

# The Penalties for Piracy

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# THE PENALTIES FOR PIRACY

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## EXECUTIVE SUMMARY

The prosecution of Somali pirates has gone global. Today, ten nations on four continents have convicted Somalis who were involved in the epidemic of piracy and armed robbery at sea which began in 2008, and at least six other nations have cases pending. Any nation can arrest suspected pirates on the high seas—piracy is the oldest international crime—yet international law defines only the crime, not the penalty. As a result, the current piracy prosecutions have led to a massive cross-national variance in both actual and possible punishments. The cross-jurisdictional differences appear to have less to do with the underlying conduct or culpability of the pirates than with variations in the municipal statutes, sentencing norms, and judicial views of the nations that happen to take custody of the pirates.

This paper presents the first global empirical study of the penalties for piracy. It compiles an original data set of sentences imposed on Somali pirates outside of Somalia. It examines the sentences in relation to the characteristics of the particular crimes as well as other factors. It finds that worldwide, the sentences imposed on pirates for similar crimes range from four years to life in prison. The average sentence globally is 16 years—quite high in relation to sentences administered by international tribunals for more severe international offenses such as genocide and war crimes. Yet the average belies a massive variance across jurisdictions, with European nations and Kenya giving sentences that are one-third to one-half the global average and the US imposing sentences several times longer. The disparity in sentencing raises the issue of equity among defendants, particularly because the defendants are all engaged in similar conduct but their punishments depend on where they happen to be tried.

Several approaches can be taken to mitigate these inequities. First, and most simply, national courts sentencing Somali pirates should consider the sentencing practices of foreign courts in similar cases. Given that most prosecuting nations have not completed more than one or two cases, if any, such external information could be useful in promoting at least some natural convergence. The cross-national variance shows that an increase in the number of prosecuting nations has its costs; thus, second, a dedicated international court or a small number of regional piracy centers would reduce the problem of sentencing being fundamentally inconsistent across countries.

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## I. Introduction

For many years the persistent challenge facing international efforts against Somali piracy has been finding a nation willing to prosecute and imprison those captured by the multinational forces. While no comprehensive or centralized solution has yet been found, in the interim the prosecution of Somali pirates has become, on a small scale, a worldwide effort. In the first years of the Somali piracy surge no nation was willing to take pirates for prosecution, but that has changed. While the lead roles taken by Kenya and Seychelles are well known, pirates have now been tried and convicted in ten nations around the world, from Belgium to Korea. Cases are pending in at least six other nations with more than 100 defendants in India alone. Today, *de jure gentium* prosecution of piracy has reached levels unprecedented in modern times.

The great majority of pirates are still immediately released under the policy of “catch and release.” Prosecutions of pirates have become sufficiently widespread to raise important legal issues that have been neglected thus far. The sentences imposed in the trials of Somali pirates around the world vary greatly, which reveals a lack of global consensus on the proper punishment for the crime.

The international law of piracy, having lain dormant for much of the past century, is in most respects the same as it was when sailing ships plied the seas. While such a long-unused regime could easily have become an anachronism,<sup>1</sup> it was instead revived rather conveniently to deal with the massive epidemic of armed robbery at sea now emanating from Somali shores. Yet in the interval since the regime had last seen wide use, one major component of the old law of nations for piracy has dropped out—the punishment.

Classically, international law specified not only the elements of the offense of piracy, but also the penalty—which was universally death. During piracy law’s twentieth-century hibernation, many nations abolished the death penalty altogether; it could no longer be regarded as the internationally presumptive (or even maximum) penalty for piracy. However, while the death penalty was displaced, it was not replaced in international law with a *new* uniform penalty.

In contemporary piracy prosecutions, the presumptive uniformity of punishment has been replaced with a massive international variance in both actual and possible punishments. The cross-jurisdictional differences appear to have little to do with the underlying conduct or culpability of the pirates, but rather with variations in the municipal statutes, sentencing norms, and judicial views of the nations that happen to take custody of them.

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<sup>1</sup> For example, the law of nations required that piracy had to be committed from onboard one ship to another. Thus passengers who attempted to seize or steal from their own vessels could not be pirates, though their crimes would otherwise be identical. The United Nations Convention on the Law of the Sea (UNCLOS) preserves the “two ship” rule. However, UNCLOS has arguably expanded the scope of the crime from robbery to any “acts of violence.”

The variability in piracy sentencing has both conceptual and practical implications for anti-piracy efforts. It raises the question of what kind of international crime piracy is; is it like robbery and other “ordinary” crimes? Or more like torture, war crimes, and other international offenses? Practically, the variability shows that choices about where to prosecute—the courts of the captor, a regional nation that has specialized in such cases, or an international tribunal—have significant implications on the kinds of sentences pirates receive. While all of these forums apply the same law, they do not apply the same penalties. The choice of forum has generally been based on feasibility and convenience; a logistical or technical matter. The sentencing consideration—the ultimate goal of prosecution—has largely been absent from discussions of the optimal modalities for trying pirates.<sup>2</sup>

These sentences have ramifications beyond the immediate problem of Somali piracy. Uniformity in sentencing for international crimes has been a subject of growing interest to international lawyers in recent years. Sentencing for international crimes has long been criticized as inconsistent, lax, and generally incoherent—an “afterthought” to the imperative for prosecution.<sup>3</sup> Much of this criticism has focused on the sentencing practices of the ad hoc international tribunals. It has repeatedly been noted with some concern that the median and mean sentences in the International Tribunal for the Former Yugoslavia (ICTY) are considerably shorter than those in the Rwandan Tribunal (ICTR), despite their dealing with similar crimes.<sup>4</sup> Commentators have suggested that such disparate punishment poses problems with equity among defendants.

