Prosecution of Maritime Pirates in India: A Critical Appraisal

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ABSTRACT

The United Nations Convention on Law of the Sea regime makes it incumbent upon the capturing state to effectively prosecute the apprehended pirates as per their domestic laws. Many states, including India, have not developed piracy-related domestic legislation; therefore, the domestic courts face various substantive and procedural challenges during trial. Indian judiciary relies on various criminal law statues to prosecute maritime pirates, none of which defines piracy as a crime in India. The Indian government has recently introduced the Anti-Maritime Piracy Bill, 2019. This paper seeks to examine the prosecution of maritime pirates in India and identify the existing gaps within the legal framework. Further, this paper discusses the Anti-Maritime Piracy Bill, 2019 in detail to determine if it can achieve effective prosecution of maritime pirates by filling in the gaps of the current Indian criminal law regime.

Introduction

The United Nations Convention on Law of the Sea, 1982 (UNCLOS) lays down the international legal framework for suppression of maritime piracy. As per this framework, capturing states are under an international obligation to prosecute pirates as per their domestic laws. Therefore, it is incumbent upon states to enact specific domestic legislation defining and punishing the crime of piracy, in the absence of which, domestic courts face various challenges during the trial. Against this backdrop, Indian courts also face many challenges while prosecuting apprehended pirates, because they rely on criminal statutes, which do not directly deal with the crime of maritime piracy (Ministry of External Affairs, Government of India. (n.d.), para 1.10). Considering this international obligation, the Indian government introduced the Anti-Maritime Piracy Bill, 2019. This paper underscores the international obligation requiring states like India to enact maritime piracy specific legislation, which would help in achieving effective prosecution of apprehended pirates as required by UNCLOS. Further, this paper will discuss why the current Indian criminal law framework falls short of achieving effective prosecution. Finally, this paper will scrutinize

the provisions of the Anti-Maritime Piracy Bill, 2019, to determine if it can successfully bridge the gaps in the current Indian legal framework.

India and anti-piracy Operations

India has been involved with anti-piracy operations in and around Somalia for many years. India --along with counties like Iran, Japan, Kenya, Malaysia, Russia, Saudi Arabia, South Africa, and Yemen-- contributes naval ships and aircraft for anti-piracy operations off the coast of Somalia. India is also a part of the Shared Awareness and De-confliction (SHADE) initiative. SHADE involves a mechanism for coordinating and de-conflicting activities between countries and coalitions involved in anti-piracy operations in the Gulf of Aden and the West Indian Ocean (Ocean Beyond Piracy, 2015). Furthermore, India is a contracting party to Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP), which is a government-to-government agreement that aims at promoting and enhancing cooperation against piracy and armed robbery in the Asian region. Thus, India plays an important role in the anti-piracy operations conducted in and around the Gulf of Aden. In 2011, it was reported that Somalian pirates were using mother ships to extend their activities eastwards, thus operating very close to the Indian Exclusive Economic Zone (EEZ). It was reported that in the year 2011, 286 piracy attacks took place in this region, which resulted in nearly 33 hijackings. During this period the Indian Navy and Coast Guard had apprehended nearly 150 suspected pirates operating in this region (Ministry of External Affairs, Government of India. (n.d.), para 1.6).

UNCLOS and prosecution of apprehended pirates

Piracy as an international issue was marginalised at the UNCLOS III, and piracy-related provisions in the Convention on High Seas,1958 were directly imported into the UNCLOS with minor changes as Articles 100 to 107 (Geiss & Petrig, 2011, pp. 40-41). UNCLOS serves as the foundation of the international piracy framework, and all global anti-piracy operations are based on this internationally accepted convention. In other words, UNCLOS provides the legal framework for repression of piracy under international law. The United Nations Security Council has acknowledged the same in its 2009 resolution stating, "…that international law, as reflected in the United Nations Convention on the Law of the Sea of 10th December 1982 ("The Convention"), sets out the legal framework applicable to combating piracy and armed robbery at sea…." (United Nation Security Council, 2009, p. 1). As per the UNCLOS, Article 105, capturing state has jurisdiction over the pirate vessel and the persons

involved. The UNCLOS framework is based on the concept of universal jurisdiction, which was first codified in the Harvard draft convection on piracy in 1932 and gradually made its way into the UNCLOS as a result of series of codification efforts. The Harvard Draft Convention on Piracy, 1932 was developed by the faculty of Harvard Law School, after the League of Nations dropped maritime piracy from its agenda. This draft convention played a vital role in the codification of the international maritime piracy legal regime. The International Law Commission directly adopted the provisions of the draft, which were further adopted and incorporated in the Convention on the High Seas, 1958. Important features of the draft are as follows:

a) Harvard draft is based on the principle that piracy is not a crime as per the law of nations; rather it is the basis for extraordinary jurisdiction given to every state to apprehend and punish pirates (Harvard Research in International Law, 1932, p. 760).

