

Human Rights of the Somali Pirates under International Law

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Abstract: Modern piracy has been an increasing phenomenon in the last decade. The pirate attacks to commercial and private vessels in the Horn of Africa, are growing to a very fast pace that the International Community is obliged under International Law to take measures to suppress piracy. In practice, the level of force that is used by militaries of the navy vessels that safeguard the area around the Gulf of Aden, when prosecute suspected pirates, is disproportional to the crime that takes place and as a result pirates are exposed to violations of their human rights standards. The fear of violating human rights obligations plays an important role when states prosecute suspected pirates, and in order nations to repress piracy without violating the human rights of the pirates, create many legal rules that leads to practical constraints, and other considerations that pull states in the opposite direction.¹ The question that is raised is whether a tradeoff exists between prosecution of pirates and protecting and promoting human rights. This paper introduces the phenomenon of piracy, highlighting the state of insecurity in Somalia and how this insecurity boosts piracy. It also discusses the considered failure of the international legal system, and the potential human rights concerns in front of the regional courts. In addition, examines Kenya's legal and systemic deficiencies as the main regional center for piracy prosecution and at the end offers an alternative approach to the problem.

Keywords: International Human Rights; International Piracy Law; Somali Pirates; Human Rights Violations; Kenyan Legal System.

1. INTRODUCTION

Somalia officially the Federal Republic of Somalia is a country located in the Horn of Africa. The Transitional Federal Government (TFG) was the internationally recognized government of Somalia until 20 August 2012, when its tenure officially ended. The end of the TFG's interim was followed by the Federal Government of Somalia, the first permanent central government in the country. The focus is specifically on Somalia for three main reasons: first, the increase in piracy in the last few years can be credited largely to pirates from Somalia. Second, the Gulf of Aden, an area under attack by Somali pirates, is one of the busiest trafficked maritime regions in the world. Located at the heart of major shipping lanes, it is considered that, an average of 16,000 to 33,000 ships pass through the gulf every year. Third, the waters off Somalia force one of the largest anti-piracy armadas in the world—a mass of states and multinational organizations involved in counter-piracy operations.

¹ Eugene Kontorovich, "A Guantanamo on the Sea": The Difficulties of Prosecuting Pirates and Terrorists, 98 CALIF. L. REV. 243, 256 (2010). "While international law has developed to include many new crimes, the successful prosecution of piracy has grown more difficult than it was in the age when ships were powered by sails. Although international law obligates nations to repress piracy, many legal rules, practical constraints, and other considerations pull states in the opposite direction."

1.1 PROFILE OF THE SOMALI PIRATE

A Somali is raised in an anarchic environment where the poverty is extreme, unemployment and insecurity is a constant present fear and the country is a humanitarian disaster. On the other hand western companies are constantly crime against Somalia either by illegally fishing or dumping toxic waste in the Somali coast. It is estimated that 700 foreign vessels are without license and without reporting themselves engaged in illegal fishing² in Somali waters. As a result, the poor equipped Somali fisherman cannot compete with western vessels in the tuna shrimp commerce.

Therefore, the reaction of Somalis to all this unwelcoming environment in order to improve their livelihood is either to become a refugee, (and actually according the UN High Commissioner for Refugees, Somalia has one of the largest groups of refugees in the world,³) or to be recruited into militias to become pirates. Both solutions contain the risk of death either in the refugee camps or when engaging to pirate acts. It is sad the fact that the only prospects a pirate has, is a wealthy life from the ransom of their successful endeavor, and in case of being captured, relying on a better life by being prisoned in a European State prison than being free in Somalia!

From all the pirates that they are captured so far only one has been a financier, trainer or a recruiter, the Somali pirate rarely kills hostage because it represents loss of profits.

1.2 INTERNATIONAL PIRACY LAW

Certain crimes such as piracy are of such a serious nature that universal jurisdiction exists. Any state is responsible to prosecute the alleged suspects regardless of the nationality of the hostages or the offenders or the location that the crime took place.⁴ Universal jurisdiction is a principle of Customary International Law and is binding on all states. However, international agreements are governing actions only of the states that are party to them.

