

## MARITIME PIRACY IN THE MODERN ERA IN LATIN AMERICA: DISCREPANCIES IN THE REGULATION

AMARILLA KISS

Pázmány Péter Catholic University, Budapest

**Abstract:** Maritime piracy is an activity that was considered defunct long ago and that Latin American countries experience it again in the 21st century. Since 2016 the number of attacks has increased dramatically involving armed robbery, kidnapping and massacre. Modern day piracy has nothing to do with the romantic illusion of the pirates of the Caribbean, this phenomenon is associated with the governmental, social or economic crisis of a state. When it appears, we can make further conclusions regarding the general conditions of the society in these states. But do these attacks really constitute piracy under international law? Does Latin American piracy have unique features that are different from piracy in the rest of the world? The study attempts to answer the questions why piracy matters in Latin America and how it relates to drug trafficking and terrorism. Apart from that, the study presents a legal aspect comparing the regulation of international law to domestic law, especially to the national law of Latin American states.

**Keywords:** Latin America, UNCLOS, SUA Convention, Piracy, Armed Robbery.

### 1. Modern day piracy in Latin America

A decade ago we could hear a lot about piratical attacks in connection with Somalia and due to novels and films, the romantic illusion of the pirates of the Caribbean made a strong impression on all of us. This is all true, the Caribbean region, Central and South America has its – not so romantic– history of buccaneers.

As for the current situation, while in East Africa and Asia the number of attacks decreases, in the Latin American and Caribbean region piracy is on the rise. Piracy has an ever-shifting nature and it is an indicator of the instability of the state. It is similar to a symptom of an illness since the actors involved in piracy and piracy itself have an opportunistic nature. In Latin America this crime traditionally correlates to human and drug trafficking and smuggling. Though this region has always been a hotspot, not too many piratical incidents happened there for a long time. Since 2016, we have witnessed that piracy returned to the region and by 2017, the overall number of incidents increased dramatically according to the report of Stable Seas Program and this trend continued in 2018 as well. In 2016 the number of incidents was around 20, by 2017 about 70 cases were reported, and in 2018 this number was over 80. The reason for this trend can be explained by weakening states and crisis in some Latin American states, especially in Venezuela, but attacks in Guyana and Suriname were extraordinarily violent leaving several people dead. Notwithstanding that St. Lucia, Grenada and St. Vincent and Grenadines are the hotspots, there were incidents recorded in Ecuador and Trinidad as well.

What are the unique characteristics of these attacks? Is there anything related to the incidents that is typical of this region? Apart from having a more violent nature, these types of incidents tend to happen in territorial waters. Another interesting fact is that besides attacking tankers, bulk carriers and fishing vessels, yachts are often targets, especially if they anchor, and small vessels may approach them easily. The crimes generally involve depredation and armed robbery, but kidnapping is very rare. The seafarers are usually threatened by guns or sometimes by knives that is usual in case of these types of crimes, but in this region the chance that an attack ends up in taking lives away is higher than in other regions of the world. It is also typical that these attacks are linked to drugs. It sometimes happens that cargo ships are attacked because some of the containers have drugs inside and the perpetrators look for these packages. They have the information, they use the ship as a location where drugs can be handed over and they disappear on speedboats without a trace. The data mentioned above can only build on the reported cases, but there is a certain tendency that the region of Venezuela and Trinidad remain underreported which is problematic since rumour has that many attacks involving kidnapping remain unrevealed. Another location for these attacks is Mexico where perpetrators go for oil platforms and support vessels servicing the platforms (“The State of Maritime Piracy 2018”, 2018: 21-24). Then there is a problem coming along in connection with Colombia. Colombia does not have as many carriers and nuclear submarines as Brazil does, but considering the total naval strength of countries in the world, Colombia is in the top ten<sup>1</sup>. This data shows the capability to protect national interests and maritime borders. This is important since, when it comes to drug trafficking, one of the most important routes in the world goes through Caribbean waters starting from Colombian territorial waters to the coasts of the United States. The Colombian Navy has an extremely difficult task because they have to control an exceptionally huge area covered by water. The problem is that they can’t completely cover it and it means that crimes against maritime security can flourish, though they have the experience since they fight to repress piracy at the Horn of Africa as well (Nitschke, 2015: 3, 33-36).

