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THE PENALTIES FOR PIRACY:

AN EMPIRICAL STUDY OF NATIONAL PROSECUTION OF INTERNATIONAL CRIME

*By Eugene Kontorovich**

1. Introduction

The first several years of international efforts against Somali pirates were marked by nations' unwillingness to prosecute suspects, coupled with unsuccessful efforts to establish a one or more centralized international piracy courts. In the meantime and with little fanfare, numerous nations have begun prosecuting Somali pirates – they have now been tried and convicted in ten nations on four continents. Cases are pending in at least seven other nations, with more than 100 defendants in India alone. While anti-piracy patrols continue to release over 90% of captured suspects, nonetheless piracy *de jure gentium* trials have become a worldwide effort, and have reached levels unprecedented in modern times. Indeed, in terms of the number of defendants, piracy has quickly become the thickest part of the international criminal docket.

Yet the growth of pirate prosecution presents difficult challenges of its own. While the criminalization of piracy by international law is ancient and well-established, there is no international standard for the punishment to be imposed. As a result, the sentences imposed in the trials of Somali pirates around the world vary greatly. To be sure, one would not normally expect prosecutions of a particular international crime in different municipal systems to result in equivalent sentences. Yet with Somali piracy, the parallel proceedings in multiple countries involve a common pool or class of offenders, committing often interchangeable offenses within a single geopolitical context. A lack of a “minimum of uniformity and coherence in the sentencing of

* Professor, Northwestern University School of Law; Member, Institute for Advanced Study, School of Social Science. Another version of this paper was prepared as a discussion paper for the Oceans Beyond Piracy Project of the One Earth Future Foundation, and the author thanks Jon Bellish of OBP, and Gregory Barr of Northwestern University's Searle Center for their invaluable assistance.

international crimes” for similarly-situated defendants raises basic questions of fairness.¹ Some commentators argue that such uniformity is even required across different courts prosecuting international crimes.² Even if sharp variances in sentences across different municipal systems are not thought to raise questions of horizontal equity, they at least raise the question of the *preferable* approach to pirate punishment, from the perspective of retribution, deterrence and relative severity with other international crimes.

This Article presents an empirical study of worldwide sentencing for Somali pirates captured and tried outside of Somalia. It assembles an original dataset of all Somali pirate sentences by foreign courts, and examines the factors affecting the sentencing. Thus it responds to repeated calls for empirical research on international criminal law and sentencing.³ The paper contributes the understanding of the legal regime for piracy by identifying a previously unappreciated problem of horizontal inequity in multi-national prosecutions of Somali defendants. This problem will likely grow as more nations accept Somali pirates for trial.

Sentencing for international crimes has long been criticized as inconsistent, lax and generally incoherent – an “afterthought” to the imperative for prosecution.⁴ The Article contributes to the growing empirical literature on sentencing for international crimes, which has mostly focused on international tribunals.⁵ Unlike much of the recent work focusing on international tribunals, it finds a significant degree of variance that cannot be explained by the characteristics of the offense.⁶ This is particularly relevant to discussions of implicit hierarchies among international crimes.⁷ Empirical studies of ICTY and ICTRY sentencing discern an implicit

¹ Barbora Holá, Alette Smeulers & Catrien Bijleveld, *International Sentencing Facts and Figures: Sentencing Practice at the ICTY and ICTR*, 9 J. INT’L CRIM. JUST. 411, 439 (2011); cf. Antonio Cassese, *The ICTY: A Living and Vital Reality*, 2 J. INT’L CRIM. JUST. 585, 596 (2007).

² James Meernik, *Sentencing Rationales and Judicial Decision Making at the International Criminal Tribunals*, 92 SOC. SCI. Q. 588, 600 (2011).

³ MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 2-5 (2007); Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT’L L. 1, 30 (2012); Ralph Henham, *Developing Contextualized Rationales for Sentencing in International Criminal Trials: A Plea for Empirical Research*, 5 J. INT’L CRIM. JUST. 757 (2007).