1.2.1 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (UNCLOS)

One of the international agreements is the 1982 United Nations Convention on the Law of the Sea (UNCLOS) which defines piracy in detail in article 105. One of the limitations of UNCLOS is that it does not apply to 60% of the successful attacks on ships because they take place in territorial waters⁵ and UNCLOS can only occur on the High Seas. Also, according to Article 105 of the Convention there is no obligation on states to exercise jurisdiction.⁶ The language is permissive but not prescriptive. As a result, the states even they have the opportunity to arrest and prosecute pirates, in the end they don't do so. Furthermore, Article 105 is not clear towards the transfer of the pirates from the arresting state to another for prosecution. Most legal experts agree that the transfer cannot fall under the definition of jurisdiction as defined in UNCLOS. The provision "private ends" in the definition of UNCLOS lacks clarity. It excludes politically motivated attacks and

² High Seas Task Force, Closing the net: stopping illegal fishing on the high seas, Governments of Australia, Canada, Chile, Namibia, New Zealand, and the United Kingdom, WWF, IUCN and the Earth Institute: Columbia University, 2006, <http://daa.iucn.org/dtbw-wpd/edocs/2006-024.pdf>

³ 'there is [no other] group of refugees as systematically undesired, stigmatized and discriminated against' UN High Commissioner for Refugees, ExCom: UN refugee chief says protracted major conflicts creating new 'global refugee' populations. <http://www.unhcr.org/refworld/docid/4caaba022.html>

⁴ Eugene Kontorovich, The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation, 45 HARV. INT'L. L. J. 183, 184 (2004). Notably, other forms of jurisdiction could also apply to piracy on the high seas, which explains why universal jurisdiction is not always invoked. The flag state principle, a form of territorial jurisdiction, could apply, as ships are registered to a nation, and are considered state territory for the purposes of jurisdiction. Similarly, the nationality principle could be applied by the state where the pirates have nationality, as it allows a state to apply its laws to its citizens even if they are located outside its territory. Alternatively, passive personality principle allows a state to apply its laws to an offense committed extraterritorially if its citizen is a victim of that offense. Note that all of these principles have limitations in application. See, Jon D. Peppetti, Building the Global Maritime Security Network: A Multinational Legal Structure to Combat Transnational Threats, 55 NAVAL L. REV. 73, 101-104 (2008).

⁵ Eugene Kontorovich, —A Guantanamo on the Sea": The Difficulties of Prosecuting Pirates and Terrorists, 98 CAL. L. REV. 243, 263 (2010) (noting that as universal jurisdiction specifically applies to piracy on the high seas, at times when suspected pirates are caught, they claim to be fishermen). Territorial waters extend up to twelve nautical miles from a coastal state's baseline, while the contiguous zone stretches for a further twelve nautical miles. The exclusive economic zone exists up to 200 nautical miles from the baseline, and thereafter there are international waters.

⁶ UNCLOS, at Art. 105

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

environmental attacks. Before that, the Belgian Court of Cassations decision in *Castle John v. NV Mabeco* (1986), where Greenpeace activists boarded and destroyed two ships on the high seas, in order to get attention on the environmental damage that the ships caused by throwing waste into the sea, the court ruled that the violence the protestors used from their vessel to another vessel, regardless the political protest motives, advanced private ends and constituted piracy. Therefore, private ends include any privately motivated attack without any direct relation to the interest of the state, and does not include anti-terrorism regulations since the ransom that is paid gives a commercial sense to the motives.

1.2.2 CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF MARITIME NAVIGATION (SUA)⁷

SUA is supposed to fill the gaps of UNCLOS but in reality, it's consider to be an anti-terrorist Convention and is binding only among the signatory states.⁸ It is different from UNCLOS as it covers attacks not only in the high seas but in territorial waters too. Also, it allows jurisdiction to any state that is signatory to the convention that has relation with the attack (the act takes place in a state's territory, is against a ship flagged to that state, the attack is by a state national, the state national is the victim). Article 8(1) stipulates the transfer of a suspected pirate to any other state party. Article 10 obligates prosecution of suspected pirates by states. The escape window, however, is that in Article 7 permits state parties to take suspects into custody, therefore the state avoids the obligatory prosecution by not arresting the suspects. As a result, it is rarely the basis for prosecution.

