

SEA PIRACY LAW A COMPARATIVE STUDY BETWEEN INDIA AND UNITED KINGDOM

Abishek Murthy
School of Law Christ University,
Bangalore, India.

1. INTERNATIONAL SEA PIRACY

1.1 Piracy

“An act of boarding or attempting to board any ship with the intent to commit theft or any other crime and with the intent or capability to use force in the furtherance of that act”¹. Piracy is an act of robbery or criminal violence at sea. The term can include acts committed on land, in the air, or in other major bodies of water or on a shore. It does not normally include crimes committed against persons travelling on the same vessel as the perpetrator (e.g. one passenger stealing from others on the same vessel). The term has been used throughout history to refer to raids across land borders by non-state agents.

Piracy is the name of a specific crime under customary international law and also the name of a number of crimes under the municipal law of a number of States. It is distinguished from privateering, which is authorized by national authorities and therefore a legitimate form of war-like activity by non-state actors. Privateering is considered commerce raiding, and was outlawed by the Peace of Westphalia (1648) for signatories to those treaties.

Those who engage in acts of piracy are called pirates. Historically, offenders have usually been apprehended by military personnel and tried by military tribunals.

In the 21st century, the international community is facing many problems in bringing pirates to justice.²

1.2 Location & Extent of Piracy

Piracy is considered a serious problem by governments and the shipping industry alike. In January 1999 HM Foreign & Commonwealth Office (FCO) produced a paper which stated that modern piracy was “a real and growing problem”. It defined four types of piratical attack:

1. Robbery, armed or otherwise, targeted mainly at money, crews’ personal effects, and ships’ equipment;
2. Permanent hijacking of ships (most prevalent in the Far East), sometimes turning them into ‘phantom ships’ for use in cargo frauds;³
3. Hijacking ships to steal their cargoes; and
4. Possible ‘state-involved’ hijacking.⁴

The FCO stated that the latter two of these were on the increase.

Piracy in the twentieth and twenty-first centuries has tended to come in fits and starts, with the most recent high-profile attacks coming on ships sailing off the Somali coast in East Africa and the Nigerian coast in West Africa. In the 1990s, the number of attacks increased with major ‘hotspots’ identified in the Caribbean and off the coast of South America; in the Indian Ocean and the South Pacific.

The International Maritime Bureau (IMB) collates information about piracy attacks. Its annual report is available by contacting the organisation directly.³ However, its weekly piracy reports do give a summary of pirate activity in various parts of the world. The bulletin for 30 September – 6 October 2008 states:

Piracy prone areas and warnings

Mariners are warned to be extra cautious and to take necessary precautionary measures when transiting the following areas:

¹ IMB, ICC International Chamber of commerce, October 19 2001

² D. Archibugi, M. Chiarugi “Piracy challenges global governance” April 9, 2009.

³ ‘phantom ships’ are ships with no real identity – the vessel is registered on the basis of false information provided to the registration authorities about the vessel’s previous names and the owner’s identity

⁴ FCO, *Focus International: Piracy and armed robbery at sea*, January 1999

S E Asia and the Indian Sub Continent

Bangladesh: Although the number of attacks has fallen, the area is still listed as very high risk. Pirates are targeting ships preparing to anchor. Most attacks reported at Chittagong anchorages and approaches.

Indonesia: Anambas/Natuna island area, Belawan. Pirates armed with guns and knives. Generally be vigilant in other areas. Many attacks may have gone unreported.

India: Kandla. Most ships were attacked while at anchor.

Malacca straits: Although the number of attacks has dropped due to the increase and constant patrols by the littoral states relevant Authorities since July 2005, ships are advised to continue maintaining a strict anti piracy watch when transiting the straits.

Philippines: Manila - Pirates target ships at anchor.

Singapore Straits: Only one reported incident in the last quarter, but vessels are advised to continue to be vigilant and maintain anti piracy watch. In the past pirates seen attacking ships while at anchor and underway.

Africa and Red Sea

Lagos & Bonny River (Nigeria): Pirates are violent and have attacked and robbed vessels/kidnapped crews along the coast and rivers, at anchorages and ports. Vessels advised to be also vigilant in other areas in Nigeria.

Dar es Salaam (Tanzania): Pirates are targeting ships in port and anchorages.

Gulf of Aden/Red Sea: Somali pirates are now attacking vessels in the northern Somali coast in the Gulf of Aden. These pirates are firing automatic weapons and Rocket Propelled Grenades (RPG) in an attempt to board and hijack vessels. Once the attack is successful and the vessel hijacked, the pirates sail towards the Somali coast and thereafter demand a ransom for the release of the vessel and crew. All vessels transiting the area are advised to take additional precautionary measures and maintain strict 24 hours radar and anti piracy watch using all available means. Watch keeping crews should look out for small suspicious boats converging on vessel. Early sighting and accurate assessment will allow Master to increase speed and manoeuvre to escape pirates and at the same time request various Authorities/Agencies for assistance.

