



SCHOOL OF LAW
CASE WESTERN RESERVE
UNIVERSITY

Case Western Reserve Journal of
International Law

Volume 46 | Issue 1

2014

Assessing Current Trends and Efforts to Combat Piracy

Sulakshna Beekarry

Follow this and additional works at: <https://scholarlycommons.law.case.edu/jil>

Recommended Citation

Sulakshna Beekarry, *Assessing Current Trends and Efforts to Combat Piracy*, 46 Case W. Res. J. Int'l L. 161 (2013)
Available at: <https://scholarlycommons.law.case.edu/jil/vol46/iss1/9>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

A stylized world map in a light blue-grey tone, showing the outlines of continents and major landmasses. It is set against a background of a faint grid of latitude and longitude lines. The map is centered horizontally and occupies the upper half of the page.

Case Western Reserve Journal of International Law

Volume 46

Fall 2013

Issues 1 & 2

ASSESSING CURRENT TRENDS AND EFFORTS TO COMBAT PIRACY

Sulakshna Beekarry

ASSESSING CURRENT TRENDS AND EFFORTS TO COMBAT PIRACY

*Sulakshna Beekarry**

The sudden rise of piracy incidents in the Gulf of Aden in 2008 presented the international community with immediate and unique legal challenges. In particular, the legal regimes of most states were not equipped to deal with detention, prosecution, and other post-trial procedures for pirates. To effectively address these various issues, legal reform through regional and international cooperation was required. This article propounds the view that in order to face these on-going difficulties, states should engage in novel mechanisms such as pre- and post-trial transfer agreements, adoption of domestic piracy-specific legislation, and revision of procedural rules used in prosecutions. It specifically looks to practices in Mauritius and Seychelles, which have already successfully adopted and implemented such measures to facilitate extraterritorial prosecutions. While a long-term solution to piracy ultimately demands socioeconomic and political reform in Somalia, confronting the current state of piracy necessarily involves innovative changes to the existing legal regime.

CONTENTS

I. INTRODUCTION	161
II. MECHANISMS FOR PROSECUTION	164
III. POST-TRIAL TRANSFER AGREEMENTS.....	168
IV. PIRACY-SPECIFIC LEGISLATION	171
V. HANDOVER GUIDANCE.....	173
VI. CONCLUSION.....	174

I. INTRODUCTION

Until recently piracy found its place in international law textbooks only as an exception to the general rules on territorial jurisdiction. In 2008 Antonio Cassese, in his international criminal law textbook, referred to piracy as “a practice that was widespread in the seventeenth and eighteenth centuries, and has recently regained some

* Sulakshna Beekarry is the head of the Piracy Unit at the Office of the Director of Public Prosecutions in Mauritius. The views expressed in this article are entirely her own and do not necessarily represent those of the Office of the Director of Public Prosecutions in Mauritius, any other government entity or agency, or the Government of Mauritius.

importance, albeit limited to one area of the world—East Asia.”¹ Discussion on the subject was scarce. Other well-known textbooks on international law had at best half a chapter devoted to the law relating to piracy as part of a discourse on the international law of the sea.²

The usual principles put forward by textbook authors suggested that piracy under international law is a very old offence. Piracy was defined in the 1982 U.N. Convention on the Law of the Sea (UNCLOS) as: (1) an act of violence, detention or depredation; (2) on the high seas; (3) committed for private ends; and (4) by the crew or passengers of one private vessel against those of another vessel.³ This definition was accepted as customary international law. Moreover, it was generally accepted that since the time of international legal pioneer Hugo Grotius, a pirate has been considered to be *hostis humanis generis*, an enemy of mankind.⁴

This was, in essence, the body of the law when the rise in piracy attacks off the coast of Somalia took the world by surprise, and the international community awoke to the realization that the scourge needed to be robustly addressed.⁵ Piracy-specific legislation (of the kind now enacted in countries like Seychelles and Mauritius) was virtually non-existent then. In many countries, a country’s criminal code or merchant shipping legislation would contain a few provisions on piracy elaborated in the abstract and never put to the test. Further, not all states had incorporated UNCLOS into their domestic legislation, and even fewer had incorporated the Suppression of Unlawful Acts Against the Safety of Maritime Navigation Convention 1988 (“SUA”). Anti-piracy missions were conducted under the U.N. Security Council’s authority, through Resolutions 1816 (2008), 1838 (2008), 1846 (2008), and 1851 (2008), giving cooperating states the right to pursue and capture pirates in Somali waters and on Somali land.⁶ Even though the international legal community acknowledged

