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The Prosecution of Pirates in National Courts

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The Prosecution of Pirates in National Courts

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Introduction

The significant upsurge in piracy incidents involving Somali nationals off the Horn of Africa, and in the Gulf of Aden since 2008 has led to increased scrutiny of piracy offences under international law, the incorporation of that law in national legislation and the capacity of States within and beyond the Horn of Africa region to investigate and prosecute these offences effectively. Somalia has been without a functioning central government for over two decades since the fall of the Siad Barre dictatorship in 1991. This lack of effective governance and enforcement of the rule of law in Somalia has provided the basic impetus for the increase in piratical attacks off the Somali coast. This paper provides an analysis of the international legal framework for dealing with piracy and its criminalization in national legal systems. It examines some the key trends emerging from national prosecutions of Somali pirates since the onset of increased piracy incidents off the Horn of Africa and in the Gulf of Aden and the initiatives taken by the international community to strengthen the capacity of national legal systems in this region to investigate and prosecute piracy offences. Finally, it reviews the need for stronger criminal justice cooperation networks in the Horn of Africa and Gulf of Aden region to support investigation and prosecution of piracy offences

Piracy in International Law

Piracy is the oldest of the limited crimes subject to universal jurisdiction which are punishable by any state regardless of the nationality of the victim or perpetrator. Universal jurisdiction is generally reserved for crimes of an exceptionally serious and heinous nature and the placing of piracy in this category illustrates the extent to which piratical activities were seen as a widespread scourge.¹

A customary international law regime developed to respond to the threat of piracy in the 19th century.² In the 20th century this was codified in the 1958 Convention on the High Seas (HSC) and the 1982 United Nations Convention on the Law of the Sea (LOSC), both of which contain provisions recognising the universal jurisdiction of States to repress piracy and investigate and prosecute its perpetrators.³ The LOSC provisions are considered to be reflective of customary international law on piracy.⁴

Article 100 of the LOSC commits States Parties to cooperate in the suppression of piracy on the high seas. Piracy is defined in Article 101 of the LOSC 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 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).

Important elements in the definition are the requirement for two ships or aircraft, the criminal intent, the use of force, the taking over of a vessel against the wishes of its master, and the robbery of cargo, the possessions of those on board, or even the vessel itself, as the ultimate objective.⁵ Piracy can only be committed for private ends so any acts committed for political motives are excluded from the definition.⁶ Somali style piracy differs from the traditional concept of piracy reflected in the LOSC provisions since robbery does not appear to be the major objective of some contemporary Somali pirates, because vessel, crew, and cargo are released after the payment of ransom. However the taking over of the vessel by force with the intent of obtaining financial gains can be regarded as falling within the definition of piracy. Piracy also extends to the operation of a ship or boat used to commit piratical acts.⁷ In the Somali context, this ancillary provision may cover the operations of mother and brother ships.

A point to note is that the term piracy as defined under international law is often applied to piratical type activities which do not strictly fit that definition of piracy. Piracy within the meaning of Articles 100-101 of the LOSC, only applies to acts taking place within the exclusive economic zone or on the high seas, not analogous acts within the territorial sea which are subject to the criminal jurisdiction of the relevant coast State rather than the universal jurisdiction of all States.⁸ The vast majority of attacks on shipping around the world, including many off the Horn of Africa, tend to take place relatively close to shore, and thus within the territorial seas or archipelagic waters of coastal states. Technically, therefore, the vast majority of piracy-style attacks are not deemed piracy under the LOSC definition. The International Maritime Organisation (IMO) instead uses the term “armed robbery against ships” to cover piracy-style attacks taking place within the territorial sea.⁹ In contrast, the International Maritime Bureau (IMB) has adopted a more all-encompassing definition of piracy as “an act of boarding any vessel with the intent to commit theft or any other crime and with the intent or capability to use force in the furtherance thereof” whether within the territorial sea EEZ or on the high seas.¹⁰

What has become increasingly evident as the Somali piracy crisis has evolved is that the LOSC, although providing a definition of piracy, addresses none of the practical elements necessary for successful investigation and prosecution of piracy offences at the national or international level. The LOSC does not criminalise piracy offences, provide for criminal justice cooperation measures such as mutual legal assistance or extradition in relation to the investigation and prosecution of the offence or provide for punishment and international transfer of convicted offenders to serve their sentences in their states of origin. In addition, it does not address the obligation of states to take preventive measures against the crime of piracy which has transnational impacts or to establish mechanisms to trace, confiscate and recover the proceeds of piracy offences. As more pirates have been apprehended by the

international navies present off the Horn of Africa, the UN responses to the crisis in particular those developed by the relevant UN specialized organizations, IMO and UN Office of Drugs and Crime (UNODC), have begun to concentrate on strengthening the national criminal justice systems of regional states to tackle these pragmatic aspects of investigation, prosecution and punishment.

