



Preventing and prosecuting piracy at sea: legal issues

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The resurgence in piracy at sea, particularly hijackings off the coast of Somalia, has prompted a range of efforts to tackle it. These throw up a series of legal issues including the use of force and transferring of suspects for trial or imprisonment.

Naval patrols act as deterrents, using their powers under international law to board vessels where piracy is suspected, and detaining people and either releasing or transferring them for trial. Piracy off the coast of Somalia is not generally viewed as an armed conflict, meaning that only reasonable and necessary force can be used in self-defence. But navies cannot protect every ship, even by putting personnel on board merchant ships.

Shipowners are therefore increasingly turning to private security companies (PSCs) to provide armed guards for their vessels. Private armed security guards (PASGs) cannot board vessels and detain suspected pirates, but they seem to be an effective deterrent – no ship with PASGs on board has been hijacked. The UK has recently changed its position to allow PASGs on UK flagged international passenger ships and large cargo ships in high-risk areas, and has issued interim guidance. However, there are various legal questions around using PASGs at sea. When can they use force, and to what extent? Who gives the order to use force? How can they transport their weapons legally? There are also practical questions such as whether using PASGs would escalate levels of violence, whether they would make non-guarded ships more vulnerable, and whether PSCs should be regulated and accredited.

Prosecuting suspected pirates is seen as a major potential deterrent. Under international law any country can prosecute piracy on the high seas; but in practice few do so unless there are national interests at stake, and many suspected pirates are released without trial. The UK has brought no Somali suspected pirates to the UK for prosecution. Practical capacity (courts, trained judges and particularly prison spaces) and political will are sometimes lacking in countries that might prosecute. Other issues include gathering sufficient evidence for prosecution, and human rights of suspected pirates (including those transferred from one country to another). There is also the question of whether prosecuting the 'foot soldiers' is enough – can more be done to prosecute pirate leaders and financiers?

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Increasing Somalia's capacity to prosecute its pirates is a main thrust of international efforts, but even with this support it will be many years before Somalia can deal with all suspects. Several countries around Somalia have agreed to prosecute suspected pirates but capacity – particularly prison space – is still an issue. Proposals for an extraterritorial Somali court have encountered significant practical problems, and there is little support for an international piracy court.

Library Standard Notes covering related issues include: [Piracy at sea: overview and policy responses](#); [Somalia: recent political, security and humanitarian developments](#); and [Does Somali piracy have any 'developmental effects'?](#). The House of Commons Foreign Affairs Committee reported on [Piracy off the coast of Somalia](#) in January 2012, and the Government's response to its recommendations is due in March 2012.

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1 Prevention

Much of the international effort to counter piracy has focused on prevention and protection at sea. Naval patrols act as deterrents, using their powers under international law to board vessels where piracy is suspected, detaining people and using force. But navies cannot protect every ship, even by putting personnel on board merchant ships, and shipowners are increasingly turning to private armed security guards (PASGs). PASGs cannot board vessels or detain suspected pirates, but they seem to be an effective deterrent. The UK has recently changed its position to allow PASGs on UK flagged vessels, and issued interim guidance. However, there are various legal and practical questions around using PASGs at sea.

1.1 What legal powers do naval forces have?

International law gives states considerable powers to counter piracy, which is defined as:

- an illegal act of violence, detention or depredation
- on the high seas
- committed for private ends
- by a private vessel against another vessel.¹

The definition also includes cruising with pirate intent,² and inciting or intentionally facilitating piracy.³

The main provisions are in the 1982 UN *Convention on the Law of the Sea* (UNCLOS), which the UK has ratified. UNCLOS is generally accepted as codifying the customary international law of piracy, meaning that even states which are not party to UNCLOS accept and are bound by these rules.⁴

The *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*⁵ (the SUA Convention) and its Protocols provide an overlapping set of powers. Although the SUA Convention was passed in response to an internal hijacking of a vessel, and concerns about terrorism at sea, it contains a broad offence of seizing a ship by force, threat or intimidation, which would often apply in piracy cases.

Visiting and boarding vessels

On the high seas, any government vessel⁶ from any country may visit and board a vessel suspected of piracy.⁷ This is an exception to the ordinarily rule that only a ship's flag state has jurisdiction over it.

The 2005 Protocol to the SUA Convention provides additional powers of boarding with the flag state's consent, but the UK has not ratified this protocol.⁸

¹ UNCLOS article 101

² UNCLOS articles 101(b) and 103 – Dr Douglas Guilfoyle's summary

³ UNCLOS article 101(c)

⁴ 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 80

⁵ 27 ILM 668

⁶ ie warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorised to that effect (UNCLOS article 107)

⁷ UNCLOS articles 92(1), 110

⁸ IMO, *Status of conventions*, 31 January 2012

Detaining suspects and seizing vessels and property

Where evidence of piracy is discovered, the government vessel may seize a pirate ship or aircraft, arrest the persons responsible and seize property on board.⁹ They do not need the consent of the ship's flag state or of any other state.

