



## **The Role of International Law: Justice and the Legal Challenge**

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The persistence of Somali piracy is a significant problem for international institutions and international law. In theory, international prosecution of pirates should be easy; piracy is amongst the oldest international crimes. Under international law, any nation can try any pirate it catches, even if it has no connection with the crime. Few issues command as uniform an international consensus or enjoy such a level of cooperation. The U.N. Security Council has passed at least 12 resolutions on the issue. And in an unprecedented display of military cooperation, dozens of nations from around the world have sent their navies to the area to protect shipping.

Yet, many countries catching pirates have shown little interest in prosecuting them in their own courts. Roughly 90 percent of suspects apprehended by the patrolling navies have been promptly released. “That practice [of catch-and-release] has now become the rule, and judicial prosecution the exception,” according to the report of the Secretary General’s Special Advisor on Legal Issues Related to Piracy, Jack Lang.<sup>1</sup> This paper will survey the legal obstacles to prosecuting pirates both in the courts of the capturing state and in other countries. It will conclude by suggesting the persistence of the problems indicate that legal efforts would be better focused on removing impediments to vigorous private and naval efforts to defend against pirate attacks.

There are two main reasons nations appear reluctant to prosecute: One involves the difficulty of proving a case. But more serious problems often center on what happens after the trial. Proving piracy may become complicated when the defendants are not caught in the act but rather encountered on the high seas equipped with weapons and boarding equipment, which in itself is not a crime. In addition, many pirates throw any equipment that might indicate that they are involved in pirate activity overboard upon the approach of international forces. Pirates caught under such circumstances routinely claim to be they were innocent fishermen. Second, there are



logistical problems: For example, all evidence must be preserved by the capturing navy, shipped back to court, Somali translators must be secured, the crews of victim vessels (who may be anywhere around the world by this time), must be located and their testimonies obtained. Moreover, there must be admissible proof that the defendants are old enough for trial.

Such technical and logistical impediments, however, while far from trivial, have proved to be surmountable. There is evidence that a growing number of nations have undertaken - quite successfully - prosecutions in cases where their own nationals or vessels have been attacked. Such countries include the United States, South Korea, Oman, and numerous states in the European Union. In fact, countries that engage in catch-and-release do not regard the prosecution of Somali pirates in their courts as impractical or undesirable in itself - rather, they simply do not wish to prosecute under universal jurisdiction. In other words, states prefer not to prosecute in cases where their direct interests are not involved- yet universal jurisdiction is crucial to prosecuting pirates, as they are usually captured by navies unconnected to the particular crime.

The central concern capturing states have about bringing Somalis back for trial is that it would likely be a one-way trip. For example, especially under European understandings of human rights law, pirates who have served their sentence or been acquitted cannot be returned to Somalia because of the conditions there, under the international law doctrine of non-refoulement. It is in fact the same doctrine of non-refoulement that makes most states hesitant to handover suspected pirates to Somali authorities for trial, preferring instead to release them. Also, given that low-level pirates are typically young men and the pool of potential pirates in Somalia is large, so long as ransoms get paid, a country that agrees to try pirates could be accepting a large permanent pirate population for an indefinite time.

The main alternative to prosecution by capturing states that the international community has pursued is transferring the pirates for trial in one or more regional nations, with financial and technical assistance from international bodies. Regional prosecution, in states like Kenya, the Seychelles or Tanzania, has obvious logistical advantages – these countries are close to the crime and may be less burdened by expensive and elaborate judicial systems than those in capturing



states. However, regional states can also present serious disadvantages, such as the limited ability to provide security, sometimes problematic human rights records, and/or limited prison capacities.

For arrangements with regional states to be successful, they must be durable. Kenya originally took the lead in accepting pirates captured by other states but cancelled these arrangements after just one year, leaving the status of over a hundred Somalis that had been already transferred there in considerable doubt. The Seychelles has stepped into the gap, and successfully conducted several cases in a very creditable manner. However, the Seychelles is a small country with serious judicial and penal capacity constraints. In fact, the Seychelles has begun re-transferring pirates that had been transferred *to* the Seychelles for trial back to Somalia for incarceration, raising many of the non-refoulement problems for European nations.

Recently, the United Kingdom has facilitated the establishment of regional ‘prosecution cycles’ with countries such as the Seychelles, whereby pirates captured by UK forces are passed to the Seychelles for trial, and then transferred to regional territories of Somalia such as Somaliland where they serve sentences in UNODC-established penal facilities that have been constructed and are operated in line with international standards.<sup>2</sup> However, the issue of non-refoulement is an important one, and unlikely to disappear with emerging attempts to devise and pilot new approaches to judicial punishment for captured pirates given the *overall* treatment the process could hold for transferees.