-
1. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 28 (2d ed. 2008).
 2. *See, e.g.*, ILIAS BANTEKAS, INTERNATIONAL CRIMINAL LAW, at x (4th ed. 2010) (showing that only a portion of the chapter on international criminal law in the sea is devoted to piracy).
 3. U.N. Convention on the Law of the Sea art. 101, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].
 4. BANTEKAS, *supra* note 2, at 299.
 5. *See generally* Douglas Guilfoyle, *Counter-Piracy Law and Human Rights*, 59 INT’L & COMP. L.Q. 141, 141–69 (2010) (finding that piracy in the Gulf of Aden and Somalia is “endemic” and that the international community has rallied to create and improve legal frameworks to deal with piracy).
 6. Roger Middleton, Chatham House, *Pirates and How to Deal with Them* 3 (Apr. 22, 2009) (on file with Chatham House), *available at*

that it faced a crime as old as humanity, it also recognized that it was not fully equipped to address piracy in its new form as it arose off the coast of Somalia a few years ago. While piracy was defined in UNCLOS, there was a lack of national laws designed to implement the powers of international law.⁷ Too often the problems encountered were more practical than jurisdictional: Where to prosecute? How to investigate? How to overcome language barriers? How to judge the sufficiency of evidence?

Piracy off the coast of Somalia had more than doubled by 2008; pirates had attacked over sixty ships and regularly demanded and received million-dollar ransom payments.⁸ The international community expressed fears that money from ransoms was helping to pay for the war in Somalia, including funding to the U.S. terror-listed Al-Shabaab.⁹ Aid deliveries to the then drought-stricken Somalia became more difficult and costly. By November 2009, 104 pirate attacks had been reported in the Gulf of Aden for that year alone, with fifty-four attacks in the Indian Ocean during the same period.¹⁰

This was thus a time for action and rethinking. Mauritius, for instance, had a few provisions in its Merchant Shipping Act 2007 criminalizing piracy, but it had never in its history captured or prosecuted suspected pirates.¹¹ Although piracy is a universal crime, certain states—the flag state, the interdicting state, the state of nationality of the crew or owner of the victim vessel—may have particular national interests in the investigation and prosecution of

http://www.chathamhouse.org/sites/default/files/public/Research/Africa/220409pirates_law.pdf; see S.C. Res. 1816, para. 7, U.N. Doc. S/RES/1816 (June 2, 2008); S.C. Res. 1838, para. 4, U.N. Doc. S/RES/1838 (Oct. 7, 2008); S.C. Res. 1846, para. 10, U.N. Doc. S/RES/1846 (Dec. 2, 2008); S.C. Res. 1851, para. 6, U.N. Doc. S/RES/1851 (Dec. 16, 2008).

7. In 2008, India charged suspected pirates under the Indian Penal Code for trespassing and armed robbery and under other laws such as the Foreigners and Passport Act. See Raghavendra Mishra, *NMF Exclusive: Draft Indian Piracy Bill – Preliminary Assessment*, NAT'L MAR. FOUND., <http://www.maritimeindia.org/article/nmf-exclusive-draft-indian-piracy-bill-preliminary-assessment-raghevendra-mishra.html> (last visited Dec. 30, 2013).
8. Roger Middleton, Chatham House, Piracy in Somalia: Threatening Global Trade, Feeding Local Wars 1, 3 (Oct. 2008) (on file with Chatham House), available at <http://www.chathamhouse.org/sites/default/files/public/Research/Africa/1008piracysomalia.pdf>.
9. See *id.* at 10.
10. ICC Commercial Crime Servs., 27 COMMERCIAL CRIME INT'L (2009), available at <http://www.icc-ccs.org/publications>.
11. Merchant Shipping Act 2007 pt. 10, Gov't Gazette of Mauritius No. 120 of Dec. 27, 2007 (defining and outlawing acts of piracy and hijacking of ships and aircrafts).

suspects and may be regarded as “affected states.” The notion that such states could also have transfer agreements with other states that are not “affected,” but have expressed a willingness to contribute to the international community’s efforts in combating piracy by prosecuting in their national courts, was a novel one which materialized as part of this rethinking process.¹²

This article will address the current trends and efforts to combat Somali piracy.¹³ It puts forward the proposition that the resurgence of piracy off the coast of Somalia heralded a new legal era, one in which existing international law is revisited and rebuilt to construct a modern regime. The time has come for new mechanisms such as transfer agreements for prosecution and post-trial transfer agreements to relieve the burden of prosecuting states that are often reluctant to accept long periods of incarceration on their soil. Moreover, piracy-specific legislation has become necessary. It is also time to review prosecution techniques, as foreign navies at sea prepare more and more evidence for onward transmission to regional courts.

