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Pirate 'Gaolbalisation': Dividing Responsibility Among Countries, Companies, and Criminals

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Pirate 'Gaolbalisation': Dividing Responsibility Among Countries, Companies, and Criminals

Eugene Kontorovich[*]

1. Introduction

Piracy is the prototypical 'universal' offence that injures many nations at once. A pirate attack will directly injure i) the victim vessel's flag state; ii) the victim vessel's owner's state; iii) the states of the typical multinational crew. Usually i)-iii) all involve different countries; and the pirates themselves hail from yet a fourth one. Moreover, pirate attacks result in significant increases in maritime insurance policies for the affected regions, thus spreading the cost of the problem even more broadly. On the high seas, where no nation has sovereignty, responses to piracy require shared responsibility. Alongside shared responsibility among nations, piracy introduces a second axis of distributed responsibility: the division of responsibility between states and private actors. Because pirates act outside of state territory and directly target private interests, the latter have a significant role in the response.

For nearly two centuries, piracy has received little attention in international law. Customary prohibitions were codified and somewhat expanded in the high seas regime of the United Nations Convention on the Law of the Sea (LOSC)[1] and its successors, but the subject was generally seen as an anachronism. A significant rise in piracy in several vital shipping lanes since the start of the 21st century has led nations to look for new solutions to the old problem, with relatively little legal guidance or recent precedent.

Especially in response to the surge in Somali piracy, nations have developed a unique model of shared responsibility that deserves further study. This complex regime has had the advantage of providing a prompt and relatively effect set of solutions to a pressing international problem. It also raises multidimensional problems of shared responsibility between the actors involved. First,

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[1] United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, in force 16 November 1994, 1833 UNTS 3 (LOSC).

private parties (shippers and security companies) have assumed primary responsibility for piracy suppression nominally allocated to states. Second, nations have divided their suppression role both horizontally and vertically, with apprehension, prosecution and incarceration of suspects each handled by different groups of nations. Let us call this 'gaolbalisation' – when globalisation, outsourcing and off-shoring meet gaol, or jail.

These arrangements are quite attractive from an efficiency perspective. At each stage, the most efficient provider of the relevant service assumes responsibility, accompanied with side-payments from the transferring nation and other interested parties, who essentially subcontracts parts of the criminal process to other countries. Yet the efficiency of such practices depends in part on mechanisms for assigning responsibility for international law violations, which still remain undeveloped because of the multilayered nature of the phenomenon. This Chapter examines such arrangements and the relevant positive law, but also assesses them from an efficiency perspective. Such explicit contractual arrangements to deal with a global public goods problem are an appropriate place to introduce economic logic into public international law.

2. *Ex ante* responsibility – suppression and deterrence

2.1 Role of states

The response to maritime piracy presents one of the most complex scenarios of shared responsibility in international law. Piracy involves stakeholders from multiple different nations – the flag state, the owners' state, the coastal state, the pirates' home state, and the apprehending state may all have some responsibility for responding to the problem. International law classifies pirates as *hostis humani generis* – enemies of all mankind.[2] This is reflected in the principal legal consequence of piracy. Any nation can stop and arrest pirates on the high seas,[3] and any nation may prosecute any pirates that fall in its hands.

Indeed, the United Nations Convention on the Law of the Sea treats piracy suppression as a

[2] See E. Kontorovich, 'The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation' (2004) 45 Harv ILJ 183.
[3] Article 105 LOSC, n. 1.

general *responsibility* incumbent on all states. In its first provision on piracy, dubbed '*Duty to cooperate in the repression of piracy*', the Convention provides that '[a]ll States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.'[4] The drafters' Commentary to the first Law of the Sea Convention stresses that 'any State having an opportunity [to take] measures against piracy, and neglecting to do so, would be failing in a duty laid upon it by international law'.[5] It also favourably cites the Harvard Draft Convention on Piracy, which went so far as to state that legal claims could be brought against any nation that does not take sufficient steps to bring pirates to justice.[6] This is strong and unusual language; international law rarely obligates nations to take particular actions against foreign or extraterritorial conduct. Moreover, the language of Article 100 LOSC speaks only of a duty to 'cooperate', which is much more nebulous than a duty to take particular measures, and Article 105 makes clear that *prosecution* itself is not obligatory.

