

PIRACY IN SOMALIA – A LEGAL PERSPECTIVE

An Interview with Mr. Michele Ameri,

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From Liberian oil tankers to Portuguese cruise ships, modern day piracy targets indiscriminately and remains an intractable international threat. While international navies fight increasingly brazen gangs that hijack commercial vessels in what is surely the oldest form of international crime, what are some of the legal issues surrounding piracy from an international law perspective? PGI explores the issue with Mr. Michele Ameri, the Law of the Sea Officer for the United Nations Division for Ocean Affairs and the Law of the Sea (DOALOS).

FA: Thank you so much for taking the time to speak with us today. Let's begin by looking at the big picture - what kind of work is the DOALOS involved in? How does DOALOS (and the Office of Legal Affairs) fit within the context of the different U.N. organs?

MA: DOALOS is one of the six parts of the U.N. Office of Legal Affairs, and each of these parts deals with a specific area of international law. DOALOS, as the secretariat for the United Nations Convention on the Law of the Sea, also referred to as UNCLOS, deals with a wide range of ocean issues, including biodiversity, protection and preservation of the environment, maritime security, navigation and fisheries.

The role that we play as the secretariat of UNCLOS [U.N. Convention on the Law of the Sea] is that firstly, we promote the Convention and its uniform and consistent application by providing information and advice to states and intergovernmental organizations. To that end we also prepare publications and training programs. For example, we have organized a series of training programmes for States to assist them in making submissions to the Commission on the Limits of the Continental Shelf. The Commission, for which DOALOS acts as Secretariat, is one of three bodies set up by UNCLOS; the International Seabed Authority and International Tribunal for the Law of the Sea are the other two.

Secondly, we assist states by monitoring and reporting to the General Assembly regarding developments in ocean affairs and law of the sea, providing substantive servicing for the meetings of processes established by the General Assembly to address oceans issues, and preparing the reports of the Secretary-General on oceans and law of the sea, which serve as a basis of the discussions of the General Assembly on oceans issues. We also provide information and advice at meetings organized by other international organizations, when they are dealing with issues related to the application of UNCLOS. In general, we try to ensure that there's a consistent approach throughout the U.N. system in the application of the Convention.

How would you describe your role, specifically, as an Ocean Affairs/Law of the Sea Officer?

PERSPECTIVES ON GLOBAL ISSUES

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The views of Mr. Ameri are his own and do not necessarily represent those of the U.N. Office of Legal Affairs.

I work with my colleagues on a range of issues, in teams or individually. It could be preparing a report for the Secretary General or servicing a meeting. Each of us also has their own specialization and is responsible for following the developments in that area, with a particular view to preparing relevant reports and providing information. Because there are so many areas that we deal with, it's really helpful to have people specialize in different areas. I generally specialize in the area of maritime security. (Florence: So you must have been busy recently?) Yes, I have...there are a wide range of piracy issues which arise every day; processes that are underway and initiatives that states are taking at the regional, national and international levels.

I understand that you are an alumni of NYU Law School – how has your academic background and your experience as an attorney led you toward the U.N., in particular with DOALOS?

It's funny, because growing up I didn't so much want to be an attorney as I wanted to be in the international arena working for an international organization; I've always wanted to work for the U.N. or another IO [international organization] – I think that studying law was a really good way to get in and to deal with some interesting issues. NYU is one of the top schools for international law in the world, and it puts you in a good position, in terms of what you learn there. I had also an internship with one of the members of the International Law Commission when I was still in law school and that helped me, because when I started at the U.N. I immediately began working with the part of the Office of Legal Affairs which provides substantive servicing for the International Law Commission. After I graduated I did a traineeship with the European Court of Justice in Luxembourg and then I did a clerkship with a Judge in the Southern District of New York. Each of those experiences was very helpful.

I believe that any experience which is an interesting experience that you can learn from and gain skills from, is a positive step in the right direction, regardless of whether it's directly related to your dream job, because no matter what you're doing you'll be improving yourself. I'd rather take an interesting experience where you get really great practical exposure to things but not exactly in your field, rather than something that is exactly in your field which doesn't offer these opportunities.

How is DOALOS involved in addressing the cases of piracy off of the coast of Somalia?

DOALOS is involved in three ways: First, as a secretariat to UNCLOS, DOALOS provides information and advice to states and intergovernmental organizations, on the uniform and consistent application of UNCLOS. UNCLOS, as you may know, contains the definition of piracy under international law and it also sets forth the legal framework for the repression of piracy under international law. So those provisions are the basis for the international community's response to piracy. It's therefore important for all relevant actors to have a good understanding of those provisions and how they are applied.