⁴ See Drumbl, *supra* note 3, at 11.

⁵ See Shaffer & Ginsburg, *supra* note 3, at 27.

⁶ See e.g., Meernik, *supra* note 2; Holá *et. al.*, *supra* note 1.

⁷ See Margaret M. deGuzman, *Gravity and the Legitimacy of the International Court*, 32 FORD. INT’L L. J. 400 (2009); Allison Marston Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 Va. L. Rev. 415 (2001).

hierarchy of crimes.⁸ raises the question of what kind of international crime piracy is – it is more like robbery and other “ordinary” crimes,” or more like war crimes, torture and other international offenses. Moreover, the evidence about pirate sentencing suggests that there can be an international consensus about the a crime’s international illegality without a corresponding consensus on the severity or magnitude of the crime. It also suggests that the distributed prosecution of a single international criminal situation across multiple municipal courts raises potential problems of inequity to similarly situated defendants. This may be an inevitable consequence of a lack of an international tribunal, but it also suggests the challenges of establishing one.

Part 2 begins by explaining why sentence variance may be particularly problematic in the Somali piracy context. Part 3 sketches the history of punishment for piracy. Part 4 gives an overview of global sentencing for piracy and introduces the dataset of pirate convictions. Part 5 discusses the average sentences and other interesting aspects of the data. Part 6 examines the factors discussed by courts in their sentencing opinions, and then uses a multiple regression to see if these factors explain variance across cases. Part 7 turns to the question of what appropriate penalties should be based on retributive and deterrent considerations, and Part 8 concludes with some implications for anti-piracy policy and international sentencing theory.

2. The problem of sentences variance

Given that pirate sentencing takes place in multiple separate municipal systems, it bears considering whether any non-uniformities should be seen as even potentially problematic. It has been repeatedly noted with some concern that the median and mean sentences in the International Tribunal for the Former Yugoslavia are considerably lower than in the Rwandan Tribunal.⁹ The ICTY and ICTR operate under entirely different charters; they are as much separate legal universes as two different nations. Moreover, the charter of each Tribunal adopts as a sentencing factor the sentencing practice for serious crimes in the domestic Yugoslavia and

⁸ Kimi L. King and James D. Meernik, *Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia: Balancing International and Local Interests While Doing Justice*, at 22-25, in *THE LEGACY OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA*, BERT SWART, ET AL., EDS. (2011).

⁹ See Mark A. Drumbl & Kenneth S. Gallant, *Sentencing Policies and Practices in the International Criminal Tribunals*, 15 *FED. SENT’G REP.* 140, 142 (2002); Mark B. Harmon & Fergal Gaynor, *Ordinary Sentences for Extraordinary Crimes*, 5. *J. INT’L CRIM. JUST.* 683 (2007).

Rwanda respectively, thus building in some disparity.¹⁰ 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, generally thought to be more egregious crimes.¹¹ None the less, commentators have suggested that such disparate punishment poses problems of equity amongst defendants. The sentencing equity problem is even more acute for piracy.

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.¹² This is not simply a 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.¹³ The international double-jeopardy prohibition – *non bis in idem* – applies to piracy and other universal jurisdiction crimes¹⁴:

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.¹⁵

Thus the major disparities in sentences for Somali pirates can be viewed as if they were variations within the courts of a single legal system, for the exact same crime. Thus a group of similarly situated offenders from the

¹⁰ 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).

¹¹ *Hola, et al.*, *supra* note 1.

¹² See Quincy Wright, *War Criminals*, 39 AM. J. INT'L L. 257, 280, 282 (1945).

¹³ 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 doubled 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).

¹⁴ Lang Report, *supra* note 2, at 34.

¹⁵ *United States v. Furlong*, 18 U.S. 184, 197 (1820).

same nation, engaged in the same course of conduct, and violating the same international law, face significantly variable punishment under international law depending on the place of prosecution.