1.2.3 UN SECURITY COUNCIL RESOLUTIONS TO SUPPORT THE PIRACY LAW WITH REGARD TO SOMALIA.

UNSCR 1816 in 2008 and UNSCR 1918 in April of 2010 these resolutions under the authorization of Chapter VII of the UN Charter, allow states to use —all necessary means to repress piracy.⁹ The 1816 Resolution and the 1846 Resolutions allows states to enter Somali territorial waters, while 1851 and 1897 allows anti-piracy activities on Somali land. But a limitation exists. The authority to enter Somali land needs in advance permission from the TFG.

1.2.4 MEMORANDA OF UNDERSTANDING AND DOMESTIC LAWS

A series of agreements between Kenya and the US, UK, Denmark, Canada, China, and the EU, and between Seychelles and the EU, govern the transfer of pirates to Kenya and Seychelles for prosecution.¹⁰ On the other hand, many states bump into barriers when dealing with piracy in their domestic law. Most of them do not have definition of piracy in their domestic law and some of them as Denmark and Germany prosecute pirates only if national interests or citizens are violated.¹¹

2. LAWS PROTECTING SOMALI PIRATE INTERNATIONAL HUMAN RIGHTS

The internationality community concluded that, piracy is a criminal act and therefore must be addressed as such. The legal status of pirates is that they are considered to be criminals and not war combats. All criminals have human rights that must be protected. The pirates Human Rights are summarized in the ICCPR, CAT and the ECHR. All human rights are applicable beyond the territory of the state. The key element is to find out, whether the pirates that are captured extraterritorially are under the jurisdiction of the capturing State.

⁷ Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221, 27 I.L.M. 668 (1998) [hereinafter SUA Convention].

⁸ As of May, 2010, there were 156 signatories to SUA. Signatories include the majority of states with a nexus to piracy, although Somalia is a notable exception.

⁹ S.C. Res. 1816, (permitting states to —[u]se, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery).

¹⁰The EU has attempted to sign similar deals with Tanzania, Mauritius, South Africa, and Uganda, however to date none of these agreements have been formulated. IMB April 2010 Report, Kenya cancelled its agreement with Denmark and the UK and that it stated in April of 2010 that it was unwilling to take more suspected pirates for prosecution.

¹¹ UNSCRs 1851 and 1897 highlight the lack of domestic legislation, and UNSCR 1897 explicitly calls on states to enact laws to criminalize piracy.

2.1 The International Covenant on Civil and Political Rights (ICCPR) Article 2(1)¹²

A pirate doesn't have to be inside the territory of a specific Member State to be within the jurisdiction of the ICCPR. In addition, in relation to multi-national operations in the Gulf of Aden, the Human Rights Committee, on May 26th 2004, at General Comment No. 31, in relevance with "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", stated that : "[A] State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party . . . [The] enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation." Therefore, extraterritorial jurisdiction of a certain state is relevant with the fact if the pirate is under the effective control of a State party to the Covenant.

2.2 The Covenant Against Torture, Article 2 (CAT) (1)¹³

The Covenant¹⁴ applies to a flagged ship¹⁵. Also, at the high seas where the pirates are under control of State agents who are not on board of a flagged vessel then the Covenant also applies, if it is supposed that the agents have de facto control over the pirates.¹⁶

2.3 The European Convention of Human Rights (ECHR), Article 1¹⁷

If a State Party have suspected pirates in captivity on board of its own ship then is under the obligations of the Convention, the situation becomes ambiguous when the operation is against or on board a pirate skiff. Up till now, there hasn't been a piracy case brought in front the European Court of Human Rights (ECtHR), therefore the Court is using two criteria, established in other cases to define extraterritorial jurisdiction and these are "effective control" of an area and "authority and control" over a person.¹⁸ In any case because, as mentioned above, there is no relating piracy case to define extraterritorial jurisdiction, in general the Court accepts also, physical control over the suspected pirates in order to fall in the ECHR jurisdiction. Furthermore, any Member - State to the ECHR, that is conducting as part of multi – national forces