II. MECHANISMS FOR PROSECUTION

The international community as a whole has acknowledged that capturing and prosecuting pirates is an essential component of efficient combat against piracy. Without this aspect, impunity is inevitable. UNCLOS allows all states to exercise universal jurisdiction over piracy, and Article 100 requires states to cooperate in the repression of piracy “to the fullest possible extent.”¹⁴ However, only certain states have prosecuted pirates to date, and very often, some

-
12. See Ryan P. Kelley, Note, *UNCLOS, but No Cigar: Overcoming Obstacles to the Prosecution of Maritime Piracy*, 96 MINN. L. REV. 2285, 2308, 2311–13 (2011) (finding that despite the international community’s hesitation about exercising universal jurisdiction through transfer agreements, allowing third party states with weaker jurisdictional ties to prosecute would be an effective deterrent to piracy).
13. This article does not discuss the undisputed ongoing efforts on the political front (e.g., Indian Ocean Regional Strategy and Action Plan of 2010, Djibouti Code of Conduct), or action by the shipping industry (e.g., best management practices, use of private armed guards, naval patrols) when looking at recent trends in combating piracy. For more information on these other anti-piracy measures, see *Building Regional Maritime Capacities*, EUR. EXTERNAL ACTION SERV., http://eeas.europa.eu/piracy/regional_maritime_capacities_en.htm (last visited Jan. 10, 2014) and BMP 4: BEST MANAGEMENT PRACTICES FOR PROTECTION AGAINST SOMALI BASED PIRACY 1 (2011), available at http://www.mschoa.org/docs/public-documents/bmp4_low_res_sep_5_2011.pdf.
14. UNCLOS, *supra* note 3, art. 100, 1833 U.N.T.S. at 436.

states have done so only in situations where there was a nexus with their jurisdiction.¹⁵

Considerable thought has gone into looking at different prosecution models that could be adopted in this situation. On January 25, 2011, Minister Jack Lang's report (in his capacity as Special Adviser to the U.N. Secretary General on Legal Issues Related to Piracy off the Coast of Somalia) put forward a proposal for the establishment of a court system comprising: a specialized court in Puntland, a specialized court in Somaliland and an extraterritorial Somali specialized court.¹⁶ The recommendations were for the Puntland specialized court and the extraterritorial court to be given priority and for them to be operational within eight months.¹⁷

However, in spite of the above recommendations and the given time frame, there does not appear to be consensus so far on the establishment of an international piracy court. Dissenting voices have made themselves heard, and a number of reasons have been invoked to argue that an international piracy court is "not the right direction."¹⁸

Many authors and policymakers alike consider that an international court or tribunal is not appropriate for the crime of piracy. International tribunals have traditionally been established to deal with egregious crimes that are beyond the capacity of national jurisdictions. National governments may be unwilling or unable to exercise jurisdiction over the accused, especially when the accused includes government officials.¹⁹ Often these tribunals cover particular types of events, such as war crimes during armed conflict.²⁰ These characteristics are often seen as irrelevant to piracy, which can be, and is, successfully prosecuted in national courts.²¹

-
15. See Sandra L. Hodgkinson, *International Law in Crisis: Seeking the Best Prosecution Model for Somali Pirates*, 44 CASE W. RES. J. INT'L L. 303, 305–07 (2012) (discussing the regional prosecutions of pirates in Kenya, Seychelles, and Mauritius).
 16. U.N. Secretary-General, Letter dated Jan. 24, 2011 from the Secretary-General to the President of the Security Council, at 3, U.N. Doc. S/2011/30 (Jan. 25, 2011) (outlining the reasons and support for specialized courts in Puntland and Somaliland).
 17. *Id.*
 18. Chatham House, *An International Piracy Court—Not the Right Direction* (Oct. 1–2, 2009) (non-paper circulated at Piracy and Legal Issues Conference, London) (on file with Chatham House).
 19. *Id.*
 20. *Id.*
 21. *Id.* National prosecutions have been undertaken in Kenya, Seychelles, Belgium, India, France, Germany, Korea, Madagascar, Malaysia, Oman, Spain, Tanzania, Yemen, U.S., etc., indicating that modern Somali piracy can be successfully prosecuted in national courts with the judicial

Further, the costs associated with establishing and operating an international court have been acknowledged as prohibitive. Many argue that money is better spent facilitating prosecutions in regional and affected states and supporting efforts to build a stable government in Somalia.²² The same concerns apply to the length of time it may take to establish and staff such a court when the focus is on addressing the piracy scourge as immediately and as robustly as possible.²³

The concern has also been expressed that it would be difficult to discontinue an international court's operations as several post-prosecution functions remain, such as witness protection, sentence enforcement and review, and maintenance of archives.²⁴

As of today, there appears to be neither an international consensus on the establishment of such a body nor concrete plans as to any eventual location for such a court.²⁵ Several questions remain to be answered: Where would the suspects to be tried by this international court be imprisoned? How would such a court be constituted? Would it require an international treaty? If so, what would be the terms of that treaty? Would jurisdiction of such a court be limited to cases of piracy off the coast of Somalia? Would it be available for the trial of every participant in acts of piracy or only major offenders?²⁶

Against this background, the current trend is to encourage transfer agreements leading to the prosecution of piracy cases in the

capacity to do so. See U.N. OFFICE ON DRUGS & CRIME, COUNTER-PIRACY PROGRAMME: SUPPORT TO THE TRIAL AND RELATED TREATMENT OF PIRACY SUSPECTS, ISSUE 7, at 11 (2011), available at http://www.unodc.org/documents/Piracy/UNODC_Brochure_Issue_7_WV.pdf; Jennifer Landside, *Enhancing International Efforts to Prosecute Suspected Pirates*, 44 CASE W. RES. J. INT'L L. 317, 318–19 (2011).