However, they cannot pursue the ship into territorial waters (up to 12 nautical miles from coastal baselines) without consent of the coastal state or other authority. In territorial waters (for example at the southern end of the Red Sea in the territorial waters of Eritrea, Yemen and Djibouti), the military is allowed only innocent passage: it can go to assistance of ship being attacked or when requested to intervene, but cannot conduct patrols.¹⁰

In the case of Somalia, a series of UN Security Council resolutions¹¹ has allowed states cooperating with the Transitional Federal Government of Somalia (TFG) to pursue and capture pirates in Somali territorial waters and on Somali land, and to summarily dispose of equipment suspected of being used for piracy. As at 3 October 2011, no state or regional organisation had notified the UN of permission from the TFG to take action in Somali territory.¹²

Using force

Government forces may use force against pirates on the high seas under UNCLOS. They may also do so in Somali territorial waters and on Somali land (with permission of the TFG):

States and regional organizations cooperating in the fight against piracy and armed robbery at sea off the coast of Somalia for which advance notification has been provided by the TFG to the Secretary-General may undertake **all necessary measures** [my bold] that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea, pursuant to the request of the TFG, provided, however, that any measures undertaken pursuant to the authority of this paragraph shall be undertaken consistent with applicable international humanitarian and human rights law.¹³

An April 2009 Chatham House paper concluded that international law provides sufficient authority for government vessels to use force to suppress piracy in the high seas.¹⁴ But there is a question about the degree of force allowed, and whether it can be pre-emptive or only defensive.

If piracy off Somalia is viewed as armed conflict, then the rules of international humanitarian law would apply. Under these rules, enemy combatants and military objectives are lawful targets: the former may be killed and the latter destroyed. By contrast, civilians and civilian objects may not be targeted. Nor may civilians participate actively in the fighting. If they do, they lose their civilian status and may be lawfully targeted.¹⁵

⁹ UNCLOS Article 105

¹⁰ Major General Buster Howes, 22 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, Q87

¹¹ Eg Security Council Resolutions 1816 (2008), 1846(2008), 1851(2008) and 1897 (2009)

¹² [Report of the Secretary-General pursuant to Security Council resolution 1950 \(2010\)](#), S/2011/662, 25 October 2011, p3

¹³ UNSC Resolution 1851(2008) para 6, continued in force most recently by Resolution 2020 (2011)

¹⁴ Chatham House, *Pirates and How to Deal With Them*, 22 April 2009, p8

¹⁵ See [Drone attacks and the killing of Anwar al-Awlaqi: legal issues](#), Library Standard Note 6165, 20 December 2011

In practice warships operating off Somalia seem to resort to the use of weapons only in response to the use (or threat) of weapons.¹⁶ Currently, government vessels (whether naval or coastguard, or naval combined with police) appear to view their role as a police function against the criminal activity of piracy. In that case, the degree of force used must not exceed that reasonably required in the circumstances:

International law ... requires that the use of force must be avoided as far as possible and, where force is inevitable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law.¹⁷

Dr Douglas Guilfoyle explains how this works in practice:

There is no absolute requirement that one exhaust all non-lethal methods before turning to potentially lethal force; warning shots are expected where possible but are not (and could not be) an absolute requirement. In some situations an imminent and serious threat will make the use of lethal force as a first recourse unavoidable, reasonable and necessary. The UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials summarise the general position well:

"[I]aw enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, [or] to prevent the perpetration of a particularly serious crime involving grave threat to life ..."

In practice, many navies have lawfully targeted and killed suspect pirates on precisely this basis, especially in situations of hostage rescue or where piracy suspects present an imminent threat but have not yet fired a weapon.¹⁸

The UK does not view piracy off the coast of Somalia as an armed conflict:

We are engaged in a constabulary task, and that is the fundamental guiding principle that constrains what we can do. So force can only be applied in self-defence and in a wholly proportionate and minimal fashion. [...] I am very clear where we stand in terms of both our ROE [Rules of Engagement] and the application of lethal violence.¹⁹

The Government considers for example that the navy cannot use force pre-emptively if it sees a skiff with suspected pirates on it.²⁰ Instead it uses deterrent techniques such as circling ships and sending in helicopters,²¹ and its powers to board and destroy suspected pirate ships.²² However, there have been reports in the press that the UK is considering air strikes against pirates and militants in Somalia.²³

The US has taken steps to protect its forces from actions against its forces involved in anti-piracy operations. The 2009 US Mariner and Vessel Protection Act aims to eliminate liability

¹⁶ Tullio Treves, "[Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia](#)", *European Journal of International Law* Vol 20 no 2 (2009), 399–414 at 412

¹⁷ International Tribunal for the Law of the Sea, *M/V Saiga No 2* [1999] ITLOS Rep 10, at para 155

¹⁸ 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 82

¹⁹ Major General Buster Howes, 22 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, Q85, Q96

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, Q246

²¹ See for example "[UK naval taskforce foils pirate mothership attack](#)", Royal Navy news, 12 January 2012

²² "[Navy team boards and destroys pirate ship](#)", *Defence news*, 3 October 2010

²³ "[Somali pirates take more risks and rethink tactics](#)", *Guardian*, 21 February 2012

for death or injury caused by the use of force during the self-defence of US mariners against acts of piracy, and the 2010 Coast Guard Authorization Act eliminates liability for monetary damages in some cases of self-defence against piracy at sea.²⁴

