

The above mentioned mission had the ability to use force in order to complete its task. Therefore the peacekeepers got into fight and many of them died thus the UN troops attacked the forces of warlord Aidid who started the firing. The plan of this action came from the United States but in the end the United Nations and the NGOs left the state.

In August 2000, in Djibouti the Transitional National Assembly (TNA) was formed which elected an interim President. The new, Transitional Federal Government (TFG) set up in 2004 in Nairobi. The TFG accepted a transitional constitution according to which Somalia is considered to be a federation. Notwithstanding this government cannot operate perfectly either as the clans mean the basis of the Somali society therefore it is very different from the European ideas and social concepts, which can be clearly seen from a Somali proverb which can represent well the special way of Somali thinking: 'I and Somalia against the world, I and my clan against Somalia, I and my family against the clan, I and my brother against the family, I against my brother.'

By 2006, the Islamists pressed forward until the border of Puntland however due to this expansion the invaded areas become clear from pirates. This progress was ended by Ethiopia which made an attack –with having the support of the United States- against this area which is the so called ICU (Islamic Courts Union).

As for Somaliland and Puntland the conditions there can be considered to be steady but on the Southern areas the TFG is not able to keep control so the situation is till unstable. The armed opposition dispose of the control even in South and Central Somalia and the TFG is in control of the southern parts of Mogadishu, the airport and the seaport.*

Somalia as a 'failed state'?

Since the collapse of Somalia in 1991, there have been numerous efforts to 'save' the state, but according to experts it became a 'state failure'.†

This has several reason, namely the conflicts in central and southern Somalia, the inter –state conflicts, the humanitarian situation and the link between Somalia and the terrorist organizations.‡

* NATO Parliamentary Assembly, 169 CDS 09 E rev – The Growing Threat of Piracy to Regional and Global Security http://www.nato-pa.int/Default.asp?SHORTCUT=1770 (26. 04. 2010.) p. 3.

† *Peter Haldén,* Somalia: Failed State or Nascent States-System?, FOI Somalia Papers: Report 1. C: H: Swedish Defence Research Agency Stockholm, 2008., p. 10.

‡ *Peter Haldén,* Somalia: Failed State or Nascent States-System?, FOI Somalia Papers: Report 1. C: H: Swedish Defence Research Agency Stockholm, 2008., p. 58.

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The problem is that there are only stereotyped mechanisms for the part of the international community. It can be foreseen without any further explanations that in cases like this the international community apply humanitarian intervention and some typical steps to rebuild the state.*

We must admit that this phenomenon raises many legal questions (of statehood, sovereignty, humanitarian rights, intervention etc.) but still have doubts in connection with the expression itself.

In order to give reasonable solutions for the situation of Somalia, we should observe 'failed states' in general.

First we must examine if the expression 'failed state' has an appropriate definition and then we should place it somewhere in the system of international law if we are able to find its place at all or at least it has sense to place it somewhere.

Many experts refer to failed states as states where the 'law and order totally or partially collapsed under the pressure and amidst the confusion of erupting violence'†.

Before highlighting the definition itself we must examine the *terminus* itself. In English terminology this phenomenon is called 'failed States', but the French one uses 'Etats sans gouvernement'. The first one is too broad, while the latter is too narrow.‡ Therefore none of them is adequate. According to the Spanish terminology this phenomenon can be found under the expression of 'Estados colapsados' (collapsed states), which is a proper expression if we insist on the necessity of this definition.

The phenomenon of 'failed States' can be interpreted in many ways: from political and legal points of view, from historical aspect and from a sociological one.

This study is intended to highlight the legal aspect, as for the historical one, the colonial times and the Cold War had a very important impact on this phenomenon. In sociological meaning the reference point is Max Weber who considered it as a collapse of the monopoly of power.§

As for the legal point of view, three other aspects can de differentiated: territorial, political (lack of law and order) and functional (lack of the necessary administrative organs and therefore the impossible representation at

* *M. R. Hutchinson*, Restoring Hope*:* U.N. Security Council Resolutions for Somalia and an Expanded Doctrine of Humanitarian Interventon, in: Harvard International Law Journal, C: H: Harvard International Law Journal Publications Center, Harvard Law School, Cambridge, 1993, pp. 625-638.

† *Daniel Thürer*, The "failed State" and international law, in International Review of the Red Cross No. 836., C: H: Cambridge University Press, 1999., pp. 731.