Despite the 'duty' created by the LOSC and its Commentaries, state practice does not reveal or suggest any practical or concrete obligation upon countries. Failure to repress piracy may be in the abstract a breach of an international responsibility, which may fall on many states, but not an injury in itself. Certainly no legal claims have been brought for insufficient pirate suppression. The narrow interpretation of LOSC's general language may be attributable to the problems inherent with global, general duties.[7] When a duty to do a particular thing is laid upon all nations, it creates predictable collective action and free rider problems.[8] The failure of the Article 100 'duty' to find reflection in state practice underscores the difficult of widely shared, abstract duties toward unknown third parties.[9]

[4] Article 100 LOSC, n. 1(emphasis added).
[5] Report of the International Law Commission to the General Assembly, 11 UNGAOR 8th Sess., Supp. No. 9, UN Doc. A/3159 (1956), reprinted in ILC *Yearbook* 1956/II, A/CN.4/SER.A/1956/Add.l, 253, Commentary to Article 38, at 282, para. 2. The piracy provisions in the first Law of the Sea Convention were transferred directly to the 1982 LOSC, n. 1.
[6] Ibid., Commentary to Article 38, at 282, para. 1; see also Harvard Research in International Law, 'Draft Convention on Piracy and Comments' (1932) 26 AJIL (Supp.) 739.
[7] P.A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', (2013) 34 MIJIL 359.
[8] See E. Kontorovich, 'The Inefficiency of Universal Jurisdiction' (2008) Ill LR 389.
[9] The 'duty' to repress piracy may best be understood in the context of maritime law's unusual but longstanding tradition of affirmative duties of assistance on the high seas. The LOSC obligates vessels to come to the assistance of distressed mariners, see Article 98 LOSC, n. 1. The pirate suppression duty could be understood in a more limited sense in connection to the assistance duty, as applying to ships reasonably near a national warship, thus significantly

Instead, there is general agreement, as expressed in numerous United Nations (UN) resolutions, that the primary responsibility for suppressing piracy should fall on the pirate's home state – the place where the pirates are based.[10] The home state is generally speaking the cheapest cost-avoider.[11] Capturing pirates in the vast expanse of the high seas is haphazard and expensive. Even pirates spend most of their time on land, and this is where they are most easily located and captured. Because this occurs within the territory of a sovereign state, which has exclusive authority to police crimes within its borders, it also has the primary responsibility for doing so. Indeed, coastal states typically take the lead role in suppressing piracy – examples include Nigeria today and China a decade ago.

Yet sometimes coastal states have the political will but not necessarily the tactical resources to fully deal with a pirate problem. In such cases, it appears both efficient and expected for such countries to be offered assistance from affected and interested states. Thus the primary responsibility falls on the coastal state because it is the cheapest cost-avoider, yet those who wish the costs to be avoided can be expected to contribute. A well-regarded model of this developed in response to a surge of piracy in the Straits of Malacca at the turn of the millennia. Indonesia and Malaysia lacked the naval sophistication to catch the pirates. They were also very resistant to direct assistance by other nations, which they saw as interfering in their sovereign affairs. The much richer nations of Singapore and Japan provide resources, assets, and organised an effort that quickly suppressed the pirate problem.[12] The efforts were widely seen as a model of international cooperation – made possible by coastal states, and financed by regional states.

However, when the coastal state neglects to take appropriate measures to suppress pirates, it can expect to be held accountable by victim nations. The situation would pose the common problem of nations failing to prevent cross-border attacks from within their territory.[13] However, pirates

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reducing the problem of several responsibility (Article 100 LOSC speaks of 'states' and not their flagged vessels, and thus presumably only applies to warships).

[10] This practice follows the analogy to the general duty to render assistance discussed in the prior note. Article 98(2) of the LOSC imposes particular rescue duties on coastal states; pirates typically operate at least in part off the coast of their home state.

[11] See G. Calabresi, *The Cost of Accidents: A Legal and Economic Analysis* (New Haven: Yale University Press, 1970).

[12] P. Lehr (ed.), *Violence at Sea: Piracy in the Age of Global Terrorism* (London: Routledge, 2007); but see, C.Z. Raymond, 'Piracy And Armed Robbery In The Malacca Strait: A Problem Solved?' (2009) 62 NWCR 31.

[13] See, e.g., *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ Reports 1986, 14.

typically operate from very weak or failed states that *cannot* control their coastlines and for whom any liability imposed by international law would matter relatively little. Historically, pirates have always hidden in bays and harbours of weak states (classically, the weakly-held Caribbean possessions of the crumbling Spanish Empire). The victim states would complain to the coastal state, which would protest its inability to control the problem. Failed states are essentially judgment-proof.[14] Thus the easy answer of holding the coastal state responsible is sometimes not an option.