Somalian waters: Recent incidents indicate that attacks have spread to the northern Somali coast. The Somali pirates are now attacking vessels in the northern Somali coast in the Gulf of Aden. Somali pirates are dangerous and are prepared to fire automatic weapons at ships in order to stop them. Occasionally they fire RPG (Rocket Propelled Grenade) launchers at ships. Pirates are believed to be using "mother vessels" to launch attacks far from the coast. These "mother vessels" proceed far out to sea and launch smaller boats to attack and hijack passing ships. Eastern and North-eastern coasts are high risk areas for attacks and hijackings. The IMB maintains its advice that vessels not making scheduled calls to ports in Somalia should keep as far away as possible from the Somali coast, ideally more than 250 nautical miles until a more permanent and encouraging sign is seen. Mariners are advised to report any suspicious boats to the Centre.

South and Central America and the Caribbean waters

Brazil: Although the number of reported attacks has dropped in Santos. Ships are advised to continue to be vigilant.

Peru: Callao

1.3 Piracy and Terrorism

In the twenty-first century, and particularly following the terrorist attacks on New York and Washington DC on September 11 2001, there has been a sharper focus on so-called 'jihad at sea'. A 2004 article in *Foreign Affairs* argued that "unlike the pirates of old, whose sole objective was quick commercial gain, many of today's pirates are maritime terrorists with an ideological bent and a broad political agenda".⁵ There exists the fear that ocean-going vessels carrying oil, natural gas or other hazardous cargo could be used as weapons – in the same way that civilian aircraft were on September 11. In a 2005 article for the *Journal of Counterterrorism & Homeland Security International* Ali Koknar argued that terrorist groups are well-organised and well-trained.⁶

The previous Labour Government made it very clear in its response to the Transport Select Committee's 2006 report on piracy that there is no proven link between piracy and terrorism. It assured the Committee that:

⁵ Gal Luft and Anne Korin(2004), "Terrorism Goes to Sea", *Foreign Affairs*

⁶ Ali M. Koknar,(2005) "Corsairs at Starboard: Jihad at sea", *Journal of Counterterrorism & Homeland Security International* (Vol. 11, No. 1)

The question of any piracy and terrorism link is kept under constant review by the appropriate autonomous intelligence agency which continually monitors and reassesses all received intelligence regarding piracy and maritime terrorism to see whether any links can be established. Until such a link can be established, it would be both premature and unhelpful to the shipping industry to change the official Government line.⁷

This was reiterated in a June 2008 report by the RAND Corporation for the US Air Force. A press notice accompanying the report stated:

Acts of piracy and terrorism at sea are on the rise, but there is little evidence to support concerns from some governments and international organizations that pirates and terrorists are beginning to collude with one another ... The objectives of the two crimes remain different -- piracy is aimed at financial gain while the goal of terrorism is political. Although both events are increasing, piracy is growing much faster and remains far more common than seaborne terrorism ... "The maritime environment will likely remain a favourable theatre for armed violence, crime and terrorism given its expanse, lack of regulation and general importance as a critical conduit for international trade," said Peter Chalk, author of the study ... "While there is no quick fix for eliminating all of this, we can rationally manage the threats within acceptable boundaries."⁸

2. UNITED KINGDOM POSITION

2.1 History of piracy laws in United Kingdom

The anti-piracy laws in United Kingdom is in existence since the 17th century with the enactment of the Piracy act, 1698 in the eleventh year of William III. The long title of the Act is "An Act for the more effectual Suppressions of Piracy"⁹

It altered the Offences at Sea Act 1536, to say that "all piracies, felonies, and robberies committed in or upon the sea, or in any haven, river, creek, or place, where the admiral or admirals have power, authority, or jurisdiction, may be examined, inquired of, tried, heard and determined, and adjudged, according to the directions of this Act, in any place at sea, or upon the land, in any of his majesty's islands, plantations, colonies, dominions, forts, or factories, to be appointed for that purpose by the King's commission or commissions under the great seal of England, or the seal of the admiralty of England, directed to all or any of the admirals, vice admirals, rear-admirals, judges of vice-admiralties, or commanders of any of his majesty's ships of war, and also to all or any such person or persons, officer or officers, by name, or for the time being, as his majesty shall think fit to appoint;" - in other words, pirates could be tried other than in England, due to the "great trouble and charges in sending them into England to be tried within the realm".

