

Report

Barriers to Developing Anti-Piracy Law in Somalia⁽¹⁾

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Abstract(2)

The United Nations Security Council, through multiple resolutions, called for all nations to criminalize the crime of piracy. In particular, the SC demanded from the Somali government to enact antipiracy legislation and declare an exclusive economic zone that is in agreement with the UNCLOS treaty. Although it has been notoriously slow, Somalia has recently proclaimed its EEZ by recalling the already existing 1989 Somali Law of the Sea. However, the Somali government has failed to enact anti-piracy legislation and establish institutions. As a result, international navies capture and states in the region (Kenya, Seychelles and Mauritius) try convict and often incarcerate pirates. In this paper, we examine the factors that have prevented Somalia to pass anti-piracy law. Based on interviews with different actors, archival research and content analyses of the four past and relevant legislations on the issue, we argue that lack of institutional memory, public belief that Kenya was annexing Somali territories and resources, poor capacity, and the international community's practice of outsourcing the functions of the Somali state explain the slow base of the development of anti-piracy legislation.

Introduction

For the last fifteen years, Somali governments and the international community have faced multiple security and legal challenges in addressing the inter-related issues of piracy in the high seas, the declaration of the Exclusive Economic Zone, and illegal fishing in Somalia's waters. Through multiple resolutions(3), the UN Security Council noted the urgency, complexity and the magnitude of these inter-linked issues and called on Somalia to criminalize piracy. So far, Somali governments have failed to enact anti-

piracy legislation and establish judicial institutions. As a result, international navies arrest and states in the region (Kenya, Seychelles and Mauritius) prosecute, convict and often incarcerate pirates.

In this paper, we explore the factors that prevented Somali governments from enacting anti-piracy laws. Based on archival research, interviews and content analyses, we argue that institutional amnesia, widespread belief that Somali territories and resources are going to be annexed, poor capacity and the international community's negative attitude toward Somalia explain the slow pace of development of enacting anti-piracy legislation.

Institutional Amnesia

UNCLOS defines piracy in Article 101 as illegal act committed for private ends on the high seas.⁽⁴⁾ Under this definition, where the act of piracy takes place matters. This is further complicated by the poorly understood development of the Somali law of the sea.⁽⁵⁾ Somali parliaments have never passed an anti-piracy legislation. Instead, the various Somali governments have addressed piracy under other statutes, including the Somali Penal Code and the Somali Law of the Sea. To date, Somalia has had four legislations⁽⁶⁾ on the law of the sea. When these are contextualized, the development of Somalia's law of the sea reflects that of the global community. Yet, because of the collapse of the state, few within the Somali government or the international community fully understand these developments.

Somalia, like many African states, was not a signatory to UNCLOS I⁽⁷⁾ & II⁽⁸⁾ negotiations since they occurred before its independence. Somalia adopted the 1959 Marine Code, which was prepared during the UN trusteeship era (1950-1960). In this law, Somalia declared six nautical miles of territorial sea, which was a common practice of coastal states.⁽⁹⁾ The 1959 Marine Code was amended in 1966, extending the Somali territorial sea to 12 nautical miles.⁽¹⁰⁾ The Marine Code defined piracy as an offence committed by people on board a ship, whether it is in the high seas or within territorial waters. This definition does not limit piracy to the crimes that occur in the high seas and those found guilty of piracy would be punished by imprisonment between 10 to 20 years.⁽¹¹⁾

However, as the preparations for the negotiations of UNCLOS III started in early 1970s, the trend shifted into claiming long territorial sea. Many developing coastal states began to assert control over their coastal zones to protect their marine resources, passing laws that exceeded 12 nautical miles. In fact, the 1971 meeting of the Organization of the African Unity (OAU) raised the issue of foreign nations exploiting Africa's coastal resource, particularly illegal fishing, issuing a communique that encouraged "the governments of the African countries to take all necessary steps to proceed rapidly to

extend their sovereignty over the resource of the high seas adjacent to their territorial waters and up to the limits of their continental shelf”(12)

The Somali government responded by passing Law 37 in 1972, which declared 200 nautical miles of territorial sea. The law does not mention piracy; instead Somali Penal Law would be employed in any offence within Somalia’s territorial sea. Somalia defended the extension of its territorial waters as a vital for its economic development and security. At the time, other African states such as Angola, Ghana, Nigeria and Tanzania enacted laws extending their territorial waters beyond the 12 nautical miles.(13) In fact, in early 1970s, only 11 of 29 African countries accepted the 12-mile limit.(14)