¹² International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), at Art. 2(1), UN GAOR, 21st Sess., Supp. No. 16 at 52, UN Doc. A/6316 (1966) [hereinafter ICCPR] (—Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status);

¹³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, at Art. 2(1), UN GAOR, 39th Sess., Supp. No. 51 at 197, U.N. Doc. A/39/51 (1984) [hereinafter Torture Convention] (—Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction);

¹⁴ As of 31 August, 2022, there were 174 parties to the Torture Convention. United Nations Treaty Collection, Chapter IV Human Rights, § 9, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-9&chapter=4&lang=en.

¹⁵ Article 5(1) explicitly states that a State Party should put measures in place to establish its jurisdiction over acts of, complicity in, or attempts to commit torture that are carried out on vessels registered in that state. Torture Convention, at Art. 5(1)(a) (—Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases: 1. When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State).

¹⁶ U.N. Committee Against Torture, Convention against torture and other cruel, inhuman or degrading treatment or punishment, General Comment No. 2, Implementation of Article 2 by States Parties, ¶ 16, U.N. Doc. CAT/C/GC/2/CRP.1/Rev.4 (Nov. 23, 2007)

The Committee has recognised that —any territory| includes all areas where the State exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law. The reference to —any territory| in article 2, like that in articles 5, 11, 12, 13, and 16, refers to prohibited acts committed not only onboard a ship or aircraft registered by a State party, but also during military occupation or peacekeeping operations and in such places as embassies, military bases, detention facilities, or other areas over which a State exercises factual or effective control. The Committee notes that this interpretation reinforces article 5, paragraph 1 (b), which requires that a State Party must take measures to exercise jurisdiction —when the alleged offender is a national of the State. | The Committee considers that the scope of —territory| under article 2 must also include situations where a State Party exercises, directly or indirectly, de facto or de jure control over persons in detention

¹⁷ Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5; 213 UNTS 221 Art. 1 (1950) [hereinafter ECHR] (—The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention!).

¹⁸ In the 2010 case of *Medvedyev v. France*, the ECtHR Grand Chamber Authority established that if a State Party to the ECHR exercises coercive law-enforcement jurisdiction over a foreign vessel on the high seas, then the vessel, and its occupants, come under ECHR jurisdiction. However, in the case of *Medvedyev*, the crew of the foreign vessel was brought in for prosecution; it is less clear if suspected pirates who are disarmed and deterred, but not taken in for prosecution, would come under ECHR jurisdiction.

in Somalia, firstly, shall be considered acting under international law when the international organization exercises effective control over the aforementioned conduct and secondly, must guarantee that the acts are in terms with the EHRC. Besides the independent state forces, there are three multinational bodies fighting piracy and creating operations off the coast of Somalia. Those are:

- a) US Combined Task Force 151 an international force in the Gulf of Aden and coast off of Somalia consisted of 25 ship vessels from 16 nations, with the goal of defeating and repressing piracy. (Korean Command)
- b) The NATO Maritime Group, which has three ships belonging to the Netherlands, the US and Turkey. (Portugal Command). When confront pirates the refer to national authority which most of the times is under the internationals Commanders directions, States are controlling the situations and are bound under the international Human rights law.
- c) The European Union Naval Force Somalia runs Operation Atlanta to prevent and combats act of piracy, which is currently in force until December of 2024. It secures a zone that contains the Gulf of Aden, the southern Red Sea, and part of the Indian Ocean. Its military personnel can arrest, detain and transfer persons who are suspected of, or who have committed, piracy or armed robbery and the ships of member states even if they are under EU operational command and EU rules, the ships are also under national operational command.