1.2 Using private armed security guards

Private armed security guards (PASGs) are an alternative to naval protection. They are seen as very effective: no ship with armed men on board has ever been successfully pirated. Around 15% to 35% of ships in high-risk areas now carry PASGs.²⁵

The UK's new position on PASGs on UK flagged vessels

On 30 October 2011 the Prime Minister David Cameron announced that UK flagged vessels would be allowed to carry PASGs to protect them from pirates.²⁶ This reversed the Government's previous discouragement of PASGs on UK flagged ships. The new policy applies only to international passenger ships and large cargo ships, and only in limited circumstances:

- when the ship is transiting the high seas throughout the high-risk area (an area bounded by Suez and the straits of Hormuz to the north, 10°S and 78°E); and
- the latest "Best Management Practices" is being followed fully but, on its own, is not deemed by the shipping company and the ship's master as sufficient to protect against acts of piracy; and
- the use of armed guards is assessed to reduce the risk to the lives and well-being of those onboard the ship.²⁷

Shortly afterwards, on 6 December 2011, the Government published [interim guidance on the use of private armed guards](#).²⁸ This covers:

- the factors to be included in the risk assessment;
- advice on selecting a private security company; and
- a requirement for the shipping company to produce a counter-piracy plan and submit a copy to the Department for Transport.²⁹

The interim guidance will be reviewed by December 2012. It has been criticised for lacking in detail,³⁰ and for potentially giving rise to "real practical difficulties for a UK-registered ship-owner who wants armed guards – almost certainly at short notice".³¹

A particular issue (covered in more detail below) is firearms licensing. In the UK, this involves both Home Office authorisations and potentially UK export and/or trade licences.

²⁴ Ploch *et al*, [Piracy off the Horn of Africa](#), US Congressional Research Service, April 2011, p30

²⁵ See Major General Buster Howes, 22 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, Q106, Q87, Q90; Ince & co, [Shipping e-brief](#), January 2012

²⁶ "Somali piracy: Armed guards to protect UK ships", [BBC news online](#), 30 September 2011

²⁷ [HC Deb 6 December 2011 cc23-4WS](#)

²⁸ Department for Transport, [Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend Against the Threat of Piracy in Exceptional Circumstances](#), November 2011

²⁹ Mike Penning, "Defending Against Piracy (UK Ships)", [HC Deb 6 December 2011 cc23-24WS](#)

³⁰ House of Commons Foreign Affairs Committee, [Piracy off the coast of Somalia](#), HC 1318 2010-12, 5 January 2012, paras 37-38

³¹ Ince & co, [Shipping e-brief](#), January 2012

Other countries use PASGs and/or Vessel Protection Detachments

It is for each flag State, individually, to decide whether or not PASGs should be authorised on ships flying their flag. In 2011 the International Maritime Organization (IMO) issued interim guidance and recommendations on PASGs, but this is “not intended to endorse or institutionalize the use of armed guards”.³² International coordination is needed because many companies use flags of other nations.

Several other European countries, including Norway and Cyprus, are putting in place measures to allow armed guards on vessels. Others, such as Greece and Germany, are reportedly likely to follow suit.³³

Some other countries, including France, Spain and Israel, place military personnel (known as Vessel Protection Detachments, VPDs) on civilian ships. This avoids some of the problems of using PASGs, and many shipowners would prefer it.³⁴ The UK has done this in the past but at the moment does not have troops available to do so. It estimates that it would take roughly 500 marines to provide VPDs for UK ships going through the high-risk area at any one time.³⁵

When can PASGs use force, and to what extent?

UK jurisdiction allows PASGs, like anyone, to use reasonable force for self-defence in certain circumstances. Crown Prosecution Service guidance for England and Wales says

It is important to ensure that all those acting reasonably and in good faith to defend themselves, their family, their property or in the prevention of crime or the apprehension of offenders are not prosecuted for such action.³⁶

Self-defence against pirates could entail using non-lethal measures, such as greasing or electrifying hand rails, putting barbed wire around the freeboard, or directing water or foam sprays at vulnerable areas of the ship. More high-tech measures include dazzle guns, which produce disorientating flashes; microwave guns, which heat up the skin causing discomfort but no long-term damage; and acoustic devices that can send a painful wave of sound hundreds of yards.³⁷

But PASGs are increasingly carrying guns and other lethal equipment. Whether this is lawful under UK law would depend on whether it was necessary and reasonable to do so. It has even been suggested that an attack by PASGs on a suspected pirate ship could be interpreted as an act of piracy itself.³⁸

The UK interim guidance provides little detail on when PASGs can lawfully use force:

If, with BMP [Best Management Practice] ship protection measures in place, the threat persists, the use of firearms by the security team may be considered as a final option.
[...]

³² IMO, “[IMO approves further interim guidance on privately contracted armed security personnel](#)”, 26 September 2011. The UK’s interim guidance follows the IMO guidance in most respects.