b) The purpose of the draft convention was to define this extraordinary jurisdiction in general terms and not to define piracy as a legal crime, which in the Harvard researchers' opinion was the prerogative of the individual state's legal machinery (Harvard Research in International Law, 1932, p. 760).

c) Harvard researchers underscored that pirate were not criminals as per the law of nations. Since there was no international agency to capture them or international tribunal or court to prosecute them and since many states did not have any provision in their laws to punish foreigners involved with piratical offences committed outside their jurisdiction. Therefore, it cannot be said that piracy is a crime or an offence by the law of nations (Harvard Research in International Law, 1932, p. 756).

d) Harvard researchers emphasised that the purpose of the draft convention is not to unify throughout the domestic law of states, nor to provide a uniform standard for punishing pirates, but only to define the extraordinary basis of state jurisdiction, namely universal jurisdiction (Harvard Research in International Law, 1932, pp. 759-60).

The UNCLOS framework does not treat piracy as an international crime, but only enables states to act against pirates on the high seas, which is an area beyond the national jurisdiction. As per the UNCLOS regime, capturing state must prosecution the apprehended pirates as per their domestic laws. Therefore, states are under an obligation to enact municipal law criminalizing the act of piracy in their legal systems, and prescribe appropriate punishment for the same. But, when it comes to the prosecution of Somalian pirates, we shall see that despite municipal laws, political willingness is missing on the part of many states.

Many states have enacted relevant municipal legislation, defining the act of piracy and prescribing applicable punishment. For example, United States' legislation on maritime piracy describes the offence of piracy in line with the UNCLOS definition and prescribes the punishment as life imprisonment (Crimes and Criminal Procedure of 1948, 1948a; Crimes and Criminal Procedure of 1948, 1948b, Crimes and Criminal Procedure of 1948, 1948c, Crimes and Criminal Procedure of 1948, 1948d; Menefee, 1990, p. 161; Rubin, 1990, p. 129; Kontorovich, 2009, p. 150). Similarly, the United Kingdom enacted the Piracy Act, 1837 and Merchant Shipping and Maritime Security Act, 1997. Despite having appropriate laws in place, in 2012 it was reported that the UK had not brought back any apprehended Somali pirate to face trial in its domestic courts (Thorp, 2012, p.1). Further, New Zealand's Crimes Act, 1961, Section 92, makes piracy on the high seas punishable by life imprisonment. Australia made required amendments to the Crimes Act, 1914 in 1992 to deal with the crime of piracy.

The rise of Somalian piracy brought forth many complicated issues pertaining to the prosecution of suspected pirates apprehended during various anti-piracy operations around the region. Interestingly, the international community came together to counter the menace of piracy originating from Somalia, and the approach adopted involved deployment of naval ships in the region. But the prosecution of apprehended pirates was to be done by the states in whose locality such individuals were captured. This proposition is supported by the United Nations Security Council resolution 1851, adopted on December 16, 2008, which requested all states fighting piracy in the region to conclude special agreements with states in the region willing to take custody, and facilitate investigation and prosecution of persons detained (United Nations Security Council, 2008, p. 2). Similar sentiments were expressed by the Deputy Permanent Representative of Norway at the UN Security Council on 25th August 2010 that Somali pirates should be prosecuted and jailed in the region, close to where the act of piracy had been committed (The Norweigianamerican, 2010). In reality, it seems that the political will to prosecute Somali pirates is missing amongst states participating in anti-piracy operations in the region, which lead to a situation in 2011, where 90% of apprehended pirates were released without trial. (UNODC, 2011, p. 4; Kontorovich, 2012, p. 109). Subsequently, regional states like Kenya, Mauritius, Seychelles, and Tanzania came forth to help with the prosecution of Somalian pirates; such states were assisted by United Nations Office on Drugs and Crime (UNODC) in developing the requisite domestic legal framework and infrastructural capacity in this respect (United Nations Security Council, 2011; p. 3). Most

