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Critical Analysis of Doctrine of Hot Pursuit in Respect of Maritime Piracy

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ABSTRACT

Maritime piracy has been one of the oldest maritime crimes and has been declared as a crime against all nation-states. In the era of growing economy and trade in the world, maritime security is of paramount importance. Just like the issue of maritime piracy has persisted since long, the doctrine of hot pursuit has also persisted since long and had evolved as the customary international law. Subsequently, both were codified in the form of 1958 Geneva Convention on High Seas, and later on, in the form of United Nations Convention on the Law of the Sea 1982. There are two fundamental principles of International Maritime Law which have been recognized, one is the freedom of navigation of the state vessels on High Seas, and other being the exclusive jurisdiction of a flag-state over its vessels. The Articles dealing with maritime piracy as well as the doctrine of hot pursuit are exclusions to the said two fundamental principles. Articles 100-110 of the United Nations Convention on the Law of the Sea 1982 contains the provisions for combating maritime piracy whereas Article 111 of the United Nations Convention on the Law of the Sea 1982 contains the provision for the Doctrine of Hot Pursuit. In modern times, with evolved technologies, the paper proposes that a liberal and broad interpretation of Article 111 of the United Nations Convention on the Law of the Sea 1982 can be effectively used to combat Maritime Piracy. Through adoption of relevant provisions of piracy as domestic legislation by the states, and by construing the entire Articles 100-111 of the United Nations Convention on the Law of the Sea 1982 in a harmonious, beneficent and liberal manner can be an effective solution to combat maritime piracy. Chapter 1 of the paper introduces the issue of maritime piracy and analyses the relevant provisions related to it. Chapter 2 of the paper introduces the doctrine of hot pursuit and analyses the provision related to it, providing for broad and liberal construction of the same. Chapter 3 co-relates the said provisions and proposes how all the provisions can be read harmoniously to combat maritime piracy in a much more efficient manner.

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I. INTRODUCTION

In this world of growing economy and trade, where transport via ship has become an essential means of sustaining the trade and economy, the security of vessels in the water bodies is of paramount concern. Maritime piracy has been the oldest crime in the context of Maritime law and has imposed major security concerns for all states, calling for the cooperation of all states. In this respect, the laws regarding maritime piracy was first codified in 1958 in the Geneva Convention on the High Seas, and subsequently in the United Nations Conventions on the Law of the Sea (UNCLOS) 1982.

On the other hand, the Doctrine of Hot Pursuit had evolved as a customary international maritime law before being codified in the 1958 Geneva Convention on the High Seas, and subsequently codified in 1982 United Nations Convention on the Law of the Sea (UNCLOS). The Doctrine of Hot Pursuit is an important enforcement mechanism for member states to chase, apprehend and capture vessels, even on the high seas, which are found violating the concerned state's laws within its maritime zones. This comes as an exception to two important principles of international law, i.e. the freedom of navigation in the high seas, and the exclusive sovereignty of a state on the ships flying its flag.

While a lot has been attempted in the context of Maritime Piracy by inter-governmental cooperation to secure the seas, not a lot has evolved in the context of Doctrine of Hot Pursuit. This paper will deal both of them critically and try to establish how the Doctrine of Hot Pursuit can be used in itself to combat Maritime Piracy too.

(A) Research Problem

How far the Doctrine of Hot Pursuit can be used to combat Maritime Piracy?

(B) Existing Legal Situation

Both Maritime Piracy as well as the Doctrine of Hot Pursuit are codified in the United Nations Convention on the Law of the Sea 1982. This convention is like a constitution for all maritime laws and explicitly defines both maritime piracy and doctrine of hot pursuit, and the conditions for the same.

(C) Literature review:

- 1) Walker R, "International Law of the Sea: Applying the Doctrine of Hot Pursuit in the 21st Century" (2011) 17 Auckland University Law Review

This article states that the doctrine of hot pursuit as per UNCLOS 1982 is outdated but doesn't propose any amendment. Rather, it provides for a broad and liberal interpretation of

the article and discusses the relevant issues with respect to modern times and how the said article can still be efficiently be invoked and exercised.