2.2 Private vs. public action

An important second axis of shared responsibility is not cross-national, but public/private. Counter-piracy security and enforcement can be provided by national navies or by private security forces embarked on merchant vessels. Indeed, one reason for the breakout success of Somali pirates in 2008 was that at the time, no vessels transiting the region had armed security forces, making them easy targets. Some shippers responded by equipping their vessels with non-lethal countermeasures, which reduced pirate success rates. The introduction of armed security details has an even more dramatic effect on pirate success rates: no ship with armed guards has been successfully pirated. The private response is much cheaper than navel interdiction: it consists of a few men with rifles on each ship instead of dozens of destroyers. Because the shippers have the best information on the speed of their vessel, the value of their cargoes and the costs of delay, and fully internalise the benefits of security, they are in the best position to take appropriate preventative measures. Thus the public 'duty' to suppress parties should be thought of as one that can be shared or fulfilled not just by a nation's warship.

Despite the extensive media attention focused on naval counter-piracy efforts, in terms both of economic cost and effectiveness, private deterrence efforts vastly overshadow military ones in actually preventing piracy. Pirates initially prayed on slow-moving vessels; such a leisurely pace saves fuel. In the face of the Somali piracy spike, new industry guidelines recommended proceeding at greater speed through dangerous waters. Such navigational solutions (including

[14] This is particularly true if one thinks that a reputation for compliance is the principal (social) currency of international law. See A.T. Guzman, *How International Law Works: A Rational Choice Theory* (Oxford: OUP, 2008).

rerouting) represented fully one-third of the costs attributable to piracy in 2012 (USD 5.7-6.1 billion in total), with security guards and equipment constituting another 29 per cent.[15] By contrast military deterrence amounted to only 19 per cent of the cost. In recent years, the military costs have been between USD 1.1 and 1.3 billion, with private avoidance and security costs nearly three times that. Similarly, the cost of prosecution and imprisonment amounted to less than USD 15 million in 2012, and the cost of the various United Nations (UN) and other international agencies and Non-Governmental Organisations that deal with piracy (and pick up some of the prosecutorial tab) have been a mere USD 24 million – these costs are shared across many countries.[16]

The prominent role of private interests stems from the nature of piracy – attacks on largely private economic activity outside of national borders. Principles on the rights and responsibilities of shippers are increasingly being worked out in in international fora, through best practices guidelines and other voluntary standard-setting by trade associations like the influential Baltic and International Maritime Council, the International Maritime Bureau, and agencies such as the International Maritime Organization.

Ultimately, governmental piracy suppression represents a public subsidy for maritime shippers: the government pays for their security. In some cases the subsidy is quite explicit: several European nations place their armed forces on their flagged merchant vessels in lieu of private security. The choice between navies and security contractors is on one level the traditional choice between government and private provision of public services. In this context, there is little reason to think there are market failures necessitating such action. Moreover, the publicly provided security creates moral hazard for the masters of vessels, encouraging them to take routes they otherwise might not have if they had to provide security. Moreover, on the high seas, there is no background provision of security by a home state. For example, a distress call by a Liberian-flagged Russian owned vessel may be answered by an American warship. Thus substituting public security in the form of naval vessels for private security creates cross-national subsidies. These make it even harder to measure the cost-effectiveness of the subsidy.

[15] J. Bellish, 'The Economic Cost of Somali Piracy, 2012', Oceans Beyond Piracy Working Paper (2013), at http://oceansbeyondpiracy.org/sites/default/files/ecop2012final_2.pdf.
[16] Ibid.

Instead, the proper locus for primary responsibility should be with shippers themselves. Firstly, the shippers largely internalise the benefits of the security they provide, leading them to take the proper levels of care. They also have an informational advantaged as to the appropriate security measures, given the specifics of the vessel, cargo, and numerous other factors. Only a tiny percentage of vessels fall victim to pirates even in the most dangerous waters, and thus the appropriate *ex ante* precautions can vary considerably. It seems armed security is the dominant solution, with 70 per cent of vessels transiting the Suez Canal now employing such measures, but this will also fluctuate with the fortunes of the local pirates. While the combined cost of private measures considerably exceeds public ones, it is also much more successful. The decline in successful pirate attacks in 2011 and the dramatic and sudden end to effective Somali pirate attacks the following years are generally attributable to the broad adoption of armed security by shippers.

Moreover, several mechanisms reinforce the primary responsibility of shippers. On one hand, safety improvements result in better insurance terms. Moreover, given maritime insurers' more general interest in piracy suppression, they are well placed to price safety measures in a way that reflects some of their general deterrent effects, not just their specific deterrent effects. On the other hand, a shipper's failure to take adequate precautions – either navigational or security – can be policed *ex post* through the standard domestic tort system,[17] or contractually with the charterers. There are legal limits to private anti-piracy efforts. The LOSC provides that only national warships can *arrest* suspected pirates on the high seas.[18] The purpose of the restriction is to limit the use of force on the high seas, and greatly restrict possible inappropriate interferences with the freedom of navigation. Thus private security can only reduce the returns to piracy, but not incapacitate the pirates.