states involved with anti-piracy operations, usually do not engage with the prosecution of such individuals, and they avoid facing the complex legal issues involved in such trials, even though they have fulfilled their obligations under UNCLOS by enacting the required domestic laws criminalizing the act of piracy. In addition to legal issues, the transportation of defendants, witnesses, and evidence back to the capturing states poses a major problem during trial (United Nations Security Council, 2011). Such trials are further complicated due to the complex nature, location, and involvement of various stakeholders. Furthermore, Somalian pirates do not carry any identification, which makes it extremely difficult to differentiate between fishermen out at sea and pirates, and it has been reported that the apprehended individuals claim to be fishermen and not pirates during trials (Kontorovich, 2010, p. 263). Another problem faced in such trials is with regards to the victims, who are the crew members of the ship under attack. Such crews are usually multinational, return home once their service onboard the attacked ship is over, and get scattered all over the world, thus making the possibility of treating them as prosecution witnesses near to impossible (Kontorovich, 2010, p. 265). For a better understanding of the problem, we shall return to the above-mentioned legal issues and many others while discussing the prosecution of Somalian pirates in India.

Prosecution of maritime pirates in India

India exercises universal jurisdiction as per the UNCLOS regime while carrying out anti-piracy operations on the high seas. India does not have any specific legislation dealing with piracy and its prosecution. This problem was first perceived in the *Alondra Rainbow* case in the year 1999 (*Christianus Aeros Mintodo v. The State of Maharashtra,* 2003). In this case, two major issues came forth. Firstly, Indian penal jurisprudence did not define the crime of maritime piracy. Secondly, the delay in trial was caused due to lack of coordination among stakeholders involved. In the present case, the International Maritime Bureau (IMB), the Government of Sri Lanka, various ministries of the Government of India, the Indian navy, Indian coast guard, private insurers, and the Japanese Government were involved with the trial (Govern, 2014, p. 40).

The Sessions Court in Mumbai on August 2, 2017, decided another case involving Somalian pirates (*The State of Maharashtra v. Usman Salad & Others,* 2011). In this case, on January 28, 2011, an Indian Coast Guard plane, while patrolling in the Exclusive Economic

Zone (EEZ), received a distress call from merchant vessel CMA CGM Verdi, which was flying the Bahamas flag. The Indian Coast Guard plane, in response to the distress call, flew over the distressed ship and observed that armed pirates were attempting to board the merchant vessel. On sighting the coast guard aircraft, the pirates on-board the two skiffs immediately abandoned their attempt and returned to their mother ship, which was another hijacked vessel named Prantalaya 14. This information was passed on to the coast guard district headquarters located in Kochi, Kerala. The mother ship was intercepted by the Indian Navy, and after a gruesome gunfight, twenty pirates, along with weapons, were apprehended. All of the apprehended pirates were of Somalian descent, but none of them had any identification card or passport. First Information Report (FIR) no. 06/2011 was filed at Yellow Gate police station, Mumbai.

All fifteen accused were indicted under various provisions of the Indian Penal Code (IPC), Unlawful Activities (Prevention) Act, 1967, and Indian Arms Act, 1959. Charges were framed under sections 143, 144, 147, 148, 353 read with 149; section 307 read with 149; section 364 read with 149; section 364-A read with 149; section 304 read with 149; section 344 read with 149; section 427 read with 149; section 438 read with 149 and section 506(2) read with 149 of IPC read with section 16 and 20 of Unlawful Activities (Prevention) Act, 1967 read with section 3, 25, and 27 of Indian Arms Act (*The State of Maharashtra v. Usman Salad & Others,* 2011, para 9). The Somalian Embassy in India had requested Indian authorities to hand over the accused to them as they were Somalian nationals and cautioned the authorities that Indian crew members on other merchant ships transiting the area, as a result, may be targeted by pirates in future (*The State of Maharashtra v. Usman Salad & Others*, 2011, para 7). Interestingly, the accused pirates had made a plea of guilt during the trial, which was not accepted by the trial judge as the proceeding was at an advanced stage (*The State of Maharashtra v. Usman Salad & Others,* 2011, para 10).