- 2) UNCTD, “AN OVERVIEW OF THE INTERNATIONAL LEGAL FRAMEWORK AND OF MULTILATERAL COOPERATION TO COMBAT PIRACY”, (2014), Studies in Transport Law and Policy No.2

This article discusses the issue of maritime piracy and its provisions as enshrined in UNCLOS 1982. It deals with the various aspects related to maritime piracy, other conventions related to maritime piracy, distinguishes maritime piracy from other maritime crimes, discusses the said distinguishing conventions etc. It provides a complete overview on the issue of maritime piracy.

- 3) Crimes at Sea: A Law of the Sea Perspective” The Centre for Studies and Research in International Law and International Relations

This article discusses about the various crimes that are committed in seas and the legal situation as far as those crimes are concerned. It talks about the evolution of maritime law and how the codification of the said laws took place ultimately in the form of UNCLOS 1982. It discusses various other conventions dealing with various other crimes at sea, the enforcement mechanism, and provides a proper perspective on the same.

(D) Scope and objective of the study:

This paper attempts to critically analyze the issue of Maritime piracy as well as the enforcement mechanism of the Doctrine of Hot Pursuit and its evolution. This paper specifically deals with the maritime piracy in relation with the doctrine of pursuit in the context of UNCLOS and doesn't discuss other enforcement mechanisms or other maritime crimes or other conventions.

(E) Research Methodology:

The paper follows a doctrinal research methodology involving primary and secondary sources available to critically analyze the law on Maritime Piracy and Doctrine of Hot Pursuit, analyze them in respect of one another.

The sources used for research include, but are not limited to, conventions, ICJ judgements, Journals, Magazines, Blog articles, UN reviews, books etc.

II. INTRODUCTION TO MARITIME PIRACY AND AN ANALYSIS OF THE SAME

While there exists no specific international convention, which is solely dedicated for fighting

maritime piracy, it has been recognized as a crime against entire International community law and is subjected to a universal jurisdiction. It had been defined as a crime against all states by the Permanent Court of International Justice in the famous S.S LOTUS case².

After a number of attempts to codify international law to combat maritime piracy, the Geneva Convention on the High Seas was adopted in 1958. Article 1 of the convention defined High Seas as “all parts of the sea that are not included in the territorial sea or in the internal waters of a State”. Article 15-22 of the convention dealt with the laws on Maritime Piracy. Subsequently, United Nations Convention on the Law of the Sea (UNCLOS) was adopted in 1982 which superseded all earlier conventions on the Maritime Law and rendered them obsolete. The Laws on Maritime Piracy mentioned in Article 15-22 of the Geneva Convention on High Seas is almost repeated in the Articles 100-110 of the United Nations Convention on the Law of the Sea 1982. Article 100 of UNCLOS states that all member states shall cooperate to the maximum possible extent to repress maritime piracy, but only on High Seas and on places which are outside the jurisdiction of any State. Article 105 of the UNCLOS states provides for the universal jurisdiction over those commit the act of Maritime Piracy. Article 105 states, “*On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.*”³. Thus, all states have the jurisdiction to deal with the crime of Maritime Piracy as long as it is in consistency with articles of UNCLOS. This is also an exception to the principle of exclusive jurisdiction of the flag-state over its ships on high seas.

Article 101 of the UNCLOS defines Maritime piracy as –

“(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of

² S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7)

³ United Nations Convention on the Law of Sea 1982, A 105

any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).”⁴

Thus, the definition of maritime piracy has a geographical scope as well as a substantive scope in its definition. The geographical scope limits the scope of the articles only to the acts of piracy which occur on the High Seas or in a place which is outside the jurisdiction of any state. But this article should be read along with Article 58(2) of UNCLOS which states that the International laws which are applicable on the High Seas shall be applicable to the Exclusive Economic Zones (EEZs) of the states in so far as they are not inconsistent with the provisions for EEZs in the UNCLOS. Hence, the geographical scope extends also the EEZs of the states but not to the territorial waters of the states.