‡ *Daniel Thürer*, The "failed State" and international law, in International Review of the Red Cross No. 836., C: H: Cambridge University Press, 1999., pp. 732.

§ ibid.

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international level) aspects. According to the above mentioned the only remaining feature of the state in question is its legal capacity.*

In our opinion that state may be considered as a failed state which is inadequate for its purpose and cannot provide the necessary living standards for its population because one of the criteria (permanent population, defined territory, government and the ability to enter into foreign relation with other states thus sovereignty) required by the definition of the state according to international law is missing. These four conditions are considered to be *condition sine qua non* in connection with statehood in international law, therefore the lack of only one is enough to declare that the state in question cannot function.

According to some other sources at least two characters should be missing from the three main features of a state, namely territory, population, monopoly of power.†

It is a difficult question as on the one hand there are some objective criteria but referring to other elements of the criteria it is still doubtful that for example how we can measure the lack of monopoly of power.

However the question remains the same: do we need the category of 'failed states' in international law? In our opinion the category of failing or failed state cannot be applied in international law. It is an existing definition in political sciences but international law cannot do anything with it.

Though we made a suggestion referring to the definition of 'failed states', there does not exist a proper, coherent definition of it. Notwithstanding there are some conceptions but if a proper definition existed, would it add anything new to either the practice or our knowledge of statehood under international law? In our opinion it definitely would not change a thing. Not to mention the fact that if we take a look at the map we can easily recognize that in this case almost every African ex-colony could be considered as failed state.‡ The conception of 'failed states' can also be a very 'useful' idea as if there is no state, the sovereignty and the principle of non-intervention can be interpreted in a more flexible way§, but it is not advisable to confuse political interests with international law. This can raise a more serious practical problem too as we have to face the fact that lately the Security Council has liked to interpret its mandate broadly.(It can be recognized clearly in case of Somalia as well.)

We must also emphasize that if a state collapses it effects the whole international community so as to it can be a threat to international peace and security. According to the Charter of the United Nations in this case the Security Council is empowered to make the necessary measures. Therefore, as it

* ibid.

† http://www.playhold.com/www.ckke.hu/index_10303016.php (02. 09. 2009.)

‡ *William Easterly and Laura Freschi*, Top 5 reasons why "failed state" is a failed concept, C: H: Aid Watch, www.aidwatchers.com/2010/01, 2010., p. 2.

§ im. p. 3.

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was mentioned above, it cannot add anything new to our knowledge because the UN has a script for a situation like this so there is no need for an extra category of 'failed states' from legal point of view.

The symptom: piracy along the Somali coast

Comparing this area to other zones affected by piracy we must face the fact that this case is quite different as it is motivated by other reasons. On the one hand it is a special type of piracy and on the other hand, from another point of view we can consider it as a symptom of all those happening in the background in Somalia.

Initially Somali pirates were fishermen protecting their area from poachers thus they were celebrated as heroes by the people. In the beginning their aim was to chase poachers out of their own areas but due to the warlords these fishermen realized the profit they can make by the depredation of ships therefore they started to commit piracy in an organized form.

At first this phenomenon was not significant but since 2006 the number of the attacks has been increasing. By now many ex-militiamen fighting on behalf of the warlords have joined the fishermen.

The centre of pirates is in Northeastern Somalia, in the region of Puntland, more exactly Eyl and Boosaaso but Hobyo and Haradheere are also important and safe ports where the pirates can lead the captured ships and wait for the payment of the ransom.[*] To prove the extension of the problem we must note that nowadays there are four groups committing these acts off the Somali coast: one of them is operating on the southern coast and hunts for fishing vessels and small boats, another –less organized group– can be found near town Marka, the third one consists of traditional Somali fishermen operating around Puntland and at last but not least the most powerful group is the Somali Marines. This latter group has military structure and disposes of developed technical equipments and they can be considered as the head of financial operations as well.

As for the way of committing this type of piracy they chase the boat in question by using very light skiffs (as it is fast and they can disappear easily). There are 4-5 people with weapons on the board of these skiffs (altogether 10-20pirates) and their 'mother' ship is waiting for them in the background. By disposing of technical equipments they can leave the territorial sea and can operate on the high seas.

It is must be emphasized that it is very difficult to capture these pirates as the repression can only be possible on the high seas thus it is considered to

[*] NATO Parliamentary Assembly, 169 CDS 09 E rev – The Growing Threat of Piracy to Regional and Global Security http://www.nato-pa.int/Default.asp?SHORTCUT=1770 (26. 04. 2010.) p. 4.