Based on the evidence and documents on record the Ld. additional sessions judge formulated points for the court's determination and gave the following findings:

1. Whether the accused were members of unlawful assembly-

a) who had in pursuance of its common object, which was to commit piracy, murder of the hostages and public servants and other persons had indiscriminately fired AK-47 rifles at officers and sailors on board the Indian naval ship, with the intention and under such circumstances that by that act, they would have been guilty of murder and thereby punishable

under section 307 read with 149 of IPC? (*The State of Maharashtra v. Usman Salad & Others*, 2011, para 14)

b) who had in pursuance of its common object, to commit piracy and abduction had wrongful confined hostage/ crew members on board the mother ship (Prantalaya 14) so that they might be murdered and thereby punishable under section 364 read with 149 of IPC? (*The State of Maharashtra v. Usman Salad & Others,* 2011, para 14)

The court noted its finding in affirmation on both the points. The court explained that the prosecution had to prove that the accused, in pursuance of their common object as an unlawful assembly wanted to kidnap and abduct hostages of the merchant ship for ransom and that the accused had done such an act with the intention or knowledge that their actions could cause death. Additionally, the prosecution had to prove that the victims were carried away by the accused persons to establish the offence of kidnapping or abduction. Based on the testimonies of prosecution witnesses, Indian naval officers involved with the anti-piracy operation, the court held that the accused had fired on them with deadly weapons and that hostages were rescued from the pirate ship. Therefore, the offence under sections 307 and 364 of IPC was established against the accused.

2. Whether the accused were members of the unlawful assembly who had in pursuance of its common object, which was to commit piracy, the murder of the hostages and public servants had abducted and wrongfully confined the crew members of the mother ship to extract ransom, with the intent to cause death to compel the government or any foreign state or international inter-governmental organization or any other person to do or abstain from doing an act or pay the ransom and thus, punishable under section 364-A read with 149 of IPC? (*The State of Maharashtra v. Usman Salad & Others,* 2011, para 14)

The court noted its finding in negative on this point. It observed that the prosecution had to prove that the kidnapped or abducted persons were threatened to be hurt or killed to compel the government or any foreign state or international organization or any person to pay the ransom. Further, the court observed that the punishment under section 364-A of IPC was either death or life imprisonment, therefore strict proof was required to warrant such severe punishment. Unfortunately, none of the rescued crew members of Prantalaya 14, who were of Thai and Myanmar nationality, appeared in court to testify. Therefore, the court held that the offence under section 364-A could not be established in the absence of the testimonies of the

persons kidnapped or abducted (*The State of Maharashtra v. Usman Salad & Others,* 2011, para 31-33).

3. Whether the accused had committed a terrorist act as per section 16 of the Unlawful Activities (Prevention) Act, 1967? (*The State of Maharashtra v. Usman Salad & Others,* 2011, para 14)

The court noted its finding in affirmation on this point. The prosecution had to prove that the act of the accused amounted to terrorist act as per section 15 of the Unlawful Activities (Prevention) Act, which defines a terrorist act as an act intended to threaten or likely to threaten the unity, integrity, security, or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people in India or any foreign country by using explosive substance or fire-arms or other lethal weapons. Based on the testimonies of the witnesses the court concluded that the accused had entered the Indian admiralty jurisdiction to commit a crime and in pursuance of the same they had used firearms against Indian naval personnel, thus committing a terrorist act as per section 15 (*The State of Maharashtra v. Usman Salad & Others,* 2011, para 34-35).

4. Whether the accused persons possessed deadly weapons such as AK-47 rifles and rocket-propelled grenade launchers, without a licence and thereby punishable under section 3 read with sections 25 and 27 of the Indian Arms Act? (*The State of Maharashtra v. Usman Salad & Others,* 2011, para 14)

The court noted its finding in negative on this point. The court noted that the investigating officer had not seized any weapon in the present case, thus the accused could not be convicted under the provisions of the Indian Arms Act (*The State of Maharashtra v. Usman Salad & Others,* 2011, para 36).

5. Whether the accused were to be deported to their native country? (*The State of Maharashtra v. Usman Salad & Others,* 2011, para 14)

The court noted its finding in affirmation on this point. Relying on the *Alondra Rainbow* case (*The State of Maharashtra v. Usman Salad & Others,* 2011, para 20), the court held that the accused pirates could not stay in India once they were released from prison as their stay would be illegal, therefore the accused were to be deported to Somalia once released (*The State of Maharashtra v. Usman Salad & Others,* 2011, para 37).