Criminalisation of Piracy in National Laws

The ability of a State to apply and enforce its own laws against piracy will depend on the existence of applicable provisions criminalising the relevant piratical acts in the domestic law of the State and its political will to take jurisdiction.¹¹ Some domestic laws on piracy only provide jurisdiction to the State concerned where the pirate ship or the pirates have the nationality of that State or are in the territory of that State. Samuel Shnyder notes that prior to the recent upsurge in Somali piracy there were very few prosecutions in which “the court asserted universal jurisdiction over piracy where the prosecuting state had no connection to the offence either as the flag state of the victim vessel or the nationality of the perpetrators or the victims.”¹² Not all national laws make piracy a universal crime which can be subject to arrest and prosecution anywhere in the world. Initial responses to questionnaires by the IMO sponsored contact group on piracy revealed that criminalisation of piracy offences in national legal systems is far from comprehensive or harmonized.¹³

In 2010, the UN General Assembly (UNGA) called on member states “to take appropriate steps under their national law to facilitate the apprehension and prosecution of those who are alleged to have committed acts of piracy” including by adopting the LOSC definition in their national criminal code definitions of piracy.¹⁴ The more recent UN Security Council resolutions on Somali piracy have called on member States to criminalize piracy and the Djibouti Code of Conduct requires regional States to review their “national legislation with a

view towards ensuring that there are national laws in place to criminalize piracy.”¹⁵ This task has been assisted by the preparation of guidance documents on the elements of national legislation and the implementation of the international law regime of piracy by UNODC.¹⁶

Yvonne Dutton’s recent survey of national laws criminalizing piracy reveals considerable diversity in the definitions of piracy adopted and approaches to jurisdiction. This survey found that 47 countries had piracy laws. Another 9 countries could prosecute piracy offences under other State laws. Of the 47 countries with piracy laws, 10 countries defined piracy as an offence but without universal jurisdiction. Of these 47 countries, 12 followed the LOSC definition of piracy with some differences apparent in their conformity to this definition.¹⁷

Regional states of the Gulf of Aden and Horn of Africa have gradually implemented the LOSC definition of piracy in their national laws.¹⁸ Some countries incorporate the words of the LOSC definition in their national criminal law while others simply refer to their treaty obligations or the law of nations in their references to piracy offences.¹⁹ These latter approaches can sometimes involve difficulties in prosecuting and punishing the piracy offence in countries where the prosecution must prove all elements of a criminal offence beyond reasonable doubt and where the criminal law requires all elements of the offence to be described for enforcement purposes.

Some acts of violence at sea against ships may potentially also be investigated and prosecuted under national laws implementing the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention). Maritime violence, including piracy, became an issue of increasingly greater concern to the international community during the 1980s following the *Achille Lauro* hijacking in 1985 off Egypt by terrorists representing the Palestine Liberation Front. As a consequence of this attack, the United States submitted a proposal to the IMO Assembly that further measures should be required, and a regime dealing with all aspects of suppression of acts of maritime violence should be

drafted.²⁰ As a result the SUA Convention was adopted on March 10, 1988, and entered into force on March 1, 1994. The convention makes it an offence for a person to seize or exercise control over a ship by threat or use of force or any other form of intimidation.²¹ Under the convention, State's Parties must create criminal offences, establish jurisdiction, and accept into their custody persons responsible for such acts.²² The convention was accompanied by the "Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf."²³ Measures to amend both were adopted in 2005 and entered into force on July 28, 2010, although the 2005 protocol only has 23 parties to date.²⁴ These amendments are more related to the unlawful use of a ship to intimidate governments or international organizations, or the use of a ship or any of its cargo, fuel, or other equipment in a manner likely to cause serious injury, death, or destruction; the amendments are therefore not directly relevant to the suppression of piracy.²⁵

The importance of the SUA Convention is that it commits States Parties not only to exercising their jurisdiction where possible to arrest those engaged in the relevant activities and to seize their vessels and equipment, but also to either try offenders before their domestic courts, or to extradite them to their state of origin or to a state which has interests in the suspected criminal activities of the accused.²⁶ Enforcement of SUA Convention provisions, however, relies on the traditional international law jurisdictional bases of nationality and territoriality.²⁷ Ratification of the SUA Convention has improved considerably over the past decade, however, many countries in piracy-ridden countries have opted to stay outside the SUA Convention and its protocols. In the Horn of Africa region, Somalia, Eritrea and Ethiopia are not parties to the Convention.²⁸