The sentencing equity problem may be more acute for piracy. The ICTY and ICTR operate under entirely different charters; they are as much separate legal universes as two different nations. Moreover, the charters of the tribunals adopt, as sentencing factors, the domestic sentencing practices for serious crimes from Yugoslavia and Rwanda respectively, thus building in some disparity.<sup>5</sup> Furthermore, while both charters include the same international offenses, the proportion of defendants charged with particular crimes varies considerably, with the ICTY having a larger war crimes docket and the ICTR seeing a much higher proportion of genocide cases, which are generally thought to be more egregious crimes.<sup>6</sup>

States that prosecute pirates under international law exercise a jurisdiction shared in common with the world. National courts act as agents of the international legal order.<sup>7</sup> This is not simply a

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<sup>2</sup> See Special Rapporteur on Legal Issues Related to Piracy off the Coast of Somalia. *Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia*, in letter dated Jan. 24, 2011 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2011/30 (Jan. 24, 2011) (by Jack Lang) [hereinafter *Lang Report*].

<sup>3</sup> Mark A. Drumbl, *Atrocity, Punishment, and International Law* 11 (2007).

<sup>4</sup> See Mark A. Drumbl & Kenneth S. Gallant, *Sentencing Policies and Practices in the International Criminal Tribunals*, 15 *FED. SENT’G REP.* 140, 142 (2002).

<sup>5</sup> International Criminal Tribunal for the Former Yugoslavia Statute, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993); Statute of the International Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

<sup>6</sup> Barbora Holá, Alette Smeulders & Catrien Bijleveld, *International Sentencing Facts and Figures: Sentencing Practice at the ICTY and ICTR*, 9 *J Int’l Crim. Just.* 411 (2011).

<sup>7</sup> See Quincy Wright, *War Criminals*, 39 *AM. J. INT’L L.* 257, 280, 282 (1945).

fanciful turn of phrase, but a legal reality. For non-international crimes, countries generally adhere to some version of the multiple sovereignties principle, whereby if a single act violates the laws of multiple nations, each one can prosecute separately and cumulatively.<sup>8</sup> The international double-jeopardy prohibition—*non bis in idem*—applies to piracy and other universal jurisdiction crimes<sup>9</sup>:

Robbery on the seas is considered an offence within the criminal jurisdiction of all nations. It is against all, and punished by all; and there can be no doubt that the plea of *autre fois acquit* would be good in any civilized State, though resting on a prosecution instituted in the Courts of any other civilized State.<sup>10</sup>

Thus the major disparities in sentences for Somali pirates should be considered as if they were variations within the courts of a single legal system, for the exact same crime. Similarly situated offenders from the same nation, engaged in the same course of conduct, and violating the same international law, face significantly variable punishments under international law depending on the place of prosecution. This raises concerns about equity as well as the substantive question of how to define the proper punitive standard.

Jurisdictional arbitrage by capturing states magnifies concerns about cross-forum inequities. Most pirates facing prosecution originate in Somalia, are captured by a vessel from another nation (typically European or American), and are sent for trial in the courts of a third nation, usually in the region. This means that in almost all universal jurisdiction cases, the sentencing forum is not merely determined by the accident of capture. Consider a case in which pirates were captured by France but transferred for trial to Seychelles. As will be explained, the transfer doubles the expected sentence of the defendants. Conversely, when the US transfers pirates to Kenya, the expected sentence is greatly reduced. Disparate national sentencing practices mean that such transfers are no longer simply tools of convenience and expedience, but measures taken with substantive and predictable penal implications and consequences.

This forum-shopping is particularly noteworthy because the United Nations Convention on the Law of the Sea (UNCLOS) itself only speaks of prosecution by the courts of the captor nation. Arguments have been made that UNCLOS does not authorize such transfers, and the practice has raised some controversy.<sup>11</sup> As the Lang Report notes, Art. 105 of UNCLOS does not establish a general universal jurisdiction, but rather one limited to the “jurisdiction of the state that carried

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<sup>8</sup> See generally Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Teaches About the Limits of the Alien Tort Statute*, 80 Notre Dame L. Rev. 111, 142-44 (2004). If double jeopardy barred such multiple prosecutions, defendants could seek out the most lenient jurisdiction and get off with a slap on the wrist. See *United States v. Lanza*, 260 U.S. 377, 385 (1922).

<sup>9</sup> Lang Report, *supra* note 2, at 34.

<sup>10</sup> *United States v. Furlong*, 18 U.S. 184, 197 (1820).

<sup>11</sup> See Kontorovich, *supra* note 8; but see Tullio Treves, *Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia*, 20 Eur. J. Int'l L. 399, 402 (2009).

out the seizure.”<sup>12</sup> There is also some evidence that captors select a place-of-trial forum not just for geographic convenience, but also keeping in mind the kind of justice and punishment the captured will receive.<sup>13</sup>

To be sure, as with the separate charters of the tribunals, UNCLOS suggests the inevitability of there being some sentencing disparities in piracy prosecutions by providing that the courts of the capturing state shall “decide” on the penalties.<sup>14</sup> This does not mean such disparities are consistent with the policy of UNCLOS. The treaty-makers regarded piracy as largely a thing of the past. At most they seem to have been concerned with opportunistic or one-off incidents, rather than a new “age of piracy.” They almost certainly did not contemplate a situation in which large numbers of defendants accused of engaging in a large-scale piratical enterprise in one region would be prosecuted in dozens of parallel cases in courts around the world. Moreover, Art. 105 does not mean that the significant observed variances in penalties are not troubling, or that national courts should not take into account the sentencing practices of other nations.

National courts have been involved in prosecuting other offenses against international law, often applying significantly different punitive norms than have parallel international tribunals.<sup>15</sup> Yet the current piracy situation is unique because national prosecution has been taking place in parallel, and not in one or two countries, but in more than a dozen. Indeed, the international community has made expanding the roster of forum states a priority, but this also increases sentencing variance.