3. INTERNATIONAL HUMAN RIGHTS VIOLATIONS IN THE COAST OF SOMALIA

3.1 DETENTION OF SUSPECTED PIRATES

According to Article 5(3)¹⁹ of the ECHR and Article 9(4) of the ICCPR, a person has the right to be brought in front of judicial authorities within a reasonable time. This right as simple as it sounds as hard is to be respected in high seas. Usually, for navy vessels it is needed a serious amount of time to bring the offenders in front of judicial authorities. The Court held that because of the “exceptional circumstances” the delay is justifiable. It is true, that in practice vessels capture pirates and held them under detention for a long period of time (a month or two), and in the end, decide to release them based on international confusion where to prosecute them²⁰. Even then, it is not clear if there is a violation of Article 5 (3). The general rule though is to release them without prosecution, after detaining them for a long period of time, attitude that is a clear violation of Article 5 (3).²¹ Furthermore, detaining the pirates to disrupt piracy falls, also, under the Violation of Article 5(3). Under SUA Convention, the pirates, after they are captured, have the right to immediately inform their State and also have the right to be visited by a representative of their State. In practice this is not necessarily the case, for example, according to reports of Somalis pirates who attacked the USS *Nicholas* in April of 2010, they were being prosecuted after they were held naked, blindfolded, handcuffed and without access to an interpreter for days. In addition, both the ICCPR and the ECHR contain the right to be informed of the reasons for arrest and judicial supervision of detention, the right to contact family members and access to legal advice. Also, appropriate detention standards should be respected.²² The reality though shows that there is no common criminal international procedure to prosecute pirates, therefore each individual state because of the lack of a legal framework must define the procedure.

¹⁹ Article 5(3) of the ECHR states that:

Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial

²⁰ In January of 2009, the Danish warship Absalon picked up five suspected pirates who had been forced to jump into the water after their boat started on fire during an attempted attack. The pirates were held on board Absalon for over a month while the Danish and Dutch authorities deliberated the transfer of the pirates to Dutch custody

²¹ In May of 2010, Russian forces stormed a hijacked oil tanker in a rescue attempt that lead to the arrest of ten pirates. Afterwards, the pirates were set free without navigational tools in a small vessel in the Gulf of Aden (an area covering approximately 205,000 square miles) and are now considered dead. There is still uncertainty regarding what happened to them. At that time, Somalia's Transitional Federal Government (TFG) demanded an explanation and an apology from Russia regarding the treatment of its citizens, while the Russian officials reported that the pirates were released in a boat due to the lack of legal options for prosecution. THE ASSOCIATED PRESS, May 8, 2010, available at <http://insidesomalia.org/201005093038/News/Travel/Russia-says-pirates-who-held-tanker-are-freed.html>

²² The problem lies partly in the various legal frameworks that intersect in the fight against piracy: domestic laws, international treaties, UNSCRs, customary law, and human rights law. Thus, EU Recommendation 840 suggests that each nation-state involved in the fight against piracy needs to determine, domestically, the conditions for detaining pirates on board ships, the means of transfer to judicial authorities, and the means of monitoring the detention before transfer, including which judges should oversee the proceedings. Report: The role of the European Union in combating piracy.

3.2 CLAIMS OF ASYLUM AND NON-REFOULMENT

One of the biggest worries of the Western countries is the claim of Asylum by the Somalis pirates after their acquittal or after serving their jail time in the Western jail. The above mentality led the British authorities to tell the UK navy not to detain pirates due to fear of asylum claims. Furthermore, Lord Chancellor Jack Straw used Article 1 (f), of UN's 1951 Refugee Convention, to state that no pirate would receive asylum in UK, because if the refugee commits the crime outside his country, then the above Convention does not cover him.

Even though, the approach was very clever to avoid providing Asylum to refugees, CAT Article 3(1), ICCPR Article 7, and ECHR Article 3, contain the non-refoulement principle, where individuals must be protected and not be returned in their home country where they is a high risk of torture, inhuman or degrading treatment, or punishment. Therefore, given the fact that situation in the State of Somalia, day by day worsens, it is not unlikely for the States not to violate international Law and return the pirates back to the State of Somalia.

3.3 TRANSFER OF PIRATES TO A THIRD STATE

In 2010, the average cost of regional prosecutions was 52.000\$, of European prosecutions 246.000\$ and of North American 335.733\$²³. Because of the high cost of prosecution EU, UK, Denmark and US signed agreements to transfer the suspected pirates to Kenya to be prosecuted and trialed and Kenya has given diplomatic assurances that the pirates won't be subjected to torture or to cruel, inhuman, or degrading treatment or punishment, to a death penalty, or to an unfair trial. The EU and US has agreement with Seychelles too. Also some states hand suspected pirates over to authorities in Somalia, Puntland and Yemen, and there are reports of discussions to sign agreements—similar to those with Kenya and Seychelles—between the EU and Mauritius, Mozambique, South Africa, Tanzania and Uganda.