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be as *res communis omnium usus*. The United Nations Convention on the Law of Sea (hereinafter UNCLOS), which was adopted in Montego Bay in 1982*, regulates the seizure of pirate ships on the high seas, or in any other place outside the jurisdiction of any state in Article 105. (Every State may seize a pirate ship, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board.)

According to the definition of Article 101.of the UNCLOS piracy can be any illegal acts of violence, detention or depredation, committed for private ends by the crew or the passengers of a private ship, committed on the high seas, against another ship or against persons or property on board. This act can be committed also by a warship or government ship whose crew has mutinied and taken control of the ship.

As it can be noticed the criterion referring to 'high seas' is a *conditio sine qua non* as it is not a part of the territory of a state therefore any ship (warships and other ships clearly marked and identifiable as being on government service and authorized to that effect) can chase (case of hot pursuit) and capture pirates without violating the sovereignty of the state. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State [Article 111. UNCLOS]. Moreover these perpetrators can be held responsible at the court of the captor ship. This can create a universal jurisdiction based on the concept of *hostis humanis generis*. In case of Somalia this legal basis can be important as the situation of its government is not stabilized and the enforcement of the law is problematic.

The Somali law means mainly customary law and the main characteristics of this are the following:

- they apply restitution or compensation but no punishment
- the limited fines must be provided to the victim or his family
- there are no public prosecutors
- everyone is insured for his liabilities
- judges, chosen by the litigants†(kind of an arbitration)

We must also notice that the so called Somali law also contains the right to defend oneself, but under this law they can 'act as his own judge and his own policeman'‡, thus people can take the justice in their hand. This latter statement also represents well the different way of thinking and why the punishment of pirates by the enforcement of law is almost impossible.

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* United Nations Convention on the Law of Sea (UNCLOS) Montego Bay, 10 December 1982 [16 November 1994] 1833

† *Michael van Notten*, From Nation-State to Stateless Nation: The Somali Experience, http://www.liberalia.com/htm/mvn_stateless_somalis.htm (16. 09.2009), p. 7.

‡ *Michael van Notten,* The Somali Legal system, http://www.arts.uwaterloo.ca/~jnarveso/TeachingMaterials/PoliSci226/Somali%20law.pdf (19. 09. 2009.) p. 5.

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However the UNCLOS creates a universal jurisdiction in order to an adequate prosecution. In fact there is another document that can be helpful or in the contrary, confusing in this case: the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (hereinafter SUA) which was set up in 1988 and according to it the definition of maritime piracy has not been bounded to high seas anymore. According to Article 6 of the SUA in case of noticing the acts of piracy against their ships the States have an obligation to establish their jurisdiction in their territory or by their nationals.* Therefore a question has raised: which convention must be considered the right one to apply. The official point of view is that the SUA is a complement of the UNCLOS so theoretically there is no need to consider the question to be problematic because the universal jurisdiction can always be applied. The real problem is that there are not too many states that have incorporated the rule of universal jurisdiction of the UNCLOS thus they have to release the pirates in some cases as their jurisdiction cannot be laid down because of the domestic legal regulation.†

Notwithstanding the European Union and the United States concluded agreements with Kenya in order to start the prosecutions, however the problem is that because of the capacity of the legal system of Kenya they are not able to handle any more pirates. As a matter of fact some states support to cite these cases in front of the International Court of Justice, but this idea has a problem, namely that in this case we would regard to this phenomenon as a war crime which is not appropriate.‡

Therefore according to the Security Council, a special tribunal would be the best to create which is like the International Criminal Tribunals for the former Yugoslavia and Rwanda.§

Nowadays the regulation of the UNCLOS referring to piracy must face with the criticism of publicists as this convention is based on the one from 1958 when piracy was not significant. Some experts prefer to accept the draft suggested by the International Maritime Bureau. According to this proposal the condition of 'high seas' should be excluded from the definition of piracy and there should be no differentiation between the aims of piracy (whether it has private or public purpose). In spite of the regulation settled by the UNCLOS [Article 100.] unfortunately there is hardly any conformity/cooperation between the domestic regulations/states thus it can be questionable what constitutes an illegal act which is also a condition required in the definition of piracy.

* NATO Parliamentary Assembly, 169 CDS 09 E rev – The Growing Threat of Piracy to Regional and Global Security http://www.nato-pa.int/Default.asp?SHORTCUT=1770 (26. 04. 2010.) p. 6.
† ibid.
‡ im. p. 7.
§ ibid.