National Prosecutions of Somali Pirates

The criminal justice response to Somali pirates after their capture has become a focal point in the UN response over the last three years. If pirates are captured by foreign navies involved in the anti piracy patrols off the Horn of Africa, the question then becomes one of what to do with them. The lack of a stable and effective central government in Somalia, has made handing the pirates over to Somali authorities difficult. Although the pirates can be tried under the capturing state's laws, if they are to be dealt with and imprisoned in the capturing state this represents a considerable burden to that state. Moreover, even when such individuals have served their sentences, it may be difficult to return them to Somalia on human rights grounds, as there is a legitimate concern that they may be subject to torture or execution on their return.²⁹ There are also substantial practical and logistical difficulties associated with holding captured pirates on naval vessels at sea for long periods of time. For all these reasons, the majority of Somali pirates detected at sea have not been detained for investigation and prosecution. Special Adviser to the UN Secretary General on Piracy, Jack Lang reported on 25 Jan 2011 that 90% of all pirates apprehended by national navies were released because very few States were prepared to accept and prosecute them.³⁰ Many foreign navies involved in the anti piracy patrols have adopted a catch and release policy in most cases confiscating the pirates' weapons and sending them on their way. This practice is particularly common where the operators of a suspected piracy vessel have not yet been involved in an attack and are simply cruising and planning for piracy.³¹

For those pirates that have been detained for investigation and prosecution, the criminal justice outcomes have varied widely. The UN Secretary General's report of October 2011 showed that over 1000 suspected Somali pirates had been prosecuted or were awaiting prosecution in 20 States.³² The report identified a range of factors contributing to these

investigations and prosecutions including increased apprehension of suspected pirates, improved gathering and preservation of evidence, enhanced information sharing, strengthened legislative frameworks in some states and increased political willingness to undertake prosecutions.³³ The numbers of prosecutions are steadily increasing in regional countries as their capacity improves with international assistance.³⁴

Regional Prosecutions

Within the Horn of Africa region, States have increasingly committed to accepting pirates for investigation and prosecution.³⁵ The key regional States involved in prosecution with international assistance have been Somalia, Kenya, Seychelles, the United Republic of Tanzania and Mauritius. Hundreds of suspects have been transferred to Kenya for prosecution and several million US dollars has been paid to Kenya for the development of its judicial and prison capacity by the UN Office of Drugs and Crime (UNODC).³⁶ The Seychelles agreed to take suspects for prosecution in March 2010, Tanzania in May 2010 and Mauritius in May 2012.

Kenya was the original forum for universal jurisdiction over Somali pirates with its first case in 2006. *Republic v Hassan M Ahmed and Nine Others* involved the hijacking of the *Safina al-Bisarat* an Indian registered dhow 300 miles off the coast of Somalia on 20 Jan 2006. The arresting ship was from the US Navy and none of the victims were Kenyan. The court convicted and sentenced each of the accused to seven years imprisonment.³⁷ During 2009 and 2010, Kenyan courts convicted 50 pirates.³⁸ In March 2010 Kenya announced it would not accept any more pirates unless other countries gave security guarantees and shared the costs. It gave a 6 month termination notice on all its transfer agreements claiming that nations had not met obligations of helping with funding and assistance.³⁹ In May 2010 it resumed receiving and adjudicating piracy cases but only on an ad hoc basis. A specialist court was

then opened in Kenya to clear the backlog of piracy cases.⁴⁰

The most detailed record of regional court decisions on piracy convictions is from the Supreme Court of the Seychelles and this has been a centre of gravity for regional piracy trials. Key trends that have emerged from these cases include:

- Consistent universal jurisdiction over pirates
- Consistent liability for attempted piracy
- Consistent use of the common enterprise doctrine to solve problems of identification and accomplice liability
- The development of case law relating to circumstantial evidence and piracy action groups
- Severity of sentences
- A willingness to prosecute for cruising without violence as participation in the operation of a pirate ship.⁴¹

Rather than adopting a policy of accepting a certain number of Somali pirates for prosecution, States in the Gulf of Aden and Arabian Sea region have only prosecuted Somali pirates where there is a national interest involved. Yemen has mainly prosecuted pirates who have attacked Yemeni ships and crew members or who attack in Yemeni waters. Oman trials have involved pirates who attempted attacks while at port in Oman, in Omani territorial waters or against Omani citizens. A case before the Federal Court in UAE involved an attack on an Emirati ship.⁴²

Overall in the region the largest number of prosecutions of Somali pirates have occurred in areas of Somalia itself and the majority of prosecutions have been under laws which do not

incorporate the LOSC provisions on piracy. This situation is apparently changing however with the capacity building work of UNODC in the region influencing states to pass domestic piracy laws which reflect the LOSC definition of piracy and create an offence of universal jurisdiction. The increasing number of piracy prosecutions in the region is also fostering the development of jurisprudence on the various elements of the piracy offence and ancillary offences such as attempted piracy.