Jurisdictional arbitrage by capturing states magnifies concerns about cross-forum inequities. Some of the pirate prosecutions in the dataset involve defendants that attacked the forum nations' vessel. Yet the majority of convicted Somalis were captured by a vessel of one nationality (typically European or American), and sent for trial in the courts of a third nation, usually in the region. For most defendants, the sentencing forum is not determined merely by the accident of capture. Consider a case where pirates were captured by France, but transferred for trial to the Seychelles. Such a transfer *doubles* the defendants' expected sentence, from an average sentence of seven years in French courts, to nearly 15 in the Seychelles. Conversely, when the U.S. transfers pirates to Kenya, it greatly reduces their expected sentence, from life in prison to roughly nine years. Disparate national sentencing practices mean that such transfers are no longer simply tools of convenience and expedience, but measures with substantive and predictable penal implications and consequences.

This forum shopping is noteworthy because UNCLOS itself only speaks of prosecution by the courts of the captor nation. Arguments have been made that UNCLOS does not authorize such transfers, though state practice has clearly taken UNCLOS's language as permissive.¹⁶ As the Lang Report notes, Art. 105 does not establish a general universal jurisdiction, but rather one limited to the "jurisdiction of the state that carried out the seizure."¹⁷ There is some evidence that captors select place-of-trial fora not just with an eye to geographic convenience, but also to the kind of justice and punishment they will receive.¹⁸ The existence of sentencing disparities suggests that these choices significantly impact defendants.

¹⁶ See Eugene Kontorovich, "A Guantanamo on the Sea": *The Difficulties of Prosecuting Pirates and Terrorists*, 98 CALIF. L. REV. 234, 270-72 (2010); *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).

¹⁷ 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.

¹⁸ 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).

To be sure, as with the separate charters of the tribunals, UNCLOS suggests the inevitability of some sentencing disparities in piracy prosecutions, by providing that the courts of the capturing state shall “decide” on the penalties.¹⁹ This does not mean significant 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 where large numbers of defendants engaged in a large-scale piratical enterprise in a given region would be prosecuted in dozens of parallel cases in courts around the world. Moreover, the deference to the national courts in Art. 105 does not mean that significant observed variance in penalties is not troubling, or that courts should not take into account sentencing practices in other nations.

3. History of punishment.

Piracy is perhaps the oldest international crime. It was the first, and for centuries the only, universal jurisdiction offense. Throughout the 18th and 19th centuries, execution was the presumptive international punishment. Indeed, the availability of the death penalty was one of piracy law’s salient features. Chancellor Kent noted the “severity with which the law had animadverred upon this crime”: pirates are “everywhere pursued and punished by death.” International law even allowed for the extrajudicial killing of pirates when encountered on the high seas. Naval ships happening upon pirates could treat them as a hostile enemy (thus literally *hostis humani generis*) and immediately resort to lethal force.²⁰ By the 20th century, international lawyers came to see killing pirates without a trial as “inconsistent with the spirit of modern jurisprudence.”²¹ In today’s anti-piracy efforts, nations generally apply a law enforcement model, greatly restricting the use of force.

Similarly, as nations began to narrow or abolish 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

¹⁹ United Nations Convention on the Law of the Sea art. 106, Dec. 10, 1982, 1833 U.N.T.S. 397.

²⁰ 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[.]”).

²¹ 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).

the death penalty for simple piracy in 1837, after the last major wave of piracy had abated.²² The U.S. made piracy punishable by death 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.²³ The same pattern played out in other Western nations. Today, the charters of the ICTY, ICTR and International Criminal Court rule out the death penalty even for the most serious international crimes, and thus it would be hard to maintain that international law requires it for piracy.²⁴ When piracy was codified in the Law of the Sea Treaty in 1956, appropriate penalties were simply not mentioned.²⁵ When piracy seemed a mere hypothetical danger, such omissions would be of no consequence.