On the other hand, the substantive scope consists of five core components⁵ –

- 1) The act should be committed for private gains only. Political or other forms of gains are covered with this definition of Maritime Piracy in UNCLOS.
- 2) There should exist two or more ships, i.e. a victim ship and a pirate ship. Mere internal hijacking or violent take-over of the ship by its own crew members are not included within the definition of maritime piracy.
- 3) The definition of pirate ship/aircraft which needs the reading of article 101(b) with the article 103 of the UNCLOS. Article 103 defines a pirate ship and aircraft as one if the persons in dominant control of the ship/aircraft intends to commit the acts mentioned in article 101 of the UNCLOS.
- 4) Inclusion of incitement and facilitation of acts of piracy in the Article 101(c).
- 5) A specific distinction between private ships and Government ships. As per the definition in Article 101(a), acts of piracy committed by private ships are only covered within UNCLOS though the said act maybe directed against a government ship or a private ship. But the reading of article 102 also provides for inclusion of government ships whose crew has mutinied and thus taken over the control of the said ship.

⁴ United Nations Convention on the Law of Sea 1982, A 101

⁵unctd, “an overview of the international legal framework and of multilateral cooperation to combat piracy”, (2014), studies in transport law and policy no.2

Article 107 of the UNCLOS further provides that the act of “*seizure on account of piracy may be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect*”⁶. Thus, only warships, military aircrafts, or other ships/aircrafts identifiable as belonging to the government of a state, which are authorized to act against said acts of piracy, are permitted under UNCLOS to seize a ship on account of piracy. Also, only such above-mentioned vessels are authorized to exercise the “Right of visit” under Article 109 of the UNCLOS which permits the state vessel to board another vessel suspected on the account of piracy.

Lastly, Article 106 of the UNCLOS provides for liability of the states concerned in case of an unjustified seizure of ship or aircraft on grounds of piracy. Similar clause of liability is also contained in Article 110(3) of the UNCLOS for unjustified use of the “Right to visit”.

The said articles 106 and 110(3) of the UNCLOS should be read along with article 300 (good faith and abuse of rights) and article 304 (general provisions on responsibility and liability for damages) of the UNCLOS 1982.

III. INTRODUCTION TO THE DOCTRINE OF HOT PURSUIT AND AN ANALYSIS OF IT

The doctrine of Hot Pursuit evolved as international customary international law before being codified in the 1958 Geneva Convention on High Seas, and subsequently in the United Nations Convention on the Law of the Sea (UNCLOS), 1982. Just like the articles concerning maritime piracy 1958 Geneva Convention on High Seas were reiterated in essence in UNCLOS 1982, similarly, the article on Doctrine of Hot Pursuit mentioned in article 23 of 1956 Geneva Convention on High Seas was reiterated in essence in article 111 of UNCLOS 1982.

UNCLOS regulates the rights and duties of the coastal states in various maritime zones under their sovereignty and also provides for the freedom of navigation within coastal waters as well as freedom of navigation through the EEZ, continuously attempting to strike a balance between the rights of coastal states to control their maritime zones and the rights of maritime states to enjoy freedom of navigation over the ocean. The principle of freedom of navigation on high seas, along with the principle of exclusive jurisdiction of flag-state over its ship, are fundamental principles in maritime law, and exceptions to these principles can be invoked in exceptional cases. Maritime Piracy is one of them. Another exceptional case is the Doctrine of Hot Pursuit. The doctrine provides that if a vessel commits a violation of the laws of a foreign coastal state while on that state’s territorial or sovereign waters, the said vessel can be

⁶ United Nations Convention on the Law of the Sea 1982, A 107

pursued onto the high seas and thus seized.

Article 111 of UNCLOS 1982 reads as follows –

“1. The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone. If the foreign ship is within a contiguous zone, as defined in article 33, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.

2. The right of hot pursuit shall apply mutatis mutandis to violations in the exclusive economic zone or on the continental shelf, including safety zones around continental shelf installations, of the laws and regulations of the coastal State applicable in accordance with this Convention to the exclusive economic zone or the continental shelf, including such safety zones.

3. 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.

4. Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be available that the ship pursued or one of its boats or other craft working as a team and using the ship pursued as a mother ship is within the limits of the territorial sea, or, as the case may be, within the contiguous zone or the exclusive economic zone or above the continental shelf. The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.

5. The right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

6. Where hot pursuit is effected by an aircraft:

(a) the provisions of paragraphs 1 to 4 shall apply mutatis mutandis;

(b) the aircraft giving the order to stop must itself actively pursue the ship until a ship or another aircraft of the coastal State, summoned by the aircraft, arrives to take over the pursuit, unless the aircraft is itself able to arrest the ship. It does not suffice to justify an arrest outside the territorial sea that the ship was merely sighted by the aircraft as an offender or suspected offender, if it was not both ordered to stop and pursued by the aircraft itself or other aircraft or ships which continue the pursuit without interruption.