The accused were successfully prosecuted by the sessions court, but whether it amounted to effective prosecution as required by the UNCLOS framework, is a matter of debate. The prosecution of pirates in the above case falls short of effective prosecution for the reasons discussed below, which are the substantive and procedural gaps in the Indian penal jurisprudence, additionally, the issues identified internationally above also may be perceived here-

(i) The Indian criminal jurisprudence does not define the crime of maritime piracy; thus, it fails to prescribe the applicable punishment. In the above cases, the pirates were convicted under various penal statutes that do not address the crime of maritime piracy directly. During the codification process, the international community deliberately chose not to make piracy a crime as per the law of Nations on the understanding that the state would make the act of maritime piracy a crime as per their municipal penal law. Further, pirates have been treated as *hostis generis* (an enemy of mankind) from time immemorial (Nordquist et. al, 1995, p. 200), and the same has been accepted as a customary principle of international law (Nordquist et. al, 1995, p. 197). This reflects the attitude of the world community towards the heinous nature of the crime perpetrated by pirates. Therefore, the international obligations to criminalize the very act of piracy weighs heavily on India. If we take the example of Somalian pirates, they attack merchant ships equipped with heavy weaponry and usually engage in indiscriminate firing, endangering the lives of innocent crew members onboard. Furthermore, if pirates manage to capture any merchant ship, they usually take it back to Somalia till the shipowner pays the ransom for its release. During this period the crew members on board such ships are kept hostage under dire conditions and are subjected to cruelty. In the *Usman Case*, the accused were prosecuted under penal provisions applicable to unlawful assembly, which does an act in furtherance of a common objective. It is submitted that in the absence of specific piracy legislation, the application of such provisions does help in the prosecution of the pirate, but the very act of piracy remains unpunished. Thus, in the interest of justice, any person involved with such a heinous crime should be firstly punished for the very act of piracy, and then other penal provisions may be supplemented accordingly.

(ii) Main prosecution witnesses in such trials are the victims of the piratical attack, i.e., the crew members of either the captured ship or the ship under attack, and such person may not necessarily be a national of the capturing state. The witnesses in the above-mentioned *Usman case* included the original crew members of the vessel Prantalaya 14, comprising Thailand or Myanmar nationals, who did not show up during the trial. Official letters were written to their

respective embassies through the Government of Maharashtra and to the office of the Advocate General of Thailand through diplomatic channels, but all attempts to contact the witnesses and their governments went unanswered. Such failure to cooperate on the part of states is contrary to various UNGA & UNSC resolutions, which reiterate that international cooperation is of vital importance in the fight against piracy.

(iii) The trial court took nearly six years to decide the *Usman case*. The standing committee of Ministry of External Affairs Ministry, India in its 2011-2012 report (hereinafter referred to as MEA report) (Ministry of External Affairs, Government of India. (n.d.), 2012) has also identified such delay in other cases and has opined that the main reason for the delay is the limitations of IPC which does not apply to foreigners involved in piratical acts outside the territorial waters of India (Ministry of External Affairs, Government of India. (n.d.), para 1.10).

(iv) Collection of evidence is important for any criminal trial, and the same applies to the trial of the apprehended pirate. The only difference between a conventional criminal trial and that involving pirate is that collection of evidence must be done hundreds of miles away from the coastline, thus making the whole process of collection of evidence and its presentation in court very cumbersome (Oceanus.org, 2013). The collection of evidence in such cases needs a concerted effort on the part of agencies involved (Fouche & Meyer, 2012, p. 49). For example, if we consider the *Usman case*, coordination between the Indian Navy and the Mumbai police was required. The actual anti-piracy operation, in this case, was conducted by the Indian Navy, and the accused were then handed over to the Mumbai police for facing trial. As pointed out in the *Usman Case*, the investigation officer failed to seize the weapons used by pirates, and therefore the court could not indict the accused under provisions of the Indian Arms Act. The court, in this case, observed that " ...[i]t appears that the weapons seized from accused in all the four operations must have been collected at one point and the said weapons must have been shown in other two or three offences…"(*The State of Maharashtra v. Usman Salad & Others*, 2011, para 36), therefore implying that the weapons were seized by the Indian Navy which conducted the anti-piracy operation, but the same were not handed over to the investigation officer of the case, pointing towards the lack of coordination between the two agencies. Coordination in piracy cases is not only vital between agencies of the apprehending country, but also at the regional and international level as well, and failure to do so may have an adverse effect on the outcome of such trial.

