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978-1-107-08122-2 - Prosecuting Maritime Piracy: Domestic Solutions to International Crimes

Edited by Michael P. Scharf, Michael A. Newton, and Milena Sterio

Excerpt

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Introduction

Michael P. Scharf¹

I.

After 200 years of quiescence, maritime piracy has recently reemerged as a major economic and humanitarian problem. Whereas piracy was historically associated with such places as the Barbary Coast or the Caribbean, the modern version is centered on Somalia, one of the poorest and most dysfunctional countries in the world.² In the past few years, Somali pirates have seized more than 179 vessels, taken more than 1,000 crewmembers and passengers hostage, and extracted more than \$400 million in ransom.³ A recent report found that piracy off the coast of Somalia cost the world more than \$12 billion in 2012 – the price of everything from counter-piracy naval operations to increased insurance rates for commercial shippers to ransom payments.⁴ Piracy is also significantly hampering the delivery of food aid to perennially drought-stricken Somalia, resulting in untold thousands of deaths.⁵ Although the world saw a temporary downturn in Somali piracy in 2013 and 2014, many experts believe the problem will soon get much worse as the international community begins to draw down its anti-pirate armada off the

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² SOMALIA HUMAN DEVELOPMENT REPORT 2012, UNITED NATIONS DEVELOPMENT PROGRAMME REPORT xix, 25, 48 (2012).

³ Christopher Harress, *Secret Flow of Somali Piracy Ransoms: 179 Hijacked Ships Generated Some \$400 Million in Payments since 2005. So Where Has It All Gone?*, INTERNATIONAL BUSINESS TIMES, Apr. 13, 2014, www.ibtimes.com/secret-flow-somali-piracy-ransoms-179-hijacked-ships-generated-some-400m-payments-2005-so-where-has.

⁴ WORLD BANK, THE PIRATES OF SOMALIA: ENDING A THREAT, REBUILDING A NATION (2013), available at www-wds.worldbank.org/external/default/WDSCContentServer/WDSP/IB/2013/05/06/000333037_20130506120556/Rendered/PDF/767130WP0REPLA0aliaomainoreporto-web.pdf.

⁵ Robyn Curnow, *Piracy Delaying Vital Food Aid from Reaching Somalia*, CNN NEWS, Nov. 11, 2011, <http://edition.cnn.com/2011/11/03/business/mpa-piracy/>.

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east coast of Africa. Meanwhile, piracy is proliferating to Africa's west coast, transforming the threat into a two-ocean challenge.⁶

In combating modern piracy, one of the key initiatives has been the increase in prosecutions across the globe. As Professor Eugene Kontorovich observes, Somali piracy has become perhaps the highest-volume area of international criminal law by national courts prosecuting extraterritorial crimes. Between 2008 and 2012, more than 1,000 Somali pirates were brought to justice in 20 different countries. Government attorneys have creatively and aggressively prosecuted these modern pirates with a panoply of new legal authorities and approaches. Meanwhile, modern pirates are increasingly represented by sophisticated defense counsel who have raised novel issues never before litigated. As a result, there have been far more developments in the law relating to piracy in the past 6 years than there were in the preceding 200 years.

In 2011, the Public International Law & Policy Group (PILPG),⁷ a Nobel Peace Prize-nominated NGO, asked me to assemble and chair a High-Level Piracy Working Group devoted to addressing the numerous legal challenges posed by modern maritime piracy and focusing especially on facilitating the prosecutions of captured pirates. Since its establishment, the working group has met physically several times a year at the PILPG office in Washington, DC, and virtually via video conference.

The High-Level Piracy Working Group consists of more than 30 key actors in counter-piracy efforts, including representatives from the Department of State, Department of Defense, and Department of Justice, as well as judges, practitioners, NGO officials, and leading academics. The High-Level Piracy Working Group's mandate has been to provide legal and policy advice to domestic, regional, and international counter-piracy mechanisms with the goal of helping create effective responses to the growing piracy threat.

Since its creation, the working group has been providing legal assistance to countries such as Kenya, the Seychelles, and Mauritius, which have established UN-supported regional piracy courts and prisons. The group has also forged relationships with other regional and international partners, including the UN Office of Drugs and Crime and the UN Contact Group on Piracy. To date, the members of the working group have prepared more than 60 research memoranda on cutting-edge issues raised by modern piracy prosecutions. In addition, teams from the working group (including this book's general editors) have traveled to Kenya, the Seychelles, and Mauritius to provide copies of these memoranda and expert advice to the attorneys general, prosecutors, and judges who are actively prosecuting piracy. Finally, Professor Milena Sterio and I have

⁶ Gordon Ripinski, *Increasing Attacks: Piracy Shifts Coasts in Africa*, SPIEGEL ONLINE INTERNATIONAL, July 19, 2013, www.spiegel.de/international/world/threat-of-pirates-grows-off-west-coast-of-africa-a-912089.html.