Piracy presents a challenge to penal models and philosophies of international law. On one hand, piracy is clearly a threat to global order, to international cooperation and integration, and to humanitarian programs. Piracy is an extra-national and transnational crime; policing it is truly for the global public good. Yet it is also very much a simple economic crime, with a high human cost. Offenses dealt with by modern international criminal tribunals (ICTs) may be quite local in their impact, yet more morally egregious.

## II. History of Punishment

Piracy is perhaps the oldest international crime. It was the first, and for centuries the only, universal jurisdiction offense. Throughout the eighteenth and nineteenth centuries, execution was the presumptive international punishment. Indeed, the availability of the death penalty was one of

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<sup>12</sup> Lang Report, *supra* note 2, at 22, § 48. However, the Lang Report does go on to praise transfer-for-trial agreements without discussing their compatibility with the limited jurisdictional grounds he had previously mentioned. *See id.*, pg. 25, § 65.

<sup>13</sup> European Union Committee, Combating Somali Piracy: the EU's Naval Operation Atalanta: Evidence, 2009-10, H.L. 103, at 14 (U.K.) (recording parliamentary testimony of U.K. Minister of State for Africa, Asia, and the United Nations that transfer to Kenya served deterrent purposes because the “pirates... would probably prefer a British prison” to a Kenyan one).

<sup>14</sup> United Nations Convention on the Law of the Sea art. 106, Dec. 10, 1982, 1833 U.N.T.S. 397.

<sup>15</sup> For example, Rwandan courts applied the death penalty to *genocidaires* while the ICTR ruled out such punishment for even more high-ranking offenders.

piracy law's salient features. Chancellor Kent noted the "severity with which the law had animadverted upon this crime": pirates are "everywhere pursued and punished by death." International law even allowed for the extrajudicial killing of pirates when they were encountered on the high seas. Naval ships happening upon pirates could treat them as hostile enemies (literally *hostis humani generis*) and immediately resort to lethal force.<sup>16</sup> By the twentieth century, international lawyers came to see killing pirates without a trial as "inconsistent with the spirit of modern jurisprudence."<sup>17</sup> In today's anti-piracy efforts, nations generally apply a law enforcement model, greatly restricting the use of force.

As nations began to narrow or abolish the use of the death penalty, it became impossible to treat it as the default punishment for piracy. The United Kingdom, perhaps the world leader in suppressing piracy, abolished the death penalty for simple piracy in 1837, after the last major wave of piracy had abated.<sup>18</sup> The US made piracy punishable by death in its first criminal code in 1790. The penalty was lowered to life in prison with hard labor in 1897, and later the hard labor was dropped.<sup>19</sup> The same pattern played out in other Western nations. Today, the charters of the ICTY, ICTR, and International Criminal Court (ICC) rule out the death penalty even for the most serious international crimes, and so it would be hard to maintain that international law requires it for piracy.<sup>20</sup> When piracy was codified in the Law of the Sea Treaty in 1956, appropriate penalties were simply not mentioned.<sup>21</sup> When piracy seemed merely a hypothetical danger, such omissions were of no consequence.

Before the surge in Somali piracy and the subsequent international response, there were few, if any, international law prosecutions of piracy.<sup>22</sup> But even these scant cases demonstrated the massive variance in penalties across countries. China became the world leader in such prosecutions during a crackdown in the late 1990s and early 2000s. China exemplified the harsh approach to punishment: in a series of four or five cases, it imposed the death penalty in two of

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<sup>16</sup> 4 William Blackstone, *Commentaries on the Laws of England* 71 (1838) ("As therefore he has renounced all the benefits of society and government, and has reduced himself to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him[.]").

<sup>17</sup> See Harvard Research in International Law, *Draft Convention on Piracy*, (1932) 26 Am. J. Int'l L. (Suppl.) 825, 873 (disagreeing with support for summary proceedings expressed in draft report by League of Nations committee of experts).

<sup>18</sup> Britain retained the death penalty for "piracy with violence," which involves assault or attempted murder, until the total repeal of capital punishment in 1998.

<sup>19</sup> See Act of Jan. 15, 1897, ch. 29, 29 Stat. 487 (1897). Hard labor was dropped in 1918, leaving the current mandatory life sentence.

<sup>20</sup> Of course, whether international law *allows* capital punishment for international crimes is a separate question.

<sup>21</sup> The question of penalties simply did not arise during the years of discussions of the proposed treaty. See *Report of the International Law Commission to the General Assembly*, 11 U.N. GAOR Supp. No. 9, U.N. Doc. A/3159, reprinted in [1956] 2 Y.B. Int'l Law Comm'n 253, at 283, U.N. Doc. A/CN.4/SER.A/1956/Add.1 ("The Commission did not think it necessary to go into details concerning the penalties to be imposed and the other measures to be taken by the courts.").

<sup>22</sup> See Eugene Kontorovich & Steven Art, *An Empirical Examination of Universal Jurisdiction for Piracy* 104 Am. J. Int'l L. 436 (2010).

them, at one point executing 13 pirates.<sup>23</sup> These cases appear to be the only use of the death penalty for piracy under international law in recent decades. While China handed down these harsh sentences, India had also launched a then-unusual Universal Jurisdiction prosecution of Indonesian pirates for taking the Japanese-owned *Alondra Rainbow*. This case took the opposite approach of China's, sentencing the defendants to seven years in prison.<sup>24</sup>

The first international law prosecution of Somali pirates took place in 2006, when the USS *Winston S. Churchill* captured a group attacking an Indian bulk carrier. After some discussions, Kenya agreed to try the suspects. The defendants received seven-year sentences, which shocked the U.S. ambassador, who wrote in a cable that twice that would be a more appropriate punishment.<sup>25</sup> Nonetheless, as the number of piratical attacks increased, more nations sent Somalis to neighboring Kenya for trial.<sup>26</sup>

### III. Overview of the Data

The available data on international Somali pirate prosecutions covers 30 separate piratical incidents<sup>27</sup> involving 209 individual defendants and 39 separate sentences.<sup>28</sup> Pirate crews are typically tried and sentenced as a group, with all defendants receiving identical sentences. The difference between the number of incidents and sentence arises from a few cases in which members of a pirate crew were tried or sentenced separately, and differences in culpability or leadership roles are taken into account. Only some nations appear to regard individual sentencing as an option.