(v) One can argue that such apprehended pirates should be repatriated back to their country of origin after capture to face trials. In other words, apprehended pirates may be extradited to their country of origin. It is important to note that the extradition of apprehended pirates is not covered under UNCLOS or any other multi-lateral treaty. Extradition is a complex process, and it mostly takes place where bilateral treaties exist between the apprehending state and the prosecuting state or the state of origin of the pirate. In many cases, as it was noted in the *Usman Case*, such individuals do not carry any identification documents, making it very difficult to determine their nationality. In this case, since the suspects were apprehended while performing the act of piracy, they could not claim that they were fishermen, as has been pointed out above. There have been some bilateral agreements between states for the prosecution of apprehended pirates, for example, Kenya entered into a memorandum of understanding (MoU) with the United States and the United Kingdom in 2008 and 2009 respectively (Gathii, 2010, p. 363; Hodgkinson, 2011, pp. 305-306; Scharf & Taylor, 2017, p. 81; Chang, 2010, p. 280). As per the memorandum, Kenya would receive and prosecute Somalian pirates apprehended by the United States and the United Kingdom. The Republic of Seychelles entered into an understanding with the European Union in 2009 and Mauritius and the European Union also entered into a similar agreement for the prosecution of the apprehended pirates in 2011 (European Union, 2011). It needs to be noted that India has not entered into any such agreement with other states.

(vi) Under section 15(2) of the Unlawful Activities (Prevention) Act, 2008 the terrorist act includes acts that constitute an offence within the scope and as defined in any of the treaties listed in the second schedule of the act. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation,1988 (SUA Convention) (UN General Assembly, 1988) is also listed in this schedule. The Convention on High Seas and UNCLOS deal with piracy involving two ships, they do not address the situation where only one ship is involved. This problem came forth during the *Achille Lauro* incident. On 7th October 1985, four men from Palestine Liberation Front (PLF) hijacked an Italian cruise ship in the Mediterranean. The hijackers demanded the release of 50 prisoners. Alarmed by this incident, IMO developed and adopted SAU Convention in 1988. The purpose of the SUA Convention is to ensure that appropriate actions are taken against persons who commit unlawful acts against ships beyond the outer limit of the territorial seas of a single state (UN General Assembly, 1988, Article 4). The convention required each state party to make such offence a crime in their domestic legal systems and prescribe punishment accordingly. Under the convention, a

state party may either prosecute such offenders or extradite them, thus requiring states to make such offence an extraditable offence in every extradition treaty that may be concluded with other states (UN General Assembly, 1988, Article 11). Even though India has not ratified this convention, the provisions of the Unlawful Activities (Prevention) Act, 2008 do give effect to the SUA Convention. It is important to note that in the *Usman Case*, two ships were involved; and the piratical attack exclusively falls under the ambit of UNCLOS and not the SUA convention. In the absence of maritime piracy specific legislation, the reliance of the Unlawful Activities (Prevention) Act could help in the prosecution of the accused, but the larger goal of effective prosecution of maritime pirates will not be achieved in the true sense as the obligation under the UNCLOS regime remains unfulfilled.

Effective prosecution of pirates is one of the main objectives of the international piracy framework; failure to effectively prosecute persons involved with the act of maritime piracy undermined the efforts of the national agencies involved with anti-piracy operations on high seas (United Nations Security Council, 2010, pp. 2-3). Therefore, establishing the act of piracy as a crime in the domestic legal system is vital for achieving effective prosecution of pirates. The same has been reiterated by the United Nations on many occasions, and even underscored by government officials of various states (The Economic Times, 2014). The MEA report underscores that "…[i]n the absence of a clear and unambiguous reference to the offence of maritime piracy in the Indian law, problems have been faced in ensuring **effective** prosecution of the pirates..." (emphasis added) (Ministry of External Affairs, Government of India. (n.d.), 2012, para 1.9). The committee also proposed a bill in this regard, which shall be discussed below.

Attempts to enact maritime piracy specific legislation in India

As mentioned above, the MEA report recommended a bill specifically aimed at addressing piracy, i.e. The Piracy Bill, 2012 (2012 bill). Unfortunately, this bill failed to materialize into law. Therefore, the Anti-Maritime Piracy Bill, 2019 (2019 bill) was introduced in Lok Sabha on 9th December 2019 with the objective "to make special provisions for repression of piracy on the high seas and to provide for punishment for the offence of piracy" (The Anti-Maritime Piracy Bill, 2019, p.1), which seems to be quite similar to the 2012 bill in content.
The 2019 bill seeks to achieve the following concerning the prosecution of pirates:

1. The bill seeks to implement the UNCLOS provisions on piracy in the Indian legal system (The Anti-Maritime Piracy Bill, 2019, p. 1).