Secondly, as a body in the secretariat with an expertise on law of the sea, we work with other parties of the secretariat to formulate the U.N. response and to coordinate the Organization's efforts. It's important to think of piracy, especially off the coast of Somalia, as a multi-dimensional problem that requires the expertise of many different parts of the U.N. Secretariat to address. There are political, humanitarian and potentially environmental

questions – all of these things have to be taken into account.

Thirdly, our role is in monitoring developments and reporting to the General Assembly and also to the Meeting of States Parties to UNCLOS. The reports prepared by DOALOS form a basis for their discussions and contribute to the long-term normative development of the framework by the General Assembly. In terms of monitoring, we rely on information from the media and other departments within the U.N., as well as other intergovernmental organizations. We also gain substantial amounts of information just by going to intergovernmental meetings where states discuss what's going on in the field and their experiences – those are the main sources.

What do you think contributes to the success of the UNCLOS as a convention that most states have signed and accepted?

In my view, UNCLOS has been remarkably successful as an international agreement in a large part because of the balance it was able to achieve between the interests of different stakeholders. That was part of the reason why it took years to draft and reach a final text. I think you're right, the results have to be judged really favorably both in terms of participation of states and in terms of the genuine commitment that states have shown in the implementation of the provisions and the general principles and norms contained in it. It's a mix of generality and specificity; a good balance between those two. Sometimes, the quality of the drafting can also help determine the longevity of the norm. Moreover, states have shared interests in the use and protection of the ocean; and they recognize that int'l cooperation is the most effective way of protecting those shared interests. For many states, the interest in having one shared set of common rules and norms outweighs their interest in any specific provision of the Convention, and thereby makes it possible to reach consensus.

In your opinion, has the UNCLOS been elevated to the status of customary international law?

Many of the provisions of UNCLOS are generally considered to reflect customary international law, and even some states that are not parties to UNCLOS have stated that in their view, many of the provisions do reflect customary international law. The provisions of piracy, in particular, which are almost identical to the ones adopted in the ILC in 1956 and contained in the Convention of the High Seas in 1958, are generally accepted as customary international law. This is confirmed by recent state behavior and the statements that the General Assembly and the Security Council have made - for example the Security Council has repeatedly said that international law, as reflected in UNCLOS, sets out the legal framework applicable to combating piracy and armed robbery at sea, as well as other ocean activities.

Why is the coastal area surrounding Somalia and the Gulf of Aden prone to piracy? What makes this an international problem rather than a Somali problem?

There are two basic factors that makes piracy off the coast of Somalia so problematic; one of them is the geographic position of Somalia. One must consider the position of Somalia on the Gulf of Aden, at the mouth of the Red Sea - it's an incredibly important waterway for international navigation and a virtual choke point for navigation because so many ships need to pass. I think the BBC estimated that 16,000 to 20,000 ships pass through every year.

The second aspect is the political instability in Somalia and the relative inability of Somalia to patrol its own waters. The Security Council recognized this when it stated that incidents of piracy and armed robberies at sea in the waters off the coast of Somalia exacerbate the situation in Somalia, which constitutes a threat to international peace and security in the region. It makes it easier for pirates to act and to establish bases there. It's therefore both a Somali problem and an international problem. In terms of the international community, it has to be concerned about the safety of the seafarers and ships, which are from many different nations, as well as the effect that piracy has on international commerce and navigation by affecting safety and security and by raising the cost of insurance. Shipping costs go up, fuel costs can potentially go up – all of these aspects make it an international problem. Moreover, it should be recalled that successful pirate attacks can exacerbate the situation in Somalia.

Is there a difference between ‘armed robbery against ships’ and piracy? What is the implication of that difference in terms of states’ jurisdiction over suspected offenders?

Piracy is defined in Article 101 of UNCLOS and basically refers to certain illegal acts which are committed in areas outside the territorial sea of the state (the territorial sea is the first twelve miles off the coast of the state). These acts can be considered piracy and UNCLOS provides for universal jurisdiction for any state to seize ships that commit piracy and prosecute suspected pirates. If these acts are committed inside the territorial sea of the state, they fall under the rubric of armed robbery against ships. In that situation, generally the coastal states will have exclusive jurisdiction over that offense. In the case of Somalia, however, that's changed by the Security Council resolutions which allow for foreign naval forces from states that are cooperating with the Transitional Federal Government of Somalia to take measures against suspected offenders, even if they are committing those acts inside the territorial sea. (reference: Resolution 1816 which was renewed by Resolution 1846)

How is the international community addressing this problem?

The task that the international community is faced with is a difficult one. The space that's being patrolled is very large and the risk an offender faces is relatively low compared to the possibility of a successful attack – but the international community has begun to take a number of steps, and the reaction of the international community and the level of cooperation among states to address piracy has been pretty extraordinary. Eventually we'll start seeing results – to some extent, we're already seeing results - attacks being thwarted, pirates being captured. I'm hopeful that the measures will continue to be successful.