⁷ See <http://publicinternationallawandpolicygroup.org/>.

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presented the working group's recommendations to the UN Contact Group on Somali Piracy in Copenhagen.⁸

As one of the final stages of its work, the High-Level Piracy Working Group decided to publish its analyses, findings, and recommendations for a wider audience in the form of a book authored by some of its members focusing on the legal issues related to modern piracy prosecutions.

II.

Piracy is a "hot" topic and has been the subject of several recently published works, but this is the first book that focuses on the unique and fascinating issues arising in the course of domestic piracy prosecutions. This timely book is written for scholars, practitioners, prosecutors, and government officials who are interested in the judicial arm of counter-piracy efforts.

The existing literature on piracy currently lacks a volume like this one. Those few books that focus on the legal framework surrounding piracy are primarily concerned with the operation and implications of relevant international law. For instance, *Piracy and Armed Robbery at Sea* by Robin Geiß and Anna Petrig (Oxford University Press, 2010) explains the enforcement powers and legal constraints on counter-piracy efforts created by, among other things, the UN Convention on the Law of the Sea, UN Security Council resolutions, and regional and bilateral agreements, but it includes only a cursory assessment of the operation of domestic piracy trials. The same is true for James Kraska's *Maritime Power and Law of the Sea* (Oxford University Press, 2011), which surveys different aspects of the law of the sea, and Kraska's *Contemporary Maritime Piracy: International Law, Strategy, and Diplomacy at Sea* (Praeger, 2011), which devotes only a dozen pages to piracy prosecutions. Finally, *Modern Piracy: Legal Challenges and Responses* (Edward Elgar, 2013) discusses piracy more generally in the context of public and private law, but it does not address many of the issues into which we delve in this volume.

This book differs from its predecessors in its thorough exploration of the legal issues arising throughout the process of prosecuting pirates, from the pursuit and apprehension of pirates to their trials and transfer to the countries in which they serve their sentences. It also examines novel matters not addressed in other published works, such as the challenges of preserving and presenting evidence in piracy trials and of contending with alleged pirates who are juveniles.

Several other volumes address the legal regime governing maritime piracy through the lens of terrorism and counterterrorism mechanisms. This is the case for *Small Boats, Weak States, Dirty Money: Piracy and Maritime Terrorism in the Modern World* by Martin Murphy (Columbia University Press, 2009);

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The World for Ransom: Piracy is Terrorism, Terrorism is Piracy by Douglas Burgess (Prometheus, 2010); and *Piracy and Maritime Terrorism: Logistics, Strategies, Scenarios* by S. Ciotti Galletti (ISO Press, 2012). In contrast, this book focuses on the prosecution of individual pirates under relevant domestic piracy legislation – the legal basis underlying the piracy trials that are under way in prosecuting states around the world.

Accordingly, this book is designed to fill a very conspicuous gap in the literature on piracy. It presents an in-depth exploration of a unique and important topic in counter-piracy: that of national prosecutions of alleged pirates and the novel issues that such prosecutions face. A more thorough understanding of these trials is critical to the broader community interested in counter-piracy efforts because these prosecutions are likely to be the primary judicial mechanism for contending with pirate activity in the future.

III.

Our chapter authors are respected academics and practitioners with distinguished track records. Some have been working on piracy issues for decades. Others have come to piracy after developing an expertise in the analogous world of war crimes prosecutions.

The first four chapters of the book examine the legal foundations for the prosecution of pirates. Chapter 1, “The Governing International Law on Maritime Piracy,” was written by Sandra L. Hodgkinson, who served as deputy assistant secretary of defense for detainee affairs from 2009 to 2011 and prior to that as deputy to the ambassador-at-large for war crimes issues at the U.S. State Department. Hodgkinson points out that piracy prosecutions in the respective jurisdictions have been based on the domestic incorporation or use of the customary international law on piracy, the United Nations Convention on the Law of the Sea (UNCLOS), and/or the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA). Chapter 1 analyzes the relative merits of these three different, but often complementary, approaches to piracy prosecution and the substantive laws and procedures of each, and it concludes with a recommendation on the best approach for states adopting domestic legislation on piracy.