It also added the death penalty for subjects committing piracy or robbery upon other subjects whilst under the colours of a "foreign prince or state", or for being an accessory to piracy; and added some new offences including deserting a ship (forfeiture of all wages) and refusing to "bring home with him again all such of the men which he carried out with him" (three months imprisonment). The death penalty under this Act was abolished by the Piracy Act 1837.

England was the first country to enact and pass an anti piracy bill in the 17th century. These piracy acts in England were amended as follows:

- Piracy Act ,1698(repealed on 5.11.1993)
- Piracy Act ,1721(repealed on 5.11.1993)
- Piracy Act ,1744(repealed on 5.11.1993)
- Piracy Act ,1837
- Piracy Act, 1850
- Aviation Security and Piracy (overseas territories) order 2000¹⁰.

This gives us a brief history and the evolution of the piracy acts in England and shows us that the country has made the necessary amendments and has a very well established legislation.

⁷ "Government Response to the Committee's Eight Report of 2005-06" (sixteenth special report of session 2005-06), HC 1690, 2 November, p10

⁸ Library house of commons(2012), "piracy at sea overview and policy responses" sn3794,p10-11

⁹ William III, 1698-9: An Act for the more effectual Suppressions of Piracy. [Chapter VII. Rot. Parl. 11 Gul. III. p. 2. n. 5.]. Statutes of the Realm: volume 7: 1695-1701 (1820), pp. 590-94. URL:<http://www.british-history.ac.uk/report.asp?compid=46966>

¹⁰ Piracy legislations, <http://http://www.legislation.gov.uk>

2.2 Problem faced in the prosecution

Jurisdiction

Any country may prosecute piracy on the high seas, but in practice few do so. By June 2011, 20 countries around the world had prosecuted just over 1,000 pirates in their courts¹¹.

States that are directly affected by acts of piracy (flag states, states whose citizens have become victims of piracy and states whose citizens are themselves pirates) have been reluctant to take on piracy prosecutions. Some have taken pirates to their countries (Yemen, Spain, France, the Netherlands and the United States¹²) for trial when their nationals or vessels are victims of an attack, but the international community has generally preferred to seek a regional solution. The Netherlands is one of the few countries to have prosecuted pirates where the only connection with the Netherlands was that the Dutch navy captured them.¹³

The problem is not a lack of jurisdiction. International law permits – but probably does not oblige – states to prosecute suspected pirates:

Customary international law permits any State subsequently finding a pirate within its territory to prosecute him or her as an exercise of universal jurisdiction. This jurisdiction equally covers cases where pirates are transferred into that State's territory by agreement. The mere existence of such jurisdiction, however, does not necessarily oblige States to use it.

While UNCLOS requires that States must "cooperate to the fullest possible extent in the repression of piracy" (article 100), it only provides that a seizing warship **may** send pirates for trial before national courts (article 105). The inference is that States have no duty to enact relevant offences into national law and have "certain latitude" to cooperate in suppressing piracy by means other than prosecution.¹⁴

Nor does UNCLOS require states to extradite suspected pirates if it does not submit them for prosecution.

States that have not made piracy on the high seas a criminal offence clearly cannot prosecute people for piracy there (although other offences may have been committed). The UN Security Council has noted that many states have not made piracy on the high seas a criminal offence under their domestic law.¹⁵ Some states have criminalised piracy itself but not cruising with pirate intent or inciting or intentionally facilitating piracy. In Somalia, only Puntland has a piracy law, despite the efforts of UN experts to agree draft legislation –prosecutions have otherwise been for other criminal offences including illegal possession of weapons.¹⁶

The SUA Convention is couched in stronger terms:

Flag ships of a SUA Convention state can deliver people suspected of committing a SUA offence to any other SUA convention state, which has a primary responsibility to accept them.

States must adopt the SUA Convention offences as crimes under national law when committed against or on board their flag vessels, within their territory or territorial sea, or by one of their nationals.

States must also either extradite suspects or submit them for prosecution.

But there is a question over whether suspects held on warships are within the flag state's "territory" for the purposes of the SUA Convention, which would require the state to extradite or prosecute.¹⁷

The UK position

The UK, like other European states, is seen as having a poor record for prosecuting pirates: it has brought no Somali suspected pirates back to the UK for prosecution.