Before the surge in Somali piracy and subsequent international response, there were few if any international law prosecutions of piracy.²⁶ 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 them, at one point executing 13 pirates.²⁷ These cases appear to be the only use of the death penalty for piracy against foreigners under international law in recent decades. While China handed down these harsh sentences, India had also launched a then-unusual UJ prosecution of Indonesian pirates for taking the Japanese-owned *Alondra Rainbow*. This case took the opposite approach to China's, sentencing the defendants to seven years in prison.²⁸

²² Britain retained the death penalty for "piracy with violence," which involves assault or attempted murder, until the total repeal of capital punishment in 1998.

²³ See Act of Jan. 15, 1897, ch. 29, 29 Stat. 487 (1897). Hard labor was dropped in 1918, leaving the current mandatory life sentence.

²⁴ Of course, whether international law *allows* capital punishment for international crimes is a separate question.

²⁵ 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.").

²⁶ See Eugene Kontorovich & Steven Art, *An Empirical Examination of Universal Jurisdiction for Piracy* 104 AM. J. INT'L L. 436 (2010).

²⁷ 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.

²⁸ *India Shows the Way in Piracy Battle*, ASIA TIMES (Feb. 27, 2003), http://www.atimes.com/atimes/South_Asia/EB27Df01.html. The sentence was ultimately thrown out on appeal.

The first international law prosecution of Somali pirates took place in 2006, when the *U.S.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.²⁹ Nonetheless, as number of piratical attacks increased, more nations sent Somalis to neighboring Kenya for trial.³⁰ When that nation soured on the arrangement, the international community turned to the Seychelles, and then other regional states to accept pirates captured by multinational forces. At the same time, various European and other nations tentatively stepped into the gap, bringing some Somalis back to their courts, particularly in cases where their own ships had been attacked.

4. The Data

The available data on international Somali pirate prosecutions cover 30 separate piratical incidents,³¹ involving 209 individual defendants and 39 separate sentences.³² (See Table 1, *infra*.) The time period runs from 2006, when the first Somali prisoners were brought to a foreign court for trial, to the present, with the vast majority of sentences imposed since 2010. The cases come from ten different national jurisdictions outside of Somalia. Prosecutions by Somali courts have been excluded for several reasons.³³ 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 punished piracy on the high seas as a law of nations crime, and thus their sentences are not directly comparable to the

²⁹Kevin J. Kelley, *How Kenya Backed Out of Piracy Trials*, MARITIMESECURITY.ASIA (Sept. 3, 2011), <http://maritimesecurity.asia/free-2/piracy-2/how-kenya-backed-out-of-piracy-trials/>.

³⁰*EU Naval Force Welcomes Ruling on Piracy in Kenya*, HIIRAAAN ONLINE (Oct. 1, 2010), http://www.hiiraan.com/news2/2010/oct/eu_naval_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/ (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 sentence for seven pirates in attack on Maltese-flagged merchant ship *Anny Petrakis*); NTVKenya, *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 attacking an Iranian vessel; they faced 5-10 year terms.

³¹ This is not counting additional, prior attacks for which some of the defendants were also charged.

³²Typically, pirate crews are 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 where members of a pirate crew were tried or sentenced separately, and differences in culpability or leadership roles is taken into account. Only some nations appear to regard individual sentencing as an option.

³³ Convictions by Somali courts represent the vast majority of cases worldwide, with UNDOC reporting over 300 convictions, more than double the rest of the world's amount.

foreign cases. International concerns come in when the accused is tried by foreign powers.³⁴ 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 found by this study is significantly lower than the numbers reported by UNDOC and widely cited elsewhere.³⁵

The data does not differentiate plea bargains from convictions after trial. Moreover, it only reflects the original sentence 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 the convictions, and most countries that have convicted pirates have only done so in one or two cases. 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. Yet the sentencing penalties, and in some cases the disparities merit attention before they become more severe or entrenched, in case policymakers and courts have any interest in mitigating it. [See next page for Table 1 – could not put it here due to formatting issues.]

³⁴ Often pirates are convicted in foreign courts on municipal law charges in addition to piracy on the high seas, or in some cases charged with multiple counts of piracy. The numbers here are the total sentence, except for concurrent sentences.

³⁵ UNDOC counts Omani and Yemeni cases as piracy despite their taking place in territorial waters.