Against this background, the third conference on the law of the sea began in 1973.(15) Since many post-colonial states were not part of the previous conventions, the UN General Assembly mandated universal participation.(16) While 86 countries attended the 1958 UNCLOS conference, more than 160 participated in the UNCLOS III.(17) Moreover, the OAU encouraged African states participating in UNCLOS III to harmonize their positions by collectively standing for their national interest.(18)

Somalia, like many developing states, participated in the UNCLOS III conference advocating for a territorial sea longer than 12 nm, which was in line with its 1972 Law 37. As early as 1973, different camps – those that supported extended territorial waters (Group of 77) and those that wanted to limit the territorial water to 12 nm (developed countries) reached compromise deal through the introduction of the Exclusive Economic Zone (EEZ) as a win-win proposal. The adoption of the EEZ allowed the coastal states to have exclusive control of the resources within 200 nautical miles, while limiting the territorial sea to 12 nautical miles, where coastal states have exclusive jurisdiction. Thus, the concerns of the so-called territorialist states(19) that insisted on territorial seas beyond 12 nautical miles were accommodated through the 200 nm EEZ, while in return the industrial countries accepted the 200 nm EEZ.(20)

Somalia was an active participant of many of the UNCLOS III meetings that took place in New York (United States), Caracas (Venezuela), Geneva (Switzerland) and Montego Bay (Jamaica). Its delegation contributed to the debates leading to the adoption of the compromise reached among many contested issues, including the length of the territorial sea. It saw the successful conclusion of the conference.

On 9 December 1982, Somalia’s representative, Yusuf Elmi Roble, the leader of the delegation, announced Somalia’s support and recognition of the EEZ being separate both from the territorial sea and the high seas. He noted, “my government has over the years lent its unswerving support to the novel concept of the exclusive economic zone now enshrined in Part V of the new Convention.”(21) Roble, before signing UNCLOS III for

Somalia, pledged that Somalia would honour the international law that limits the territorial sea of coastal States to 12 nm and EEZ up to 200 nm and that Somalia would bring its 1972 Law 37 into alignment with the Convention by stating:

The Somali Democratic Republic has had on its statute books since 1972 Law No. 37, which decreed a territorial sea of 200 nautical miles. However, in fulfilling the obligations we have assumed under the various provisions of the Convention, Somalia will endeavour to the greatest possible extent to harmonize the 1972 law on the territorial sea with our obligations under the Convention.⁽²²⁾

After signing UNCLOS on December 10, 1982, the Somali government embarked on harmonizing its law of the sea with UNCLOS.⁽²³⁾ From 1982 to 1989, Somalia, under the leadership of the Special Standing Committee on the Sea, worked in the alignment of its laws with its international obligations. The Committee drafted a comprehensive Somali national law of the sea. Somalia's National Assembly approved the Somali Law of the Sea, Law No. 5, on January 26, 1989.⁽²⁴⁾ Article 4, paragraph 4 states that "the territorial sea of the Somali Democratic Republic shall be 12 miles, measured to seaward from the baselines."⁽²⁵⁾

Following its enactment of the 1989 Law of the Sea, the Somali government started the process of ratification of UNCLOS III in early 1989. The Somali Official Bulletin records the UNCLOS ratification decree on February 9, 1989, which came into force on the same date.⁽²⁶⁾ It declares that UNCLOS and its Annexes "shall have the force of the Law in the Territory of the Somali Democratic Republic".⁽²⁷⁾ In addition to harmonizing its national law with UNCLOS III, Somalia also repealed Law 37 of 1972 and any other law opposing Law No. 5. On July 24, 1989, Somalia became the fortieth state to ratify UNCLOS III.

Ironically, as comprehensive as Law No. 5 was meant to be, none of its articles directly addressed the issue of piracy. However, since Somalia ratified UNCLOS III, the articles of the convention that deal with piracy could be utilized. Moreover, the comprehensive efforts of the Somali government from 1972-1990 were not noticed at the international level. Paradoxically, the United Nations keeps on its records two contradictory documents on the case of Somalia's Law of the Sea and its territorial and EEZ declaration. One is the Law 37 and the other is the acknowledgement of Somalia's ratification of UNCLOS III, which can only happen after the member state brings its national law in harmony with the treaty.