According to the 2017 Report of Oceans Beyond Piracy, the cost of the stolen goods in the Latin American region, not calculating an overall economic cost, was about \$ 950000 dollars (“The State of Maritime Piracy 2017”, 2018: 26).

Considering everything, we can observe how Latin American and Caribbean maritime security have been challenged by the crimes mentioned above. But do these crimes constitute piracy in *stricto sensu*? The following chapter is about to understanding what piracy is and how Latin American states regulate this crime or whether they regulate only something similar.

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<sup>1</sup> <https://www.globalfirepower.com/navy-ships.asp> Accessed: 28 Oct 2019.

## 2. The regulation of maritime piracy in public international law and in Latin American states

### 2.1. The international regulation

Piracy *jure gentium* is regulated by articles 101-107 of the United Nations Conventions on the Law of The Sea (hereinafter UNCLOS). Latin American states have traditionally been active in shaping international law and when it comes to maritime law, Chile and Peru had a leading role in the creation of the Exclusive Economic Zone. The reason for this concept was the conservation and protection of fishery resources against illegal fishing and overfishing that may also induce piracy (as it did in Somalia). The most argued topics within piracy involve dilemmas on the definition itself, the enforcement powers and jurisdiction conferred by article 105 and the emerging problems around criminal prosecution. Besides the obvious, practical relevance this crime has in different regions, piracy as an abstract phenomenon also turns out to be an interesting subject matter in legal studies that means a challenge for the international community. It creates a special legal situation mostly because of the difficulties around the definition and because the jurisdiction has an extraordinary basis. Therefore, the aim of this chapter is to summarize how public international law regulates piracy and to compare it with how Latin American states criminalize piracy in order to become aware of potential discrepancies.

According to article 101, piracy consists of the following acts:

- (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 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).

There are key elements to this definition frequently analysed by legal experts. One of the prerequisites is the two-ship-requirement. There must be two ships involved in piracy and at least the attacker ship should be in private hands (Shearer, 2012: 322). Article 103 of the UNCLOS provides further details about whether a ship may be considered a pirate ship. First, the *Achille Lauro* affair raised the question whether there is a legal gap in the requirement of two ships and as we will see, some Latin American states regulate it differently in the domestic law.

However, the most basic requirement is linked to the location of the crime. It must be committed on the high seas or outside the jurisdiction of any other state. We must note that any act fitting in the definition and committed in the Exclusive Economic Zone shall be considered piracy too. Considering everything, there is a territorial limitation here and the common view seems to be obvious: those acts that fit in the definition but are committed in territorial waters don't constitute piracy. However, this is not that easy. The assistance of accomplices, who provide help from territorial waters or directly from mainland, raises concerns (Petrig-Geiß, 2011: 65).

Last, but not least the motivation of the act must be revealed. According to the definition, it must be committed for private ends. When the League of Nations introduced this requirement, they linked it to the armed conflicts and insurgents since at that time there were not any serious concerns about terrorism (Guilfoyle, 2015: 38). Later, the *travaux préparatoires* just adopted this term without having any discussion about it. After the attacks of 11 September, 2001, the topic was on agenda again. The reason for it was that some experts intended to find similarities between terrorists and pirates in order to justify the establishment of universal jurisdiction to punish terrorists (Kontorovich, 2010).

Even though the requirement of private ends were never really in the focus of scientific discussions, it is an overly simple narrative to think that if an act was not committed for private ends, then it is for public ends or political reasons, therefore if it is not piracy, the act must be related to terrorism and therefore, piracy and maritime terrorism are mutually exclusive. The term 'private ends' in this definition does not intend to reveal the personal motivation of the perpetrators but to inform us whether there is a government behind the actions and if it induces a reaction of the state.