22. Chatham House, *supra* note 18; see also U.N. Secretary-General, *Options to Further the Aim of Prosecuting and Imprisoning Persons Responsible for Acts of Piracy and Armed Robbery at Sea off the Coast of Somalia*, at 1–2, 5, U.N. Security Council, U.N. Doc. S/2010/394 (July 26, 2010); Max Boot, *Pirates, Then and Now: How Piracy Was Defeated in the Past and Can Be Again*, 88 FOREIGN AFF. 94, 107 (2009).
23. Chatham House, *supra* note 18.
24. *Id.*
25. Some authors treat the idea of an international piracy court as “dead and buried.” Douglas Guilfoyle, *Prosecuting Somali Pirates: A Critical Evaluation of the Options*, 10 J. INT'L CRIM. JUST. 767, 795 (2012).
26. See generally Middleton, *supra* note 6 (discussing jurisdictional issues for prosecuting pirates and other considerations in finding long-term solutions to piracy).

national courts of the region with appropriate enabling support. Kenya and the Seychelles have taken the lead in this process, and Mauritius has now followed.²⁷ Kenya has prosecuted pirates since 2006,²⁸ resulting in 130 pirate convictions to date.²⁹ The rate of success in more than ten piracy prosecutions before the Seychelles Supreme Court is no less than phenomenal, with only one acquittal so far for a juvenile suspect, and one case withdrawn in 2010 for lack of sufficient evidence, where the suspects were repatriated.³⁰ To date, the Seychelles Court has convicted 112 suspects for acts of piracy and imposed a wide range of sentences, going as high as twenty-four years.³¹

The issue of the establishment of an international piracy court remains a live one,³² whilst national prosecutions in regional states are

-
27. Mauritius signed a Transfer Agreement with the European Union on July 14, 2011 for the transfer and prosecution of suspected pirates, as well as a Memorandum of Understanding to the same effect with the United Kingdom in June 2012, and has accepted its first transfer of suspected pirates in January 2013. Council Decision 2011/640/CFSP, 2011 O.J. (L 254) 1, 3 (EU); *UK Signs Agreement with Mauritius to Transfer Suspected Pirates for Prosecution*, GOV.UK (June 8, 2012), <https://www.gov.uk/government/news/uk-signs-agreement-with-mauritius-to-transfer-suspected-pirates-for-prosecution> (describing the MOU with Mauritius); UNODC, COUNTER PIRACY PROGRAMME: SUPPORT TO THE TRIAL AND RELATED TREATMENT OF PIRACY SUSPECTS, ISSUE 11, at 1 (2013), *available at* http://www.unodc.org/documents/easternafrika//piracy/UNODC_Brochure_Issue_11_wv.pdf.
 28. The first piracy prosecution took place in 2006 after the U.S. handed over to Kenyan authorities ten Somali nationals captured by the USS *Winston S. Churchill*. See J. Ashley Roach, *Countering Piracy Off Somalia: International Law and International Institutions*, 104 AM. J. INT'L L. 397, 417, 422 (2010).
 29. *Contact Group on Piracy off the Coast of Somalia: Quarterly Update*, U.S. DEP'T OF STATE (Apr. 17, 2013), <http://www.state.gov/t/pm/rls/fs/2013/207651.htm>.
 30. *Somali Juveniles Captured with Suspect Pirates Are Repatriated*, OCEANUS LIVE (Aug. 14, 2012), <http://www.oceanuslive.org/main/viewnews.aspx?uid=00000504>; U.N. Secretary-General, *Rep. of the Secretary-General on Specialized Anti-Piracy Courts in Somalia and Other States in the Region*, ¶ 42, U.N. Security Council, U.N. Doc. S/2012/50 (Jan. 20, 2012).
 31. See, e.g., Republic v. Abdugar Ahmed & Five Others, Sentence, Crim. Side No. 21 of 2011 [6] (Supreme Ct. Sey. 2011) (providing for a twenty-four year maximum sentence for one of the piracy counts); *Six Suspect Pirates to Go on Trial in Seychelles Court*, OCEANUS LIVE (Sept. 3, 2012), <http://www.oceanuslive.org/main/viewnews.aspx?uid=00000513> (referring to the hijacked vessel *Burhan Noor* captured in the Gulf of Aden).
 32. See, e.g., *Piracy: Outcome of CGPCS Working Group 2*, BIMCO (Nov. 4, 2010), https://www.bimco.org/News/2010/11/04_CGPCS_WG2.

on-going. Even if regional prosecutions are very much in the cards, these remain subject to the political will, the deployment of resources, and international support of the countries undertaking such prosecutions, and may well be providing a short to medium-term solution, not a long-term one.