The UK does have relevant domestic criminal offences. Piracy is an offence in UK law:

for the purposes of any proceedings before a court in the United Kingdom in respect of piracy, [UNCLOS's piracy provisions] shall be treated as constituting part of the law of nations.¹⁸

¹¹ Report of the UN Secretary-General on the modalities for the establishment of specialized Somali anti-piracy courts, S/2011/360, 21 June 2011, Annex I

¹² Ploch *et al*, *Piracy off the Horn of Africa*, US Congressional Research Service, April 2011, p2

¹³ "Somali pirates jailed in Netherlands for Choizil hijack", *BBC news online*, 12 August 2011

¹⁴ Dr Douglas Guilfoyle, 4 July 2011, Written evidence to the House of Commons Foreign Affairs Committee, *Piracy off the coast of Somalia*,

¹⁵ UN Security Council Resolution 1976 (2011), preamble

¹⁶ Report of the UN Secretary-General on the modalities for the establishment of specialized Somali anti-piracy courts, S/2011/360, 21 June 2011, p5

¹⁷ Dr Douglas Guilfoyle, 4 July 2011, Written evidence to the House of Commons Foreign Affairs Committee, *Piracy off the coast of Somalia*, HC 1318 2010-12, 5 January 2012, Ev 96

¹⁸ *Merchant Shipping and Maritime Security Act 1997* s26

This requires the judge to determine the current definition of piracy in international law and apply it as if it were domestic law. Dr Douglas Guilfoyle suggests that “a clearer and more direct incorporation of the relevant UNCLOS provisions into statute law might be an improvement”, noting that at least two common law jurisdictions (Australia and Seychelles) have taken this approach.¹⁹

The UK has also incorporated the SUA offences into domestic law. Part II of the *Aviation and Maritime Security Act 1990* creates offences of unlawful seizing of a ship and destruction or damage of a ship over which the national courts have jurisdiction, regardless of the offender’s nationality and regardless of where the offence is committed

But even with amended offences, the UK would be unlikely to bring suspected pirates to the UK for prosecution unless there were UK hostages or UK casualties.²⁰ Such a connection might help to pass the ‘public interest’ test for prosecution. Prosecutions in the UK could be very expensive, involving bringing suspects, victims, witnesses and evidence long distances, and providing translations and legal aid for the defendants. The British former hostages Rachel and Paul Chandler would like to see prosecution by the UK (though not necessarily in the UK) and would be happy to give evidence at a trial.²¹

The UK currently prefers to support countries in the region to prosecute suspected pirates. The Royal Navy has transferred some suspected pirates to other states around Somalia for prosecution, and released others because a successful prosecution was thought unlikely.²² The UK is currently providing financial and practical support to Somalia and other countries prosecuting pirates, including Kenya, Mauritius and Seychelles (see below). The *Telegraph* has reported on the UK’s support for piracy prosecutions in Seychelles, including seconding staff from the prison service and the crown prosecution service, financial support, training and a new intelligence-sharing scheme.²³

Gathering sufficient evidence for prosecution

A major obstacle to prosecuting suspected pirates is the difficulty in gathering enough evidence. The Foreign Affairs Committee recognised the challenges but felt more could be done to gather evidence.²⁴

Suspected pirates are sometimes hard to distinguish from fishermen; and some throw their equipment overboard when they fear capture.

The capturing vessel has to comply with the rules of evidence and procedure (including the length of time for which suspects can be held) of whichever territory the trial will place in – regardless of the nationality of the suspect, victim, ship, cargo or capturing forces:

In practice, navies have developed “templates” or “guidelines” to assist them in collecting evidence in a manner useful to prosecution before the courts of regional partners. To take a simple example, it was common naval practice to throw the weapons of suspected pirates overboard. In Kenyan trials where the use of a firearm is alleged, the firearm should be produced. If this type of information is not known in advance, prosecutions may be compromised.²⁵

There have been significant efforts to provide guidance for capturing forces on gathering evidence:

- UNODC has issued handover guidance, agreed with senior prosecutors in regional states, to help international navies ensure that evidence packages meet the requirements of regional legal systems.²⁶
- The IMO has also issued guidelines to assist in the investigation of piracy and armed robbery against ships.
- A new enforcement chapter in the fourth edition of the Best Management Practices directives gives guidance on collecting and preserving evidence.

- INTERPOL has set up a mechanism to provide real-time advice to ship owners and PASGs.²⁷

The UN understands that this guidance has overcome initial problems associated with gathering evidence and transferring it to regional prosecuting states, particularly Kenya and Seychelles. However, similar problems may occur with transfers to Somaliland and Puntland.²⁸

¹⁹ Dr Douglas Guilfoyle, 4 July 2011, Written evidence to the House of Commons Foreign Affairs Committee, *Piracy off the coast of Somalia*, HC 1318 2010-12, 5 January 2012, Ev 84

²⁰ Henry Bellingham, 6 July 2011, Oral evidence to the House of Commons Foreign Affairs Committee, *Piracy off the coast of Somalia*, HC 1318 2010-12, 5 January 2012, Qq269-273

²¹ Paul Chandler, 24 October 2011, Oral evidence to the House of Commons Foreign Affairs Committee, *Piracy off the coast of Somalia*, HC 1318 2010-12, 5 January 2012, Q350