³⁶ 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 NEWSASIA (Jan. 26, 2011, 2:58 AM), http://www.channelnewsasia.com/stories/afp_asiapacific/view/1106905/1/.html.

Table 1 – Somali Pirate Convictions

Case ID	Vessel Name	Prosecuting	Flag State	Sentence	# of Ds	Max Sent.	Conviction D
Ned-1	Choizil	Netherlands	South Africa	5	3	12	Jul-07
Ned-2	Choizil	Netherlands	South Africa	6	1	12	Jul-07
Ned-3	Choizil	Netherlands	South Africa	7	1	12	Jul-07
Ned-4	Samanyolu	Netherlands	Dutch Antilles	5	5	12	May-08
Fr-3	LePonant	France	France	10	1		Jun-08
Fr-4	"" ""	""	""	7	1		"
Fr-5	"" ""	""		7	1		"
Fr-6	""""	""	""	4	1		""
Fr-1	Carre d'As IV	France	France	8	3		Oct-07
Fr-2	Carre d'As IV	France	France	5.5	2		Oct-07
Bel-1	Petra/Pompei	Belgium	Belgium	10	1	30	Sep-07
Esp-1	Alakrana	Spain	//Span owned	30	2	30	Apr-07
SK-1	Samho Jewelry	South Korea	Malta/ Kor owr	60	1		Apr-07
SK-2	Samho Jewelry	South Korea	Malta	15	1		Apr-07
SK-3	Samho Jewelry	South Korea	Malta	13	2		Apr-07
SK-4	Samho Jewelry	South Korea	Malta	12	1		Apr-07
UAE-1	Arrilah	UAE	Liberia/UAE ow	25	10	60	Apr-08
Sey-1	Topaz	Seychelles	Seychelles	10	11	30	Jun-08
Sey-2	Intertuna II	Seychelles	Seychelles/Spar	6	11	30	Oct-08
Sey-3	Galate	Seychelles	Seychelles/Iran	22	8	30	Nov-08
Sey-4	Talenduic	Seychelles	France	18	5	30	May-07
Sey-5	Draco	Seychelles	Seychelles	10	11	30	Sep-07
Sey-6	Gloria	Seychelles	Seychelles	24	6	30	Jun-07
Sey-7	Faith	Seychelles	Seychelles	20	10	30	Feb-07
Yem-1	Fishing vessels	Yemen	Yemen	5	10	60	Oct-06
Yem-2	Fishing vessels	Yemen	Yemen	12	13	60	Dec-06
Yem-3	""	Yemen	Yemen	12	6	60	Jun-06
Yem-4	""	""	""	5	1	60	Feb-07
Ken-1	Powerful	Kenya	Panama	20	8	60	Sep-06
Ken-2	Safmarine Asia	Kenya	Panama	5	11	60	Aug-06
Ken-3	Nepheli	Kenya	Panama	4.5	7	60	Sep-06
Ken-4	Spessart	Kenya	Germany	5	7	60	Aug-06
Ken-5	Anny Petrakis	Kenya	Malta	5	7	60	Aug-06
Ken-6	Pirate mothersh	Kenya	n/a	20	11	60	Mar-08
Ken-7	Safina al Bisarat	Kenya	India	7	10	60	2006
USA-1	Quest	United States	United States	60	12	60	Sep-07
USA-2	Maersk Alabam	United States	United States	34	1	60	Jan-07
USA-3	USS Nicholas	United States	United States	60	5	60	Feb-07
USA-4	USS Ashland	United States	United States	30	1	60	Oct-06

5. Basic Features of Pirate Sentencing

This section will outline some of the key features of the data. A complete table of pirate sentences can be found in Table 1, above.