Extra Regional Prosecutions

Extra-regional States have usually only accepted Somali pirates for investigation and prosecution where there are national interests involved.⁴³ Only the Netherlands has asserted universal jurisdiction over Somali pirates. A survey of non regional prosecutions of piracy shows that most cases involve attacks on ships or nationals of the prosecuting State.⁴⁴ In Europe, piracy suspects have been held in France, Spain, the Netherlands and Germany but the Dutch were the first to put any on trial. The trial of five pirates began on 25 May 2010 and they were sentenced to 5 years in prison.⁴⁵ In Nov 2011 France tried six men for attacking a private yacht the Carre D'As and holding a couple to ransom for \$US 2 million. Five pirates received sentences between four to eight years and one was acquitted. Another case decided in the French courts in June 2012 involved an attack on the French luxury yacht Le Ponant and resulted in four convictions between four to ten years imprisonment and two acquittals.⁴⁶ A German trial of ten pirates accused of seizing the MV Taipan, a German registered ship resulted in the adults being sentenced to six or seven years in prison and the juveniles under 21 were sentenced to two years in custody with time served counted. Belgium sentenced its first pirate to ten years imprisonment in June 2011 for an attack on a Belgian vessel in 2009. Italy has prosecuted nine pirates captured by the Italian navy after hijacking an Italian flagged cargo ship Monte Cristo while the crew locked themselves in the hold for 24 hours. The suspected pirates face up to 20 year sentences if convicted.⁴⁷ In the US a

Somali man pleaded guilty to hijacking the *Maersk Alabama* on 9 April 2009 and kidnapping its captain and was sentenced to 33 years in prison. Some Somali pirates apprehended by US Navy warships have also been sent to the eastern district of Virginia for prosecution.⁴⁸

There have been significant disparities in the sentences imposed on convicted Somali pirates across national jurisdictions. Sentences in Kenya have varied from 5 to 20 years imprisonment. In September 2010 a court in Puntland sentenced a Somali pirate to death and a Yemeni court has also sentenced 6 pirates to death.⁴⁹ Sentences extra-regionally have varied from 5-7 years imprisonment in European courts to 33 years imprisonment in the US.⁵⁰

Building the Capacity of National Criminal Justice Systems to Prosecute Somali Pirates

United Nations Security Council Resolutions on Somali Piracy

The UN Security Council has provided the overarching authority for addressing the upsurge in Somali piracy in a series of resolutions under Chapter VII of the UN Charter and the majority of these resolutions have addressed the legal basis for apprehending the pirates and their subsequent investigation and prosecution. Initially, Resolution 1816 (of June 2, 2008) authorized states cooperating with the Somali TFG to enter the territorial waters of Somalia and to use “all necessary means” to repress acts of piracy and armed robbery at sea in a manner “consistent with the relevant provisions of international law for a period of six months.”⁵¹ In passing this resolution, the Security Council was clearly recognizing the fact that Somalia was unable to provide its own maritime security and law enforcement in waters under its jurisdiction. To avoid any allegation of intrusion into the domestic affairs and sovereignty of Somalia, the resolution was passed with the consent of the Somali TFG following a request for international assistance. Resolution 1816 was renewed with the adoption of Resolution 1846 on December 2, 2008, which extended the international

community's mandate for another twelve months and added authorization for regional organizations such as the European Union to participate in the fight against piracy.⁵²

In Resolution 1851 on December 16, 2008, the Security Council extended the international community's mandate even further by allowing states and regional organizations to undertake "all necessary measures that are appropriate in Somalia for the purpose of suppressing acts of piracy and armed robbery at sea." The words "in Somalia" are understood as including the land territory and the territorial airspace of Somalia. This resolution also invited all states and regional organizations participating in the antipiracy patrols off Somalia to conclude special agreements or arrangements, known as "shiprider agreements," with countries willing to take custody of the pirates in order to embark law enforcement officials from those countries to facilitate the investigation and prosecution of persons detained as a result of the antipiracy operations.⁵³ States were also encouraged to establish an international cooperation mechanism to act as a common point of contact among them all on aspects of the fight against piracy off Somalia. In accordance with Resolution 1851, the Contact Group on Piracy off the Coast of Somalia, which held its inaugural meeting on January 14, 2009, was established as the principal contact point between states and regional and international organizations on combating piracy. It is supported by four working groups that cover:

- Military and operational coordination;
- The establishment of a regional coordination center;
- Legal issues including the prosecution of suspected pirates and strengthening of shipping awareness; and
- Diplomatic and public information.

On September 10, 2009, the contact group approved the terms of reference of an international

trust fund to help defray prosecution expenses.⁵⁴ Expressing its concerns with the ad hoc and inconsistent nature of criminal justice outcomes for Somali pirates, the Security Council passed Resolution 1918, sponsored by Russia, on April 27, 2010.⁵⁵ This resolution expressed continuing concern about the threat posed by piracy and armed robbery for Somalia, nearby states, and international shipping, and it reiterated the need to address problems caused by the limited capacity of the judicial systems in Somalia and neighboring states to effectively prosecute piracy suspects. The resolution called upon member states to criminalize piracy in their national laws and to detain and prosecute suspected pirates off the coast of Somalia in accordance with international human rights law. The UN Secretary-General was requested to report within three months on options for prosecuting and imprisoning those responsible for piracy and armed robbery at sea.

Following this examination of the legal options available to the international legal community in combating the Somali piracy phenomenon, the Security Council passed Resolution 1950 on November 23, 2010, which reauthorized states to intervene in acts of piracy by Somali pirates at sea for an additional period of twelve months.⁵⁶ Member states were urged to improve the capacity of authorities in Somalia to prosecute those planning and undertaking attacks, to determine jurisdiction, and to criminalize piracy under their domestic laws. The Security Council also directed Interpol and Europol to investigate criminal networks involved in piracy off the coast of Somalia, and the Secretary-General was instructed to report within eleven months concerning the implementation of Resolution 1950.