²² House of Commons Foreign Affairs Committee, *Piracy off the coast of Somalia*, HC 1318 2010-12, 5 January 2012, para 75

²³ “Britain’s anti-piracy ‘conveyor belt’ stretches from Somalia to Seychelles and back”, *Telegraph*, 22 February 2012

²⁴ House of Commons Foreign Affairs Committee, *Piracy off the coast of Somalia*, HC 1318 2010-12, 5 January 2012, para 81

²⁵ Dr Douglas Guilfoyle, 4 July 2011, Written evidence to the House of Commons Foreign Affairs Committee, *Piracy off the coast of Somalia*, HC 1318 2010-12, 5 January 2012, Ev 83

²⁶ UNODC, *Piracy: what are we doing?*

²⁷ Report of the Secretary-General pursuant to Security Council resolution 1950 (2010), S/2011/662, 25 October 2011, p10-12

The captain of the target vessel, and any hostages, would have to be prepared to give evidence. In practice, naval states have ensured that their military witnesses attend trials, and UNODC and shipping companies help civilian witnesses attend. The shipping industry has been encouraged to look at introducing contractual obligations for seamen to attend trials.²⁹

Lack of practical capacity

Practical limitations on prosecution, particularly a lack of judicial and prison capacity, pose serious problems:

- The vessel capturing a suspected pirate might conclude that it is a better use of limited time and resources to carry on acting as a deterrent than to take the suspect back to land for prosecution.³⁰
- Lack of judicial and trial capacity. Somalia, for instance, has so few legally trained judges that it will take an estimated three years of capacity-building with international support before trials in Somalia meet international standards.³¹
- Lack of prison capacity. Somalia and other countries in the region have a shortage of prison spaces, and standards are often extremely poor.³²

3. INDIAN POSITION

3.1 Problem Of Piracy In Indian Context

With the increase in global trade, the maritime security has emerged as a major challenge. The Gulf of Aden which separates Somalia and Yemen and connects the Arabian Sea to the Red Sea has seen a major spurt in Attacks by pirates operating from Somalia since 2008. This problem has really been exasperated in recent years. With Indian naval presence in the Gulf of Eden, the problem which were at the time related to Somalia and the Horn of Africa, some of the pirates began to shift their operations eastwards and southwards. This led to some of the pirates operating closer to the Indian Exclusive Economic Zone (EEZ) and the Western coast of India. In 2011, 286 piracy attacks took place which resulted in 33 hijacking. From December 2010, the Indian Navy and the Coast Guard conducted several major antipiracy operation of India's Western Coast and apprehended around 120 suspected pirates.³³

The problem of piracy continues to persist but particularly after the actions of Indian Navy, it is seen as being worst in the western sector of the Indian Ocean than in the areas immediately close to India's EEZ. However, at present India does not have a separate domestic legislation to deal with piracy-related offences. In the absence of a clear and unambiguous reference to the offence of maritime piracy in the Indian law, problems have been faced in ensuring effective prosecution of the pirates. In the *Alondra Rainbow* case, which was the first piracy case to be tried in an Indian Court in 1999, in the absence of a piracy law or the definition of piracy in the penal law of India, other relevant provisions of the Indian Penal Code and Admiralty Act were invoked to try the pirates. Although the prosecution was successful in the trial court, the appeal went in favour of the accused in the High court presumably on jurisdictional grounds. The 120 captured pirates are currently being prosecuted under provisions of IPC, Indian Arms Act etc. However, in the absence of a suitable domestic legislation, pirates that are captured at sea cannot be successfully prosecuted. The provisions of the Indian Penal Code pertaining to armed robbery etc as also the Admiralty Act have been invoked in the past to prosecute pirates apprehended by the Indian Navy and the Coast Guard. India's domestic law (i.e. IPC) has not defined piracy as an offence and an accused person can be charged only for offences such as attempt to murder, dacoity, robbery etc. Another limitation of the IPC is that the piratical acts by a foreigner committed outside territorial waters of India do not constitute an offence under the IPC. These offences may attract lower sentences and cases may take a long time to be disposed off.