³³ Ince & co, [Shipping e-brief](#), January 2012

³⁴ Mark Brownrigg, Director-General, Chamber of Shipping, 22 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, Q32

³⁵ Captain David Reindorp, 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, Q261

³⁶ Crown Prosecution Service, [Self-Defence and the Prevention of Crime](#) [undated; viewed 21 February 2012]

³⁷ “[Security firms join Somali piracy fight](#)”, *Fox News*, 26 October 2008

³⁸ Chatham House, [Pirates and How to Deal With Them](#), 22 April 2009, p19

The shipping company and PSC [Private Security Company] must agree upon the rules for the use of force that the armed security personnel will operate within, based upon the applicable laws. All members of the armed security team must fully understand the rules of the use of force and comply with them.³⁹

The Foreign Affairs Committee considers that more guidance is needed on when PASGs can use force to defend a vessel under attack:

Guidance over the use of potentially lethal force should not be left to private companies to agree upon. We recommend that the change of policy be accompanied by clear, detailed and unambiguous guidance on the legal use of force for private armed guards defending a vessel under attack. This guidance should be consistent with the rules that would govern the use of force by members of the UK armed forces in similar circumstances, and should include:

- the circumstances in which private armed security guards faced with a clear threat of violence may respond with force, including lethal force, where proportionate and necessary, and
- examples of a "graduated response" to an attack, including confirmation that nothing in UK law or the CPS guidance requires a victim of pirate attack to await an aggressor's first blow before acting in self-defence.⁴⁰

The Committee's chairman, Richard Ottaway, illustrated these concerns:

There is a question to which everyone needs an answer, however. If a skiff is approaching a ship at high speed carrying pirates with rifles or rocket-propelled grenade launchers, can the armed guards on board the ship open fire?⁴¹

The international law firm Ince & co suggest that a unified and state-endorsed set of rules on the use of force would be beneficial:

Any use of arms must be governed by clear Rules for the Use of Force ("RUF"). There are as many RUFs as there are security companies and there must be some merit in trying to develop a uniform system which all companies and operators agree to follow. In our view, RUF should be attached to the contract and discussed in detail with the master and crew. Furthermore, they should be endorsed by the Flag State, whose laws we would expect to govern the use of force in deterring or preventing what is a criminal act. In the UK for example, lethal force is normally only allowed where there is serious and imminent threat to life. The decision to use lethal force must be reasonable and the force used proportionate.

Distinguishing between fishermen armed to protect themselves and pirates intent on hijacking a vessel should be possible but perhaps only at the last moment. There has undoubtedly been at least one incident where an armed security team have engaged a fishing boat with devastating effect.⁴²

Who gives the order to use force?

A ship's Master has ultimate authority on board. This includes the final decision on whether or not to have PASGs on board, and when they are armed. But the UK guidance states that

³⁹ Department for Transport, *Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend Against the Threat of Piracy in Exceptional Circumstances*, November 2011, paras 8.2, 8.4

⁴⁰ House of Commons Foreign Affairs Committee, *Piracy off the coast of Somalia*, HC 1318 2010-12, 5 January 2012, para 37

⁴¹ [HC Deb 9 February 2012 c525](#)

⁴² Ince & co, *Shipping e-brief*, January 2012

the security team leader can act without the Master's approval if there is no time; and that the Master does not have the final decision on whether or not to use lethal force:

The decision to use lethal force must lie with the person using force where they believe there to be a risk to human life. Neither the Master nor the security team leader can command a member of the security team against that person's own judgement to use lethal force or to not use lethal force.⁴³

Ince & co suggest that this could put the Master in breach of his safety obligations:

The use of armed force on a vessel must relate to the safety of the crew and the protection of the environment and yet, by employing armed guards, owners may be forcing masters to give up that discretion in breach of SOLAS Regulations. This could lead to issues arising under SOLAS, which at Article 34-1 provides:

"The Owner, Charterer, the Company operating the ship as defined in Regulation 1X/1 or any other person shall not prevent or restrict the Master of the ship from taking or executing any decision which, in the Master's professional judgment, is necessary for the safety of life at sea and protection of the marine environment".

This message is reinforced in the ISPS Code which states:

"At all times the master of a ship has the ultimate responsibility for the safety and security of the ship..."

This was reinforced graphically after the *Maersk Alabama* case in 2009, where Captain Phillips before the hearing of the Senate Foreign Relations Committee said:

"I am not comfortable giving command authority to others. In the heat of an attack, there can be only one final decision maker."

His comments seem to support the belief that masters will not be happy to give up any of their overall authority on board.

Owners, charterers and others should therefore give serious thought as to how they would deal with the issue of authority on board the vessel when considering employing armed guards.⁴⁴

What if PASGs are prosecuted for using force?

The UK guidance warns that PASGs using force could risk prosecution under the laws of the territory where the force was used or where the victim is from:

Having and complying with rules of use of force may serve to reduce the risk of armed guards acting unlawfully. However in the event that criminal charges (e.g. of grievous bodily harm, manslaughter or murder) are brought to court, proving that one acted within the agreed rules would not in itself serve as a defence. It would be for the court to decide whether the force used in the particular case was necessary.