The focus on regional prosecutions should not distract the international community from continuing efforts to criminalize and prosecute acts of piracy in a wider number of states than is currently the case. The international community as a whole should not lose sight of the U.N.'s call for all states to criminalize piracy³³ and of the bigger picture of piracy's human cost. So far, as many as 3,741 crewmembers of 125 different nationalities have been captured, while facing detention periods as long as 1,178 days.³⁴ However, there is still a legal void in a number of countries, and even some of the major maritime powers are still grappling with inherent intricacies either to formulate anti-piracy laws or to improve on existing legislation to address the modern form of piracy.³⁵

III. POST-TRIAL TRANSFER AGREEMENTS

To be effective, the regional prosecution model would have to be supported by two networks of transfer agreements. First, those states willing to engage in transfer agreements would agree to transfer piracy suspects from the capturing warship to the prosecuting state. Second, the states would permit the post-conviction transfers of sentenced pirates to a state willing to detain them. The reasons for such a mechanism are two-fold: firstly, prosecuting states are themselves often unwilling or unable to offer the option of long periods of detention in their prisons; and secondly, it is acknowledged that it is more humane to allow convicted Somali pirates to serve their sentences closer to their families and culture.

aspx (reporting on the sixth meeting of Working Group 2, where different models of international tribunals were discussed).

33. Press Release, Security Council, Security Council Unanimously Adopting Resolution 1918 (2010), Calls on All States to Criminalize Piracy Under National Laws, U.N. Press Release SC/9913 (Apr. 27, 2010).
34. Press Release, The World Bank, Ending Somali Piracy Will Need On-Shore Solutions and International Support to Rebuild Somalia (Apr. 11, 2013), <http://www.worldbank.org/en/news/press-release/2013/04/11/ending-somali-piracy-will-need-on-shore-solutions-and-international-support-to-rebuild-somalia>.
35. See Ragheendra Mishra, *NMF Exclusive: Draft Indian Piracy Bill – Preliminary Assessment*, MAR. INDIA, <http://www.maritimeindia.org/article/nmf-exclusive-draft-indian-piracy-bill-preliminary-assessment-ragheendra-mishra> (last updated Sep. 14, 2013) (describing these legal voids as part of the reason for developing the draft Indian Piracy Bill).

As a result, a definite trend these past years has been the signing of post-trial transfer agreements providing for the transfer of convicted pirates back to Somalia after their prosecution and sentencing in regional states. The first such documents were signed in 2011 between Seychelles and Somaliland, the Transitional Federal Government (TFG), and Puntland, and recognized the need for sentenced persons to be afforded social rehabilitation opportunities through serving their sentences in their home countries.³⁶ Mauritius followed suit in May 2012 through the signing of two post-trial transfer agreements,³⁷ both of which recognize the desirability of allowing foreign national prisoners to serve their sentences in their own countries.³⁸ These instruments also allow regional states with limited prison capacity and resources to ensure that their burden is shared through incarceration back in Somalia and may well encourage states outside the region to enhance the number of prosecutions undertaken.³⁹

Experience this year has demonstrated the workability of this system of post-trial transfers when convicted Somali pirates were transferred from Seychelles to the U.N. Office on Drugs and Crime (UNODC)-built prisons in Somalia with the help and assistance of UNODC.⁴⁰ Moreover, the transfer documents entered into by

-
36. Seychelles entered into three post-trial transfer agreements in the first half of 2011. U.N. Secretary-General, *supra* note 30, ¶¶ 35, 57.
37. See UNODC, COUNTER PIRACY PROGRAMME: SUPPORT TO THE TRIAL AND RELATED TREATMENT OF PIRACY SUSPECTS, ISSUE 9, at 14 (2012), available at http://www.unodc.org/documents/easternafrika/piracy/UNODC_Brochure_Issue_9_Final_webversion.pdf (stating that Mauritius signed agreements with Puntland and TFG in May 2012 on the transfer of prisoners to Somalia).
38. The agreements were facilitated by the assistance of UNODC and the Chair of Working Group 2 of CGPCS. *See id.*
39. See AMBER RAMSEY, CIVIL MILITARY FUSION CTR., REGIONAL COURTS AND PRISONS: DEVELOPING LOCAL CAPACITY TO PROSECUTE SOMALI PIRATES 4 (2012), available at https://www.cimicweb.org/Documents/CFC%20Anti-Piracy%20Thematic%20Papers/CFC_Anti-Piracy_Report_Courts_and_Prisons_JAN_2012_FINAL.pdf (showing that because prosecuting regional states already have limited prison capacity and are unable to incarcerate convicted pirates in the long-term, transfer agreements with Somalia relieve this burden).
40. Seventeen convicted pirates were transferred to Somaliland in March 2012; twelve to Somaliland in December 2012; five to Puntland in December 2012, twenty-five to Puntland in March 2013; and eight to Puntland in May 2013. *See* UNODC, *supra* note 37, at 6; *Somalia: 5 Convicted Pirates Transferred from Seychelles to Puntland*, GAROW ONLINE (Dec. 4, 2012), http://www.garowonline.com/artman2/publish/Somalia_27/Somalia_5_convicted_pirates_transferred_from_Seychelles_to_Puntland.shtml; UNODC, *supra* note 27, at 16; *Transfer*