Somalia's transitional parliament passed a fourth legislation (Dhahal-Dhawr) on this issue on October 25, 2011 in response to a public outcry against a memorandum of understanding (MOU) between the Somali government and Kenya. It upheld the 1989 Law of the Sea as the law that would govern Somalia's seas. The Parliament nullified the

MOU imposing a moratorium on government activities relating to Somalia's maritime resources until the country has the capacity to effectively negotiate. Finally, the parliament declared anyone violating the law would be considered a traitor.(28)

Despite the presence of these four legislations, the Somalia government has acted haphazardly in dealing with the issue of piracy. The government has not shown an understanding of past activities and processes.

Perception of Kenyan Annexation of Somali Territories and Resources

Besides the loss of institutional memory, many Somalis, particularly legislators, believe that Kenya and some Western oil companies are exploiting Somalia's resources and taking advantage of a weak Somali state. Somali journalists, politicians and intellectuals have mobilized Somali public opinion, creating a widespread belief that Somalia is losing part of its territories and resources to Kenya.(29) This has had serious impact for the Somali government in developing anti-piracy legislation or any other law that deals with the sea.

Because of the rise of piracy off the Somali coast, maritime issues have become a priority for various governments and international agencies. The UN Special Representative of the Secretary General (SRSG) for Somalia, Ahmedou Ould Abadallah, started, in October 2008, to assist Somalia in working on the delimitation of its outer continental shelf for submission to the UN Secretary General. The SRSG office also convinced the Somali government to accept the assistance of the Norwegian government and Norwegian Petroleum Directorate regarding the delimitation of the outer continental shelf.(30)

Following this, Kenya and Somalia signed a Memorandum of Understanding (MOU) on April 7, 2009, to resolve a "maritime dispute" between Somalia and Kenya. With the help of the SRSG, Somalia's Transitional Government submitted the complete text of the MOU with the preliminary information to the Commission on the Limits of the Continental Shelf in April 2009. SRGS Ould Abdallah and the Somali cabinet defended the MOU as a required step for Somalia to demarcate its maritime boundary with Kenya. But, the Somali media covered the signing of the MOU with Kenya as treasonous and argued that the Somali government is selling out the interests of the country.

The Kenya-Somalia maritime boundary issue is also complicated by the involvement of oil companies who have been issued licenses by Kenya.(31) As a collapsed state, Somalia has no capacity to independently demarcate its maritime boundary with Kenya and negotiate in an equal position with Kenya.

Taking advantage of the ambiguity of the MOU, Kenya submitted “its outer limits of the continental shelf beyond 200 nautical miles”; including maps showing parts of territorial waters Somalia believes to be part of its territorial waters to the UN Secretary-General. The signing of the MOU created confusion within Somalia. Panicked that Somalia’s territorial sea was being given away, Somali lawmakers rejected the MOU on 1 August, 2009, as “null and void”. Further, the Somali Parliament upheld the 1989 Somalia Law of the Sea.

This case still hampers the Somali government from correcting the legal ambiguity in its territorial waters. Knowing Somalia is at a disadvantage, Kenya insists on negotiating its maritime demarcation based on the MOU. Moreover, Somali government, particularly the cabinet and the parliament, are absent from these discussions, albeit the president’s office is actively involved. For now, the Somali government has taken the case to the International Court of Justice.⁽³²⁾

Poor Capacity

In addition to institutional amnesia and the negative perceptions against Kenya’s perceived land and resource annexation, there is an apparent lack of capacity with respect to the Somali government. Somali leaders have shown poor capacity in understanding and handling these complex maritime issues. Besides division among Somali authorities, politicians lack clarity when it comes to formulating policy on this issue.

Somali politicians have issued contradictory positions. former Prime Minister Omar Abdirashid Ali Sharmarke, submitted two contradictory letters – one defending the MOU with Kenya and the other supporting the Somali parliament’s rejection of the deal. First, Sharmarke contested the maritime zone claims indicated in the maps submitted by Kenya to the Commission on the Limits of the Continental Shelf (CLCS) but still accepted the CLCS to make recommendations on the limitation of the Somalia and Kenya’s outer continental shelf. Prime Minister Sharmarke changed his position within two months and submitted another letter notifying the UN Secretary General of the rejection of the MOU by the Somali parliament, reiterating that the MOU was non-actionable.