During 2011 the Security Council passed three more resolutions on the piracy situation off the Horn of Africa. The first of these, Security Council Resolution 1976 of April 11, 2011, was a very comprehensive resolution focusing primarily on the capacity-building needs of Somalia and the surrounding region to combat the piracy problem.⁵⁷ It requests states, the UN Office on Drugs and Crime (UNODC), the UN Development Programme, the UN Political

Office for Somalia, and regional organizations to assist the TFG in Somalia in establishing a system of governance, rule of law, and police control in lawless areas where land-based activities related to piracy are taking place, and it requests the TFG to increase its efforts in this regard. It encourages states and regional organizations cooperating with the TFG to assist Somalia in strengthening its coast guard capacity by supporting the development of land-based coastal monitoring and increasing their cooperation with the Somali regional authorities in this regard. In addition to the legal issues, Resolution 1976 urges states individually or within the framework of competent international organizations to positively consider investigating allegations of illegal fishing and illegal dumping of toxic substances with a view to prosecuting such offences when committed by persons under their jurisdiction, and it emphasizes the importance of the earliest possible delimitation of Somalia's maritime spaces in accordance with the UNCLOS. In this connection, it requested that the Secretary-General report within six months on the protection of Somali natural resources and waters and on alleged illegal fishing and illegal dumping, including of toxic substances off the coast of Somalia.

UN Security Council Resolution 2015 of October 24, 2011, continues the consideration of establishing specialized anti-piracy courts in Somalia and other states in the region with substantial international participation and support and to investigate the kind of international assistance needed to establish such courts.⁵⁸ Finally, UN Security Council Resolutions 2020 of 22 November, 2011 and 2077 of 21 November 2012 of have renewed the authorizations contained in earlier resolutions for States and regional organizations to cooperate with the Somali TFG in fighting piracy off the coast of Somalia for another twelve months.⁵⁹

The UNSC resolutions relating to the Somali piracy situation have consistently recognized that combating the effects of the piratical activity off Somalia requires a more effective and comprehensive global and regional regime which is capable of bringing the pirates to justice

in a more efficient and timely manner. A range of options for this have been considered by the UN in the context of the Special Report to the UN Secretary General of 26 July 2010 including:

- The enhancement of UN Assistance to build capacity of regional States to prosecute and imprison persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia
- The establishment of a Somali court sitting in the territory of a third State in the region either with or without UN participation
- The establishment of a special chamber within the national jurisdiction of a State or States in the region without UN participation
- The establishment of a special chamber within the national jurisdiction of a State or States with UN participation
- The establishment of a regional tribunal on the basis of a multilateral agreement among regional States with UN participation
- The establishment of an international tribunal on the basis of an agreement between a State in the region and the UN
- The establishment of an international tribunal by Security Council resolution under Chapter VII of the UN Charter.⁶⁰

The response of the UN Security Council to the Report of the Special Adviser to the UN Secretary General on legal options to combat the piracy off the coast of Somalia in UN Security Resolutions 1976 and 2015 largely debunked the costly option of establishing a specialist international tribunal preferring instead to strengthen the capacity of Somali and regional based anti-piracy courts through international assistance. UN Security Council Resolution 1976 emphasized the need for a multifaceted response to the criminal justice issues associated with the piracy off the Horn of Africa again urging all States to criminalize

piracy in their domestic legislation including ancillary offences such as incitement, facilitation, conspiracy and attempt to commit acts of piracy. It underlined the need to investigate and prosecute those who illicitly finance, plan, organize or unlawfully profit from pirate attacks off the coast of Somalia and invited States, in conjunction with UNODC and INTERPOL, to assist Somalia and other States in the region to strengthen their counter-piracy law enforcement capacities including implementation of anti money laundering laws, establishment of Financial Intelligence Units and strengthening forensic capabilities. In relation to specialist anti piracy tribunals, this Resolution supported the ongoing efforts by regional States for the development of anti piracy courts or chambers in the region and decides to urgently consider the establishment of specialized Somali courts to try suspected pirates both in Somalia and the region including an extraterritorial Somali specialized anti piracy court, an option referred to in the report of the Special Adviser to the Secretary General on Legal Issues related to Piracy off the Coast of Somalia referred to above. UN Security Council Resolution 2015 decided to continue the consideration of establishing specialized anti piracy courts in Somalia and other States in the region with substantial international participation and support and to investigate the kind of international assistance needed to establish such courts.