Secondly, the United Nations Convention on the Law of the Seas does not provide clear support for trials by third-states: Article 105, for example, which codifies universal jurisdiction over piracy, only speaks of trials “in the courts of the State which carried out the seizure” and not in any court to which the defendants might be cost-effectively “off-shored.” Nations have not paid much regard to this apparent lack of authority, but it remains a possible basis for challenges to such transfers in pirate trials, or even in claims against the transferring state in its courts.

Moreover, the proximity of regional states – including those that may be part of any ‘prosecution cycle’ – also raises the possibility of reprisal or pressure by pirate gangs. If one nation were to



become the locus for pirate prosecutions, the pirates, organized along clan lines, could threaten the fishing and coastal vessels of the forum state, or seek to harm hostages from that nation.

### **Conclusion: Prevention before Prosecution**

In summary, there are many obstacles to the systematic prosecution of pirates by capturing states. Nor is it apparent that prosecution is necessarily preferable to a policy of catch-and-release by capturing states. It is far from clear if trial and typically brief incarceration in affluent countries, or by the pleasant beaches of the Seychelles, would deter pirates given the poverty and brutality of conditions in Somalia: Pirates tried in European countries have reportedly been quite enthusiastic about their new conditions – not surprising given that they have gone from the fifth poorest country in the world to some of the richest. One told reporters that he would not return to Somalia “for a million dollars,” while others have filed papers to bring their families over to Europe as well.<sup>3</sup>

Given numerous complications with judicial measures, more attention should be paid to legal reforms that would reduce the piracy problem without a need for trial. Self-defence by merchant mariners has historically been at least part of the response to piracy. Currently most ships go unguarded, in part because of restrictive national regulations. Even at the height of the piracy crisis, leading maritime nations and organizations strongly opposed firearms on ships – yet one of the outstanding successes of anti-piracy efforts is that no ship with an armed security team has even been successfully hijacked. Only in recent months have governments begun to internalize this reality, with several leading nations and maritime groups reversing their gun-shy stance.

However, measures involving private security companies still face a daunting slew of regulatory obstacles. For example, ships with arms on board must comply with the firearms regulations of every port they call in, requiring each vessel to navigate a bewildering sea of bureaucratic permissions, often futilely. Moreover, the rules governing the use of lethal force by ships against pirates remain murky, which ultimately turn on individual nations’ varied criminal law principles on self-defence. The specter of criminal liability – and civil suits – by putative pirates still hangs over private security.



Leading maritime nations should develop and promote easy-to-understand and not unduly cautious guidelines for weapons possession and use on the high seas. Current draft guidelines in circulation, following the laws of many nations, only allow the use of lethal force when facing imminent danger to life or limb, which is unduly restrictive. Normal self-defense doctrine assumes some potential police response, which is unlikely on the high seas. Given the threat posed by piracy to the safety and wellbeing of individuals they aim to take hostage, it is hard to understand why ships should be deterred from using the necessary levels of force to prevent such outcomes.

Parallel to the legal uncertainty over private security, the rules for military action against pirates also remain unclear. Pirates are not combatants, nor are they engaged in hostilities - presumably making them ordinary civilians under international law, who can only be fired upon in immediate self-defense. Currently, European and United States naval forces operate under very restrictive rules of engagement. Yet historically, customary international law has given greater latitude to naval forces in dealing with pirates, and today Russia and some other states have apparently adopted more aggressive postures. In recent months, the EU has announced intentions to take a more aggressive approach to fighting piracy, including potentially disruptive attacks on bases on shore. Moving forward, it is worth developing and articulating international practice and legal opinion that reflects pirates' status as somewhere between traditional combatants and simple criminals. Such efforts, if successful, would reduce the need for prosecution.

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*For more information, see the conference website at [www.counterpiracy.ae](http://www.counterpiracy.ae).*



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<sup>1</sup> “France at the United Nations, Somalia: Report by Jack Lang on the Legal Issues Related to Piracy off the Coast of Somalia,” 2001, page 21 paragraph 43.

<sup>2</sup> “*Seychelles Hands Over Pirates to Somaliland*” (Somalia Report). For example, in April, the Seychelles government transferred 17 convicted pirates from the Seychelles to Somaliland, in line with an agreement made at the London Conference on Somalia between President James Michel and Somaliland President Ahmad Mohamed Silyano. They will serve jail terms of between 10 and 24 years, in prison facilities established with the support of the UNODC.

<sup>3</sup> “*Somali Pirates on Trial in Netherlands*,” available at:

[http://www.dutchnews.nl/news/archives/2009/05/somali\\_pirates\\_on\\_trial\\_in\\_net.php](http://www.dutchnews.nl/news/archives/2009/05/somali_pirates_on_trial_in_net.php); Beate Lakotta, “German Justice Through the Eyes of a Somali Pirate,” *Der Spiegel International*, available at <http://www.spiegel.de/international/world/0,1518,755340-2,00.html>