2. The objective of the bill is to make special provisions for the suppression of piracy, criminalize the act of piracy, and establish jurisdiction for Indian courts. The bill aims to fill the gaps in the Indian penal jurisprudence, which does not define maritime piracy and related activities. The bill not only makes the act of piracy crime in India but also attempts to commit piracy or aid or abet or council or procurement for the commission of such crime also an offence (The Anti-Maritime Piracy Bill, 2019, Section 4). A person involved with the organisation or anyone who may direct others to participate shall also be punished under the bill (The Anti-Maritime Piracy Bill, 2019, Section 5).

3. The bill incorporates the concept of universal jurisdiction as per UNCLOS. Section 1(3) and clearly states that the provisions of the Act shall apply to all parts of the sea adjacent to and beyond the limits of EEZ of India, thus extending the jurisdiction of Indian agencies to arrest such perpetrators and seize their property even on the high seas.

4. The bill spells out the punishment for piracy as either life imprisonment or the death penalty, depending on the facts of the case, for instance, if an act of piracy was committed or any death was caused in committing the act or its attempt respectively (The Anti-Maritime Piracy Bill, 2019, Section 3). In the *Usman Case*, the apprehended pirates were convicted for a maximum jail term of seven years and their sentences were to run concurrently. Under the 2019 bill, the accused would have been serving life imprisonment.

5. The act of maritime piracy is unique when compared to other criminal acts perpetrated on land as it involves an international element. For instance, they take place on the high seas or involve foreign perpetrators or victims. The international nature and complexities of such cases can be understood from the facts of the *Alondra Rainbow case*. In this case, the vessel was owned by a Japanese national, the crew onboard was from the Philippines, and the vessel was under the command of two Japanese officers. The vessel was hijacked by pirates when en route from Indonesia to Japan. The Indian Navy intercepted the vessel, and the perpetrators were brought to India for facing trial (Azubuike, 2009, p. 55). The vessel once released from the hands of pirates; the crew, its officers, and the vessel itself may move to different parts of the world depending on vessel voyage and crew change. In other words, the crime scene moves, along with vital witnesses/victims, making transportation of witnesses and evidence very difficult. Keeping in mind the unique nature of such cases and the various stakeholders involved, it becomes imperative that such trials are not delayed as they may

adversely affect the outcome. Therefore, in such cases, it is highly advisable that trials are conducted as quickly as possible. The Act makes provisions for speedy trials in such cases by empowering the Central Government, in consultation with the Chief Justice of the concerned High Court to dedicate one or more Court of Sessions to be the designated court for trials.

6. Both the 2019 bill and 2012 bill incorporate a provision on the presumption of guilt. Section 11 of the 2019 bill states that when a person is accused of having committed an offence punishable under the bill, and if such a person is in possession of arms, ammunition, explosives and other equipment which may be used in the commission of the offence, and if there is evidence of the use of force, the threat of force or any form of intimation caused to the crew or the passenger of the ship and there is evidence of the threat to use such an arm or explosive to commit any form of violence against the crew, passengers or cargo of a ship, then there shall be a presumption that such persons have committed the offence unless otherwise is proved. In other words, if the above three ingredients are satisfied then there shall be a presumption of guilt against the accused, which is quite important considering the nature of the crime, which is perpetrated on high seas, in the presence of a limited number of witnesses or victims. This provision is extremely important to address a major concern pointed out above with regards to suspects who claim they are fishermen and not pirates during trials.

7. The bill makes the offence of piracy a bailable offence (The Anti-Maritime Piracy Bill, 2019, Section 12).

8. The bill does not lay down the procedure for the collection of evidence. As pointed out above, due to the unique nature and location of piratical attacks, the collection of evidence becomes a very cumbersome and arduous task. Therefore, it was incumbent upon the drafters of the 2019 bill to either lay down a detailed mechanism for the collection of evidence or make provisions that would allow the government to notify the same at a later stage. Section 6 of the bill prescribes that the Central Government may confer the power of arrest, investigation, and prosecution exercisable by a police officer as per the Code of Criminal Procedure, 1973 on any of its gazetted officer or any officer of the State Government (The Anti-Maritime Piracy Bill, 2019, Section 6), but does not touch upon the evidence collection procedures to be adopted. The failure to lay down procedures for the collection of evidence may have fatal consequences and undermine the whole endeavors the 2019 bill seeks to achieve.

