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South African Criminal Law: Difference between maritime piracy and hijacking a ship

Introduction

This brief outlines an important difference in South African legislation regarding maritime piracy and hijacking a ship. Arguably, the most important element of maritime piracy is that the crime must be committed on the high seas or outside the jurisdiction of any State.² In contrast to piracy, the South African offence of hijacking a ship is committed within South African territorial sea and thus within the jurisdiction of South Africa.

Demarcating maritime territories, transgressions and rule of law

Unfortunately, uncertainty often reigns where the sovereignty of a littoral State's territorial sea stops and the high seas related to acts of maritime piracy begins. Fortunately, article 3 of UNCLOS does state that a littoral State's territorial sea may not exceed 12 nautical miles from its baseline. The territorial sea is further part of each country's sovereignty³ wherein that country may enforce any of its laws. UNCLOS further provides for a contiguous zone⁴, which permits coastal States an adjoining 12 nautical miles to the territorial sea. The contiguous zone is thus between the baseline at the coast and 24 nautical miles. Although a country may enforce any of its laws between the baseline and 12 nautical miles, the respective States may only exercise control over infringements to its customs, fiscal, immigration or sanitary laws between 12 and 24 nautical miles. Article 57 further permits littoral States an additional exclusive economic zone (EEZ), not exceeding 200 nautical miles from the State's baseline. The EEZ is exclusively for the purpose of exploring and exploiting as well as conserving and managing the natural resources within. From 24 nautical miles up until the 200 nautical miles mark, only legislation regarding exploring, exploiting, conserving and managing natural resources of the coastal State may be enforced. After the 200 nautical mark, the high seas commences that belongs to all of humanity.

Piracy is not included in the exceptions UNCLOS provides for coastal States to police in the contiguous and exclusive economic zones. As mentioned, piracy must be committed on the high seas or outside the jurisdiction of any State. Taking into consideration a sovereign State's jurisdiction is limited to 12 nautical miles from the

¹ The discussion forms part of the author's thesis for his LL.D degree issued by the University of South Africa

² Article 101 of the *United Nations Convention on the Law of the Sea of 1982* (UNCLOS)

³ Article 2 of UNCLOS

⁴ Article 33 of UNCLOS

baseline and that piracy is not included as an infringement that can be policed in the contiguous zone or EEZ exceptions, piracy can thus be committed from 12 nautical miles from the baseline of any coastal State. Piracy can thus be committed from the 12 nautical miles line, which will be regarded as the high seas. Within the 12 nautical miles territorial seas of a country, the robbery of a ship will have to be dealt with in terms of the specific littoral State's laws.

Sect 4(1) of the Maritime Zones Act⁵ reiterates article 3 of UNCLOS and states that the sea within a distance of 12 nautical miles from the baseline shall be the territorial sea of the Republic of South Africa. The Act further provides for a contiguous zone, which gives the Republic the right to exercise all the powers it may find necessary to prevent contraventions of any fiscal, customs, emigration, immigration or sanitary laws. Up until the 200 nautical miles line from the baseline of the Republic, an exclusive economic zone is recognised wherein the Republic has the same rights as within its territorial waters relating to natural resources.

South African Criminal Law, piracy and hijacking in South Africa's maritime territories

Pirates or hijackers will most probably not know exactly where they are on the sea when committing the heinous crime of robbing a ship. They will further not be interested to know they are committing an offence of piracy or hijacking a ship. It is however important for a prosecutor of the National Prosecuting Authority to know the exact location, as is the locality of the offence offers different charges for the perpetrator to plea to. The elements of piracy and hijacking a ship also differs. This results in different evidence sets to be presented to the criminal court.

The definition of piracy in sect 24 of the Defence Act⁶ is a close echo of article 101 of UNCLOS. Sect 24 criminalises piracy in the Republic, and includes any illegal act of violence for private ends by the crew or passengers of a private ship on the high seas or in a place outside the jurisdiction of any State. The high seas or a place outside the jurisdiction of any State referred to, will thus be further than 12 nautical miles from the baseline of any coastal State.

Sect 10 of POCDATARA⁷ criminalises article 3 of the 1988 SUA Convention⁸. Sect 10 includes offences relating to hijacking a ship or endangering the safety of maritime navigation. These offences are only applicable within the territory of the Republic of South Africa and includes the territorial sea of the Republic. A perpetrator, who intentionally seizes or exercises control over a ship by force or threat thereof or any other form of intimidation, contravenes sect 10 of POCDATARA. The perpetrator and his accomplices do not commit an act of piracy when violently taking control over a ship, as envisaged in sect 24 of the Defence Act, but commits an offence of hijacking a ship.

It is important to mention that the Defence Act is promulgated by parliament for the South African National Defence Force. The SANDF deals with piracy offences, as it is committed on the high seas. On the other hand, the South African Police Service enforces POCDATARA. A hijacking of a ship offence is committed within the jurisdiction of South Africa on the territorial sea. SAPS are thus the appropriate law enforcement department attending to such incidents.

Concluding remarks

Of importance is to note that piracy or hijacking a ship are committed at different locations at sea. Different government departments are mandated to monitor and police these offences. Although it might not seem to be noteworthy where exactly the offence was committed, it can result in a mistrial if the perpetrator pleads to the wrong offence. For the prosecutor to know whether to formulate a count of the contravention of sect 24 or sect 10, it will have to be determined if the offence was committed within the territory of the Republic of South Africa or on the high seas. The South African society or the international community in general can feel that an

⁵ *Maritime Zones Act 15 of 1994*

⁶ *Defence Act 42 of 2002*

⁷ *Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004*

⁸ *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*

excellent opportunity to prevent these serious offences were lost and that they were robbed of a prospect to feel safer at sea, if the perpetrator was found not guilty because of a technicality that could easily be prevented.

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