So, External affairs ministry of India have come up with a bill to prosecute the pirates named the Piracy bill, 2012. This bill defines piracy according to the UNCLOS and offers death sentence to pirates who commit the offence and India will be facing the same problem as the United Kingdom. In order to overcome the problems few potential solutions are suggested

4. POTENTIAL SOLUTIONS

4.1 Increased support for prosecution and imprisonment in Somalia

The most popular idea for improving prosecutions for piracy off Somalia is to increase the international support for training judges, amend the domestic law on piracy and increase and improve prisons in Somalia:

It is clearly desirable that Somalia prosecutes and imprisons more of its own nationals suspected and convicted of piracy. This would hopefully have advantages of local legitimacy and "messaging", and it is

²⁸ Report of the UN Secretary-General on the modalities for the establishment of specialized Somali anti-piracy courts, S/2011/360, 21 June 2011, p16

²⁹ Report of the UN Secretary-General on the modalities for the establishment of specialized Somali anti-piracy courts, S/2011/360, 21 June 2011, p10

³⁰ House of Commons Foreign Affairs Committee, *Piracy off the coast of Somalia*, HC 1318 2010-12, 5 January 2012, para 77

³¹ Report of the UN Secretary-General on the modalities for the establishment of specialized Somali anti-piracy courts, S/2011/360, 21 June 2011

³² Report of the UN Secretary-General on the modalities for the establishment of specialized Somali anti-piracy courts, S/2011/360, 21 June 2011, pp8-9

³³ Standing committee report ,ministry of foreign affairs, India

generally considered desirable that convicted persons serve their sentence as close to their family and community as possible.³⁴

The UN Office on Drugs and Crime (UNODC) is leading work on capacity-building in Somalia, in conjunction with the UN Development Programme (UNDP), the UN Office of Legal Affairs, the UN Political Office for Somalia, the European Commission, the Contact Group on Piracy of the Coast of Somalia and its anti-piracy trust fund, and other donors including the US and the UK. This includes training judges and prosecutors, equipping courtrooms, and upgrading and building new prisons. The UN estimates that its support will enable around 200 more suspected 'low-level' pirates to be prosecuted in Somalia per year, at a cost of \$25 million for the first three years (not including staff costs).³⁵

Although the Somali authorities do not favour foreign nationals participating as judges or prosecutors in Somali courts, 36 appropriately qualified and experienced legal professionals have been identified who would be interested in participating in anti-piracy courts either inside or outside Somalia. Many of them had served as legal professionals in Somalia before the 1990s.³⁶

The UNDP has a legal assistance programme which provides free legal advice and assistance to people in Somalia. It represented 107 suspected pirates in 2010-11.³⁷

The *Telegraph* reports that prison-building in Somalia is proceeding apace:

A new prison built by the UN and with £600,000 of British money will open next year in the central Somali town of Garowe, in the country's semi-autonomous region of Puntland. It will house up to 500 convicted pirates.

Major upgrades to prisons in Hargeisa, in Somaliland, and Bossaso, in Puntland – both more than half funded by Britain – will also soon begin taking prisoners transferred from the Seychelles.³⁸

However, there is a long way to go: three years before trials in Somalia meet international standards and two years for the latest 1,000-bed prison-building programme – and that is only the start. Considerably more would be needed for Somalia to deal with all captured pirates at the current rate.

There have been suggestions that specialised piracy courts could be established in Somalia, but the TFG and Somali regional authorities do not envisage this,³⁹ not least because it could require changing the constitution.

Regional prosecution: Kenya, Seychelles, Tanzania

Since Somalia is not yet in a position to prosecute or imprison large numbers of pirates, the UK and others have been encouraging and supporting countries around Somalia to do so. However, legal obstacles and the potential scale and expense of prosecuting and imprisoning large numbers of pirates mean this is not always straightforward.

Any state may accept the transfer of a suspected pirate, because international customary law provides universal jurisdiction for piracy.⁴⁰

Furthermore, certain states may also have jurisdiction over suspected pirates under the ordinary principles of criminal jurisdiction:

- The state of the suspected pirate's nationality
- The State of nationality of the suspected pirate's victim
- The flag State of any involved vessels

Several states might have equally valid claims to exercise jurisdiction over an offence; but no state is under a duty to prosecute, and international law does not provide a rule of priority between competing potential jurisdictions.⁴¹ States therefore have to cooperate over what to do with suspects, and they often tend to prosecute only when their nationals are involved – and only then,

³⁴ Dr Douglas Guilfoyle, 4 July 2011, Written evidence to the House of Commons Foreign Affairs Committee, *Piracy off the coast of Somalia*, HC 1318 2010-12, 5 January 2012, Ev 100

³⁵ Report of the UN Secretary-General on the modalities for the establishment of specialized Somali anti-piracy courts, S/2011/360, 21 June 2011, pp3-11

³⁶ Report of the UN Secretary-General on the modalities for the establishment of specialized Somali anti-piracy courts, S/2011/360, 21 June 2011, p7

³⁷ Report of the Secretary-General pursuant to Security Council resolution 1950 (2010), S/2011/662, 25 October 2011, p13

³⁸ "Britain's anti-piracy 'conveyor belt' stretches from Somalia to Seychelles and back", *Telegraph*, 22 February 2012

³⁹ Report of the UN Secretary-General on the modalities for the establishment of specialized Somali anti-piracy courts, S/2011/360, 21 June 2011, p3