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<sup>23</sup> Keyuan Zou, *New Developments in the International Law of Piracy*, 8 CHINESE J. INT'L L. 323, 342-44, n. 83 (2009) ("In comparison with trials in other countries, the punishment imposed by Chinese courts is the most severe."); see also Zhu Lijiang, *The Chinese Universal Jurisdiction Clause: How Far Can it Go?*, 52 NETH. INT'L L. REV. 85 (2005). In another case, the pirates received sentences of 10–15 years.

<sup>24</sup> *India Shows the Way in Piracy Battle*, ASIA TIMES (Feb. 27, 2003), [http://www.atimes.com/atimes/South\\_Asia/EB27Df01.html](http://www.atimes.com/atimes/South_Asia/EB27Df01.html). The sentence was ultimately thrown out on appeal.

<sup>25</sup> Kevin J. Kelley, *How Kenya Backed Out of Piracy Trials*, Maritime Security Asia (Sept. 3, 2011), <http://maritimesecurity.asia/free-2/piracy-2/how-kenya-backed-out-of-piracy-trials/>.

<sup>26</sup> *EU Naval Force Welcomes Ruling on Piracy in Kenya*, Hiiraan Online (Oct. 1, 2010), [http://www.hiiraan.com/news2/2010/oct/eu\\_nval\\_force\\_welcomes\\_ruling\\_on\\_piracy\\_in\\_kenya.aspx](http://www.hiiraan.com/news2/2010/oct/eu_nval_force_welcomes_ruling_on_piracy_in_kenya.aspx) (eleven pirates sentenced to five years in prison in fourth Kenyan conviction); *Kenyan Piracy Court Sentences Seven Somali Pirates to Five Years in Jail*, Republic of Kenya (Sept. 8, 2010), [http://republicofkenya.org/2010/09/\\_kenyan\\_piracy\\_court\\_sentences\\_seven\\_somali\\_pirates\\_to\\_five\\_years\\_in\\_jail/](http://republicofkenya.org/2010/09/_kenyan_piracy_court_sentences_seven_somali_pirates_to_five_years_in_jail/) (seven Somali pirates sentenced to five years for attacking German vessel); *Somali Pirates Sentenced to Five Years in Kenya*, BBC NEWS (Sept. 24, 2010, 9:47 AM), <http://www.bbc.co.uk/news/world-africa-11407176> (reporting sentences for seven pirates in attack on Maltese-flagged merchant ship *Anny Petrakis*); NTV Kenya, *8 Pirates Handed 20-year Jail Sentence*, YOUTUBE (Mar. 11, 2010), <http://www.youtube.com/watch?v=Ej7mkOkLIRs>. Similarly, Yemen has prosecuted a group of pirates captured by the Russian navy after their attack on an Iranian vessel; they faced 5–10 year terms.

<sup>27</sup> This is not counting additional, prior attacks for which some of the defendants were also charged.

<sup>28</sup> The time period runs from 2006, when the first Somali prisoners were brought to a foreign court for trial, to the date of this report.

The cases come from ten different national jurisdictions outside of Somalia. Prosecutions by Somali courts have been excluded for several reasons.<sup>29</sup> First, trials in the defendant's home country do not raise the international law issues posed by piracy. The national court is not limited to punishing piracy on the high seas as a law of nations crime, and thus their sentences are not directly comparable to those in foreign cases. International concerns come in when the accused is tried by foreign powers.<sup>30</sup> Other reasons for excluding Somali cases are technical. There is little information on the details of these cases or on the sentences imposed, and there is some question whether prison sentences are actually being served. Similarly, prosecutions by other nations, such as Yemen, for maritime robbery within territorial waters are excluded because these are not piracy under international law. (A significant number of the Somali cases also seem to be territorial.) As a result, the number of convictions for piracy under international law examined by this study is significantly lower than the number reported by United Nations Office on Drugs and Crime (UNODC) and widely cited elsewhere.<sup>31</sup>

The data does not differentiate plea bargains from convictions after trial. Moreover, it only reflects the original sentences imposed at the trial level, without regard to subsequent appeals, largely because many cases still have pending appeals, and because the availability and nature of appellate review varies across jurisdictions. The study focuses on sentencing; so even if a case were subsequently thrown out on appeal, it would be included here.

Obviously the data should be approached with caution. Two nations account for nearly half of the convictions, and most nations that have convicted pirates have only done so in one or two cases, and their sentences may not be typical. Moreover, international prosecution of Somali pirates is still a new phenomenon, and the existing data may not be predictive of future trends. There are numerous pending cases in new jurisdictions which may have more severe penalties, and in some cases the most severe.<sup>32</sup> Yet the sentencing disparities already merit attention before they become more severe or entrenched, in case policymakers and courts have any interest in mitigating them.

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<sup>29</sup> Convictions by Somali courts represent the vast majority of cases worldwide, with UNODC reporting over 300 convictions, more than double the rest of the world's amount.

<sup>30</sup> Often pirates are convicted in foreign courts on municipal law charges in addition to the charge of piracy on the high seas, or in some cases are charged with multiple counts of piracy. The numbers here are the total sentence, except for concurrent sentences. In two cases, the data reflects actual rather than nominal sentences: in the Spanish case, the combined sentence exceeded the maximum total sentence allowed under Spanish law. In such cases, the legal maximum becomes the effective sentence. Similarly, the U.A.E. case ended in a life sentence but with instructions to deport the pirates after a period of years.

<sup>31</sup> UNODC counts Omani and Yemeni cases as piracy despite their taking place in territorial waters.