In terms of what the international community has done, in 2008 the Security Council adopted four resolutions specifically on piracy and armed robbery off the coast of Somalia, which provide a framework for international cooperation and action. States have begun cooperating with the Transitional Federal Government of Somalia by sending naval vessels to the region, individually and collectively. The EU has launched a major operation called Operation Atlanta; the U.S. is involved in an operation titled Combined Task Force 151, other states, such as China, India and Russian Federation have all sent vessels to the region. States have set up security corridors and are accompanying ships/convoys. It's hard to be everywhere, however, so sometimes pirates slip through the cracks, for now. States are also engaged in cooperation in terms of trying to find more coordinated approaches to address piracy at the regional,

bilateral and global levels. Many of these measures have been highlighted in a report of the Secretary-General to the Security Council(S/2009/146).

On a regional level, I would point out that, for example, a number of states near Somalia have adopted the Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden. There are also efforts by the shipping community and industry to come up with guidelines for ship owners on how to prevent attacks or to respond to attacks. There's also increased monitoring by regional monitoring centers...so a lot of things are going on.

Moreover, I think all of these measures must be seen in the context of the measures that are being taken to improve the situation in Somalia itself. In fact, that is one of the things the Secretary General has stated in his report – that any measure taken to combat piracy off the coast of Somalia will require an integrated approach that supports the peace process; strengthening efforts on land and Somali security forces, strengthening maritime institutions such as the Somali regional coast guards, addressing the lack of accountability, strict compliance with arms embargoes, SC resolutions, and peace-building efforts by empowering local communities. So, in my view, measures taken to address the situation in Somalia are also going to play an important role in finding a sustainable solution to the problem of piracy.

UNSC Resolution 1851 states that: ‘Noting with concern that the lack of capacity, domestic legislation, and clarity about how to dispose of pirates after their capture, has hindered more robust international action against the pirates off the coast of Somalia and in some cases led to pirates being released without facing justice.’ What are some of the issues regarding the jurisdiction, trial and punishment of pirates after their capture?

One of the big issues is that many states don't have national legislation on piracy that's up to date. Piracy is a very old phenomenon, and even states that have legislation might have drafted it a hundred years ago. For example, while international law permits states to exercise universal jurisdiction over acts of piracy, some states don't have provisions for universal jurisdiction under their national law. There are also a lot of states that don't have any legislation on piracy at all.

There is also a question of how to improve international cooperation to handle the more practical aspects of prosecution of suspected offenders. Some states prefer that suspected offenders be prosecuted by a state in the region that's willing to do so. When you have that situation you have a need for practical cooperation, even if there's already a transfer agreement in place. For example, there may be issues with collecting evidence for trial in a state that has a different legal system. That requires a certain level of forethought, or maybe even training. Making witnesses available when they're seafarers or military officers – these are all practical problems that need to be resolved.

What kind of trends, then, do you see developing in states that are currently lacking that capacity?

There are number of states that are in the process of updating their national legislation. I know that Japan and France are updating their national legislation. In terms of developing countries in the region, one of the focuses of the international community is to assist them in

updating their legislation and developing their capacity to prosecute, detain or punish offenders. There are a range of capacity-building programs that are just beginning or already underway. Some are through U.N., while others are through the IMO and other international organizations.

There has been no proper government in Somalia since 1991 - competing clans, IDPs standing at 1.3 million as of December 2008 - do you see the situation improving that would lead to a decrease in the incidents of piracy around the coast of Somalia?

This is not particularly my area of specialization – but if it did improve, I suspect that it would certainly have an effect on the levels of piracy if it led to more patrolling by the coastal state. For example, in the Straits of Malacca and Singapore, increased cooperation among regional states and increased surveillance and patrolling is credited with contributing to a reduction in incidents of piracy and armed robbery against ships. The same thing could happen in Somalia.

What are some of the human rights issues States are concerned with in regard to the repression of piracy?

It seems that states are interested in ensuring that human rights are respected in all phases of anti-piracy operations. They can be an issue in relation to the capture, prosecution, treatment and detention of suspected offenders.

Is there anything you would like to leave with our readers before we conclude the interview?

A lot of what you see in the media is that people are questioning whether the legal framework is adequate. In my view, it really is. UNCLOS already provides for universal jurisdiction in the repression of piracy – so any state can seize the suspected vessel – and moreover, the Security Council has provided a specific framework for reacting to incidents off the coast of Somalia...so there clearly is an international framework for addressing these problems. The problem really requires a multi-dimensional approach, which is not necessarily easy to implement– but international law does provide the tools.