The applicable laws governing the use of force will depend on the court where charges are brought, which may depend on where the offence took place and / or where the victim (or possibly the alleged perpetrator) is from.⁴⁵

⁴³ Department for Transport, *Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend Against the Threat of Piracy in Exceptional Circumstances*, November 2011, para 5.6

⁴⁴ Ince & co, *Piracy - issues arising from the use of armed guards*, 2011

⁴⁵ Department for Transport, *Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend Against the Threat of Piracy in Exceptional Circumstances*, November 2011, paras 8.6-7

In March 2010, for the first time, PASGs on a cargo-ship killed a Somali pirate attempting to attack a vessel.⁴⁶

And PASGs are not the only ones at risk of prosecution: two Italian marines are reportedly in custody in India following the fatal shooting of two fishermen who were mistaken for pirates. Italy insists that the marines have immunity, as their tanker was flying an Italian flag and was in international waters when the incident happened. But India wants to try the marines for murder under local laws.⁴⁷

How can PASGs carry weapons legally?

Before the new UK guidance was published, PASGs on UK flag ships were allowed to carry only shot guns and single-shot rifles (with certification). Now a private security company (PSC) employed to put armed guards on board UK ships can get Home Office authorisation for “prohibited firearms”.⁴⁸ The Home Office and police will carry out checks into the PSC and its personnel before granting an authorisation.⁴⁹ In addition, if the PSC is a British company, it will need UK export and/or trade licences to carry firearms, ammunition and other equipment. The shipping company might also need these licences.⁵⁰ One estimate is that it will take up to three months to complete the authorisation and licensing process.⁵¹

However, complying with UK laws might not be enough, as some ports may not accept foreign-licensed guns in their waters.⁵² Ince & co describe the need to comply with port states’ licensing laws as a “legal minefield”,⁵³ and Baltic Exchange suggest it is the “biggest barrier to the use of armed guards on board ships”:

There is anecdotal evidence of ships taking armed guards on board for journeys through the Gulf of Aden which subsequently have to dump weapons overboard prior to landing in a port hostile to the principle of weapons being carried on board ships.⁵⁴

The Foreign Affairs Committee recommended that the Government establish an agreement with port and coastal states around Somalia to allow PASGs to put weapons on and off ships going into the high risk area.⁵⁵

Might the use of PASGs have negative consequences?

Many in the shipping industry are not in favour of PASGs, or at least see significant risks in their use.⁵⁶

A practical concern with increased use of PASGs is that pirates might seek to match the increased level of arms. Piracy off the coast of Somalia has already become more violent, and the more protected ships become, the more the violence could escalate.⁵⁷

⁴⁶ Ploch *et al*, *Piracy off the Horn of Africa*, US Congressional Research Service, April 2011, p41

⁴⁷ “India court keeps Italian navy guards in 14-day custody”, *BBC news online*, 21 February 2012

⁴⁸ *Firearms Act 1968 s5*, as amended

⁴⁹ Mike Penning, “Defending Against Piracy (UK Ships)”, HC Deb 6 December 2011 cc23-24WS

⁵⁰ Department for Transport, *Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend Against the Threat of Piracy in Exceptional Circumstances*, November 2011, para 3.5

⁵¹ Ince & co, *Shipping e-brief*, January 2012

⁵² Richard Ottaway, letter to *The Times*, 16 January 2012

⁵³ Ince & co, *Piracy - issues arising from the use of armed guards*, 2011

⁵⁴ Baltic Exchange, 27 June 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 109

⁵⁵ House of Commons Foreign Affairs Committee, *Piracy off the coast of Somalia*, HC 1318 2010-12, 5 January 2012, para 43

⁵⁶ Stephen Askins, Ince & Co LLP, Supplementary written evidence to the House of Commons Foreign Affairs Committee, *Piracy off the coast of Somalia*, HC 1318 2010-12, 5 January 2012, Ev 64

Another fear is that arming more ships might make non-guarded ships more vulnerable. The majority of ships still do not carry PASGs. In some cases shipowners may calculate that the risk of having the ship hijacked and possibly having to pay a ransom does not justify the cost of hiring PASGs. In other cases the cargo might be too dangerous to have weapons and armed guards on board.⁵⁸ There is a risk that these vessels may become 'easy targets' in comparison to those with PASGs on board.

Should private security companies be regulated and accredited?

A recurring issue with private security companies is whether or how they should be regulated and accredited, to provide some quality control of the growing number of providers. There are reportedly now 120 companies offering private security services to ships, and this number is likely to rise.⁵⁹

Several witnesses to the Foreign Affairs Committee called for a system of accreditation, and the Committee itself recommended a national regulatory structure (either governmental or industry-based).⁶⁰

The UK does not have a recognised accreditation process for PSCs in the maritime sector, and has tended to adopt a self-regulatory approach. However, the Government is currently reviewing industry-based regulation (including for UK vessels at sea) in conjunction with Aerospace Defence and Security, the regulatory body for private military security companies.⁶¹ There are also various other attempts at providing industry standards, including by the Security Association for the Maritime Industry.⁶²

2 Prosecution

Prosecution of suspected pirates is another major limb in international counter-piracy efforts. If more were prosecuted and imprisoned, particularly in their home country or nearby, it would help counter the perception among many pirates that they will not suffer any negative consequences.