Although the solution appears to be effective the practical application is far from securing the pirates human rights. None of the above States have an excellent protecting human rights record. Kenya has a dysfunctional criminal system, that lacks judiciary infrastructure and corruption is prevailing in political and judicial institutions. Kenya police exercise torturous methods when interrogating suspects and prisoners and as a result a lot of deaths have been reported due to this behavior. In Kenyan prisons, the torture is continuing combined with the lack of adequate health services, the risk of HIV to the prisoners is high. Kenya hasn't signed or ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and despite the EU-Kenya Memorandum²⁴ the situation has changed.

In Yemen, brutality and torture is also the rule. The punishment for piracy is crucifixion. Due to this severe and inhuman punishment the States are forbidden to prosecute pirates to Yemen. The State of Seychelles has also political problems and mistreats the detainees. Somalia is highly instable as discussed above.

3.4 FAIR TRIAL

According to Article 6 of the ECHR, everybody deserves a fair trial. A fair trial includes the presumption of innocence until proven guilty according to law (In Kenya trials the presumption of guilt is the rule), the entitlement of a fair and public hearing by an independent and impartial tribunal established by law (the hearing in Kenya trials is terminated with amazing speed in contrast to ordinary criminal cases), the right to defend oneself or to have legal assistance (the most experienced lawyers are not in the list of UN approved lawyers and they ones that are appointed are living in Nairobi when the trials are in Mombasa)²⁵, to have the assistance of an interpreter if needed (In Kenya trials the recordings of statements are subjected

²³ Cost of Somalia piracy prosecutions in 2010, Source Bowden, The economic costs of maritime piracy, One Earth Future Foundation Working Paper

²⁴ The Kenya–EU piracy memorandum requires that Kenya notify the European Naval Force Somalia (EU-NAVFOR) of any deterioration in a suspect's physical condition and of any allegations of improper treatment. Despite this memorandum, however, it is highly unlikely that the Kenyan government will admit to any such failings on its part. Somali pirates have rights too: judicial consequences and human rights concerns ,ISS Paper 224, July 2011

²⁵ However, there are allegations that the defense attorneys of suspected pirates are not getting compensated, and that there is much international pressure on Kenya to ensure convictions. Matthias Gebauer, Attorneys File Suit in Germany on Behalf of Alleged Pirates, DER SPIEGEL, Apr. 15, 2009, available at <http://www.spiegel.de/international/europe/0,1518,619103,00.html> (commenting that cases were filed against the German government by the lawyers of suspected pirates on trial in Kenya, who claimed that the German government should pay for the pirate's defense. The EU-Kenya agreement stipulates that pirates have the right to an attorney, and that one should be provided free of charge if the defendant cannot arrange their own counsel. As free counsel is not guaranteed by Kenya's legal system, the lawyers claim that Germany has responsibility to ensure the provisions of a fair trial are met.);

to a lot of mistakes, and most of the case the pirates are incapable to communicate and therefore don't understand the evidence that are brought against them and are unable to defend themselves), to be clearly and promptly informed of the nature and cause of the charge.

4. AN ALTERNATIVE SCENARIO TO THE TRANSFER OF PIRATES

The situation in the Gulf of Aden as presented above led the law community to create new approaches in order to deal with the violating of pirates' international human rights. Some of them are presented in the paper at hand. All of them are theoretical solutions, none of them exists.

4.1 AN INTERNATIONAL TRIBUNAL

One possible solution could be the creation of an International Tribunal to deal with international piracy case, following the example of Rwanda and Yugoslavia. Even if the problem of the prosecution would be solved, it would be difficult to create the tribunal in the near future because it would need a large number of nations to agree with the creation in order to sponsor it. Furthermore, the funds that go to regional states of the Gulf of Aden to improve their facilities, it will be taken away to support the creation of the Tribunal and as a result all the financial aid to these countries will be lost, and the judicial system won't be able to improve.²⁶

4.2 EXTRADITION TO THE STATE OF SOMALIA

The second possible solution is extradition to Somalia. Even though the asylum problem is avoided, it is almost sure that the suspected pirates would face severe punishments under Somali Law.