The confusion among Somali policy makers regarding its maritime laws escalated after the current government came into office in 2012. For instance, to settle the Somali Law ambiguity issue, President Hassan Sheikh Mohamud in an address to the 14th Plenary Session of The Contact Group on Piracy off the Coast of Somalia (CGPCS) on 1 May 2013 correctly argued that the 1989 Somali Law of the Sea is in agreement with UNCLOS III and that there was no ambiguity. However, former Prime Minister Abdi Farah Shirdon and his cabinet issued a press release on June 6, 2013 reiterating their support for the

1972 Law 37(33) declaring that it was not the right time for Somalia to open any dialogue regarding maritime boundary delimitation with Kenya.(34)

On February 4, 2014, Somalia's Foreign Minister Abdirahman Beileh wrote a letter to Secretary General Ban Ki Moon requesting that the Commission on the Limits of the Continental Shelf (CLCS) not make any recommendations on the Somalia and Kenya outer continental shelf. Beileh also underlined that the MOU should be considered as "null and void" and requested that its references in the Somali case be completely removed. It is not clear what triggered this letter. As explained earlier, former Prime Minister Sharmarke sent a similar letter which the commission noted.

The Parliament continues to oppose any action related to Somalia's maritime territory and most of the Somali media champion the 1972 Law of the Sea and charge the government with committing treason any time this issue is raised. In fact, one interview from international community we interviewed for this study said, "Somali politicians are too confused and they do not know what they want."(35)

International Community's Attitude toward Somalia

Besides lack of institutional memory, perception of Kenyan annexation of Somali territories and poor capacity, the international community's practices toward Somalia perpetuate the status quo. Three reasons are provided. First, the international government ignores on-shore solutions and bypasses Somali authorities. Instead, to contain the problem of piracy, many members of the international community support short-term off-shore solutions – sending in the navy, encouraging on-board private security guards and the adoption of best management practices. Second, in order to prosecute pirates, western nations encouraged neighboring countries to prosecute pirates. Finally, the international community often dismisses illegal fishing and toxic-waste dumping concerns of Somalis. These practices have contributed to the disinterest of Somali authorities in tackling piracy.

One of the rationales for ignoring, undermining or bypassing the Somali state is a negative perception by the international community against Somali government leaders believing them to be unreliable partners in fighting against piracy.(36) In fact, some argue that Somali politicians, at different levels, are corrupt and are therefore not interested in addressing piracy problem.(37) For instance, with respect to the prosecution of pirates, Western navies capture suspected pirates and hand them to Kenya, Seychelles or Mauritius for prosecution. These countries, at the behest of the international community, enacted anti-piracy law and signed third party agreements with Western countries. After their conviction, UNODC transfers some of the pirates to Somaliland and Puntland for their incarceration. So far this arrangement perpetuates the

status quo as some of the major functions of the Somali state have been outsourced to non-Somali partners.

In addition, based on many interviews, governments, IGOs and some industry leaders dismiss illegal fishing and toxic-waste dumping practices in Somalia. Some call it “unsubstantiated” and others consider it ‘paranoia.’ In fact, one western diplomat argued that countries that fishing from Somali waters are largely from the region, not Europe. This is not helpful because it perpetuates the grand conspiracy mentality against the Somali resources. Some Somali politicians and intellectuals openly expressed to us that the navies knowingly look the other way when it comes to illegal fishing and toxic-waste dumping.(38)

The behavior of Somali politicians has a great deal to do with the way the international community treats them. The division among competing groups, opportunism and more importantly, the culture of corruption discourage donors, governments and IGOs to take them seriously. However, the implication of relying on off-shore solutions and non-Somali partners is that it has affected the Somali government’s capacity to patrol and secure its coast.

Conclusion

We have examined the factors that have prevented from Somali governments to develop anti-piracy legislation. We have argued that loss of institutional memory, perception that Kenya was annexing part of Somalia, lack of capacity, and international community’s practice in outsourcing the functions of the Somali state explain the slow progress in addressing this issue. We find that the chronological process of the Somalia’s Law of the Sea demonstrates that Somalia enacted four legislations (1959, 1972, 1989 and 2011), albeit few understand it. Moreover, many Somalis believe Kenya and Western oil companies are collaborating to annex Somali resources. In addition, poor capacity has contributed to the misunderstanding of this complex problem. Finally, the international community’s practice of outsourcing the functions of the Somali state, and dismissal of their legitimate illegal fishing and toxic-waste dumping concerns affects the will of Somali authorities.