<sup>32</sup> Julia Zappei, *Somali Pirates Face Death Sentences in Malaysia*, The Jakarta Globe (Feb. 11, 2011), <http://www.thejakartaglobe.com/home/somali-pirates-face-death-sentences-in-malaysia/422152>; *Somali Pirates Could Face Prosecution in Malaysia, South Korea*, CHANNEL NEWS ASIA (Jan. 26, 2011, 2:58 AM), [http://www.channelnewsasia.com/stories/afp\\_asiapacific/view/1106905/1/.html](http://www.channelnewsasia.com/stories/afp_asiapacific/view/1106905/1/.html).

## IV. General Findings

A complete table of pirate sentences can be found in Appendix A.

- The longest and shortest sentences for similar acts of piracy by Somalis spans the entire spectrum of possible jail times, from 4.5 or 5 years in Kenya, the Netherlands, and Yemen, to life in the US and the UAE.
- The mean sentence worldwide is 16 years, slightly less on a per-defendant basis.<sup>33</sup> There is a massive variance across sentences. The standard deviation in sentences is 15.2 years, nearly equal to the average sentence itself. Excluding the U.S. cases, which are dominated by life sentences, the mean sentence drops to 12.6 years, and the standard deviation to 10.8 years. Thus even with U.S. cases to one side, there is a massive variance in jail terms across nations.
- The Seychellois (and Korean) mean sentence is close to the global average, which makes sense as Seychelles has convicted the most pirates, and has applied sentencing norms that seem stricter than those of Europe but less severe than those of the US. On the other hand, the mean penalty in Kenya, the other major piracy forum, is nearly half the length of the global average. Similarly, European penalties (with the exception of Spain's) are anywhere from 1/3 to 2/3 the global average.
- The data also shows that the choice made by capturing states between transferring to Kenya or the Seychelles has significant penal consequences. Both countries have concluded enough cases to be able to speak somewhat confidently about their sentencing practices. Seychellois sentences are on average 50% longer than Kenyan ones.
- The numbers show piracy has quickly become the largest branch of international criminal law. The ICTY and ICTR have both sentenced slightly more than 60 defendants (and acquitted 10 each).<sup>34</sup> In a few years, Kenya and the Seychelles have sentenced almost as many international criminals as each of the tribunals have in their nearly two decades of operation. This is not to compare the gravity of the offenses involved, or the complexity of the proceedings. It does suggest that piracy as an international crime is one of unprecedented volume, and this volume will raise particular challenges that have not been fully addressed or even conceptualized.

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<sup>33</sup> Life sentences are difficult to account for in sentencing studies. Max M. Schanzenbach & Emerson H. Tiller, *Strategic Judging Under the U.S. Sentencing Guidelines: Positive Political Theory and Evidence*, 23 J.L. ECON. & ORG. 24, 35 n.34 (2007). In this study they have been somewhat arbitrarily calculated as a 60-year sentence for data purposes, because of the youth of the defendants. See James Meernik, *Sentencing Rationales and Judicial Decision Making at the International Criminal Tribunals*, 92 SOC. SCI. Q. 588, 601 (2011).

<sup>34</sup> *Key Figures*, ICTY – TPIY, <http://www.icty.org/sections/TheCases/KeyFigures> (last updated Feb. 3, 2012); *Status of Cases*, International Criminal Tribunal for Rwanda – UNICTR, <http://www.unictcr.org/Cases/tabid/204/Default.aspx> (last visited June 3, 2012).

- Piracy is, on average, punished under international law as severely as some of the gravest international crimes. Thus, worldwide, the mean sentence for piracy is equivalent to the average sentence (16 years) of the ICTY, which also prosecuted war crimes, ethnic cleansing, and other serious international crimes. However, pirate sentences worldwide are significantly less than those imposed by the ICTR because of the latter's extensive use of life sentences.<sup>35</sup> The mean pirate sentence internationally also approximates the average penalties imposed by the East Timor and Kosovo international tribunals.<sup>36</sup> The mean pirate sentence is also approximately half of the International Criminal Court's presumptive maximum sentence for the "most serious crimes of international concern."<sup>37</sup> At the same time, given the variance in sentences, in practice pirates are being punished either much more leniently or more severely than serious international criminals before international tribunals.

## V. Sentencing Factors

This section will examine the kind of qualitative factors courts have identified as relevant to pirate sentencing.<sup>38</sup> Two kinds of factors seem to affect sentences; one varies across countries, and the other varies across pirates. First, different nations have different sentencing norms, reflected in statutory sentencing ranges and judicial practices and attitudes in using their discretion within those ranges. Second, cases of piracy also vary in their specifics; while all involve "acts of violence" against another vessel, the level and extent of that violence can range from merely speeding towards a targeted ship and attempting to board; to firing at it, successfully boarding and taking hostages; or even to abusing or injuring the crew or rescuers. There are also a variety of sentencing factors that are routinely invoked by pirates, such as their young age, the desperate situation in their homeland, their legal counsel, and so forth.

Differences in sentencing statutes and policies seem to explain some of the variance across jurisdictions (see Appendix B). This is clearest in the U.S. example, where a life sentence can be both the mandatory minimum and maximum sentence. Indeed, while the US has a reputation for relatively strict criminal punishment, life sentences are quite uncommon in the federal system,<sup>39</sup> and mandatory minimum life sentences for first-time convicts are reserved for aggravated murder.<sup>40</sup> Similarly, European countries tend to have significantly lower maximum penalties for

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<sup>35</sup> Even for non-life terms, the average ICTR sentence is almost 25 years.

<sup>36</sup> Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 557-58 (2005).

<sup>37</sup> Rome Statute of the International Criminal Court Arts. 1, 77 (1998) 2187 U.N.T.S. 90.

<sup>38</sup> The discussion is based on written opinions in cases from Kenya, Seychelles, the Netherlands, Spain and the United States. Information on other jurisdictions is less extensive and comes from news reports.

<sup>39</sup> In 2009, for example, only 0.3% of federal defendants sentenced by a judge received life terms.