Seychelles and Mauritius fundamentally provide for the protection of a transferred person's human rights. For example, Article 9 of both the Mauritius and Seychelles agreements relates to the "treatment of sentenced persons" and lays down in no uncertain terms that each party to the agreement will treat all sentenced persons transferred "in accordance with applicable international human rights obligations, particularly regarding the right to life and the prohibition against torture and cruel, inhuman or degrading treatment or punishment."⁴¹

It is believed that such protection enshrined within the post-trial transfer mechanism ought to ensure that states do not transfer individuals under their jurisdiction to places where they run a real risk of prohibited treatment (non-refoulement). Particularly relevant in this context is Article 3(1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which requires that "[n]o State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."⁴²

These arrangements also ensure that the transferred person is not subjected to a new trial in the receiving state and that the sentence of the transferring state is continued (as opposed to being converted or reviewed).⁴³ This implies that the receiving state under no circumstances will be allowed to impose a more severe penalty than what was imposed by the prosecuting state.

It is considered that these post-trial transfer agreements, as elaborated, go hand in hand with the transfer agreements for prosecution. These agreements in concert ought to provide a viable model that will ensure that regional states will maintain their readiness and enthusiasm to accept the transfer of suspected pirates for detention and prosecution without any apprehension regarding

of 8 Convicted Somali Pirates to Puntland, OCEANUS LIVE (May 14, 2013), <http://www.oceanuslive.org/main/viewnews.aspx?uid=00000710>.

41. Prisoner Transfer Agreement, Mauritius-Som., art.9, May 25, 2012; Prisoner Transfer Agreement, Sey.-Som., art. 9, (Feb. 11, 2011).
42. U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3(1), *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987).
43. *See Mauritius: Mauritius-Somalia: Agreement on the Transfer of Sentenced Pirates Signed*, U.N. PUBLIC ADMIN. NETWORK (Oct. 22, 2012), <http://www.unpan.org/PublicAdministrationNews/tabid/113/mctl/ArticleView/ModuleID/1460/articleId/34121/Default.aspx> (stating that the intended purpose of the transfer agreement is for convicted pirates to serve their remaining sentences in their Somali homeland).

long periods of incarceration in their often already overcrowded prison systems.⁴⁴

IV. PIRACY-SPECIFIC LEGISLATION

There has been a clear call on the international community to criminalize piracy in domestic laws. For instance, U.N. Security Council Resolution 1918 (2010) called on all states to criminalize piracy under their domestic laws and to favourably consider the prosecution of suspected, and the imprisonment of convicted, pirates apprehended off the coast of Somalia, in compliance with applicable international human rights law.⁴⁵

As stated above, Mauritius has paid careful attention to this call and has enacted piracy-specific legislation to address the challenges that could arise in piracy prosecutions in its jurisdiction.⁴⁶ The Mauritian Piracy and Maritime Violence Act 2011 is a piece of legislation in which considerable thinking has gone, incorporating both traditional and novel elements. The Act aims at providing a comprehensive framework for prosecuting, in Mauritius, persons suspected of having committed piracy and related offences.⁴⁷

The main feature of the Mauritian piracy legislation is that it incorporates Articles 100 through 107 of UNCLOS in its Schedule, thereby aligning Mauritian domestic law with the international legal framework for the repression of piracy.⁴⁸ In this respect, Mauritius has adopted the principle that national legislation on piracy may provide for the exercise of universal jurisdiction regardless of the nationality of the suspected offender(s) or victim ship(s)/aircraft(s), pursuant to Article 105 of UNCLOS concerning the repression of piracy.⁴⁹ Further, the definition of piracy, the geographic scope, the private ends

44. See RAMSEY, *supra* note 39, at 4.

45. See Press Release, Security Council, *supra* note 33.

46. Jurisdictional and other legal arguments arose in the first two cases tried in Seychelles under very old provisions of the Penal Code, and this led to the enactment of a new Section 65 to the Seychelles Penal Code incorporating many of the provisions of UNCLOS Articles 100 through 107. See U.N. Secretary-General, *supra* note 30, ¶ 41.