Under international law any country can prosecute piracy on the high seas. But in practice few do so unless there are national interests at stake: around 90% of suspected pirates detained by naval forces in multinational operations off Somalia are released without trial.⁶³ According to the Chamber of Shipping, "the repeated images of pirates being released without trial by naval forces, including by the Royal Navy, causes understandable derision".⁶⁴

⁵⁷ See for example 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, Q157; BCB International Ltd, written evidence to the House of Commons Foreign Affairs Committee, [Piracy off the coast of Somalia](#), HC 1318 2010-12, 5 January 2012, Ev 110

⁵⁸ See Nautilus International, written evidence to the House of Commons Foreign Affairs Committee, [Piracy off the coast of Somalia](#), HC 1318 2010-12, 5 January 2012, Ev 104; Ploch *et al*, [Piracy off the Horn of Africa](#), US Congressional Research Service, April 2011 p37

⁵⁹ "Somali piracy begets new security industry", [UPI.com](#), 14 February 2012

⁶⁰ House of Commons Foreign Affairs Committee, [Piracy off the coast of Somalia](#), HC 1318 2010-12, 5 January 2012, paras 39-40

⁶¹ See [HC Deb 21 Nov 2011c53W](#)

⁶² See Ince & co, [Shipping e-brief](#), January 2012

⁶³ House of Commons Foreign Affairs Committee, [Piracy off the coast of Somalia](#), HC 1318 2010-12, 5 January 2012, para 74

⁶⁴ House of Commons Foreign Affairs Committee, [Piracy off the coast of Somalia](#), HC 1318 2010-12, 5 January 2012, para 74

The UK has brought no Somali suspected pirates to the UK for trial even though British citizens have been taken hostage.⁶⁵

An initial difficulty is gathering sufficient evidence for prosecution. But perhaps the major obstacle is a lack of judicial and prison capacity. Other issues include the human rights of suspected pirates, especially those transferred from one country to another. Finally there is a question of whether the right people are being prosecuted.

Increasing Somalia's capacity to prosecute its pirates is a main thrust of international efforts, but even with this support it will be many years before Somalia can deal with all suspects. Several countries around Somalia have agreed to prosecute suspected pirates, with international support; but capacity – particularly prison space – is still an issue. Proposals for an extraterritorial Somali court have encountered several practical problems, and there is little support for an international piracy court.

2.1 Problems

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 courts⁶⁶.

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 States⁶⁷) 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.⁶⁸

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** [my bold] 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 "a certain latitude" to cooperate in suppressing piracy by means other than prosecution.⁶⁹

⁶⁵ 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, Q268

⁶⁶ [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

⁶⁷ See Ploch *et al*, *Piracy off the Horn of Africa*, US Congressional Research Service, April 2011, p2

⁶⁸ "Somali pirates jailed in Netherlands for Choizil hijack", *BBC news online*, 12 August 2011

⁶⁹ 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 82

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.⁷⁰ 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.⁷¹

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.⁷²

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.⁷³

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.⁷⁴

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

⁷⁰ [UN Security Council Resolution 1976 \(2011\)](#), preamble

⁷¹ [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

⁷² 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

⁷³ [Merchant Shipping and Maritime Security Act 1997 s26](#)

⁷⁴ 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

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.⁷⁵ 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.⁷⁶

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.⁷⁷ 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.⁷⁸

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.⁷⁹

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.⁸⁰

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

⁷⁵ 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

⁷⁶ 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

⁷⁷ House of Commons Foreign Affairs Committee, [Piracy off the coast of Somalia](#), HC 1318 2010-12, 5 January 2012, para 75

⁷⁸ "Britain's anti-piracy 'conveyor belt' stretches from Somalia to Seychelles and back", *Telegraph*, 22 February 2012

⁷⁹ House of Commons Foreign Affairs Committee, [Piracy off the coast of Somalia](#), HC 1318 2010-12, 5 January 2012, para 81

⁸⁰ 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

- 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.⁸¹
- 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 shipowners and PASGs.⁸²

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.⁸³

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.⁸⁴

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.⁸⁵
- 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.⁸⁶
- Lack of prison capacity. Somalia and other countries in the region have a shortage of prison spaces, and standards are often extremely poor.⁸⁷

Human rights issues

The treatment of captured pirates is subject to international human rights law. The European Convention on Human Rights (ECHR), for example, is generally agreed to apply to people within a state's effective control.⁸⁸ Other relevant treaties include the UN Convention Against Torture and the International Covenant on Civil and Political Rights. Possible issues include

⁸¹ UNODC, *Piracy: what are we doing?* [undated; viewed 22 February 2012]

⁸² [Report of the Secretary-General pursuant to Security Council resolution 1950 \(2010\)](#), S/2011/662, 25 October 2011, p10-12

⁸³ [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

⁸⁴ [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

⁸⁵ House of Commons Foreign Affairs Committee, *Piracy off the coast of Somalia*, HC 1318 2010-12, 5 January 2012, para 77

⁸⁶ [Report of the UN Secretary-General on the modalities for the establishment of specialized Somali anti-piracy courts](#), S/2011/360, 21 June 2011

⁸⁷ See [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

⁸⁸ Chatham House, *Pirates and How to Deal With Them*, 22 April 2009, p11

the length of time they can be detained, humane treatment, right to a fair trial, and prison conditions.