UNODC Criminal Justice Capacity Building in the Region

The criminal justice capacity building efforts of the international community in Somalia and the surrounding region have been spearheaded by the UN Office on Drugs and Crime (UNODC) counter-piracy programme (CPP) which was established in 2009. This programme initially operated in Kenya and now works in six countries in the Somali Basin region. A range of assistance has been provided to Somalia, Kenya, the Seychelles, Mauritius, Tanzania and the Maldives to support fair and efficient trials and humane and secure imprisonment in all these States. Kenya and the Seychelles have undertaken most trials with Kenya having

conducted 18 trials involving 147 suspects and the Seychelles having 14 cases in progress involving 118 suspects. Types of assistance provided span judicial, prosecutorial and police capacity building programmes as well as the building of prisons and the supply of office equipment, law texts and coastguard equipment. A new prison has now been built in Hargeisa, the capital of Somaliland to strengthen the capacity of Somalia itself to imprison piracy and other offenders and other prisons are being constructed and refurbished in Puntland Somalia. Transfer of Somali convicted pirates has also occurred between the Seychelles and Somaliland.⁶¹

Developing Criminal Justice Cooperation Networks

In addition to criminal justice capacity building within regional States, there is also a need to forge closer criminal justice cooperation links between all States involved in combating Somali piracy and piracy activities in other regions. The LOSC emphasizes the role of the seizing state providing that every state may seize a pirate ship or aircraft, arrest the persons and seize the property on board and that the courts of the seizing state may decide upon the penalties to be imposed and determine the action to be taken with regard to the ship, aircraft or property, subject to the rights of third parties acting in good faith.⁶² These provisions are cast in discretionary terms and the seizing state may be unable or unwilling to follow through with investigation or prosecution of the offences. The LOSC does not address this eventuality and has no detailed provisions on the transfer of alleged pirates to states other than the seizing state. This gap in the LOSC combined with the absence of domestic legislation criminalising piracy in many countries and the lack of international or regional criminal tribunals empowered to exercise a first instance or complementary jurisdiction over piracy increases the possibility that many pirates in the Horn of Africa region and elsewhere will escape justice.⁶³

In the Somali piracy situation, ad hoc transfer agreements between some States apprehending pirates at sea, such as the US, UK and other European Union members were initially negotiated with Kenya, the Seychelles and the United Republic of Tanzania but as previously noted, many other States participating in the counter piracy patrols off the Horn of Africa have been forced to adopt a policy of catch and release.⁶⁴ These transfer agreements while providing an expedient remedy to the problem faced by some of the states participating in the counter piracy patrols were unlikely to provide a comprehensive, equitable and long term solution to the dilemma of bringing the pirates to justice. The capacity of these few regional states to absorb all of the alleged offenders was limited even with the international assistance provided by UNODC as it materialised. Further as the transfer agreements were confidential between the parties, with the exception of the EU transfer agreement with Kenya, it was not clear whether the human rights safeguards present in other criminal justice cooperation processes such as extradition, had been incorporate in all the transfer agreements.⁶⁵ Some of the alleged offenders initially transferred to Kenyan prisons reported instances of physical abuse and at least one took legal action against an apprehending state for alleged violations of human rights.⁶⁶ Seizing states which facilitate transfers to countries where alleged offenders are subject to torture run the risk of being implicated in human rights violations.⁶⁷ In addition there are practical difficulties for the transferring state as personnel involved in the capture of alleged pirates may be required to give evidence at their trial.

Although theoretically the characterisation of piracy as an offence subject to universal jurisdiction should obviate the need to rely on the extradition of alleged pirates from one country's jurisdiction to another for investigation and prosecution, some States affected by the upsurge in piracy incidents in the Horn of Africa region have requested the extradition of pirates from the seizing State. The Netherlands requested the extradition of five pirates captured by a Danish navy frigate participating in the NATO led Combined Task Force 150

when they attacked a Dutch cargo vessel in the Gulf of Aden on 2 January 2009.⁶⁸ These pirates were tried in the Netherlands and sentenced to five years imprisonment in June 2010.⁶⁹ Acceptance of a request for the extradition of pirates from a seizing state's jurisdiction by another state would normally depend on whether extradition arrangements exist between both states and whether both states have criminalised the alleged piratical activities in their national legislation. This latter prerequisite for extradition is known as the requirement for dual criminality. A request for extradition of pirates from the seizing state could also be made on the basis of the SUA Convention in cases where both states are parties to that convention as piratical activities would constitute offences which parties to that Convention would be obliged to criminalise in their national legislation. The SUA Convention contains extradition obligations in Article 11 which provide that the offences contained in the Convention are deemed to be included as extraditable offences in every extradition treaty to be concluded between the states parties. States Parties to the SUA Convention are also required to provide each other with the widest possible measure of assistance in relation to the investigation and prosecution of offences under the mutual legal assistance provisions of the Convention in Article 12.