One major constraint on shippers' use of armed security is national restrictions on such measures. These restrictions can come from the flag state, the vessel owner's state, or port states. Dealing with the multiple inconsistent regulations is itself a problem for shippers. Indeed, there have been

[17] For example, the famous *Maersk Alabama* capture was dramatically ended by the US Navy SEALS assault on the pirates. Numerous *Alabama* crewmembers that were held hostage have sued the company for failing to take adequate precautions. See R. McCabe, 'Warnings on pirates ignored, Maersk lawsuits say', The Virginian-Pilot, 26 May 2013, at http://hamptonroads.com/2012/05/warnings-pirates-ignored-maersk-lawsuits-say. Indeed, several subsequent attacks on the same vessel were repelled by armed security details hired after the hijacking.
[18] Article 107 LOSC, n. 1.

several high-profile incidents in which vessels carrying security details have been arrested on weapons charges when coming into a port.[19] One of the major subjects of discussion in anti-piracy efforts is how nations should align their rules on the employment of security personnel and the use of force, but no clear approach has been developed.

To some extent, such questions will be resolved in light of the market response. Flag states compete for vessels. Home-port jurisdictions that restrict private security may find themselves less attractive bases, and may also be expected to provide a higher level of military force. Ports of call that restrict armed vessels will be more expensive to ship to. Indeed, after several years of broad governmental resistance to any use of armed force, the trend has swung significantly in the opposite direction, with nation after nation dropping or relaxing such limitations. Still, nations in pirate-affected areas continue to take strong measures against private security forces; India in late 2013 invoked weapons charges in arresting a United States (US) private vessel, the *Seaman Guard,* that provides armed escort to cargo ships.[20] Still, this raises the interesting issue of the extent to which the Article 100 duty of states to cooperate in suppressing piracy implicates a responsibility to cooperate with private actors – by not restricting them – when such efforts are clearly the cheapest and most effective measures of reducing both the total number of pirate attacks and their success rate. A descriptive understanding of the economics of pirate suppression suggests that the broad shared responsibility of states to suppress piracy should be considered one that is not only shared with other states, but with private actors as well.

3. *Ex post* responsibility: division of labour and specialisation

The international efforts against Somali pirates have developed a fascinating model for distributing *ex ante* responsibility[21] for enforcing international law against pirates. The model evolved organically and incrementally, without having been planned. Indeed, the model represents a rejection of the more centralised methods of pirate suppression proposed by many

[19] 'Nigerian navy detains Russian crew over arms', BBC News, 12 October 2012.
[20] 'Report of suicide bid underscores desperation of US ship's crew jailed in India', FoxNews.com, 22 October 2013.
[21] *Ex post* responsibility refers to liability for internationally wrongful outcomes, whereas *ex ante* responsibility refers to duties or obligations to take or not take certain measures, regardless of whether liability would attach for breach. See Nollkaemper and Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', n. 7, at 365-66, 393-94.

experts, such as an international piracy court.[22] The current system reflects an explicitly economic logic – a specialisation of labour and a drive for efficiency. In this arrangement, the traditionally unified enforcement function is disaggregated, and different nations assume responsibility for the arrest, prosecution and detention of the pirates. The broad diffusion of roles raises complex questions of shared responsibility, which should be resolved with an eye to preserving the explicitly efficiency-minded features of the system.

The surge in Somali piracy in 2008 lead dozens of nations to commit military resources to disrupting the attacks in the Gulf of Aden and Indian Ocean. These forces prevented many hijackings, and apprehended hundreds and thousands of suspected pirates. Yet over ninety per cent of them were immediately released because patrolling nations had concerns about taking them back for trial. Some of the concerns focused on the actual costs of the trials. With the elaborate procedural protections and requirements of Western countries in particular, such trials could require disproportionate significant resources. One German trial, for example, took over one year and over one hundred separate court dates. Apart from the actual costs of trial, such jurisdictions worried about the long-term responsibility they would assume by taking Somalis into their territory. If acquitted or upon completion of their sentence, they could not necessarily be repatriated to Somalia, and might claim asylum, and receive state support benefits.[23]

The answer to this has been for capturing nations to send most suspects for trials in one of several regional states – primarily Kenya and Seychelles, and more recently Tanzania and Mauritius. Thus a division of labour based on specialisation and comparative advantage has emerged. Western and Asian nations, generally among the most developed, provide the ships to patrol the oceans looking for pirates. Such a commitment requires preexisting expeditionary naval assets that most nations do not possess. At the same time, there is also likely to be a rough correlation between the size of a nation's navy and its share of international trade.

While the naval component enjoyed broad participation, it is also worth noting that this was achieved not through the promulgation of top-down duties, but through a coincidence of interests.