There are potential human rights issues in holding pirates at sea:

For those states which are parties to the European Convention on Human Rights, there is no legal problem with their public vessels holding pirates on board for the purpose of taking them to a proper jurisdiction for arrest and prosecution. There may, however, be a problem in relation to the holding of pirates on their own vessels, and not allowing them to go, for the purpose of disruption of piracy, rather than of detention for prosecution.⁸⁹

The European Court of Human Rights has held in the *Rigopoulos* and *Medveyev* cases that long periods of detention are not compatible with Article 5(3) ECHR, and has called for a legal framework for detention at sea.⁹⁰ Some countries (Germany, Kenya, Russia and Spain for example) have constitutional limits of one or two days from capture to appearance before a judge.⁹¹

Moreover, capturing countries must be confident that trials and prisons in the countries to which they transfer suspected pirates meet international human rights standards, otherwise the capturing country risks breaching its own human rights obligations. A 2008 case highlights these difficulties:

The Danish Navy ship *Absalon* on 17 September 2008 captured 10 pirates in the waters off Somalia. After six days' detention and the confiscation of their weapons, ladders, and other implements used to board ships, the Danish government decided to free the pirates by putting them ashore on a Somali beach. The Danish authorities had come to the conclusion that the pirates risked torture and the death penalty if surrendered to (whatever) Somali authorities. This was unacceptable, as Danish law prohibits the extradition of criminals when they may face the death penalty. Moreover, they were not ready to try them in Denmark as it would be difficult (in light of the possible abuses they would risk) to deport them back to Somalia after their sentences were served. It is clear that human rights considerations, or perhaps reasons of expediency presented as human rights concerns, prevailed over considerations concerning the fight against piracy.⁹²

The UNODC is helping Somalia and surrounding countries improve their criminal trials and prisons,⁹³ and the UK is helping with this:

Once a prisoner has been transferred to Kenya or Tanzania – we are doing this for UNODC – we make sure that the detention and court facilities, and the judicial system that is in place around this area of law are, if not up to western standards, of a much higher standard than in the region generally.⁹⁴

⁸⁹ Chatham House, *Pirates and How to Deal With Them*, 22 April 2009, p8

⁹⁰ See Tullio Treves, "Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia", *European Journal of International Law* Vol 20 no 2 (2009), 399–414 at 409

⁹¹ 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, p23

⁹² Tullio Treves, "Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia", *European Journal of International Law* Vol 20 no 2 (2009), 399–414 at 408

⁹³ UNODC, *Piracy: what are we doing?* [undated; viewed 22 February 2012]

⁹⁴ 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, Q286

The UNODC also sponsors a programme to visit all prisoners and keep an eye on their welfare.⁹⁵

Are the right people being prosecuted?

The people who are prosecuted for piracy are, in the main, the 'foot soldiers' rather than their superiors. Yet as far as Somalia is concerned, there are not actually very many people at the top: naval forces estimate that there are around 2,500 foot soldiers, 300 leaders of pirate attack groups and about 50 main pirate leaders, and that financing is provided by around 10 to 20 individuals.⁹⁶ The Monitoring Group of the Security Council Committee on the Somalia weapons embargo⁹⁷ has identified not only the key leaders of pirate militias and networks, but also their location and political connections. Many of them are reportedly in Somalia.⁹⁸

The London Conference on Somalia on 23 February 2012 emphasised the need to prosecute leaders and financiers:

We reiterated our determination to prosecute the kingpins of piracy. Recognising work already undertaken, we agreed to enhance coordination on illegal financial flows and to coordinate intelligence gathering and investigations. We noted the establishment of a Regional Anti-Piracy Prosecutions Intelligence Coordination Centre in the Seychelles.⁹⁹

2.2 Potential solutions

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 generally considered desirable that convicted persons serve their sentence as close to their family and community as possible.¹⁰⁰

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).¹⁰¹

⁹⁵ Chris Holtby, 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, Q288

⁹⁶ [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

⁹⁷ Under [UN Security Council resolution 751 \(1992\)](#)

⁹⁸ [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 IV

⁹⁹ FCO, [London Conference on Somalia: Communiqué](#), 23 February 2012

¹⁰⁰ 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

¹⁰¹ See [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

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.¹⁰²

The UNDP has a legal assistance programme which provides free legal advice and assistance to people in Somalia. It represented 107 suspected pirates in 2010-11.¹⁰³

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.¹⁰⁴

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,¹⁰⁵ 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.¹⁰⁶ 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

¹⁰² [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

¹⁰³ [Report of the Secretary-General pursuant to Security Council resolution 1950 \(2010\)](#), S/2011/662, 25 October 2011, p13

¹⁰⁴ "Britain's anti-piracy 'conveyor belt' stretches from Somalia to Seychelles and back", *Telegraph*, 22 February 2012

¹⁰⁵ [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

¹⁰⁶ 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

between competing potential jurisdictions.¹⁰⁷ 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, 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.¹⁰⁸