Establishing more fully-fledged criminal justice cooperation mechanisms between States for piracy offences and promoting wide spread criminalisation of piracy in the domestic legislation of all States are integral steps in the effective repression of piracy. A durable solution to bringing the Somali pirates and future piracy offenders to justice which is consistent with human rights prescriptions and distributes the burden of investigation, prosecution and punishment of alleged offenders more equitably among States, will depend on further development of the international law framework and its domestic implementation. The duty to cooperate to the fullest possible extent in the repression of piracy in Article 100 of the LOSC could form the basis for an implementing agreement to the LOSC which

obligates States Parties to criminalise piracy in their domestic law and contains provisions on the transfer of pirates to face justice in situations where the seizing State is unable or unwilling to investigate and prosecute the alleged offenders. A global anti-piracy agreement of this nature could contain similar provisions to other crime suppression treaties such as the UN Convention against Transnational Organized Crime (UNTOC) and the SUA Convention obligating States Parties to cooperate with each other in providing evidence for the investigation and prosecution of pirates and to accept transfer of alleged pirates for investigation and prosecution subject to prescribed criteria. States Parties to the agreement whose flag vessels are attacked could be obliged to accept transfer of the alleged offenders as could States Parties of the same nationality as the pirates. Transfer of alleged offenders to receiving States could be made dependent on human rights safeguards, common in extradition agreements, that the death penalty would not be imposed or if imposed would not be carried out and prohibitions on transfer if there is evidence of the likelihood of torture or discrimination on the basis of race, religion, nationality or political opinion during investigation or trial. The IMO-sponsored soft law instrument, the Djibouti Code of Conduct Concerning the Repression of Piracy and Armed Robbery against Ships, adopted by 17 States from the Western Indian Ocean in January 2009, represents a political and moral commitment by those States to cooperate in the arrest, investigation and prosecution of persons who have committed or are suspected of having committed piracy. In the long term, this could form the basis of a regional agreement to spread the burden of criminal justice action relating to the Somali pirates among States in the immediate region. Tightening the net around the perpetrators of this egregious crime goes beyond apprehension, investigation and prosecution of particular offenders and requires further expansion and strengthening of criminal justice links between seizing States and others able and willing to investigate and prosecute the offences.

Tracing and Freezing Pirate Assets

Another dimension of the criminal justice approach to the piracy crisis off the Horn of Africa has focused on reducing the financial incentives to engaging in this form of criminal activity by tracking and denying access by the potential beneficiaries to the instruments and proceeds of the criminal activity. The US Government announced, following a Somali pirate attack on the US flagged vessel, the Maersk Alabama in 2009, that it would explore the tracking and freezing of pirate assets.⁷⁰ This initiative was implemented in Executive Order 13536 of 12 April 2010, entitled ‘Blocking Property of Certain Persons Contributing to the Conflict in Somalia.’⁷¹ This prevented payments and other asset transfers to certain persons listed in an annex to the Executive Order including two individuals linked to 1300 pirates where such persons come under the jurisdiction or control of the United States. While on the face of it this approach appears to have potential benefits in deterring the behind the scenes organizers of Somali piracy, it has encountered obstacles in implementation. This model, used previously for tracking terrorist financing, does not work as well for tracking the proceeds of piratical activity in Somalia where the money is filtered away into a localised economy and industry located in safe havens which are essentially divorced from the global financial market. Simple questions from investigators about relevant assets have been difficult to answer such as whether a boat suspected of being involved in piracy activities was purchased for piracy or just for fishing. Any expansion of this sophisticated method of criminal investigation and sanction into the local jurisdiction would also require proceeds of crime legislation, experienced investigators and a functioning court system. In a practical sense urging clan leaders and the Somali business community to help restrain piracy is likely to produce more tangible results.

Conclusion

The significant increases in piratical attacks off the Horn of Africa since 2008 and the threat to freedom of navigation and global trade that they pose have produced a multifaceted criminal justice response from the global and regional community. These efforts have only begun to produce credible results in terms of bringing substantial numbers of pirates to justice in the last few years. The initial UN and naval responses to the upsurge in piracy off the Horn of Africa predominantly addressed the symptoms of piracy rather than underlying causes of the piracy attacks and the practical measures necessary to bring the pirates to justice. These initial responses demonstrably failed to provide an effective deterrent to the perpetrators and a noticeable decline in Somali piracy attacks has only been recorded since 2012.

Fundamentally the roots of piracy off the Horn of Africa lie ashore in unstable and conflict beset Somalia, directly linked to the failure of the central government of that state to enforce the rule of law and prevent this type of criminal activity. Responses by international navies to the manifestations of these problems in the sea lanes off the Horn of Africa and in the Gulf of Aden provide only a temporary and limited remedy to the underlying problems of lack of effective governance in Somalia which enables pirates to operate from safe havens ashore and drives individuals in grinding poverty to become pirates. In the absence of governmental control and enforcement of the criminal law, opportunities and motives to engage in piracy abound in Somalia. Given the proximity to busy shipping lanes coupled with access to maritime skills, GPS technology and modern weapons and fuelled by the blatant theft of marine living resources in their offshore zones, it is unremarkable that Somali pirates have flourished.