- The high and low sentences for similar acts of piracy by Somalis spans the entire spectrum of possible jail times, from 4.5 or 5 years in Kenya, Holland, and Yemen, to life in the U.S. and U.A.E. The data reveals a sharp bifurcation between “lenient” European jurisdictions and the U.S. and a few other nations.
- The worldwide mean sentence is 16 years, slightly less on a per defendant basis.³⁷ 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 massive variance in jail terms across nations.
- The Seychellian (and Korean) mean sentence is close to the global average, which makes sense as that country has convicted the most pirates, and applied sentencing norms that seem stricter than Europe but less severe than the U.S. The mean penalty in Kenya, the other major piracy forum, on the other hand, is nearly half the global average. Similarly, European penalties are (with the exception of Spain) anywhere from 1/3 to 2/3 the global average.
- The data also show that the choice by capturing states between transfer to Kenya and the Seychelles has significant penal consequences. Both countries have concluded enough cases to be able to speak somewhat confidently about their sentencing practices. Seychellian sentences are on average 50% longer than Kenyan ones.

³⁷ 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 converted to 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).

- 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).³⁸ In a few years, Kenya and the Seychelles have sentenced almost as many international criminals as each of the tribunals 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 – the international criminal equivalent of street crime - and this volume will raise particular challenges that have not been fully address or even conceptualized.
- Piracy is, on average, punished under international law as severely as some of the gravest international crimes. Thus worldwide mean sentence for piracy is equivalent to the average sentence of the ICTY (16 years), which prosecuted war crimes, ethnic cleansing and other serious international crimes. However, worldwide pirate sentences are significantly less than those imposed by the ICTR, because of the latter’s extensive use of life sentences.³⁹ The mean pirate sentence internationally also approximates the average penalties imposed by the East Timor and Kosovo international tribunals.⁴⁰ It is also approximately half of the International Criminal Court’s presumptive maximum sentence for the “most serious crimes of international concern.”⁴¹ At the same time, given the variance in sentences, in practice pirates are being punished either much more leniently or severely than serious international criminals before international tribunals.

6. Sentencing factors

This section will examine the kind of qualitative factors courts have identified as relevant to pirate sentencing.⁴² Two kinds of factors seem to affect sentences; one which varies across countries, and the other

³⁸ *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.unicttr.org/Cases/tabid/204/Default.aspx> (last visited June 3, 2012).

³⁹ Even for non-life terms, the average ICTR sentence is almost 25 years.

⁴⁰ Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 557-58 (2005).

⁴¹ Rome Statute of the International Criminal Court Arts. 1, 77 (1998) 2187 U.N.T.S. 90.

⁴² The discussion is based on written opinions in cases from the Kenya, Seychelles, Holland, Spain and the United States. Information on other jurisdictions is less extensive and comes from news reports.

which varies across pirates. First, different nations have different sentencing norms, reflected both 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 a “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 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, and so forth.

Table 2 – Sentences by Place and Crime Characteristics

Global	202	4	60	16.80
Europe	22	4	30	8.45
United States	19	30	60	57.05
South Korea	5	13	60	23.20
Somali Region	156	4.5	60	12.88
Level of violence	N	Min. Sentence	Max Sentence	Mean
Attempt w/o shots	24	5	20	12.08
Shots fired	87	4.5	60	14.22
Detention	65	4	34	13.15
Assault/injury	11	5	24	15.64
Death	15	13	60	56.00
Hours Aboard	N	Min. Sentence	Max Sentence	Mean
0	101	5	20	12.65
1-100	70	12	60	25.43
101-200	19	4	60	11.26
Over 200	12	5	30	10.25

Differences in sentencing statutes and policies seem to explain some of the variance across jurisdictions (See Table 2). This is clearest in the U.S. example, where a life sentence is both the mandatory minimum and maximum sentence. Indeed, while the U.S. has a reputation for relatively strict criminal punishment, life sentences are quite uncommon in the federal system,⁴³ and mandatory minimum life sentences for first-time

⁴³ In 2009, for example, only 0.3% of federal defendants sentenced by a judge received life terms.

convicts are reserved for aggravated murder.⁴⁴ Similarly, European countries tend to have significantly lower maximum penalties for piracy (for example, 15 years in Germany; 12 in Holland, or 15 when lethal force is used; in Italy 14, or 20 for the captain).