<sup>40</sup> Despite the mandatory sentence in the piracy statute, there is nothing mechanistic about these sentences. The cases result from a combination of the defendants not pleading guilty and a policy decision by the U.S. Attorney to press piracy charges in addition to the numerous other indictable counts.

piracy (for example, 15 years in Germany; 12 in the Netherlands— or 15 when lethal force is used; and in Italy 14, or 20 for the captain).

By contrast, Seychellois and Kenyan maximum sentences are 30 years and life, respectively. It bears noting that Kenya's sentences are particularly short in relation to the statutory maximum. Even in nations with relatively low maximum sentences, the maximum penalties are generally not imposed. Thus in the European and regional prosecutions, prosecutors typically requested much stiffer sentences, and appealed shorter ones.<sup>41</sup> In other words, it does not appear that jurisdictions with higher ranges strive for convergence by sentencing at the top of the range, or that those with lower ranges impose the strictest ones they can. This tends to reinforce the impression that sentences are almost entirely determined by local sentencing norms, rather than punishments in the international justice system or other prosecutions of Somali pirates in other fora. Indeed, national courts explicitly refer to past sentences of Somali pirates in their own jurisdictions as benchmarks. However, national courts make no mention of sentences in other nations, even in universal jurisdiction cases. National courts taking into consideration the sentencing practices of foreign courts in similar cases might be a solution.

Despite the disparity in outcomes, national courts take into account similar aggravating and mitigating circumstances. Some of these circumstances are quite ordinary. Courts consider the youth of the defendants, status as (presumably) first-time offenders, and the desperate economic and social circumstances in Somalia.<sup>42</sup> Perhaps the biggest variable is the level of violence used. Kenyan and Seychellois courts have treated an exchange of fire, injuries to the crew or vessel, or even the intimidation of the crew as aggravating factors. Attacks are said to be more serious the further they progress; thus while attempts are regarded as piracy, the failure of an attack is treated as mitigating. The leniency towards simple attempts is part of a broader pattern. There is a correlation between sentence length and the length of detention of the vessel, and the consequent deprivation of liberty of the crew, with attempts obviously not resulting in any detention of the vessel (see Appendix C).

One open question relates to how to conceptualize the gravity of the offense. Pirates could be regarded as ordinary robbers who happen to fall under international criminal law because of the location of their crimes, or as part of a serious threat to international security. Courts have

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<sup>41</sup> Alice Baghdjian, *German Prosecutor Urges Jail in Somali Piracy Trial*, REUTERS (Jan. 25, 2012, 6:32 PM), <http://uk.reuters.com/article/2012/01/25/uk-germany-pirates-idUKTRE80O22U20120125>; *Somali Pirates Plead Innocence in Paris Trial*, REUTERS (May 22, 2012, 3:16 PM), <http://af.reuters.com/article/topNews/idAFJJOE84L0AG20120522>; *Pirates somaliens du Carré d'As: appel du parquet de Paris, vers un nouveau procès*, L'EXPRESS.FR (May 12, 2011, 4:07 PM), [http://www.lexpress.fr/actualites/1/societe/pirates-somaliens-du-carre-d-as-appel-du-parquet-de-paris-vers-un-nouveau-proces\\_1058123.html](http://www.lexpress.fr/actualites/1/societe/pirates-somaliens-du-carre-d-as-appel-du-parquet-de-paris-vers-un-nouveau-proces_1058123.html).

<sup>42</sup> There has been some discussion of pursuing pirate ringleaders and financiers with greater severity. Sentencing practice in the ICTY and ICTR supports the notion that sentence length should be related to the leadership role of the defendant. Given that with the exception of one U.S. case, all the defendants in this study have been "foot soldiers" rather than masterminds, there is no reason to think that prosecuting states would not impose relatively stiffer sentences for the latter, were they to get them into custody.

adopted the latter approach. Thus a Dutch court noted the steep increase in pirate attacks since 2008, and concluded that “piracy is now a serious threat to the internationally acknowledged right to free passage in international waters.”<sup>43</sup> Similarly, the Seychellois courts have observed in sentencing that “we must not forget that the enormity of the threat that piracy poses to maritime enterprise is phenomenal and has the potential to disrupt international law, order and maritime security environment at sea, which in turn impacts on the international system of trade.”<sup>44</sup> Seychellois courts have also spoken of “the adverse effects of this offence on humanity.” A Kenyan court said “Piracy in this region has become a menace...this calls for a deterrent sentence.”<sup>45</sup> Interestingly, while all of these courts say they wish to impose a tough deterrent sentence that takes into account the broader security implications, the actual sentences vary greatly, suggesting one nation’s severity is another’s leniency.

Some sentencing considerations relate directly to the exercise of universal jurisdiction. One might expect this would be an aggravating factor—universal jurisdiction is thought to be a hallmark of the seriousness of an international crime. Interestingly, courts have treated this as a mitigating factor, because it involves incarceration in a country far from one’s home and with which one has no previous ties.<sup>46</sup> Even in universal jurisdiction cases, one forum may have a greater nexus with the crime than others, and this can impact sentencing. Thus Seychellois courts specifically take into account, as an aggravating factor, the significant impact of Somali piracy on their nation’s economy, which has seen tourism and fishing revenues drop sharply.<sup>47</sup> Surprising, perhaps, for an international criminal charge, is that Seychellois courts have emphasized that Somali piracy “adversely affects our country,” and that the judiciary must “play its role” in punishing piracy with the appropriate severity. Again, this underscores that the choice of which nation to transfer pirates to has substantive consequences for the defendants.