A key contributing factor which has not been addressed in the global or regional responses to the problem thus far is the willingness of the international shipping industry and insurers to

pay huge ransoms to the pirates. The payment of multi-million dollar ransoms for the release of captured vessels cargo and crews is a key motive for piratical attacks. This is difficult, however, with the lives of crew members at risk. To date the shipping industry and consequently consumers have been willing to shoulder the financial burden of Somali piracy in terms of ransoms and increased insurance costs as an unpleasant but acceptable price for transiting the seas off the Horn of Africa. This “pot of gold” for pirates at the end of their piratical activities effectively dilutes the deterrent effect of any criminal penalties they may face if apprehended and eventually prosecuted.

Over the past three years more regional states have accepted the burden of investigating and prosecuting Somali pirates with substantial assistance from the international community to strengthen their forensic, prosecutorial, judicial and penal capacities. The piracy crisis off the Horn of Africa has also served as an incentive for more states to amend their laws to include piracy offences although not all states have chosen to legislate for piracy as a universal offence. Criminal justice outcomes for Somali pirates charged and convicted within and beyond the region have varied widely and this is likely to continue given the wide disparities in the criminal justice systems dealing with the pirates. Considering the horrific conditions on shore in Somalia and the potentially enormous financial rewards to be gained, it is little wonder that even the sternest of penalties, up to and including capital punishment, have not served as a complete deterrent for piracy in this region. In fact, since the majority of captured pirates have been released, the incentives to take up piracy appear to far outweigh the disincentives to do so. Ultimately effective investigation and prosecution of piracy offences is a significant element but one of many in the long term strategy to curb piracy attacks in the region.

Endnotes

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- ² Donald R. Rothwell and Tim Stephens, *The International Law of the Sea* (Oxford, UK: Hart Publishing, 2010), 162.
- ³ HSC, Arts. 14-19, LOSC, Arts. 100-107.
- ⁴ Rothwell and Stephens, above note 2, 163.
- ⁵ O’Connell, above note 1, 968-70.
- ⁶ Robin R. Churchill and A.V. Lowe, *The Law of the Sea* 3rd edition (Manchester, UK: Manchester University Press, 1999), 210.
- ⁷ HSC, Art. 17, LOSC, Art. 103.
- ⁸ Rothwell and Stephens, above note 2, 162-3.
- ⁹ Robert C. Beckmann, “Combating Piracy and Armed Robbery against Ships in Southeast Asia: The Way Forward,” *Ocean Development and International Law* vol. 33, no.3 (2002): 319.
- ¹⁰ Ibid.
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- ¹³ Contact Group on Piracy off the Coast of Somalia (CGPCS) Working Group on Legal Issues, “Chairman’s Conclusions”, 5 March 2009, <http://www.marad.dot.gov/documents/wg2-Vienna_meeting_Meeting-chair-summary-March_5-2009.pdf>.
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- ¹⁷ Yvonne Dutton, “Maritime Piracy and the Impunity Gap: Insufficient National Laws or a Lack of Political Will,” *Tulane Law Review* vol. 86 (2012), 1141.
- ¹⁸ Shnider, above note 12, 520.
- ¹⁹ Ibid.
- ²⁰ Churchill and Lowe, above note 6, 210–11
- ²¹ SUA Convention, Art. 3.
- ²² SUA Convention, Arts. 5–7,10.
- ²³ Churchill and Lowe, above note 6, 211.
- ²⁴ Status of ratifications for the 2005 SUA protocol can be found at International Maritime Organization (IMO), Status of Conventions <<http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx>>.
- ²⁵ Rothwell and Stephens, above note 2, 163.
- ²⁶ SUA Convention, Art.11.
- ²⁷ Rothwell and Stephens, above note 2, 163.
- ²⁸ Status of ratifications for the SUA Convention can be found at International Maritime Organization (IMO), Status of Conventions <<http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx>>.
- ²⁹ Michael Passman, “Protections Afforded to Captured Pirates under the Law of War and International Law,” *Tulane Maritime Law Journal* vol. 33, no. 1 (2008), 36.
- ³⁰ UN Secretary- General, *Report of the Special Adviser to the Secretary- General on Legal Issues related to Piracy off the Coast of Somalia*, UN Doc. S/2011/30, (25 Jan 2011), paras. 14,41,43-44,59.
- ³¹ Shnider, above note 12, 557.
- ³² SG Report, above note 16, para 58.
- ³³ Ibid.
- ³⁴ Shnider, above note 12, 535.
- ³⁵ Ibid, 534.
- ³⁶ UNODC, *UNODC and Piracy*, < <https://www.unodc.org/unodc/en/piracy/index.html>>.

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- ³⁸ Ibid, 537.
- ³⁹ Ibid, 540.
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- ⁴³ Ibid, 531.
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- ⁴⁷ Ibid, 532-3.
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- ⁵⁹ UNSC Resolution 2020, UN Doc. S/RES/2020 (2011), November 22, 2011, www.un.org/Docs/sc/unsc_resolutions11.htm; UNSC Resolution 2077, UN Doc. S/RES/2077 (2012) , November 21, 2012, [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/2077\(2012\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/2077(2012)).
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