By contrast, Seychellian and Kenyan maximum sentences are 30 years and life, respectively. It bears noting that Kenya's sentences are particularly low in relation to the statutory maximum. And 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 appeal lower ones.⁴⁵ 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 international justice or other prosecutions of Somali pirates in other fora. Indeed, national courts explicitly refer to past sentences of Somali pirates in their own jurisdiction as benchmarks. However, they make no mention of sentences in other nations, even in universal jurisdiction cases.

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, their status as (presumably) first-time offenders, and the desperate circumstances in Somalia.⁴⁶ Perhaps the biggest variable is the level of violence used. Kenyan and Seychellian courts have treated as aggravating factors

⁴⁴ Despite the mandatory sentence in the piracy statute, there is nothing mechanistic about these sentences. They cases result from a combination of the defendants not pleading guilty, and from a policy decision by the U.S. Attorney to press piracy charges in addition to the numerous other indictable counts.

⁴⁵ 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.

⁴⁶ 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.

an exchange of fire, injuries to the crew or vessel, or even the intimidation of the crew. Attacks are said to be more serious the further they progress; thus attempts are treated as mitigating.

One conceptual question relates to how to treat the abstract gravity of the offense. Pirates could be regarded as ordinary robbers that happen to fall within international criminal law because of the location of their crime, or as part of a serious threat to international security. Courts have 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.”⁴⁷ Similarly, the Seychellian 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.”⁴⁸ Seychellian courts have also spoken of “the adverse effects of this offence on humanity.” A Kenyan court has said, “Piracy in this region has become a menace... this calls for a deterrent sentence.”⁴⁹ Interestingly, while all these courts say they wish to impose a tough deterrent sentence taking 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, the courts have treated this as a mitigating factor, because it involves incarceration in a country far from one’s home with which one has no previous ties.⁵⁰ Even in universal jurisdiction cases, some fora will have a greater nexus with the crime than others, and this can impact sentencing. Thus Seychellian courts specifically take into account, as an aggravating factor, the significant

⁴⁷ 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, at 12.

⁴⁸ 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.

⁴⁹ 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.

⁵⁰ Samanyolu, *supra* note 43, at 12; Gloria, *supra* note 44.

impact of Somali piracy on their nation’s economy, which has seen tourism and fishing revenues drop sharply.⁵¹ Perhaps surprisingly for an international criminal charge, Seychellian courts have emphasized that Somali piracy “adversely affects our country,” and the judiciary must “play its role” in punishing it with the appropriate severity. Again, this underscores that the choice of nation to transfer pirates to has substantive consequences for the defendants.

While these sentencing factors may explain intra-forum variance (in the few nations with multiple cases), they do little to explain cross-national variance. To explore the possible effects of various factors, each conviction was coded for three independent binary variables - success (vs. attempt), use of violence, and exercise of universal jurisdiction. The dependent variable is sentence length per defendant, expressed in years. Each defendant is an observation. In a multiple regression of these variables, along with nine dummy variables, only success is significant (and predictably positive), along with several country dummies. (See Table 3, below – significant variables are in bold.) Moreover, the coefficient of success is smaller than any of the significant country variables. This suggests that neither the level of violence nor the use of UJ explain the overall variance in sentences. Moreover, differential treatment of attempts and successful attacks – a very basic distinction that supports the overall validity of the model – does explain some of the variance. However, country effects overshadow even the most salient case effects.

Table 3 – Piracy Sentences, Regression estimates

variable	Coef.	Std. Err.	t	P> t	[95% Conf. Interval]	
success	5.889671	1.249405	4.71	0.000	3.425349	8.353992
violence	-1.865146	1.231557	-1.51	0.132	-4.294265	.5639725
Univ. Jurs.	1.90375	2.425505	0.78	0.433	-2.880308	6.687807
France	-.2929607	3.786221	-0.08	0.938	-7.760889	7.174968

⁵¹ 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).