⁴⁰ Dr Douglas Guilfoyle, 4 July 2011, Written evidence to the House of Commons Foreign Affairs Committee, *Piracy off the coast of Somalia*, HC 1318 2010-12, 5 January 2012, Ev 89

⁴¹ Dr Douglas Guilfoyle, 4 July 2011, Written evidence to the House of Commons Foreign Affairs Committee, *Piracy off the coast of Somalia*, HC 1318 2010-12, 5 January 2012, Ev 89-90

of course, when their domestic law has a relevant offence. The UK is pressing for a system for showing capturing forces which country has capacity and which is next in line.⁴²

Kenya was one of the first regional countries to provide assistance. It changed its domestic law and signed a series of bilateral agreements under which it prosecuted and imprisoned 50 Somalis captured by international navies. But in March 2010 the Kenyan government announced that it would not accept any new pirate suspects for prosecution. It has a backlog of suspects, perhaps as a result of underestimating the scale of transfers, and some domestic legal questions.⁴³ Kenya is now accepting some suspects on a case-by-case basis where there is sufficient connection with Kenya.⁴⁴

Seychelles has also reached agreements to accept the transfer of pirate suspects for prosecution. One motive for doing so is that piracy could affect tourism in Seychelles.⁴⁵ However, its prison capacity is very limited, and it has made the availability of imprisonment in Somalia a precondition for accepting more piracy suspects from naval states for prosecution.⁴⁶ Seychelles has now reached agreements with the TFG, Punt land and Somaliland to transfer convicted pirates back to serve their sentences, but implementation is proving slow,⁴⁷ and in any case the agreements do not compel Somalia to receive all pirates convicted in Seychelles.

The UK supports the return of convicted pirates to Somalia for imprisonment:

We will work with Somaliland, particularly on the agreement with the Seychelles to allow convicted pirates in the Seychelles to return to Somaliland to serve their sentences. Obviously, we are urging President Silanyo to pass his draft piracy law and prisoner transfer law, which are essential to allowing the transfer of prisoners back to Somaliland, in time for the conference.

Alun Michael: This may seem like a minor point, but the Minister referred to pirates returning to Somaliland. By and large, the pirates are not from Somaliland, but will go there to serve their sentences as part of the assistance that Somaliland is giving to the international community.

Mr Bellingham: That is a very good point. Some of the pirates may well originate from tribes in Somaliland, but others will be from tribes in Punt land or further south. It is a sign of Somaliland's commitment to solving the scourge of piracy that it is prepared to enter into this important memorandum of understanding.⁴⁸

Kenya, Tanzania and Seychelles have all changed their domestic legislation to make international piracy on the high seas an offence – previously they could prosecute only piracy in their territorial waters. Seychelles is the only one of the three with an offence of going equipped or with intent for piracy.⁴⁹

As well as Kenya and Seychelles, transfer agreements are being developed with Mauritius, Mozambique, South Africa, Tanzania and Uganda.⁵⁰ These agreements include a financial element. For example, the agreement with Mauritius gives the Government of Mauritius a “modest package” of EU financial, technical and logistical support for its prison and courts, to be implemented through the UN Office on Drugs and Crime (UNODC), up to a ceiling of €1.08 million. The phased release of these funds, via the UNODC, is conditional on the progress made in the implementation/delivery of the transfer agreement.⁵¹

The UNODC has taken the lead in assisting countries around Somalia with piracy prosecutions:

Kenya is currently trying 69 suspects, having convicted 50, and Seychelles, despite its tiny size, has undertaken 31 prosecutions and already convicted 22 suspects. Mauritius has declared that it too will assist in the prosecution of pirates. These countries, as well as Tanzania and Maldives, continue to be assisted by UNODC with judicial, prosecutorial and police capacity building programmes. Prisons and other buildings have been supplied in some countries as well as office equipment, law books and specialist coast guard equipment.⁵²

The UK has provided £5.3 million of funding for the UNODC's capacity-building work in Somalia, Kenya and Seychelles.⁵³

One way of making regional prosecution easier is to use “shipriders”. These are law enforcement personnel from regional states, seconded to international warships to arrest suspected pirates or to authorise the pursuit of pirates into the territorial waters of

⁴² Henry Bellingham, 6 July 2011, Oral evidence to the House of Commons Foreign Affairs Committee, *Piracy off the coast of Somalia*, HC 1318 2010-12, 5 January 2012, Q289

⁴³ Ploch *et al.*, *Piracy off the Horn of Africa*, US Congressional Research Service, April 2011, p35

⁴⁴ Dr Campbell McCafferty, 29 June 2011, Oral evidence to the House of Commons Foreign Affairs Committee, *Piracy off the coast of Somalia*, HC 1318 2010-12, 5 January 2012, Q163