Chapter 2, “The Incorporation of International Law to Define Piracy Crimes: National Laws and the Definition of Piracy,” also written by Hodgkinson, begins with the observation that there is currently no comprehensive approach to modern piracy legislation at the national level. In this chapter, Hodgkinson compares and contrasts how states have incorporated the international law of piracy into their own domestic legal frameworks and the different approaches states have taken to define piracy in their national courts. Specifically, she examines how the piracy definition has been developed in the United States, the Netherlands, South Korea, Tanzania, India, Kenya, the Seychelles, and

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Mauritius. She then describes how countries like Japan, the Philippines, and Singapore have used their national antiterrorism laws to address acts of piracy.

Chapter 3, “Exercising Universal Jurisdiction over Piracy,” was written by Ved P. Nanda, the Evans University Professor at the University of Denver Sturm College of Law. Nanda, who has been writing about piracy for 40 years, observes that only a small minority of states provide for universal jurisdiction to prosecute piracy in their courts. In this chapter, Nanda lays a foundation in customary international law and treaty law for states with no connection to the location of the incident, the registry of the target ship, the nationality of the victims, or the nationality of the perpetrators to exercise universal jurisdiction over pirates.

Chapter 4, “Incorporating International Law to Establish Jurisdiction over Piracy Offenses,” written by Milena Sterio, examines how some of the most important piracy-prosecuting nations, such as the Netherlands, South Korea, Tanzania, India, and Kenya, incorporate international law into domestic law. For each state, the domestic legal status of treaties, the mechanisms for ratification, and the process of implementation is examined. The chapter also assesses each state’s current status with regard to the implementation of major international treaties and conventions that may be used to prosecute piracy.

The next two chapters examine the law governing the use of force by government and private forces in connection with combating piracy and apprehending pirates. In Chapter 5, “The Use of Force against Pirates,” Laurie R. Blank, director of Emory Law School’s International Humanitarian Law Clinic, examines the law applicable to the use of force against pirates by national and multinational forces. Blank begins by detailing the governing framework for the use of force under the UN Convention on the Law of the Sea and associated law enforcement principles, including the right to board, search, and visit and the right of hot pursuit. Next, she examines the specific authorizations for the use of force against pirates under UN Security Council resolutions applicable to counter-piracy efforts off the coast of and in Somalia. The heart of this chapter analyzes the potential applicability of the law of armed conflict when resorting to using force against pirates. The final section of the chapter examines specific issues with regard to the three multinational counter-piracy task forces operating in the Gulf of Aden, including applicable law, rules of engagement, and coordination between and among national forces.

Whereas Chapter 5 focuses on the use of force by government forces, Chapter 6 examines “The Use of Force by Private Parties against Suspected Pirates.” In this chapter, Professor Mark V. Vlasic of the Georgetown University Law Center and Jeffrey Paul DeSousa of the Miami Public Defender’s Office discuss two issues that will invariably arise as a result of piracy challenges in Africa and elsewhere. First, they examine the parameters of the law controlling the use of force that private persons may employ against pirates, because the shipping industry has taken the initiative to employ armed guards on commercial vessels. These guards must be wary of the scope of self-defense and the defense of third parties. Although

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international law and domestic law generally allow individuals to use force in self-defense, the authors stress that any force used must be proportionate to the threat posed. When it comes to warding off pirates, defining proportionality will likely be a source of continuing debate. Passive force will sometimes suffice to thwart an attack; other times, guards will need to apply greater force to defeat more determined pirates. Individual actors who violate these principles may be liable for civil damages. Second, Vlasic and DeSousa address whether a pirate is entitled to have his or her prosecution dismissed as a result of mistreatment suffered at the hands of the capturing authorities. Although the United States applies the *mala captus bene detentus* (“bad capture, good detention”) doctrine, the authors point out that some of the African states that are the prime venues for piracy prosecutions apply the abuse of process doctrine, which allows a court to refuse to exercise jurisdiction when the authorities have committed serious misconduct against the defendant.

Chapter 7, by Rick Lorenz and Laura Eshbach, examines the “Transfer of Suspected and Convicted Pirates.” Lorenz, a former legal adviser to the UN force in Somalia, and Eshbach observe that states whose ships must traverse both territorial waters and the high seas want to protect their interests, but those states are wary about prosecuting pirates in their courts because of evidentiary problems and the fear that the criminals will seek asylum. Consequently, several nations have executed transfer agreements with other countries, such as Kenya, Mauritius, and the Seychelles, that have expressed a willingness to prosecute pirates in their courts. But Lorenz and Eshbach point out that transferring pirates to those countries has not been as seamless as the parties involved would desire. Practical concerns include preserving evidence, providing adequate health and security resources for prisoners, and dealing with the complexity of criminal prosecutions. Furthermore, Lorenz and Eshbach observe that there have been reports of human rights violations in the receiving countries, leading to a debate about what duties are owed to pirates by the capturing countries and when and to where those countries may transfer pirates.