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.¹⁰⁹ Kenya is now accepting some suspects on a case-by-case basis where there is sufficient connection with Kenya.¹¹⁰

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.¹¹¹ 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.¹¹² Seychelles has now reached agreements with the TFG, Puntland and Somaliland to transfer convicted pirates back to serve their sentences, but implementation is proving slow,¹¹³ 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 Puntland 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.¹¹⁴

¹⁰⁷ 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

¹⁰⁸ 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

¹⁰⁹ Ploch *et al*, [Piracy off the Horn of Africa](#), US Congressional Research Service, April 2011, p35

¹¹⁰ 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

¹¹¹ See "Seychelles: Buoyant economy threatened by piracy woes", Seychelles government advertisement, [Financial Times](#), 23 February 2012

¹¹² [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

¹¹³ [Report of the Secretary-General pursuant to Security Council resolution 1950 \(2010\)](#), S/2011/662, 25 October 2011, p14

¹¹⁴ [HC Deb 9 February 2012 c575](#)

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.¹¹⁵

As well as Kenya and Seychelles, transfer agreements are being developed with Mauritius, Mozambique, South Africa, Tanzania and Uganda.¹¹⁶ 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.¹¹⁷

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.¹¹⁸

The UK has provided £5.3 million of funding for the UNODC’s capacity-building work in Somalia, Kenya and Seychelles.¹¹⁹

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 their sending state. They are used in the Caribbean against drugs-smuggling.¹²⁰ 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.¹²¹ Jack Lang, a UN special advisor on piracy, recommended a

¹¹⁵ 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

¹¹⁶ EU Foreign Affairs Council conclusions, 22 March 2010

¹¹⁷ 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

¹¹⁸ UNODC, *UNODC and piracy* [undated; viewed 22 February 2012]

¹¹⁹ 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

¹²⁰ 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

¹²¹ “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

specialised extraterritorial Somali piracy court in Tanzania (in addition to specialised piracy courts in Puntland and Somaliland).¹²² 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 report¹²³ to the Security Council in June 2011, in which he set out the legal and practical considerations of establishing an extraterritorial 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.¹²⁴

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.¹²⁵ These ideas have therefore attracted little practical support, and the focus has generally returned to strengthening existing court structures in Somalia and its neighbours.

¹²² 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

¹²³ *Report of the UN Secretary-General on the modalities for the establishment of specialized Somali anti-piracy courts*, S/2011/360, 21 June 2011

¹²⁴ *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

¹²⁵ 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

3 Questions to consider

The issues outlined above give rise to various questions, including:

Prevention

- Can the UK use force against pirates outside self-defence, for instance air strikes against pirate bases on land?
- Do UK forces and PASGs have sufficient legal protection if they use force?
- Are PASGs an effective solution or are the issues too problematic?
- Should more be done to help PASGs transport weapons?
- Should the UK make greater use of military Vessel Protection Detachments?

Prosecution

- Should the UK prosecute pirates itself?
- Does UK piracy law need to be changed?
- Are the rules and guidance on gathering evidence and transferring suspects for trial sufficiently clear and coordinated?
- Where should convicted pirates be imprisoned?
- Are human rights issues being given the appropriate consideration?
- Are the right people being prosecuted or should more effort be made to go after pirate 'kingpins'?
- Are there potential negative consequences to imposing particular laws and institutions on Somalia and other countries from without?

4 Further reading

House of Commons Library Standard Notes

[Piracy at sea: overview and policy responses](#), Standard Note 3794, 28 February 2012

[Somalia: recent political, security and humanitarian developments](#), Standard Note 6115, 28 February 2012

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Department for Transport, [Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend Against the Threat of Piracy in Exceptional Circumstances](#), November 2011

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House of Commons European Scrutiny Committee, "CSDP: Piracy off the coast of Somalia", ch 2 of [Eighth Report of 2009-10](#), HC 5-vii 2009-10, 2 February 2010

UN documents

UN Security Council [resolutions](#) on piracy off the coast of Somalia

[Report of the Secretary-General pursuant to Security Council resolution 1950 \(2010\)](#), S/2011/662, 25 October 2011

[Report of the UN Secretary-General on the modalities for the establishment of specialized Somali anti-piracy courts](#), S/2011/360, 21 June 2011

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

[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

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Ince & co, [Piracy – issues arising from the use of armed guards](#), 2011

Ploch *et al*, [Piracy off the Horn of Africa](#), US Congressional Research Service, April 2011

Douglas Guilfoyle, "Counter-piracy law enforcement and human rights", *International and Comparative Law Quarterly* vol 59 part 1, January 2010, p141

Douglas Guilfoyle, 'The Laws of War and the Fight against Somali Piracy: Combatants or Criminals?', *Opinio Juris*, November 2010 – see also subsequent debate

Tullio Treves, "Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia", *European Journal of International Law* Vol 20 no 2 (2009), 399–414

[Piracy and Legal Issues: Reconciling Public and Private Interests](#), Conference Report, Chatham House, October 2009

Chatham House, [Pirates and How to Deal With Them](#), 22 April 2009

[Suppressing maritime piracy](#): 2009 conference of the American Society for International Law