⁴⁵ “Seychelles: Buoyant economy threatened by piracy woes”, Seychelles government advertisement, *Financial Times*, 23 February 2012

⁴⁶ Report of the UN Secretary-General on the modalities for the establishment of specialized Somali anti-piracy courts, S/2011/360, 21 June 2011, p8

⁴⁷ Report of the Secretary-General pursuant to Security Council resolution 1950 (2010), S/2011/662, 25 October 2011, p14

⁴⁸ HC Deb 9 February 2012 c 575

⁴⁹ Henry Bellingham, 6 July 2011, Oral evidence to the House of Commons Foreign Affairs Committee, *Piracy off the coast of Somalia*, HC 1318 2010-12, 5 January 2012, Q235, Q249

⁵⁰ EU Foreign Affairs Council conclusions, 22 March 2010

⁵¹ European Scrutiny Committee, “ESDP: Piracy off the coast of Somalia”, ch 12 of *Twenty-ninth Report of 2010-12*, HC 428-xxvii, 31 May 2011

⁵² UNODC, *UNODC and piracy*

⁵³ Henry Bellingham, Written evidence to the House of Commons Foreign Affairs Committee, *Piracy off the coast of Somalia*, HC 1318 2010-12, 5 January 2012, Ev 69

their sending state. They are used in the Caribbean against drugs-smuggling.⁵⁴ The Somalia resolutions encourage states to use shipriders, but this does not appear to have happened yet.

An international piracy court?

The problems with prosecuting suspected pirates have led to suggestions of some sort of international participation in piracy trials, and even an international piracy court.

In July 2010 the UN Secretary-General reported on seven possible options for prosecutions with an international element, ranging from capacity-building in Somalia to a new international tribunal.⁵⁵ Jack Lang, a UN special advisor on piracy, recommended a specialised extraterritorial Somali piracy court in Tanzania (in addition to specialised piracy courts in Puntland and Somaliland).⁵⁶ Other suggestions have included:

- A 'hybrid' tribunal in a national legal system with some UN-appointed judges, prosecutors and administrators
- Using the International Criminal Court or the International Tribunal for the Law of the Sea
- A dedicated international piracy tribunal.

The United Nations Secretary General submitted a report⁵⁷ to the Security Council in June 2011, in which he set out the legal and practical considerations of establishing an extra territorial Somalia piracy court (and specialized Somali piracy courts) as recommended by the Lang report. This included looking at what international personnel and support would be needed. The report found that although Tanzania would in principle be willing to host such a court, in practice there were significant obstacles, including:

- The Somali authorities are opposed to establishing an extraterritorial Somali court;
- Any extraterritorial Somali court would apply Somali criminal law and procedures, which are currently deficient;
- The judges, prosecutors, defence counsel and other legal professionals should be qualified and experienced in Somali law, but there is a shortage of qualified legal professionals in Somalia;
- The Somali authorities do not favour foreign nationals participating as judges or prosecutors in Somali courts;
- Establishing new specialized anti-piracy courts (or new sections of existing courts) in Somalia could require amendments to the constitution and/or the Transitional Federal Charter.

Moreover, it looks as if Jack Lang's estimate of around \$2.5 million for the annual operating costs of an extraterritorial Somali piracy court would probably be significantly exceeded.⁵⁸

International tribunals tend to be used only for the most serious criminals; they are time-consuming and expensive to set up and run; they do not solve the problem of lack of prison space as they depend on domestic prisons; and in any case the Somali government opposes any of these options, saying that it is illegal under the Somali constitution to have courts to try Somalis outside Somalia.⁵⁹ These ideas have therefore attracted little practical support, and the focus has generally returned to strengthening existing court structures in Somalia and its neighbours.

⁵⁴ Henry Bellingham, Written evidence to the House of Commons Foreign Affairs Committee, *Piracy off the coast of Somalia*, HC 1318 2010-12, 5 January 2012, Ev 68

⁵⁵ "Report of the Secretary General on possible 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, UN Doc S/2010/394, 26 July 2010

⁵⁶ Jack Lang, *Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia*, S/2011/30, January 2011

⁵⁷ Report of the UN Secretary-General on the modalities for the establishment of specialized Somali anti-piracy courts, S/2011/360, 21 June 2011

⁵⁸ Report of the UN Secretary-General on the modalities for the establishment of specialized Somali anti-piracy courts, S/2011/360, 21 June 2011, p24

⁵⁹ Dr Douglas Guilfoyle, 4 July 2011, Written evidence to the House of Commons Foreign Affairs Committee, *Piracy off the coast of Somalia*, HC 1318 2010-12, 5 January 2012, Ev 101