[22] See, e.g., E. Andersen, et al., (eds.), *Suppressing Maritime Piracy: Exploring the Options in International Law* (ASIL, One Earth Future Foundation, Academic Council on the United Nations System, Workshop Report, 2009), at http://acuns.org/wp-content/uploads/2012/06/SuppressingMaritimePiracyExploringOptionsIntlLaw.pdf.

[23] Such concerns appear justified. The few Somalis that have been acquitted or released in European countries have not been sent back, and will apparently remain there indefinitely.

For many Western navies, having vessels in the region was already useful for anti-terror patrol. For Russia and China, the mission offered the opportunity of a rare out-of-region deployment unopposed by the US. Indeed, for China it was an invaluable training, its first out of region deployment in half a millennia. For several European nations facing budget-cutting austerity, it was an opportunity to prove the relevance of post-Cold War maritime forces.

Yet nations that could most efficiently provide enforcement tools tend to be the most expensive for conducting adjudication because of a highly developed legal system and robust procedural rights. As a result, the apprehending nations entered into a series of agreements with regional states to transfer apprehended pirates to them for trial. The agreements were incremental, bilateral (or with the European Union), and contractual in nature, memorialised through Memoranda of Understanding (MoUs) between sending and receiving nations. The first use of such an arrangement was an *ad hoc* deal between the US and Kenya in 2006. After the piracy explosion in 2008, the US, European Union (EU), individual European nations, and several others began hammering out MoUs with Kenya. Subsequent agreements between the EU as well the US, individual EU nations and others on one hand, with most significantly, Seychelles,[24] Mauritius[25] and Tanzania have followed. Each agreement differs from the others in some particulars.

The agreements provide that the receiving state will receive and try pirate suspects sent to it, while also providing minimum human rights and due process that the defendants must receive.[26] (The Kenyan MoUs give the receiving country less discretion on accepting transferees, while subsequent deals allowed for much greater case-by-case refusal by the receiving nation.) The sending states generally reimburse the receiver for the actual expenses of trial, and often provide additional financial incentives. While the agreements do not specify any quid pro quo consideration on the part of the sending nations, it is clear that the understandings involved side

[24] 'Exchange of Letters between the European Union and the Republic of Seychelles on the Conditions and Modalities for the Transfer of Suspected Pirates and Armed Robbers from EUNAVFOR to the Republic of Seychelles and for their Treatment after such Transfer', 26 October 2009, (2009) 315 OJEU 37.

[25] 'Agreement between the European Union and the Republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer', 14 July 2011, (2011) 245 OJEU 3. 'Announcement: UK signs agreement with Mauritius to transfer suspected pirates for prosecution', Foreign and Commonwealth Office, 8 June 2012.

[26] See E. Kontorovich, 'Introductory Note to Exchange of Letters Between the European Union and the Government of Kenya on the Conditions and Modalities for the Transfer of Persons Suspected of Having Committed Acts of Piracy' 48 ILM 747 (2009).

payments to the receiving state to compensate it for the burden on their already strained criminal justice system, and provide an incentive to take such cases.[27] The payments come in the form of foreign aid from sending states, as well as legal assistance from the United Nations Office of Drugs and Crime (UNODC). The support both assured that the sending nation's legal standards would be met, while providing rents for the receiver.

The outsourcing model for trial creates significant efficiencies. They take advantage of the lower-cost justice systems in the regional nations. For example, Kenyan and Seychellois trials would often last just a day or so, compared to months-long proceedings in European countries, Japan and South Korea. Similarly, the daily costs of imprisonment are much lower. While offshoring criminal justice in such ways could be controversial in national legal systems, it seems more easily justifiable as a response to an international legal wrong.[28] Because piracy is an international offense falling under universal jurisdiction, all nations have some responsibility to respond to it. From a global perspective, it makes sense for all aspects of enforcement – naval action, prosecution and incarceration – to be provided by the lowest-cost effective provider.

Conventional international law does not seem to take this approach. The LOSC seems to place the primary responsibility for all enforcement on the capturing state; indeed, a plain reading of the universal jurisdiction provision seems to authorise trial and punishment solely by the capturing nation.[29] Yet the identity of the capturing nation, from among those that have allocated naval resources, is entirely fortuitous. Indeed, capturing nations may tend to be relatively high-cost trial jurisdictions. Under such circumstances, resting full responsibility on the capturing state would be inefficient, and moreover, result in a lower incidence of capture and trial. State practice entirely resists the narrow reading of the LOSC, a notable episode where customary practice

[27] While the text of the EU's MoU with Kenya and Seychelles have been made public, other agreements with those nations, such as those by the US and UK have not been, see ibid. The EU-Mauritius agreement specifically refers to undetermined 'financial assistance', see Article 7(3). The EU and individual member states have pledged nearly 4 million euros to the Seychelles for 'capacity building'. See 'The EU-Seychelles Relations - Cooperation beyond Development', at http://eeas.europa.eu/delegations/mauritius/eu_seychelles/index_en.htm.