## VI. Policy Considerations

The empirical data does not address the question of what the appropriate penalties should be. Criminal punishment serves two primary purposes—retribution (making the punishment fit the crime), and deterrence. The unusual circumstances of the Somali piracy prosecutions raise a variety of difficult issues about the deterrent effect and retributive justice of various penalties. There are several competing concerns. Low penalties may significantly under-deter and even

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<sup>43</sup> Rb Rotterdam [District Court of Rotterdam], 17 June 2010, NJFS 2010, 230 m.nt. (Neth.) [hereinafter *Samanyolu*], translation available at [http://www.unicri.it/maritime\\_piracy/docs/Netherlands\\_2010\\_Crim\\_No\\_10\\_6000\\_12\\_09%20Judgment.pdf](http://www.unicri.it/maritime_piracy/docs/Netherlands_2010_Crim_No_10_6000_12_09%20Judgment.pdf), at 12.

<sup>44</sup> Republic of Seychelles v. Ahmed, (Criminal Side No. 21 of 2011) [2011] (30 June 2011) (Sey.) [hereinafter *Gloria*], available at [http://www.unicri.it/maritime\\_piracy/docs/Seychelles\\_2011\\_Crim\\_No\\_21%20\(2011\)%20Sentence.pdf](http://www.unicri.it/maritime_piracy/docs/Seychelles_2011_Crim_No_21%20(2011)%20Sentence.pdf), at 2.

<sup>45</sup> Republic of Kenya v. Ahmed (2010) (K.C.M.C.) (Kenya) [hereinafter *MV Powerful*], available at [http://www.unicri.it/maritime\\_piracy/docs/Kenya\\_2010\\_Crim\\_No\\_3486%20\(2008\)%20Judgment.pdf](http://www.unicri.it/maritime_piracy/docs/Kenya_2010_Crim_No_3486%20(2008)%20Judgment.pdf), at 30.

<sup>46</sup> *Samanyolu*, supra note 43, at 12; *Gloria*, supra note 44.

<sup>47</sup> Hon. Mr. J. Duncan Gaswaga, Head of Criminal Div., Supreme Court, Sey., Presentation at the Judicial Learning Exchange Program: National Experiences and Challenges in Prosecuting Piracy Cases: Seychelles (Dec. 2011).

encourage piracy; on the other hand, high ones may not treat it comparably to other international law crimes or factor in underlying culpability.

Obviously retributive norms only make sense within the context of some legal systems—in comparison to other offenses—and retributive norms clearly vary widely across nations. Perhaps a useful benchmark can be found in other international law offenses. While it has not been made explicit in treaties, international tribunals have in practice created a hierarchy of international crimes by gravity, from war crimes to genocide. The abstract gravity of the crime, as a category, is an important determinant of sentences. It takes nothing away from the seriousness of Somali piracy or the suffering of its thousands of victims to suggest that the offense is at the bottom of this hierarchy. That is, as a class, the crime of piracy is less severe than violations of the Geneva Conventions. Moreover, pirate defendants are typically “foot soldiers,” another major factor indicating shorter sentences in international courts. Yet piracy sentences are, on average, comparable to those for war crimes and crimes against humanity. This suggests that only the low-end sentences of 5-10 years—and not the average and above-average sentences—properly reflect the gravity of the offenses.

Turning to deterrence: even if U.S.-style penalties are unduly harsh from the perspective of culpability, the opposite approach creates particular problems of inadequate deterrence. Depending on the forum, it may even give rise to the unusual possibility of negative deterrence. Somali pirates come from one of the poorest nations on earth. The reward to the lowliest pirate assisting in a single operation could exceed his total future non-piratical earnings.<sup>48</sup> Spending several years in a Western prison would not be a significant deterrent, particularly with the prospect of being released while still young. On the contrary, the differences in quality of life between Somalia and the West mean that a prison in the latter is like a palace in the former. Interviews with pirates facing trial in the Netherlands find them saying “life is good.” As the attorney for one of pirates explained: “My client feels safe here. His own village is dominated by poverty and sharia but here he has good food and can play football and watch television. He thinks the lavatory in his cell is fantastic.”<sup>49</sup>

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<sup>48</sup> Indeed, according to some estimates, even when adjusted for the risk of imprisonment or death, pirates earn career incomes 60 to 70 times greater than those of other opportunities in Somalia. GEOPOLICITY, *THE ECONOMICS OF PIRACY: PIRATE RANSOMS & LIVELIHOODS OFF THE COAST OF SOMALIA*, 11–12 (May 2012), available at [http://www.geopolicity.com/upload/content/pub\\_1305229189\\_regular.pdf](http://www.geopolicity.com/upload/content/pub_1305229189_regular.pdf).

<sup>49</sup> Bruno Waterfield, *Somali Pirates Embrace Capture as Route to Europe*, TELEGRAPH (May 19, 2009, 2:30 PM), <http://www.telegraph.co.uk/news/worldnews/piracy/5350183/Somali-pirates-embrace-capture-as-route-to-Europe.html>; and the Seychelles, in a case not involving universal jurisdiction, imposed a 10-year sentence on a group of pirates that had attempted to seize a Seychellois coast guard vessel. *Somali Pirates Sentenced to 10 Years in Seychelles*, BBC NEWS (July 26, 2010, 12:05 PM), <http://www.bbc.co.uk/news/world-africa-10763605>. (In another case, the Seychelles imposed a 20-year sentence, but immediately released the pirates to Somali custody in what appeared to be a swap for Seychellois fishermen held by the pirate gangs.)

Similarly, a pirate on trial in Hamburg said he would “not go back to Somalia for a million dollars,” and explained that his capture was the best thing that had ever happened to him.<sup>50</sup> Indeed, some pirates on trial in Europe have applied for asylum in the prosecuting nation. Thus, typical European punishments may, in effect, be consolation prizes for failed pirate attacks. On the other hand, if Western nations were to apply heavier penalties, they might be more reluctant to arrest and prosecute pirates in the first place. The burden of custody and extended responsibility over convicted pirates is one of the reasons for the prevalence of “catch and release;” stiffer penalties could result in less net punishment.