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We must emphasize that in case of Somalia the rules of the UNCLOS referring to hot pursuit provide a safety zone for the pirates as the Somali authorities are not effective. Thus it would be advisable to extend the hot pursuit to territorial sea with some restrictions. First the hot pursuit can only be undertaken if the pursuing ship or a ship under the protection of the pursuing ship is under attack by the pirates. The second condition is that the pursuing ship can only be present on the territorial sea for a reasonable time and only in a reasonable way. Thirdly if the state that exercises sovereignty calls upon the pursuing ship to cease its operation it must obey and stop. Last but not least the pursuing ship shall immediately inform the territorial state about the hot pursuit and hand over the captured perpetrators.*

Potential solutions

The international community suggested some possibilities to resolve the problem of piracy along the coast of Somalia but these proposals are not effective and they do not provide a permanent solution.

The Security Council took the first step when it adopted Resolution No. 1816.† This resolution makes it possible that in order to reduce piracy along the coast of Somalia the cooperating states may operate on the territorial sea of Somalia for six months from the date of the adoption of the resolution.

Resolution No. 1838.‡ annulled this criterion of six months therefore there were no restrictions anymore referring to the duration of the operations moreover it also authorized the states to use their air forces to stop this crime. So as to it empowered the states to make operations by using the airspace above the territorial sea though the resolution reaffirmed its respect for the sovereignty, territorial integrity, political independence and unity of Somalia.

In the end the Security Council authorized the cooperating states to pursue the perpetrators of piracy on the land of Somalia anticipating an operation against the town Eyl.

By these resolutions the Security Council abolished the differentiation between the high seas and territorial waters.§

According to the Security Council these resolutions had to be adopted because the situation in Somalia was considered to be a serious threat to the international peace and security. Notwithstanding several questions can be raised due to the above mentioned resolutions. Though the sovereignty of

* *Ethan C. Stiles*, Reforming current international law to combat modern sea piracy, in: Vol. 27:2, C: H: Suffolk Transnat'l L. Rev., 2003-2004, p. 321.

† Security Council Resolution 2008. No. 1816. (S/RES/1816)

‡ Security Council Resolution 2008. No. 1838. (S/RES/1838)

§ NATO Parliamentary Assembly, 169 CDS 09 E rev – The Growing Threat of Piracy to Regional and Global Security http://www.nato-pa.int/Default.asp?SHORTCUT=1770 (26. 04. 2010.) p. 6.

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Somalia is respected by the resolutions (the Security Council emphasizes the exceptional nature of these and stressing that they only refer to Somalia) the question remains the same whether the Security Council can adopt resolutions like these as other principles laid down in the Charter of the United Nations can be violated this way (namely the principle of non-intervention). According to the classical theory of international law there can be some exceptions to the principle of non-intervention thus it is rather a theoretical question that where the limits of the competence and power of the Security Council are.

As for the exact solutions the first proposal suggested the establishment of a safety zone. We must admit that this can be very effective on the one hand but very expensive on the other hand.

The other suggestion was to sail around Africa which also costs a lot not to mention the fact that it is very slow and it can devastate the trade of the Suez Canal.

The third idea is the sending of international troops but it could also result in only a temporary relief.

The permanent solution would be the stabilization of Somalia as this phenomenon of piracy would disappear automatically by settling the problems there. It seems they must face problems alone as neither the United Nations nor the African Union agrees on an intervention in Somalia.

Conclusion

The phenomenon of maritime piracy is a problem that should be handled as about 90 % of world trade is transported by sea and the Somali coast is one of the most important routes as 20 000-30 000 ships pass through this route annually.[*]

The problem is not only with the ransom they want in return for the ships (which is also important as the security of the personnel does not seem to be guaranteed) but pirates can make a very serious loss in the international trade, not to mention the fact what happens if they can capture a ship with for example nuclear material on the board.

The situation of Somalia should be stabilized by accepting the fact that it would never become a state functioning as European and Western mechanisms.

The power of the new government should be stabilized, but without a strong intervention of the international community it would be very difficult. An intervention can only be possible if Somalia would mean a serious threat to the

[*] NATO Parliamentary Assembly, 169 CDS 09 E rev – The Growing Threat of Piracy to Regional and Global Security http://www.nato-pa.int/Default.asp?SHORTCUT=1770 (26. 04. 2010.) p. 5.

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other countries. Now the only threat which could make the powers and the UN wake up is the maritime piracy but it seems their will is to handle the symptom itself and not to cure the illness.

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