7. The release of a ship arrested within the jurisdiction of a State and escorted to a port of that State for the purposes of an inquiry before the competent authorities may not be claimed solely on the ground that the ship, in the course of its voyage, was escorted across a portion of the exclusive economic zone or the high seas, if the circumstances rendered this necessary.

8. Where a ship has been stopped or arrested outside the territorial sea in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained.”⁷

The article provides for various procedural requirements to be met with in order to legitimize a pursuit. Unless all the procedural requirements are met, valid hot pursuit doesn't commence. The paper construes the provisions as liberally as possible so as to deal with modern issues in maritime law.

There are few major components justifying the exercise of hot pursuit-

- 1) Breach of the laws of coastal state- As per the article, if a vessel/aircraft breaches the laws of the coastal state, the doctrine of hot pursuit can be invoked. But it has generally been agreed that the doctrine is to be invoked only in cases of serious violations of the laws of the coastal state.
- 2) Good reason to believe – The said coastal state must have a good reason to believe that such a breach of law has been committed. Mere suspicion cannot be said to be enough, but complete knowledge of the same isn't required either⁸.

Article 111(1) read with Article 111(2) provides that the said pursuit must commence within the EEZ of the state, i.e. within its territorial waters, or on its contiguous zone, or within its EEZ, or on its continental shelves.

THE DOCTRINE OF CONSTRUCTIVE PRESENCE⁹

⁷ United Nations Convention on the Law of the Sea 1982, A 111

⁸ M/V Saiga (NO 2) (Saint Vincent and the Grenadines v Guinea) (1999) 120 ILR 143

⁹ Walker R, “International Law of the Sea: Applying the Doctrine of Hot Pursuit in the 21st Century” (2011) 17 Auckland University Law Review

Initially, the doctrine of hot pursuit was made applicable only for the mother ship and its own boats rather than all the boats acting together (incase of presence of other boats acting together with mother ship's boats). But this was later rejected and thus the doctrine of constructive presence was evolved and incorporated in Article 111(4) of UNCLOS 1982.

Article 111(4) of UNCLOS 1982 further specifies that the pursuing ship must satisfy itself by any means available that the foreign ship is within the relevant maritime zone before the pursuit is commenced. The absence of the specification of a method of identification opens a vast number of possibilities for the pursuing ship, especially in the modern era where technology has advanced to a great extent.

3) Warships/Military aircrafts as pursuers – As per article 111(5) of the UNCLOS 1982, only authorized governmental warships/aircrafts are authorized to undertake the pursuit of the foreign vessel. This requirement clause is similar to the requirement of Article 107 of the UNCLOS 1982.

4) The pursuit must be immediate – The pursuit should commence as immediately as possible. The delay in obtaining the relevant authorization for hot pursuit as well as the delay in identifying appropriate warship/aircraft for the pursuit and seizure is allowed.

5) The pursued vehicle must be given a signal to stop – The said foreign ship must be given a signal to stop as per the Article 111(4) of the UNCLOS 1982. The rationale behind the same is to give the said ship opportunity to await inspection. But it was held in *The Newton Bay case*¹⁰ that where it is clear that the foreign ship has no intention to allow inspection, the said requirement can be done away with.

6) The pursuit must be continuous – Article 111(1) of UNCLOS 1982 states that the pursuit be continuous and uninterrupted. This is to provide the jurisdictional link between the pursued vessel and the state on the High Seas, and to avoid misidentification or identification of a wrong ship as the suspect ship. But the convention is silent on what constitutes an interruption. A broad interruption of the article must allow the reasonable small interruptions like picking up evidences, or practical causes like weather conditions etc. Furthermore, with the advancement of technology and use of SONAR, RADAR, and other technologies allows to detect the foreign vessel's location even incase of loss of visual. Hence, as long as the pursuit is ongoing and the foreign vessel is not totally lost on the pursuing ship, the pursuit

¹⁰ *The Newton Bay* [1928] (E.D.N.Y) 30 F.2d 444

should not be termed as interrupted and thus must be termed as continuous. The key to determining whether there was an interruption or not must be the factor that whether the pursued ship was positive identified and tracked throughout the pursuit or not, whether via sight or via technological means.