[28] Perhaps the closest precedent to such an arrangement was the extraterritorial trial of the Lockerbie bombing suspects in the Netherlands. In respect to incarceration, some African war criminals, like Charles Taylor, have been incarcerated in Europe because their home country could not provide adequate security. Finally, the Netherlands and Belgium have worked out an efficiency-based penal outsourcing arrangement for ordinary municipal criminals.

[29] Article 105 LOSC, n. 1.

reinterprets a treaty provision to make it consistent with an efficient sharing of *ex ante* responsibility among states.[30]

Another way to understand the tension between practice and Article 105 of the LOSC is that the cheapest justice provider cannot be identified in advance, or described effectively in treaty language. Thus the treaty norm places default responsibility on the capturing nation, but allows it to contract around the rule when and if it can identify the more efficient justice providers.[31] It bears noting that the capturing states still send some pirates for trial back in their own courts. This almost invariably happens when the captured Somalis are suspected of attacking the capturing nation's own vessels. These can be seen as 'high value' defendants from the perspective of the capturing state, where its private benefits of prosecuting are higher than in the typical case.

All this suggests that nations have developed a kind of market model for the enforcement of international law against piracy. This helps shed light on the conduct of Kenya, which less than a year after signing the MoUs and accepting over 100 pirate suspects for prosecution, announced that it was terminating the arrangements. Though Kenyan authorities were not explicit about the reason, there were suggestions the arrangement was not as financially favourable as they had anticipated. Thus Kenya was engaged in contractual hold-up, trying to renegotiate its deal. However, capturing states responded by encouraging new entry into the market, signing deals with Seychelles and other regional states. Broadening the market presumably brings down the implicit price per pirate, and reduced Kenya's hold-up power. Indeed, Kenya again began accepting pirates for prosecution on an *ad hoc* basis after the deals with Seychelles were worked out.

The outsourcing of prosecution turned out to only be the first stage in disaggregating responsibility for pirate suppression. Perhaps the most expensive and least desirable and prestigious aspect of dealing with pirates is their incarceration. Nations like Seychelles, with a

[30] House of Commons Foreign Affairs Committee Report, 'Piracy off the coast of Somalia', Written evidence from Dr Douglas Guilfoyle, legal issues relating to counter-piracy operations off the coast of Somalia, Session 2010-12, PIR 06, at www.publications.parliament.uk/pa/cm201012/cmselect/cmfaff/writev/1318/m06.htm.

[31] This helps reconcile the views of those who read Article 105 as mandatory, with those scholars who see no particular primacy for the capturing state in the universal jurisdiction framework. The LOSC may not be mandatory, but rather a default rule. R. Geiss and A. Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (Oxford: OUP, 2011), at 189-90.

tiny prison system, or Kenya, with an overcrowded one, are reluctant to assume a costly long-term liability in the form of a permanent pirate population. Thus a second tier of agreements emerged between prosecuting nations and Puntland and Somaliland,[32] two semi-independent breakaway regions of Somalia from which many but not all of the pirates hail. These deals contemplate the transfer of the convicted pirates to the Somali regions to serve the remainder of their sentences.[33] Again, UNODC was central in facilitating these agreements, by building prison facilities and training Puntland personnel to bring their penal systems up to minimum standards. Like the prosecuting states, the Somali regions apparently receive some additional foreign aid support for its participation in this arrangement.[34]

Thus the enforcement of anti-piracy law is ultimately divided three ways – capture by one country, prosecution by a second, and detention by a third. UNODC facilitates these arrangements by providing financing and oversight. One important lesson from the solution to the piracy prosecution conundrum is that *ex ante* responsibility can be effectively apportioned contractually: such duties need not be understood as responsibility to take action, but rather to pay for it. This allows for a more fine-tuned apportionment of duties in international law. The quasi-contractual nature of these arrangements do raise the question of where to turn when one nation acts opportunistically, by, say, releasing pirates that it has already accepted consideration for, or providing inadequate levels of due process at trial or proper conditions in incarceration. One function that UNODC appears to play is monitoring the implementation of these arrangements.