Belgium		2.707039	6.878375	0.39	0.694	-10.85984	16.27392
Spain		22.70704	5.167367	4.39	0.000	12.51494	32.89914
South Korea		17.77219	3.876658	4.58	0.000	10.12588	25.41849
U.A.E		17.70704	3.19584	5.54	0.000	11.40358	24.0105
Seychelles		11.09625	2.425505	4.57	0.000	6.312193	15.88031
Yemen		2.140373	2.732279	0.78	0.434	-3.248764	7.52951
Kenya		6.434468	2.653636	2.42	0.016	1.200447	11.66849
U.S.A.		52.89572	2.867226	18.45	0.000	47.24041	58.55103

$N = 209$.

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

Obviously retributive norms only make sense within the context of some legal system – in comparison to other offenses. And retributive norms clearly vary widely across nations. Perhaps a useful benchmark is 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 their gravity, from war crimes to genocide. The abstract gravity of the crime, as a category, is an important determinant of sentences. It takes away nothing 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 is less severe than violations of the Geneva Conventions. Moreover, pirate defendants are typically “foot soldiers,” another major factor indicating lower sentences in international courts. Yet their sentences are on average comparable to 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 offense.

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 for the lowliest pirate from a single operation could exceed his non-piratical future earnings for his entire life.⁵² Thus spending several years in a Western prison would not be a significant deterrent, particularly with the prospect of release while still young. On the contrary, the difference in quality of life between Somalia and the West means 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.⁵³

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 ever happened to him.⁵⁴ Indeed, 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 applied heavier penalties, they may be more reluctant to arrest and prosecute pirates in the first place. The burden of extended responsibility and

⁵² Indeed, according to some estimates, even when adjusted for the risk of imprisonment or death, pirates earn career incomes 60-70 times greater than their 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.

⁵³ 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 Seychellian 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 Seychellian fishermen held by the pirate gangs.)

⁵⁴ 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>.

custody over convicted pirates is one of the reasons for the prevalence of “catch and release.” Thus stiffer penalties could result in less net punishment.

8. Conclusion

Choices about where to prosecute pirates – be it the courts of the captor, a regional nation that has specialized in such cases, or an international tribunal – have significant implications for the kind of sentences pirates will receive. While all these fora apply the same law, they do not apply the same penalties. The choice of forum has been generally approached based on feasibility and convenience, as a logistical or technical matter. The sentencing consideration – the ultimate goal of prosecution – has been largely absent from discussions of the optimal modalities for trying pirates.

Disparate sentencing for similar crimes raises questions of 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 it less predictable to potential pirates what kind of sanctions they might actual face. However, despite its apparent aberrancy, the current chaotic punishment system may be preferable to the alternatives. The lack of international criminal sentencing guideline is itself a consequence of the lack of consensus over such secondary issues. When a nation undertakes to “domesticate” international crimes, it expects to do so on terms similar to how it deals with other offenses. Nations have diverse penal norms, and do not like imposing punishments inconsistent with their “scale.” Domestic courts are likely to care as much or more about vertical equity (within the national criminal system) than horizontal (international) ones.

For example, a European nation that has an across-the-board maximum sentence would find it very unjust to prosecute a pirate if he faced a life-sentence – such a nation would simply rather not prosecute in the first place. Similarly, in the U.S, where non-violent crimes can easily get 15- or 25-year sentences, a five-year sentence for pirates would seem unjust, and the nation would prefer not to enforce the international crime rather than do so in ways that create domestic inequities. While the United States’ penalties are unusually (but not

uniquely) severe, the legislature's prerogative to determine separately 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 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. The current approach to prosecution in regional states has been to enlist as many nations as possible to divide the burden between them. While this has advantages, it may come at the expense of sentencing consistency. Thus developing one or two regional states as prosecution centers may be preferable than a larger number. Some regional states have already expressed the view that they have taken more than their fair share of the burden. Thus an interest in sentencing uniformity might militate for greater contributions to those states to offset their disproportionate efforts.

Finally and most simply, courts should take into account the sentencing practices of parallel fora, particularly in universal jurisdiction cases. Given the numerous 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.