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Endnotes

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- 3) Security Council resolutions on piracy off the coast of Somalia : 1816(2008),1838(2008), 1846(2008), 1851(2008),1897(2009),1918(2010),1950(2010),1976(2011),2015(2011),2020(2011)
- 4) UNCLOS Treaty
- 5) See Yvonne Dutton, Maritime Piracy and the Impunity Gap: Domestic Implementation of International Treaty, In Michael Struett, Jon Carlson and Mark Nance, Maritime Piracy and the Construction of Global Governance, London: Routledge, pp. 71-98
- 6) 1959 Maritime Code; 1972 Law of the Sea; Law Number 5 of the 1989; and Dhaxal-Dhawr (2011 Maritime Law)
- 7) UNCLOS I Geneva, Switzerland, 1958
- 8) UNCLOS II, Geneva, Switzerland, 17 March -26 April 1960
- 9) 1959 Somali Marine Code by Somali government
- 10) Article 3 of Law No. 7 of November 1, 1966
- 11) Somali Marine Code, 1959
- 12) OAU Resolution on the Permanent Sovereignty of African Countries over Their Natural Resources (Document CM/Res.245 (XVII))
- 13) Tayo O. Akintoba, African states and contemporary international law: a case study of the 1982 law of the sea convention and the exclusive economic zone. Vol. 26. Martinus Nijhoff Publishers, 1996.
- 14) Nandan, S. N. Nandan, The Exclusive Economic Zone: a Historical Perspective. In: The law and the sea. Essays in memory of Jean Carroz / FAO, Rome (Italy). Fisheries Dept. , 1987, p. 171-188
- 15) Edward L. Mile, Global ocean politics: the decision process at the Third United Nations Conference on the Law of the Sea, 1973-1982. Martinus Nijhoff Publishers, 1998.
- 16) General Assembly Resolution 2750
- 17) James Harrison, 2011, Making the Law of the Sea: A study in the Development of International Law. Cambridge: Cambridge University Press, p. 39
- 18) Nandan, 1987; OAU, 1972
- 19) Penelope Simoes Ferreira, The role of African states in the development of the law of the sea at the third United Nations conference. Ocean Development & International Law 7.1-2 (1979): 89-129.
- 20) Barbara Kwiatkowska, Creeping jurisdiction beyond 200 miles in the light of the 1982 law of the sea convention and state practice. Ocean Development & International Law 22, no. 2 (1991): 153-187.
- 21) UNCLOS III, Official Records, Volume XIV, 192nd meeting, para 157 at 127)
- 22) UNCLOS III, Official Records, Volume XIV, 192nd meeting, para 155 at 127
- 23) Interview with former Members of Specill Committee for the Somali Law of the Sea, December 2013
- 24) Bollettino ufficiale della Somalia, 1989
- 25) Bollettino ufficiale della Somalia, 1989
- 26) Somali Law of the Sea, 1989
- 27) Somali Law of the Sea, 1989
- 28) See Dhaxal Dhawr Legislation, Transitional Parliament of Somalia, 8 October 2010
- 29) <http://www.innercitypress.com/los7somalia031510.html>
- 30) Coalter Lathrop, 'Continental Shelf Delimitation beyond 200 Nautical Miles: Approaches Taken by Coastal States before the Commission on the Limits of the Continental Shelf', in David A. Colson and Robert W Smith (eds.), International Maritime Boundaries(Leiden: American Society of International law/Martinus Nijhoff, 2011), 4139; Somalia submits continental shelf information with Norwegian assistance,18 April 2009, http://www.norwaypost.no/index.php?option=com_content&task=view&id=21910
- 31) Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2060 (2012): Somalia, United Nations Security Council Report: 12 Jul 2013
- 32) See the International Court of Justice application submitted by somali on 18 August 2014, <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=00&case=161&code=SK&p3=0>

33) (Official Press Release, June 6 2013)

34) Ibid

35) Interview, Dubai, 2013

36) Most of the interviewees expressed negative views against Somali authorities.

37) Interview with IGO member, Dubai, 2013

38) This line of thought is commonly expressed by Somali politicians and journalists. Some of the Somali members we interviewed repeatedly expressed this.

