

# New perspectives on the centuries-old crime of piracy

**For centuries, states have invoked universal jurisdiction to prosecute piracy in local courts. Yet the past few years have seen a change in tide, with more countries essentially outsourcing piracy cases to specially set up courts in Mauritius, Kenya and Seychelles. Five days before the start of UAE Counter-Piracy Week 2014 in Dubai, Michael Scharf, interim dean at Case Western Reserve University School of Law and chair of the Public International Law and Policy Group's piracy working group, takes stock of recent perspectives on piracy.**

**How do you see the current state of piracy?**

Michael Scharf: There is a widespread belief that the international community has won the war on piracy. Although the world has seen a temporary downturn in Somali piracy in the past two years, the problem is likely to soon grow much worse as the international community begins to draw down its anti-pirate armada off the east coast of Africa in order to reposition those military assets for the fight against ISIS [self-proclaimed Islamic State] in Syria and Iraq. Meanwhile, piracy is proliferating to Africa's west coast, transforming the threat into a two-ocean challenge.

**The United Nations Convention on the Law of the Sea defines piracy and global leaders, like the International Maritime Organization (IMO) and the UN Office of Drugs and Crime (UNODC), are vocal about**



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**the issue. Why, then, do we lack international consensus on what constitutes piracy and how to prosecute it?**

MS: Piracy has been recognized as a crime for several hundred years, but modern piracy differs in tactics, means and objectives from its historic origins. The traditional definition that piracy is an attack by one vessel against another on the high seas for private ends does not cover many aspects of modern piracy. It does not, for example, extend the crime to those who facilitate piracy from dry land, including the kingpins who finance, recruit and organize pirate attacks.

**Legal scholar Matt Garrod is recently quoted as saying: "Piracy is a serious crime but it is robbery at sea, not a crime against humanity. Universal criminal jurisdiction never existed." Your response?**

MS: Garrod is half right. Historically, the pirate was classified as 'an enemy of all mankind', not because of the number of victims (as with crimes against humanity), but rather on two other grounds. First, piratical crimes were particularly heinous, often including rape, torture and ultimately murder. Piracy is not merely robbery at sea! Second, because pirates preyed on the ships of every state and were able to quickly flee from the scene of the crime and disappear into the high seas, the only way to combat piracy would be to grant every state 'universal' jurisdiction to apprehend and prosecute pirates when encountered. Usually states prosecuted pirates that attacked their flag ships under objective territorial jurisdiction, but there are historic precedents and many modern cases of states prosecuting pirates under universal jurisdiction.

**In 2013, a US appeals court upheld a 12-life sentences ruling for a Somali pirate who conducted hostage negotiations by cell phone during the fatal hijacking of an American yacht. In 2012, a German court found 10 Somalis guilty of acts of piracy for hijacking a German container ship and trying to hold the crew hostage; the accused got two- to seven-year sentences. Do courts heed each other's differing piracy rulings?**

MS: As Eugene Kontorovich explains in his chapter in my upcoming book, 'Prosecuting Maritime Piracy: Domestic Solutions to In-

ternational Crimes', since there is no international piracy court, piracy is prosecuted by national courts, often under universal jurisdiction. This has led to widely disparate sentences for similar conduct. Ever more frequently, foreign courts do read and often cite and quote each other's opinions on substantive matters, a phenomenon known as trans-judicial dialogue. But sentencing has always varied greatly from country to country and there doesn't seem to be much attention paid to foreign courts' sentences for piracy offences.

**Some countries have agreed to accept, prosecute and try suspected Somali pirates. How coordinated are their juridical procedures?**

MS: A team of experts from the Public International Law and Policy Group, including me, travelled to and worked with courts and prosecutors in Mauritius, Kenya and Seychelles over the past three years. These countries have recently enacted updated piracy laws, which do a good job of filling jurisdictional gaps and implementing best practices. The US, the EU, the UN Contact Group on Piracy of the Coast of Somalia (CGPCS) and UNODC have been providing financial and technical assistance to these countries to facilitate successful piracy prosecutions.

**In a memo, you urged the International Criminal Court to use its verdict for Congolese warlord Thomas Lubanga – convicted for recruiting and using child soldiers – as a precedent for prosecuting pirate kingpins who recruit and use children. What follow-up has there been?**

MS: Child piracy has become a major problem, in part because most countries practice a policy of 'catch and release' when they apprehend juvenile pirates at sea. Milena Sterio and I were asked to present that memo at the [April 2013] meeting of the CGPCS. We discussed with the several hundred experts there options for combating the recruitment and use of child pirates, including urging courts to make it an aggravating factor at sentencing if a defendant was engaged in piracy with juvenile pirates, as the Seychelles Court has done. To date, no court has indicted a pirate for the separate crime of recruiting and using child soldiers.