All these problems led to the creation of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation in 1988 (and its additional Protocols in 1988 and 2005). This Convention was revolutionary in a sense that it created a platform for all the acts not precisely fitting into the definition set by the UNCLOS and starting to call them armed robbery at sea, and it meant to deal with the question of maritime terrorism as well (Kiss, 2009: 215). The latter is a flourishing activity and not only separate cases we have information about, but terrorist organizations have their wings involving and training special divers in order to commit terrorist attacks underwater. Narcotrafficking can also be a crime against maritime security since they use special submarines in order to smuggle (Eudeline, 2011: 6).

The SUA Convention had another important novelty in its article 8, it posed obligation on states to repress these crimes and to enforce the law by being responsible that trials will be held against the perpetrators.

Considering the above-mentioned, the problem with the definition is related to practice. As we could see, in this region the incidents have some special characteristics, for example, they tend to happen in territorial waters. According to the definition of the UNCLOS, the action itself could constitute piracy, but because of the geographical requirements the Convention, it is not piracy *jure gentium*.

## 2.2. The Latin American regulation

According to article 100 of the UNCLOS, states have the duty to cooperate in the repression of piracy. The first problem with this rule is that it does not contain any obligation that states must criminalize piracy and that they have to prosecute perpetrators, it is merely about the obligation to cooperate. The other problem is that in Latin American states, the number of piratical attacks fitting in the traditional definition of the UNCLOS is low. When it comes to armed robbery at sea, we apply the SUA Convention and its article 8 as it also poses duty on states to cooperate to the fullest extent, preventing, suppressing this crime and taking law enforcement seriously. In this sense, the SUA Convention is stricter than the UNCLOS.

However, not all Latin American states are parties to these conventions. Peru and Colombia, for example, are not parties to the UNCLOS. As for the SUA Convention, some of the most affected states are not parties, like Venezuela, Suriname and Colombia. What is worrying is that the latter has a navy that is among the most powerful navies in the world.

As these states have faced with piracy and buccaneers in their history, most of them have a regulation concerning piracy in the domestic law. Brazil, Colombia, Paraguay, Peru, the Dominican Republic and Uruguay do not criminalize it independently and this is surprising as some of these states have coasts and waters to control. Brazil has the most powerful navy in Latin America and they only regulate the security of maritime transport in article 261 ('Act 2.848 of 1940', came into effect 7 Dec 1940)<sup>2</sup>. Most probably, this rule could be used in case of piratical attacks, though it does not give any details about how they interpret piracy and it is highly questionable.

The most concerned state is Colombia since it is not a member of the relevant international conventions, even though it sends missions to the Horn of Africa to help the international community to repress piracy.

Many states regulating piracy consider it a crime against security and some of them go further by acknowledging it as a crime violating international law as well. Among these states, we find Venezuela and Honduras. The rest are simply in accordance with the UNCLOS and apply the definition set in the Convention (e.g. Mexico, Cuba, El Salvador). Chile is an interesting example, article 434 of the Penal Code says that those committing piracy will be punished ('Act 20730 of 1984', came into effect 12 Nov 1984)<sup>3</sup>, but it does not say anything about the definition of piracy. The clue to reveal their attitude towards piracy is that this article is under the title dealing with robbery and intimidation of people (González Napolitano, 2011: 172). These different regulations are problematic when it comes to practice and their application can be worrying. Therefore, many Latin American states try to incorporate a rule concerning extraterritoriality in their criminal

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<sup>2</sup> [http://www.planalto.gov.br/ccivil\\_03/decreto-lei/del2848compilado.htm](http://www.planalto.gov.br/ccivil_03/decreto-lei/del2848compilado.htm) Accessed 25 Oct 2019

<sup>3</sup> <https://www.leychile.cl/Navegar?idNorma=1984&idVersion=2014-03-08> Accessed 25 Oct 2019

law and to establish jurisdiction about piracy committed on high seas or outside their jurisdiction in order to make their regulation more uniform and universal (e.g. Costa Rica, Venezuela). On the contrary, others do not want to include piracy, as they do not intend to provide universal jurisdiction (e.g. Panama) (González Napolitano, 2011: 174).