The next two chapters focus on pre-trial issues. In Chapter 8, “Pirates’ Right to a Speedy Trial,” Professor Sterio examines the principle of speedy trial rights for accused parties through a survey of domestic criminal courts, international criminal courts, and regional human rights tribunals, such as the European Court of Human Rights (ECHR) and the American and the African human rights systems. Sterio concludes that the guarantee of a trial within a reasonable time is a general principal of law. Consequently, all piracy-prosecuting nations should continue to respect the suspected pirates’ speedy trial rights; doing otherwise could jeopardize the legacy and legitimacy of national piracy prosecutions. This chapter first explores the right to a speedy trial for the accused under domestic laws and constitutions in order to assess whether they contain a guarantee of a speedy trial. Next, it analyzes the concept of speedy trial rights under

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international law by focusing on a survey of speedy trial rights in international treaties and in the statutes of international tribunals, as well as by discussing some of the most relevant case law decided by international tribunals on the issue of speedy trial rights. The chapter then examines the relationship between indictments and speedy trial rights, pointing out that indictments that are overly broad may lead to unreasonable delays in proceedings and may undermine the defendants' right to a speedy trial, but indictments that are overly narrow may result in generally unfair proceedings vis-à-vis the victims. Next, it addresses the issue of which standard or legal test should govern the determination of whether a defendant's speedy trial rights have been violated. Finally, the chapter considers the question of what piracy prosecuting nations may do in order to avoid unreasonable and undue delays in proceedings, such as managing the pre-trial phase, the trial phase, and the post-trial phase through the use of relatively simple procedural devices.

In Chapter 9, Professor Lorenz and Kelly Paradis examine "Evidentiary Issues in Piracy Prosecutions." The chapter focuses on the UN-supported Regional Anti-Piracy Prosecutions and Intelligence Coordination Centre (RAPPICC), which is located in the Seychelles. RAPPICC is designed to gather intelligence about piracy from joint intelligence teams, EUROPOL, and INTERPOL, along with international law enforcement and military partners and the maritime industry. RAPPICC plans to use this collected information to assemble "evidence packs" for use in prosecutions, to analyze the piracy business model and track the money sources, and to coordinate with international law enforcement partners to tactically disrupt the profitable business of piracy. A large amount of information on piracy is currently being collected by multiple agencies, but there are many challenges when it comes to the collection, retention, and dissemination of information, as well as the later translation of that information into evidence that can be used in court. This chapter examines the practical complications involved with collecting, retaining, and presenting evidence in piracy prosecutions. It assesses the legal evidentiary framework of the key regional states, examines recent developments in dealing with these issues, and provides insights about the extent to which this evidence can be made admissible in court.

The next two chapters focus on issues about the merits of a piracy prosecution. In Chapter 10, "Piracy and the Problem of 'Command Responsibility,'" Professor Michael A. Newton examines the difficulties of transposing the doctrine of command responsibility from its historic mooring in the laws and customs of warfare into the context of piracy prosecutions. Newton argues that extending the doctrine of command responsibility into the context of piracy could, in theory, provide another tool for targeting the real authority figures that control pirate operations. Newton reminds us that the old adage for success is as true in the world of piracy as it is in the context of investigative journalism or complex criminal litigation – "follow the money." Extrapolating a modernized variation of command

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responsibility as a form of personal liability for those authority figures responsible for the orchestration of organized piracy could become an effective tool for focusing on the big fish rather than the minnows in the fight against piracy.