## VII. Conclusion & Recommendations

Disparate sentencing practices for similar crimes raise questions around fairness, especially when the prosecutions are self-consciously being conducted as part of an *international* effort to suppress Somali piracy. The large variance in sentences across jurisdictions tends to weaken the deterrent value of such punishment by making the kind of sanctions they might actually face less predictable to potential pirates. Finally, the significant discrepancies show both some of the difficulties and some of the benefits of folding pirate prosecutions into a more formal system of international criminal justice, such as a dedicated extraterritorial tribunal, a “mixed court,” and so forth. On one hand this could provide greater uniformity. On the other hand, more explicitly linking piracy to the patchwork of international criminal courts could collapse the hierarchy of crimes.

However, despite its apparent aberrancy, the current chaotic punishment system may be preferable to the alternatives. International law typically defines the elements of a crime but leaves the specification of the proper punishment and other secondary issues to domestic law. The lack of fully specified offenses arises in part from a lack of consensus over these secondary issues. Furthermore, when a nation undertakes to “domesticate” international crimes, it expects to do so on terms similar to those dealing with other offenses. Nations have diverse penal norms, and do not like imposing punishments inconsistent in scale. Domestic courts are likely to care as much or more about vertical equity (within the national criminal system) than about horizontal (international).

For example, a European nation that has an across-the-board maximum sentence would find it very unjust to prosecute a pirate facing a life-sentence—such a nation would simply rather not prosecute in the first place. Similarly, in the US, where non-violent crimes can often get sentences of 15 or 25 years, a five-year sentence for piracy would seem unjust, and the nation would prefer not to enforce the international crime penalties rather than do so in ways that create domestic inequities. While penalties in the United States are unusually (but not uniquely) severe,

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<sup>50</sup> Beate Lakotta, *Torture? Execution? German Justice Through the Eyes of a Somali Pirate*, SPIEGEL ONLINE (Apr. 7, 2011), <http://www.spiegel.de/international/world/0,1518,755340,00.html>.

the legislature's prerogative to separately determine the punishment for piracy is actually cemented in the Constitution itself.

Another implication of the disparities uncovered here is that there are costs to increasing the number of prosecuting states. While doing so obviously spreads costs, it also comes at the perhaps inevitable expense of serious punitive inequities. For prosecutorial fora, more is not always merrier, especially as cost-spreading could be effected through more direct financial mechanisms.

As the international community continues to grapple with judicial sanctions for piracy, the results of this study would support the following policies:

- A. Courts should take into account the sentencing practices of parallel fora, particularly in universal jurisdiction cases. Given the numerous and diverse policy-based and equitable factors cited in sentencing—the international threat of piracy, its harm to local economies, the ages and alienage of the defendants—it would not be anomalous to add some interest in international penalty convergence as a sentencing factor within the often broad range of the statutory discretion.
- B. Disparities have the greatest normative significance when the defendants have been transferred by the capturing state. UNCLOS Art. 105 authorizes the courts of the capturing state to determine the penalties. Thus disparities are built into the system. Yet transfer to the courts of a third state introduces a degree of disparity and plurality in sentencing not explicitly contemplated by Art. 105. In a world of sentencing disparities, the choice of forums made by a capturing nation entails a decision about penalties. Thus suspected pirates could be transferred “up” the severity gradient. This suggests that one previously unappreciated advantage of a dedicated international piracy tribunal or chamber would be the elimination of sentencing disparities. The creation of such a court was recommended by the Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia (S/2011/30).<sup>51</sup>

In the absence of such a court, the data presented here may lend support to the creation of “specialized anti-piracy courts,” as recommended in the Report of the Secretary-General on specialized anti-piracy courts in Somalia and other states in the region (S/2012/50), which advocates enlisting regional states as prosecution centers.<sup>52</sup> The sole use of such centers could,

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<sup>51</sup> UNSC ‘Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia’ (2011) UN Doc S/2011/30 p 38-45. Proposal 25 suggests the creation of a piracy court to “strengthen the rule of law in Somalia by establishing a court system comprising a specialized court in Puntland, a specialized court in Somaliland and an extraterritorial Somali specialized court.” For the purpose of reducing sentencing disparities through centralization, the location or nationality of the court does not matter.

<sup>52</sup> The Report defines a “specialized anti-piracy court” as one “operating under national law, with international assistance and with a focus on the prosecution of piracy offences.” S/2012/50 at para. 3.

from the perspective of sentencing disparities, be preferable to a mix of capturing-state and regional prosecution.

The United Nations Development Programme, the United Nations Office on Drugs and Crime and the European Union have been developing regional states as prosecution centers. Kenya was, for a year, a de facto international prosecution center. In March of 2010 Kenya withdrew from a 2009 prosecution scheme, but the country continues to accept suspects from naval states on a case-by-case basis. Since then, the current approach to prosecution in regional states has been to enlist as many nations as possible to divide the burden among them. While this approach has advantages, it may come at the expense of sentencing consistency. Thus developing one or two regional states as prosecution centers may be preferable to having a larger number. Some regional states have already expressed the view that they have each taken more than their fair share of the burden. Thus an interest in sentencing uniformity might militate for greater contributions to those states in order to offset disproportionate efforts.

**APPENDIX A**  
**Sentences by Region**

	<b>Min. Sentence</b>	<b>Max. Sentence</b>	<b>Mean</b>
Global	4.5	60	18.85
Europe	5	30	9.75
United States	30	60	29.00
Regional	4.5	60	23.88

## **APPENDIX B**

### **Severity of Crime**

<b>Level of violence</b>	<b>Min. Sentence</b>	<b>Max. Sentence</b>	<b>Mean</b>
Attempt	5	20	7.13
Shots fired	4.5	60	8.59
Detention	5.5	34	21.88
Assault/injury	5	24	29.50
Death	13	60	34.33

  

<b>Hours Aboard</b>	<b>Min. Sentence</b>	<b>Max. Sentence</b>	<b>Mean</b>
0	5	20	5.38
1-100	12	60	21.25
101-200	7	60	26.60
Over 200	5	30	34.33



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