In the international regulation mentioned above, the definition has its elements as *conditio sine qua non*, but states sometimes think differently when it comes to domestic law. The international definition is obvious about the actions that can constitute piracy. As for Latin American Penal Codes, Silvina S. González Napolitano did research on collecting the actions that can be considered piracy. She found that, as it could be expected, it involves depredation and violence mainly. Nevertheless, there are some other actions that states regulate in detail like travelling on armed ships without governmental authorization and some interesting configurations in the national law of some Latin American states that constitute piracy. This implies being privy to pirates and/or handing over the cargo, the staff or the ship itself (e.g. in Cuba and Mexico) or to refuse the command to protect the attacked ship (e.g. Argentina). Moreover, it is truly intriguing that states like Argentina, Nicaragua, Costa Rica and Bolivia criminalize trafficking and trading with pirates (González Napolitano, 2011: 179).

Comparing these regulations with the requirements of the UNCLOS, what we find is that not only the SUA Convention realized that the two-ship requirement could be problematic, but states as well, because the majority of Latin American countries does not consider it important. This means there is a serious gap here since piracy interpreted by Latin Americans more probably constitutes armed robbery at sea. González Napolitano (2011: 180) mentions some interesting cases like Panama's, where state officials could commit piracy.

Apart from the two-ship-requirement, a fundamental characteristic of piracy is that it happens for private ends. If not, the crime is most probably linked to terrorism. Like in the first case, there are Latin American states that do not share this view and do not regulate the motivation of piracy.

However, the most basic requirement is related to the location where the crime is committed. This is the most problematic condition, basically, this was the main reason that induced the creation of the SUA Convention. Most of the Latin American countries do not specify where on the seas these crimes should be committed. As an exception to the rule we have Venezuela. In its Penal Code the high seas are mentioned<sup>4</sup>, but for example in Honduras and el Salvador the legislator refers to territorial sea. What is most intriguing is that Latin American states regulate piracy as it can be committed in lakes, rivers (e.g. Argentina, Nicaragua) and on continental shelf as well (e.g. Costa Rica) (González Napolitano, 2011: 180).

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<sup>4</sup> Article 9, Código Penal de Venezuela, entering into force : 30 June, 1915. [https://www.oas.org/juridico/mla/sp/ven/sp\\_ven-int-text-cp.html](https://www.oas.org/juridico/mla/sp/ven/sp_ven-int-text-cp.html) Accessed: 25 Oct 2019

The problem is not only that there are discrepancies between the national laws of Latin American states and the regulations of public international law, but the regulations of different Latin American states are not uniform either. When it comes to military operations on seas and the navy of a state catches a vessel with nationals of another state, the law enforcement can face problems, like double incrimination. For example, in Haiti pirates can get life sentence, while in the majority of states the punishment varies between 10 and 30 years of prison. On the other extreme, in Argentina a pirate can get away with a punishment of 3 years. It all depends on the structure of the Penal Code and where piracy is inserted in it, whether it counts as a crime threatening life or national security or crime against propriety, etc. It is also interesting how Ecuador considers those who trade with pirates to be accomplices, while in El Salvador these people are meant to be accessories and this is important since the threshold is different (González Napolitano, 2011: 183).

### **3. Concluding remarks**

Latin America and especially the Caribbean region has traditionally been prone to attacks against maritime security and these regions have a history with corsairs. Nowadays attacks are on the rise in this region again mainly because of the internal conflicts of states that weaken their stability.

The first chapter presents the characteristics of Latin American piracy and poses the question whether the attacks in this region have their own characteristics. We concluded that, based on the features of these incidents, they can be clearly told apart from attacks in other parts of the world.