47. Piracy and Maritime Violence Act 2011, Gov't Gazette of Mauritius No. 112 of Dec. 17, 2011 [hereinafter PMVA], available at <http://attorneygeneral.gov.mu/English/Documents/Recents%20Acts%20and%20Bill/2011/BXXVIIof2011.pdf>.

48. See *id.* ¶ 2. The Security Council has repeatedly reaffirmed that “international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982 . . . sets out the legal framework applicable to combating piracy.” S.C. Res. 1950, pmb., U.N. Doc. S/RES/1950 (Nov. 23, 2010).

49. PMVA, *supra* note 47, sched.

requirement, the two-ship requirement, and the definition of a pirate ship or aircraft as laid out in UNCLOS were all adopted verbatim.⁵⁰

Other salient features of the Mauritian law on piracy include acts of piracy (on the high seas) and maritime attack (in territorial seas) that can carry sentences up to a maximum of sixty years.⁵¹ In these instances, police officers have the power to board, search, detain pirate ships or aircraft, and use such force as may be necessary for that purpose.⁵² Further, hijacking and destroying ships are offences, just as is endangering safe navigation. The legislation includes the Transfer Agreement between Mauritius and the European Union, together with the post-trial transfer agreements,⁵³ arguably in an endeavour to meet any jurisdictional challenges in the future.

The author considers that the enactment of legislation to deal specifically with piracy allows the legislating state to address issues arising during piracy prosecutions well in advance, thus increasing the chances of successful prosecutions. For example, the Mauritian Act provides for the use of live video link testimony in piracy cases.⁵⁴ The Act also goes one step further in enacting a provision inspired by the U.K. Criminal Justice Act, allowing the admissibility of out-of-court statements in piracy cases in which the maker of the statement is unavailable.⁵⁵ This specific provision exists due to the notorious difficulty in ensuring the attendance of witnesses from all around the world in piracy trials. Moreover, this novel provision is expected to alleviate these difficulties in deserving cases identified as follows:

- (1) Where the maker of the statement is dead;
- (2) Where the maker of the statement is unfit to be a witness because of his bodily or mental condition;
- (3) Where the witness is outside Mauritius and it is not reasonably practicable to secure his attendance;
- (4) Where the witness cannot be found although such steps as is reasonably practicable to take to find him have been undertaken; or

50. *Id.*

51. *Id.* ¶ 3.

52. *Id.* ¶ 3(2).

53. *Id.* ¶ 8.

54. Mauritian law so far only provided for video link testimony in sexual offence cases since 2003. Sexual Offences (Miscellaneous Provisions) Act 2003 ¶ 2, July 25, 2003, *amended by* PMVA, *supra* note 47, ¶ 11(1)(b) (allowing witnesses in piracy prosecutions to testify via video link).

55. PMVA, *supra* note 47, ¶ 11(1)(d); *see* Criminal Justice Act, 2003, c. 44, § 116 (U.K.).

- (5) Where, through fear, a witness does not give or does not continue to give oral evidence in the proceedings, either at all or in connection with the subject matter of the statement.⁵⁶

This provision still remains to be tested in the future, possibly in the current on-going trial of twelve suspected pirates transferred to Mauritius by the European Union in January 2013,⁵⁷ as does the rest of the legislation.

From a prosecutor's perspective, however, it is beyond dispute that detailed and comprehensive legislation providing for definitions, offences, sentences, and a regime for evidence and procedure is an added advantage when setting out to prosecute an offence never before prosecuted in the jurisdiction.

V. HANDOVER GUIDANCE

Regional prosecutions have taught those involved that piracy cases differ from other types of criminal cases in several respects. Added difficulty comes from the fact that suspects are apprehended beyond the territorial limits of the prosecuting state, not by the country's police force. Generally, the police only receive the suspects and the evidence package once a transfer has been agreed to, and when the warship or airplane comes into the country carrying the suspects. The initial actions, at the time of apprehension at sea, are carried out by foreign navies.

In this respect too we can see another trend: that of states undertaking prosecutions producing Handover Guidance specified by their senior prosecutors.⁵⁸ Such Guidance sets out, usually in considerable detail, the manner in which foreign navies intending to transfer suspects for trial should produce the evidence packages. The Guidance explains the particular procedural and evidential requirements likely to prevail before the domestic courts, and navies

56. PMVA, *supra* note 47, ¶ 11(1)(d)(2).

57. Police v. Mohamed Ali Abdeoukader & Eleven Others, Cause Number 850/13 (Intermediate Ct. Mauritius) (scheduled for trial starting Oct. 7, 2013). *See also* Press Communiqué, Office of the Dir. of Public Prosecutions, Piracy Case (June 4, 2013).