6) Relay and Multi-lateral Hot-Pursuit¹¹ – A broad interpretation of Article 111(6)(b) of UNCLOS 1982 provides for relayed hot pursuit, i.e. taking over of the pursuit by one vessel from another vessel. The question which arose in modern times was that whether multi-lateral hot pursuit was valid or not, i.e. taking over of the pursuit by a third-party state. This issue is a novel one and hasn't been decided on as of yet. But considering the factor that Article 111(6)(b) authorizes relayed hot pursuit, and in the context of the principle of comity and international cooperation, the author is of the opinion that multi-lateral hot pursuit must be allowed.

7) Termination of the right of hot pursuit – Article 111(3) of the UNCLOS provides that the said right of hot pursuit is terminated as soon as the foreign vessel/aircraft enters its own territorial seas or the territorial seas of another state. Thus, the rights ends only upon entering of the foreign vessel/aircraft in the territorial waters of the other state, and not the EEZ or the contiguous zone of the other state.

Lastly, Article 111(8) of UNCLOS 1982 specifies liability of the pursuing state incase of unjust pursuit of a foreign vessel. Again, this clause has be to read with Article 110(3) and Article 304 of the UNCLOS 1982.

IV. DOCTRINE OF HOT PURSUIT AS AN ENFORCEMENT MECHANISM TO COMBAT MARITIME PIRACY; AN EXTENSION

The maritime laws on Maritime Piracy and the Doctrine of Hot Pursuit has been discussed in the above chapters. The said discussion raises an important question, i.e. Is Doctrine of Hot Pursuit relevant in the matter of Maritime Piracy? The author is convinced that it is very much relevant in the matter of Maritime Piracy.

Article 100 of UNCLOS 1982 provides for international cooperation of all states in the repression of any activity related to maritime piracy, and Article 105 provides for universal jurisdiction to all states to deal with any vessel involved in the act of piracy. For such purpose, to combat piracy, relevant provisions of the piracy must be enacted as domestic legislation in the nation too. UNCLOS requires adoption of relevant provisions as domestic

¹¹ Walker R, "International Law of the Sea: Applying the Doctrine of Hot Pursuit in the 21st Century" (2011) 17 *Auckland University Law Review*

legislations by the member states. To facilitate the said process, IMO resolutions have been adopted containing precise guidelines and recommendations on implementing the said relevant provisions of the convention. A lot of members states have already adopted the relevant provisions as their domestic legislations.

The purpose of the said adoption is to enable the member states to invoke the Doctrine of Hot Pursuit against a pirate ship without any confusion as to the capacity to invoke the said doctrine or as to the jurisdiction to invoke the said doctrine. While UNCLOS 1982 provides for repressing piracy, the said universal jurisdiction extends only on the high seas and places which are outside the jurisdiction of any state. Even though it can be said to extended to EEZs of the states, the jurisdiction is still limited. Thus, on adoption of the relevant provisions of piracy as domestic law by the member states, the jurisdiction becomes whole and limitless, especially when read with Article 100 and Article 105 of the UNCLOS 1982. Doctrine of Hot Pursuit can be invoked incase a pirate vessel is found in the territorial waters of the state, and thus the said ship can be pursued on to the High Seas and even on to the Contiguous zones of other states. Furthermore, even if the pirate ship enters the territorial waters of another state, since Article 100 calls for international cooperation, and Article 105 provides for universal jurisdiction, and since the provisions of piracy would have been enacted as domestic laws, another hot pursuit can be commenced by the said state. Furthermore, as Article 111(6)(b) provides for relayed hot pursuit, and if multi-lateral hot pursuit is permitted under the same, the pursuit shall continue till the said pirate vessel is captured since it would be left with no place to escape to. Hence, Articles 100 to Article 111 can be read harmoniously for a much more effective means of addressing the issue of maritime piracy.

V. CONCLUSION

Thus, as it can be observed from the above discussion that the doctrine of hot pursuit can be an effective solution or an effective enforcement mechanism to combat maritime piracy. There would be no need for any amendment of the UNCLOS or for any new convention, but just a broader interpretation of Article 111 of UNCLOS and the adoption of the piracy provisions of UNCLOS as the domestic law by the states. That in itself would effectively minimize maritime piracy to a great extent, depending on the implementation and execution by the states.

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