In the second chapter, I attempted to lay down the basics briefly, how we regard maritime piracy in public international law. The chapter shows that even in the international regulations there are dilemmas and serious concerns. I also tried to summarize how Latin American states regulate the question in domestic law. It turned out that national laws could not adopt international law correctly. Apart from this, there is no uniform regulation on regional level either which can lead to double incrimination (González Napolitano, 2011: 185). If we take a look at the dates when the different penal codes were introduced, we can easily find the reason for the lack of criminalization of piracy or for the archaic definitions. The main problem is when Latin American laws talk about piracy they mean several different phenomena under it. Therefore, we don't work from the same toolbox with lawyers representing national laws. For Latin American states armed robbery, trading with pirates etc. also count as piracy. In the long run it would be advisable to set the frames of a potential approximation of national laws in the region and to adjust these rules to public international law.

## Works Cited

- Código Penal de Brasil. Available at: [http://www.planalto.gov.br/ccivil\\_03/decreto-lei/del2848compilado.htm](http://www.planalto.gov.br/ccivil_03/decreto-lei/del2848compilado.htm), access date: 20-10-2019.
- Código Penal de Chile. Available at: <https://www.leychile.cl/Navegar?idNorma=1984&idVersion=2014-03-08>, access date: 20-10-2019.
- Código Penal de Venezuela. Available at: [https://www.oas.org/juridico/mla/sp/ven/sp\\_ven-int-text-cp.html](https://www.oas.org/juridico/mla/sp/ven/sp_ven-int-text-cp.html), access date: 20-10-2019.
- Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation. Adopted 10 March 1988.
- Guilfoyle, Douglas (2015). Piracy and Terrorism. In: Koutrakos, Panos – Skordas, Achilles (eds.). 2015. *The Law and Practice of Piracy at Sea*. Oxford: Hart Publishing. 33-53.
- Eudeline, Hugues (2011). Terrorism – A New Threat to the Control of the Sea. *Stockholm: Swedish National Defence College Conference*. 1-28.
- González Napolitano, Silvina S. (2011). La práctica de los Estados latinoamericanos con respecto a la tipificación de la piratería marítima. In: Consigli, José Alejandro (ed.). 2015. *Piratería en el siglo XXI*. Buenos Aires: Consejo Argentino para las Relaciones Internacionales. 157-185.
- Kiss, Amarilla (2009). A tengeri kalózkodás nemzetközi jogi megítélése, különös tekintettel a Szomália partjainál folyó eseményekre. *Acta Juridica et Politica*, IX. 211-220.
- Kontorovich, Eugen (2010). A Guantanamo on the Sea: The Difficulty of Prosecuting Pirates and Terrorists. *California Law Review*, 98/1. 243-276.
- Nitschke, Stefan (ed.) (2015). Projecting Colombia's forces and maritime power. *Naval Forces*, vol. XXXVI. 1-44. Available at: [https://www.armada.mil.co/sites/default/files/naval\\_forces\\_colombia\\_2015.pdf](https://www.armada.mil.co/sites/default/files/naval_forces_colombia_2015.pdf), access date: 20-10-2019.
- Petrig, Anna – Geiß, Robin (2011). *Piracy and Armed Robbery at Sea*. Oxford: Oxford University Press.
- Shearer, Ivan (2012). Piracy. In: Rüdiger Wolfrum (ed.). 2012. *The Max Planck Encyclopedia of Public International Law*. vol.8., Oxford: Oxford University Press, 322.
- The State of Maritime Piracy 2018. Oceans Beyond Piracy. Available at: <https://stableseas.org/publications/maritime-terrorism/state-piracy-2018-human-cost>, access date: 20-10-2019.
- The State of Maritime Piracy 2017. One Earth Foundation. Available at: [http://oceansbeyondpiracy.org/sites/default/files/one\\_earth\\_future\\_state\\_of\\_piracy\\_report\\_2017.pdf](http://oceansbeyondpiracy.org/sites/default/files/one_earth_future_state_of_piracy_report_2017.pdf), access date: 20-10-2019.
- Total Naval Strength by Country. Available at: <https://www.globalfirepower.com/navy-ships.asp>, access date: 20-10-2019.
- United Nations Conventions on the Law of the Sea. Adopted 10 December 1982, Montego Bay.