The current distribution of *ex ante* responsibility among states for suppressing piracy developed incrementally and informally, rather than through centralised decisions and top-down mechanisms. Indeed, numerous UN and academic reports favoured a more centralised approach, using international courts and prison facilities to prosecute and detain pirates. Such proposals were criticised as not being cost-efficient, and obscuring the ultimate questions of responsibility, such as where would the courts and prisons be located, and who would administer them. Such

[32] 'Pirates transfer agreement solves global problem', WorldNews, 4 April 2012, at http://article.wn.com/view/2012/04/04/Pirates_transfer_agreement_solves_global_problem/.
[33] ''Mauritius-Somalia: Agreement on the transfer of sentenced pirates signed', Republic of Mauritius News, 28 May 2012, at www.gov.mu/English/News/Pages/Mauritius-Somalia-Agreement-on-the-transfer-of-sentenced-pirates-signed.aspx.
[34] While the particulars of these arrangements have not been made public, at least some transfers apparently require the consent of convicts and the original capturing state.

centralised solutions proved slower and less-flexible than the market-based approach to pirate justice, which nations implemented gradually and incrementally – but immediately. Indeed, the transfer arrangements were originally seen by many as a stop-gap until a fully internationalised solution would emerge, but in practice, they have eliminated the impetus for such a solution.

4. Liability for downstream violations

The multiple levels of transfer raise the question of who bears legal responsibility for human rights violations by receiving states. Transfers from Western nations are generally pursuant to MoU that stipulate human rights protection for the transferee. This raises the question of who is ultimately responsible for the treatment of the detainees: the capturing (and first transferring) state, the final transferring state, the unrecognised entity (Somaliland and Puntland) that may be the ultimate destination, or UNODC, the agency proving assistance to the process? The question is not hypothetical: pirates captured by Germany and sent to Kenya successful sued the former in a Cologne administrative court, arguing that the transfer itself violated their human rights because of inadequate conditions in Kenya.[35]

Under current understandings of state responsibility reflected in the ILC Articles on State Responsibility,[36] responsibility rests only on the state that actually violates a suspected or convicted pirate's rights. Sending states would not be responsible for downstream violations. Yet this requires some qualifications. *Non-refoulement* is itself a right that is violated by transferring someone to a state where their rights are likely to be violated. The *non-refoulement* right is violated by the sending state at the moment of transfer. Thus the responsibility of sending states for *non-refoulement* is distinct from any responsibility for violations by receiving state. *Non-refoulement* can be violated even if there is ultimately no abuse by the receiving state, if such abuse was objectively likely at the time of transfer, and if it was not likely, actual abuse does not retroactively create responsibility upstream. In anticipation of *non-refoulement* concerns, the MoUs contain assurances of human rights guarantees for transferees. Under European human

[35] C. Ahlborn, 'Adjudicating Somali Piracy Cases – German Courts in a Double Bind', 3 January 2013, CJICL Blog, at http://www.cjicl.org.uk.
[36] Articles on the Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2).

rights precedents, such diplomatic assurance do not always get the sending state off the hook, and thus the agreements also provide varying degrees of monitoring by the sending states.[37]

The re-transfer to Somali regions raises additional wrinkles. The MoUs typically require the original sending state's permission for subsequent re-transfer. This again brings in the responsibility of the original sender (the capturing state), which becomes a joint participant with the trial state in the decision to transfer to the third state. The liability on the part of the capturing state is not vicarious, but direct, because of its role in the transfer decision. This raises the question of whether the original transferring state can divest itself of responsibility for further transfers by not requiring its agreement to such subsequent action.[38] It would seem that this is fully captured in the original *non-refoulement* responsibility. Where subsequent re-transfer to dubious countries is likely, satisfying the original *non-refoulement* obligation may require assuming shared responsibility for subsequent re-transfers.

While these arrangements raise very complex questions about the allocation of responsibility for human rights violations, they also offer a possible solution. The piracy transfer process is fundamentally contractual. The essence of the transfer agreements is that the upstream sending states compensate downstream receiving states for a service (prosecution or incarceration). Because of the nature of the arrangements, the allocation of responsibility can be shifted among the parties by prior agreement.[39]

From a normative economic perspective, in a zero-transaction context, it does not matter which state in the chain has responsibility in international law so long as it is clearly allocated.[40] Thus the parties can reallocate liability among themselves through formal or informal indemnity arrangements. Typically, the last actor in the chain of causation would have responsibility for