58. Kenya, Seychelles and Mauritius have produced and circulated Handover Guidance for Navies involved in the apprehension and transfer of piracy suspects. *See* UNODC, IN-DEPTH EVALUATION OF THE COUNTER PIRACY PROGRAMME COMBATING MARITIME PIRACY IN THE HORN OF AFRICA AND THE INDIAN OCEAN INCREASING REGIONAL CAPACITIES TO DETER, DETAIN AND PROSECUTE PIRATES, at viii (2013), available at http://www.unodc.org/documents/evaluation/indepth-evaluations/2013/CPP_Evaluation_Report_-_Final_07JUNE2013.pdf.

are encouraged to complete their evidence collection and suspect questioning in conformity with those rules.⁵⁹

Usually the accepted methodology is to earmark four primary witnesses, who will then be called upon to attend the trial: the operational witness, the primary boarding witness, the exhibit custodian, and the photography and video manager.⁶⁰ The chain of custody of evidence requirements is clearly spelled out, as are the requirements for the taking and preservation of video evidence and photographs.⁶¹ The procedure for the questioning of suspects and their medical examinations is provided in a manner designed to ensure that the courts in the prosecuting state will eventually have no difficulties in accepting evidence packages.⁶²

This procedure of providing Handover Guidance addresses the novelty of the current era of piracy prosecutions and is methodical enough to provide navies with a perfected method to prepare excellent evidence packages, meeting technological standards that were so far unseen. There has been considerable cooperation between the prosecutors in different jurisdictions when formulating this Guidance, enabling prosecutors in one jurisdiction to advise their naval personnel of the requirements of another jurisdiction, which may run its criminal justice system on a completely different philosophical basis (i.e., common law versus civil law).

VI. CONCLUSION

Even if U.N. Security Council Resolution 1918 (2010) has noted with concern that the domestic laws of a number of states lack provisions criminalizing piracy,⁶³ not many states have since taken the challenge of enacting piracy legislation. Belgium, Japan, Seychelles, and Mauritius are amongst the few to have done so. The inevitable

59. James Kraska, *Brandishing “Legal Tools” in the Fight Against Maritime Piracy*, in *THE LAW OF THE SEA CONVENTION: U.S. ACCESSION AND GLOBALIZATION* 284 (Myron H. Nordquist et al. eds., 2012) (referring to transfers to Kenyan courts and how UNODC’s handover guidance provides a communication checklist and evidentiary standards).

60. *See id.* at 286 (citing to Seychelles’ recommended guidance in preparation for a transfer).

61. *See id.* at 282, 286 (citing to the U.S. Counter-Piracy Evidence Collection Guidance on maintaining chain of custody, as well as Seychelles’ guidance on how to obtain photographic and video evidence).

62. *See id.* at 286.

63. S.C. Res. 1918, pmbl., U.N. Doc. S/RES/1918 (Apr. 27, 2010).

consequence is that many countries still have “considerable lacunae in their domestic law regarding the issue of piracy.”⁶⁴

It is felt that this is one area where efforts ought to continue, together with international assistance in supporting regional prosecutions, while also monitoring the situation in Somalia so that it may ultimately allow for its own prosecutions in the future.

The reluctance of states to provide long-term imprisonment options no longer presents a hurdle to prosecutions when one considers the possibility of post-trial transfer agreements and UNODC-monitored prisons back in Somalia. Moreover, the body of law regulating piracy has found itself immensely enriched these past years, with a crime as old as humanity now being addressed in its modern form. Considerable scholarly attention is now being given to the issues piracy raises, including jurisdiction, the use of children as pirates, the use of private armed guards, and piracy’s financing and money laundering aspects.

Piracy attacks may have declined recently, but there is certainly no room for complacency.⁶⁵ Part of a sustainable solution to ending piracy necessarily entails the re-creation of a functioning Somali state with the capacity to provide vital services to ultimately generate opportunities and alleviate poverty.⁶⁶ In the meantime, a new legal era has emerged and should continue to bear fruit in the medium-term until other trends emerge.

64. U.N. Secretary-General, *Rep. of the Secretary-General Pursuant to Security Council Resolution 1897 (2009)*, ¶¶ 41, 44, U.N. Doc. S/2010/556 (Oct. 27, 2010).

65. After 2005, there was a considerable increase in piracy incidents, culminating in 243 attacks in 2011. However, this number declined in 2012, where only 63 attacks and 15 hijackings were reported as of September. *See The Pirates of Somalia*, S. AFR. FOREIGN POLICY INITIATIVE (Apr. 18, 2013), <http://www.safpi.org/news/article/2013/pirates-somalia>.

66. Press Release, The World Bank, *supra* note 34.



SCHOOL OF LAW

CASE WESTERN RESERVE
UNIVERSITY