Chapter 11, “The Issue of Juvenile Piracy,” was written by Jon Bellish, project officer at Oceans beyond Piracy. In part because of an unforeseen result of the “catch and release” approach to juvenile pirates, the recruitment and use of child pirates has steadily expanded; it is now estimated that up to one-third of all pirates operating off the coast of Somalia at any given time are less than 15 years old. Bellish points out that the prevalence of juveniles among those captured by international naval forces patrolling the Indian Ocean complicates the treatment of captured pirates at all phases of the judicial process, from the moment of capture to the moment of repatriation or sentencing. The first section of this chapter reviews the international legal norms related to the treatment of juveniles, focusing on the concept of minimum age of criminal responsibility (MACR) under national and international law and the special rights afforded to juveniles under relevant multilateral treaties and international instruments. The second section considers practical issues associated with the prosecution of juvenile pirates. Juvenile-specific legal issues arise when considering the release of a juvenile immediately upon capture, determining the age of a suspected pirate, detaining a suspected pirate pre-trial, ensuring adequate representation during trial, and, assuming the juvenile is found guilty, sentencing him or her. Before concluding, the chapter briefly recounts what is known about state practice regarding the treatment of juveniles suspected of piracy on the high seas in France, Germany, India, Italy, Kenya, Malaysia, the Seychelles, Spain, and the United States.

The book’s final two chapters focus on sentencing and post-conviction relief. Chapter 12, “The Problems of Pirate Punishment,” written by Professor Eugene Kontorovich of the Northwestern University School of Law, examines the sentences imposed by courts around the world in prosecutions of Somali pirates captured on the high seas. As with other international crimes, international law is silent on the subject of penalties. With piracy, the large number of parallel prosecutions of offenders from a single international “situation” offers an empirical window into the interactions between international and national law in municipal courts, into factors affecting the punishments for international crimes and the hierarchy of international offenses, and into potential problems with the current model of punishing piracy. Using a new data set of all Somali piracy sentences in foreign courts, Kontorovich establishes that the global average sentence for piracy is slightly more than 14 years, which is comparable to the average penalties for more serious human rights and international humanitarian law offenses in international courts. Yet, few pirates receive the “average” sentence. Kontorovich documents massive variance in sentences imposed in similar Somali pirate prosecutions in courts around the world, ranging from four years

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to life for substantively similar conduct. There are roughly two kinds of sentencing jurisdictions – lenient and strict. The former is followed by European countries, the latter is primarily used by the United States and Asian states. This data suggest that there can be an international consensus about an offense’s international illegality without a corresponding consensus on the severity or magnitude of the crimes. It also suggests that the distributed prosecution of a single international criminal situation across multiple municipal courts raises potential problems of inequity for similarly situated defendants.

In the book’s final chapter, “The Potential for Asylum-Seeking by Convicted Pirates,” Indiana University Robert H. McKinney School of Law Professor Yvonne M. Dutton examines the potential for asylum seeking by convicted pirates. Dutton’s chapter first explores whether international law prohibits individuals who are prosecuted for piracy offenses from seeking asylum in the jurisdiction where they are prosecuted. To determine whether states can lawfully return pirates to their countries of origin post-trial, it analyzes relevant international refugee law and international human rights law. It concludes that these laws are unlikely to aid individuals subject to prosecution for piracy who might attempt to seek asylum or protection against *refoulement*. Pursuant to the Refugee Convention, in order to obtain asylum in the prosecuting state, a pirate would first have to provide substantial, credible evidence that he or she fears persecution if expelled, on the basis of his or her race, religion, nationality, membership in a particular social group, or political opinion. Even if he or she were able to make this showing, the pirate would likely be excluded from asylum protection on account of having a criminal background. A pirate would face similar difficulties claiming protection from torture or mistreatment under the principle of non-*refoulement*. The second section of the chapter turns to the question of whether and how to best reintegrate individuals back into Somalia after acquittal, conviction, or prolonged incarceration. Although some may argue that pirates are not entitled to any special support, this chapter proceeds from the premise that states and individuals should want to provide the necessary funding and expertise to successfully reintegrate pirates because doing so can produce a net benefit for the world community. Successful reintegration is vital to reforming pirates and creating a future in which individuals do not become repeat offenders and do not continue to threaten the security of the world’s high seas. Accordingly, the chapter highlights a number of best practices and recommendations with regard to reintegration programs. It concludes that any successful reintegration program for former pirates must provide individuals with a sufficient level of economic and community support so that they not only want to opt out of piracy but also are able to make a living in a lawful manner.

The Conclusion, written by Michael Scharf, examines the need and prospects for an internationalized tribunal as a final prosecutorial tool in the anti-piracy arsenal.

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IV.

Together, these 13 chapters provide a timely exposition on the modern developments related to prosecuting pirates while also highlighting possible future trends. We hope this book will prove useful both to those involved in piracy prosecutions and to the broader community interested in counter-piracy efforts.

We are extremely grateful to our expert contributors for their insightful chapters and to John Berger and his team at Cambridge University Press for supporting this scholarly project and improving the text in innumerable ways.