[37] See Geiss and Petrig, *Piracy and Armed Robbery at Sea*, n. 31, at 203-206.
[38] For example, the EU-Mauritius agreement is ambiguous on responsibility for subsequent transfer. Mauritius may transfer convicts 'after consulation with the EU'. Where there are 'serious concerns about the human rights situation in that other State' transfer cannot occur 'before a satisfactory solution will have been found through consultations between the Parties'. See EU Council Decision 9298/2/11 (6 July 2011), 'Agreement between the European Union and the Republic of Mauritius on the conditions of transfer of suspected pirates', n. 25 Article 4(8). This leaves it ambiguous whether the EU state's consent is ultimately required for risky transfers.
[39] See Nollkaemper and Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', n. 7, at __.
[40] While transaction costs are obviously positive in the real world, the bargaining between sending and receiving nations appears quite flexible, and even open to renegotiation. Unlike many other public law parties, there are multiple participants on both the sending and receiving side, with the possibility of further entry. Thus neither has monopoly power, limiting the possibilities for hold-up and other strategic behaviours.

human rights violations. However, the continued involvement of upstream actors through monitoring and so forth suggest the entire string of transfers may be viewed as a joint enterprise. For the purposes of efficiency, it is more important to have responsibility clearly allocated. Moreover, many standard arguments for joint and several liability do not apply in the public law context, where it is unlikely that either sovereign participant will be insolvent.[41] Thus from an efficiency perspective, it makes sense to clearly assign full responsibility to the most recent custodial country, which exercises the greatest degree of control at the relevant time. Thus Kenya, for example, would be solely responsible for its abuse of pirates in its custody. Given that Kenya receives compensation from the sending states, it can price its potential exposure into the deal. To put it differently, the trial states acts as an independent contractor for the capturing state, and is largely outside its control. In accepting this undertaking, the trial state presumably accepts not just the pirates themselves, but all the relevant responsibility.

Indeed, the agreements can build in indemnity claims for the original *non-refoulement* obligation. Presumably, that duty on the part of transferring states is 'personal' to that state and non-transferable. However, since the capturing state is contracting for an acceptable place to send the pirates, if a court were to find transfer barred by *non-refoulement*, one could imagine the sending state demanding a 'refund' from the receiving state. That is, the 'diplomatic assurances' that accompany transfer agreements can also be seen as warranties of fitness for the intended purpose by the receiving state. Making such provisions more explicit would be advisable, and give receiving states clearer incentives to not chisel on the deal.

The retransfer to Somali regions poses the greatest problem for the allocation of responsibility. The ultimate recipients are not recognised state actors, and cannot have international legal responsibility. Moreover, the relevant state, Somalia, is a failed state and is effectively 'judgment proof'. Thus responsibility for violations there should properly rest with the last sending state.

[41] Ibid.

5. Extensions: market-based allocation of responsibility

The emergence of an efficiency-seeking distribution of *ex ante* responsibility for piracy suppression suggests that similar efficiency-based rules should apply to responsibility for international legal breaches in this context. It also illustrates the possibilities of distributing responsibility among nations through agreement, particularly where lower-cost nations are recruited to carry out functions by higher-cost ones.

The 'outsourcing' or 'gaobalisation' model that has developed in the piracy suppression context has applications to other similarly structured phenomenon. Take migration and refugee issues, for example. Several countries have recently begun outsourcing the purported refugees that come to their shores to third-countries. A similar efficiency rationale is at play. The acceptance of refugees can be done by any country where they do not face persecution. However, migrants naturally flock to the affluent countries with generous social services. These may be the most expensive providers of refugee-acceptance services. Thus these nations can contract with lower-cost refuges to create a truly efficient situation. It ultimately allows for the absorption of larger numbers of refugees outside their home countries by not exhausting the tolerance of a small number of most-desired refuges.

These deals have all been made by 'destination' nations that refugees travel through to get to the place of their choice. What makes transfer arrangements legally possible is that the receiving nation's obligation to a refugee is not to take them in, but not to send them back to their country of origin. Refuge is from something, not to something. Naturally, the ultimate receiving state would have to satisfy minimum human rights criteria to avoid *non-refoulement* problems. But as with pirates, that contractual nature of the activity would suggest that all else equal, the receiving state would assume full responsibility for any abuses within its jurisdiction.

6. Conclusion

Piracy is unusual in international criminal law, as the relevant treaties impose an affirmative duty on states to cooperate in suppressing it. In most international piracy contexts – from the Gulf of Guinean to the Straits of Malacca – nations not surprisingly fail to meet this obligation, raising

questions about the responsibility of coastal and other states that fail to take reasonable measures to suppress pirates.

However, the international response to Somali piracy in recent years has developed into a complex, multi-sided enterprise in which international law enforcement duties are disaggregated among states. The traditionally unified functions of policing, prosecution and incarceration have been divided and assigned to different countries, based largely on considerations of economic efficiency and comparative advantage. At the same time, the advantages of this sophisticated arrangement raise particularly complex questions about responsibility for international wrongs that might be committed in the international chain of pirate custody. Given the underlying efficiency logic of arrangements, and their effectively contractual nature, this may be a particular apt context for drawing principles of state responsibility from private law contract principles.