

Addressing the Legal Challenges to Piracy Prosecution in the Gulf of Guinea

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Incidents and Trends in the Gulf of Guinea

Gulf of Guinea piracy remains a threat to the safety and security of the maritime global commons, even in the face of the adoption, with wide international support, of the Yaoundé Code of Conduct by regional States in 2013. Significantly, at the close of 2013 the Gulf of Guinea recorded more piracy attacks on the high seas than in previous years and the scope of incidents has broadened. The Maltese-flagged vessel, *Cotton*, was hijacked in 2013 off the coast of Gabon, the first attack of its kind in that coast. Then in 2014, Angola and Ghana registered their first incidents of hijackings, confirming a widening threat of piracy. Reported incidents in 2015 also suggest increasing violence and kidnapping. For example, the hijacking of the fishing vessel, *Lu Rong Yuang Yu 917*, off the coast of Ghana in February 2015, by suspected Nigerian pirates, resulted in the death of one crew member of vessel several more injured. This combine tactics of hijacking of vessels with processed oil cargo and or kidnapping of crew for ransom has continued in 2016 and 2017.

Obviously there is the need to strengthen anti-piracy responses and counter-piracy capacity in the region. However, one of the major gaps confronting current and future counter-piracy efforts in the region is the legal complexity within which Gulf of Guinea piracy is cast. This article provides a snapshot of the legal challenges and the corresponding responses required to address the challenges.

Mapping the Legal Complexity in the Gulf of Guinea

To properly situate the peculiar legal challenges in the Gulf of Guinea, it is important to contrast the Somali piracy experience with the case of the Gulf of Guinea.

The Somali Experience

Piracy off the coast of Somalia, and the corresponding international response, led to significant developments in international and national piracy legal framework and jurisprudence. These legal developments were borne out the peculiarity of the situation in Somalia. First, the Somali state was subject to widespread violence and instability since 1991, and it has been without a functioning government. As a result of the collapse of the Somali State, the country has been unable to effectively combat acts of piracy and armed robbery, and certainly lack any supporting legal regime for doing so. The problem was compounded by the fact that the State of Somalia claims a 200 nm territorial sea of 200. This territorial sea claim, which is inconsistent with the 12 nm maximum breadth stipulated by international law, added to the difficulty in implementing

counter-piracy measures because it blurred the distinction between piracy and armed robbery at sea.

To obviate these legal and practical difficulties, the United Nations Security Council, beginning from 2008, adopted multiple resolutions including Resolutions 1846 and 1851 authorizing anti-piracy measures in Somalia. Resolution 1846 granted authority to foreign naval forces to enter Somali territorial waters and use “all necessary means” to repress piracy while Resolution 1851 permits the pursuit of pirates into Somali land territory. Although the resolutions do not stipulate specific measures, their scope has been interpreted to include the right to seize and dispose of boats, vessels, arms and related equipment being used by the pirates or robbers, as well as the right to arrest and prosecute such offenders.

Legal Complexity in the Gulf of Guinea

Whereas the legal developments and experiences from Somalia have relevance for the Gulf of Guinea, piracy in the region presents distinct legal challenges. The complexities are evolving unsettled. Nonetheless, current and future counter-piracy responses (national, regional and international) have to navigate these legal conundrums.

The successful prosecution of any crime depends, foremost, on the ability to establish jurisdiction over the suspects, followed by an assembling of the requisite evidence to prove the crime. Although Somali pirates operated with considerable skill and resolve, aided by sophisticated criminal networking, their *modus operandi* fits largely into the paradigm of traditional piracy. In this context, a ship is hijacked, and held in a safe haven while payment of a ransom is negotiated. This profile makes both the establishment of jurisdiction and the relevant collection of evidence for prosecution uncomplicated, especially when the pirates are generally Somalis. The process of ransom negotiations, payment of the money, which may be transferred directly to the pirates or through intermediaries and through banks, leave footprints that aids investigation and criminal prosecution of pirates.