4.3 A MULTI-PRONG APPROACH

The third most promising solution would be a Multi-Prong Approach that would contain five instruments.

First, they would be a creation of a pirate detention center in a land, that it will be leased or bought by the US or EU, close where the majority of the piracy attacks take place. In that way the prosecution to the state of Kenya will move forward smoothly without overloading Kenyan prisons. The disadvantages are that the pirates may face an indefinite detention, like Guantanamo Bay, it will be difficult to find the land to establish this center. Some argue that it could be Saudi Arabia and the cost of maintaining this center could split among the detaining powers.

Second, the International Committee of Red Cross (ICRC) could sustain the respect of human rights at the detention center, the food hygiene and medicine of the pirates in detention. In addition, because of the extensive network staff of the ICRC, the Red Cross can provide voluntary staff and save money to the EU supervising powers.

Third, the use of Ship-rider agreements. Those agreements would activate a law enforcement officer, that could make an arrest and collect evidence needed to the court as evidentiary support, it's an agreement that is used very often to drug-trafficking cases.

Fourth, use display diplomatic assurances by the States that International Human rights would be respected and

Fifth, a creation of a Protocol that would make ECHR directly a part of UNCLOS to secure the rights of pirates that are under detention in the pirate center. However, in order the Protocol to be in full force, the countries shall not only sign and ratify the protocol but also enforce it.

4.4 PRESENT SITUATION

In January 2013, in the Seychelles, the Regional Anti-Piracy Prosecution & Intelligence Coordination Centre (RAPPICC) officially opened. The RAPPICC, with co-operation of US partners such as the FBI and NCIS, as well as INTERPOL, EUROPOL, UNODC, the Indian Ocean Commission, the IMO, EUCAP Nestor, and a wide range of European police forces, will bring together experts from around the world to share intelligence and information which will help to tackle the kingpins and financiers of piracy.²⁷

Legal Limbo Awaits Somali Pirates, WALL STREET JOURNAL, May 2010, available at http://online.wsj.com/article/NA_WSJ_PUB:SB10001424052748703961104575225810196963690.html (noting that pirates cannot afford counsel and that defense attorneys such as Francis Kadima are working pro bono to ensure that they have legal representation);

²⁶ Daniele Archibugi & Marina Chiarugi, Looking for a Jurisdiction for Somali Pirates, 82 POL. Q. 231, 241 (2011).

²⁷ <https://www.gov.uk/government/news/anti-piracy-centre-open-for-business>

RAPPICC's vision is to reduce pirates' perception of immunity from prosecution by sharing strategic information with law enforcement and international partners to bring the 'leaders, financiers and enablers' to justice. The goal is to rebalance the risk/reward ratio of piracy.

The intent of RAPPICC is to create sustainable regional capacity and capability to undermine the piracy business model by bringing pirate leaders, financiers, and enablers, to justice and depriving them of the proceeds and benefits of their crimes. RAPPICC is currently being supported by regional partners such as Seychelles, Kenya, Tanzania, and South Africa, as well as international partners.²⁸

5. CONCLUSION

This paper discusses a possible trade-off between human rights and the prosecution of pirates. Human rights and international criminal law are two pillars of an international legal system and both must be accepted. A legal framework for tackling piracy includes two of these pillars and states cannot legitimately focus on one at the expense of another. Tackling piracy is a complicated affair, let alone the lack of clarity about the human rights obligations. However, the pirates, who can be considered "enemies of mankind" are also members of mankind, and this statement means that they should be given all the rights and protection equivalent to that member.

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²⁸ <http://oceansbeyondpiracy.org/matrix/activity/regional-anti-piracy-prosecutions-intelligence-co-ordination-centre-rappicc>, <https://www.nation.sc/archive/240843/-rappicc-one-year-into-combating-piracy>