9. The bill treats the act of piracy and related offence as an extraditable offence (The Anti-Maritime Piracy Bill, 2019, Section 14(1)). The bill clarifies that the Extradition Act, 1962 would apply according to the country of registration of the vessel, thus making extradition a possibility that was not feasible before as discussed above in the *Usman case*. Even though, as mentioned above extradition is a complex process, but making the crime of piracy an extraditable offence may help in simplifying things.

The 2019 bill is an important legislative development as it aims to fill the gap within the Indian legal system with regards to the effective prosecution of maritime pirates as required by the international piracy framework. The same was envisioned by the 2012 bill, but unfortunately, it could not materialize into law. Hopefully, the 2019 bill does not meet the same fate as its predecessor. Therefore, it becomes imperative to analyse whether the 2019 bill addresses the major issues discussed above, both internationally and during the *Usman* case trial, if yes to what extent:

1. Criminalizing the act of piracy, in the *Usman case*, the Session court had relied on general penal statutes, which did not define the crime of maritime piracy specifically. As discussed above, the 2019 Act criminalizes the act of piracy.

2. Prosecution witnesses of foreign nationality, as discussed above in the *Usman case*, who were foreign nationals, did not show up during the trial. The 2019 Act does not address this issue; no procedure has been suggested or laid down to ensure the presence of such witnesses during trials. Even though it may seem to be outside the ambit of the act, some latitude should have been provided for further rulemaking in this respect in the Act.

3. Delay in the trial, the 2019 Act makes provisions for speedy trials, as discussed above in detail.

4. Collection of evidence, as pointed out in the *Usman case*, collection of evidence is vital for any criminal trial; lack of evidence may lead to failure in conviction. Considering the peculiar nature of the crime of maritime piracy some detailed procedure should have been laid down in the 2019 Act, unfortunately, the Act fails to do so.

5. Extradition of apprehended pirates, the 2019 Act makes the crime of piracy an extraditable offence and mentions that the Extradition Act, 1962 applies.

6. Punishing the act of piracy, as discussed above in the *Usman case,* even though the apprehended pirates were convicted, they were not punished for the very act of piracy. The 2019 Act addresses this issue; by bring the act and other incidental activities under the ambit of piracy.

7. Coordination amongst agencies involved with capture, transport and prosecution of pirates has not been addressed by the 2019 bill. As pointed out above in the *Usman case*, due to lack of coordination between the arresting agency and prosecuting agency, the guns recovered at the crime scene was not presented in court as evidence. The Act fails to make any procedure or suggest the possibility of future law-making in this regard. Even though international coordination may be out of the ambit of the Act, general procedures on how such cases are to be approached by domestic agencies could have to some extent brought in some clarity on the issue.

Based on the above examination, it may be concluded that the 2019 Act is a good step towards fulfilling the international obligation of developing domestic legislation specifically dealing with maritime piracy, but it falls short of addressing some of the major issues Indian courts have and may face during such trials. Its failure to deal with the presence of foreign prosecution witnesses, evidence collection and procedures for coordination between agencies may prove fatal and may lead to the release of offenders without proper trials, which would undermine the efforts of prosecutors and agencies involved.

Conclusion

The international piracy regime requires each state to develop domestic legislation addressing maritime piracy. International law only provides jurisdiction to states for capturing pirates on the high seas which is an area beyond the sovereign limits. Many states have acted accordingly, and developed appropriate legislation, whereas others have relied on their general criminal law jurisprudence, which does not deal specifically with the crime of maritime piracy and leads to various legal issues. Therefore, India has been under an international obligation to develop legislation, which criminalizes the act of maritime piracy and prescribes appropriate punishment for the same.

The decisions of the trial court in the *Usman case* and the 2019 bill are important developments in the right direction and even the United Nations General Assembly has appreciated India’s efforts in successfully prosecuting the apprehended pirates (United

Nations General Assembly, 2017). Indian courts, even in the absence of specific law, have successfully prosecuted maritime pirates, but considering the heinous nature of the crime, their efforts seem to be falling short of effective prosecution. Since major issues have been left unresolved by the 2019 Act, the dream of having a robust legal framework to deal with the prosecution of apprehended pirates may not be realized at any time soon.

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