The Gulf of Guinea presents a different scenario, with its hybrid of traditional and insurgent piracy. Unlike Somalia, pirates of West Africa frequently disable ship’s equipment and take control of the ship. This model necessitates not just combating “crimes of piracy” but also those offenses provided under the 1988 Convention for the Suppression of Unlawful Acts at Sea against the Safety of Maritime Navigation (SUA) and its 2005 Protocols that are directed at safeguarding the safety and security of the ship. This gives rise to *mix jurisdiction* in relation to the ‘heads’ of crime and therefore multiple criminal investigation and prosecution requirements.

There are further complications arising from the mix jurisdiction. Piratical incidents in the region are both inward and outward. These characteristics make the distinction between piracy and armed robbery at sea problematic, and render the jurisdictional interests complex. For example, there are instances where Nigerian pirates enter the territorial sea, and at times, port areas of other states (especially Benin and Togo) to hijack ships, which then are commandeered to the shores of the Niger Delta. From the perspective of Benin or Togo this scenario is an example of an *inward-outward* case of piracy, but from Nigeria’s perspective, it is an example of *outward-inward* piracy. Both States would have immediate and significant jurisdiction founded

on *sovereignty*, and an interest in the protection of their national security and economic interest. This situation poses a dilemma of overlapping jurisdiction over the same offense.

There are also indications that unlike their Somalia counterparts, Gulf of Guinea pirates, including those in the Niger Delta, may be of different nationalities. Therefore, additional jurisdiction may be founded (and should be founded) on the basis of nationality by third states, especially where suspects are within the territory of the state. All this aside, the flag state and the state of nationality of any of the victims of the crime, and generally all states, would have jurisdiction on the basis of international law. These intricate overlays lead to a conundrum of jurisdictional interests and imperatives with grave implications for effective investigation, evidence collection, procurement of witnesses and successful criminal prosecution.

Another key challenge in the Gulf of Guinea context relates to the article of crime, and consequently the proceeds of crime. Stealing petroleum cargo is the primary motivation of pirates in the Gulf of Guinea. The cargo is often transferred and sold at sea, while the hijacked ship released. The duration of the crime generally is short, compared to the kidnapping for ransom model that prevails along the Somali coast. More significantly, it is often difficult to trace both the article and proceeds of the time. This additional limiting factor impedes successful prosecution of piracy offenses in the Gulf of Guinea.

Two Key Recommendations for Addressing the Legal Challenges

These trends and legal analysis indicate that the Gulf of Guinea exhibits an enduring profile of piracy that is complicated to combat through the law enforcement mechanism. It is not a case of “one size fits all,” where the experiences and initiatives from Somalia could migrate to the Gulf of Guinea. What is required is an approach that uniquely addresses the peculiar legal challenges present in the region. In doing so, there are many factors to take into consideration. Two of these are discussed below.

First and foremost, an anti-strategy in the Gulf of Guinea must provide for comprehensive piracy legislation, but should also embody additional legal challenges identified above. Piracy is a crime of universal jurisdiction, and this rule is codified in the United Nations Convention on the Law of the Sea (UNCLOS). Article 100 of UNCLOS encapsulates two interrelated obligations regarding piracy. States are required to repress piracy at the national level, and also cooperate with other States in the suppression of piracy at the regional and international level. To give practical effect to the first obligation, the Gulf of Guinea States are obligated to enact and enforce laws that cover all aspects of the crime of piracy. Many of the States, however, has not updated piracy legislation upon which prosecution can be founded. The states in the Gulf of Guinea must, therefore, create an effective counter-piracy legal regime by first enacting offences for piracy with accompanying penalties, and second, establishing and maintaining effective criminal justice systems.

Second, robust investigation is essential to combating piracy in the Gulf of Guinea. The difficulty of effective criminal investigation however, is especially acute in the region. Most of the significant cases of hijacking in the Gulf of Guinea span different national jurisdictions. The vessel is often hijacked in the coast of one State and either the ship or the article or proceeds of

the crime, sent to another State. This model is particularly salient for the case oil cargo, which typically end up in another State within the region or beyond. Responding to such a crime profile requires thorough and well-coordinated investigation. The skills and mechanisms available to institutions such as the International Criminal Police Organization (INTERPOL), however, can be of great value.

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