

Piracy Prosecutions

A perspective from the **Seychelles**

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Outline

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- Law of Piracy (prior to March 2010)
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Outline

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Seychelles

East Coast of Africa

115 islands

EEZ : About 1.37 million km²

Population: Approx. 90,000

Land Area: 455km²

GDP per capita : USD\$15,075 (2016)



Introduction: Piracy in the Seychelles

- Threat since February 2009
 - First attack: February 17th 2009
- Impact on the Seychelles economy
 - Patrolling the EEZ;
 - Increase in seaborne trade – higher insurance rates;
 - Seychelles largely dependent on imports.
- More than 150 pirates have been tried since





Law of Piracy (prior to March 2010)

“Any person who is guilty of piracy or any crime connected with or relating or akin to piracy shall be liable to be tried and punished according to the law of England for the ‘time being in force’”

- *No definition of the offence; no reference even to maritime piracy*
- *Seychelles gained independence in 29th June 1976*
 - *2 cases said it was this date*
 - *Penal Code enacted in 1955*

Issue of Jurisdiction (prior to March 2010)

Case of Dahir 51 of 2009

- “Piracy jure gentium is justiciable by the courts of every nation. Such universal jurisdiction is provided for in international law, that the arresting State is free to prosecute suspected pirates and punish them if found guilty”

Case of Abdi Ali 14 of 2010

- Court held that court had jurisdiction as pirates were hostis humanis (enemy of mankind) and subject to universal jurisdiction.
- *These two judgments were not tested before the Court of Appeal*



Issue of Jurisdiction (prior to March 2010)

Determined by the Seychelles Penal Code & Criminal Procedure Code

- “The Jurisdiction of the courts of Seychelles for the purpose of the Penal Code extends to every place within Seychelles.”
- “When an act which, if wholly done within the jurisdiction of the court, would be an offence against this Code, is done partly within and partly beyond the jurisdiction, every person who within the jurisdiction does or makes any part of such act may be tried and punished under this Code in the same manner as if such act had been done wholly within the jurisdiction”.



Issue of Jurisdiction (prior to March 2010)

Section 60 (1) of the Criminal Procedure Code

Prior to March 2010

- “The Attorney General is vested with the right of prosecuting all crimes and offences *committed within Seychelles.*”

After March 2010

- “The Attorney General is vested with the right of prosecuting all crimes and offences *over which the Seychelles courts have jurisdiction.*”





Territory of the Seychelles

As per the Constitution:

- Islands of the Seychelles Archipelago, including
 - territorial and historic waters,
 - archipelagic and internal waters,
 - sea bed and sub soil underlying the waters,
 - and such additional areas as may be declared by law.

Territory of the Seychelles

- *Prior to March 2010*, there was no law giving jurisdiction to the courts of Seychelles to try offences committed on the high seas or outside Seychelles.
 - Section 65 of PC, prior to its amendment in 2010, was insufficient to give our courts jurisdiction in view of SS, 6 & 7 of PC.
- Jurisdiction has to be specifically granted by statutory law.
- Both UK and Kenya had expressly granted jurisdiction to try piracy committed in the High Seas.
- Reference in S. 65 was only to trial and punishment according to the Common Law of England.

Penal Code (Amendment Act) 2 of 2010

Came into effect 19th March 2010; Repeal S.65 with the following section

- (1) Any person who commits any act of piracy within Seychelles or elsewhere is guilty of an offence and liable to imprisonment for 30 years and a fine of R1 million.
- (2) Notwithstanding the provisions of section 6 and any other written law, the courts of Seychelles shall have jurisdiction to try an offence of piracy or an offence referred to under subsection (3) whether the offence is committed within the territory of Seychelles or outside the territory of Seychelles.
- (3) Any person who attempts or conspires to commit, or incites, aids and abets, counsels or procures the commission of, an offence contrary to section 65(1) within Seychelles or elsewhere commits an offence and shall be liable to imprisonment for 30 years and a fine of R1 million.

Penal Code (Amendment Act) 2 of 2010

(4) For the purposes of this section 'piracy' includes –

- (a) any illegal 'act' of 'violence' or detention, or any act of depredation, 'committed for private ends' by the crew or the 'passengers of a private ship' or a private aircraft and directed–
 - (i) on the high seas, 'against another ship' or aircraft, or against persons or property on board such a ship or aircraft;
 - (ii) against a ship, an aircraft, a person or property in a place outside the jurisdiction of any State;
- (b) any 'act' of voluntary participation in the operation of a ship or an aircraft 'with knowledge' of facts making it a pirate ship or a pirate aircraft; or
- (c) any act described in paragraph (a) or (b) which, except for the fact that it was committed within a maritime zone of Seychelles, would have been an act of piracy under either of those paragraphs.

Penal Code (Amendment Act) 2 of 2010

(5) A ship or aircraft shall be considered a pirate ship or a pirate aircraft if –

- (a) it has been used to commit any of the acts referred to in subsection (4) and remains under the control of the persons who committed those acts; or
- (b) it is intended by the person in dominant control of it to be used for the purpose of committing any of the acts referred to in subsection (4).

(6) A ship or aircraft may retain its nationality although it has become a pirate ship or a pirate aircraft. The retention or loss of nationality shall be determined by the law of the State from which such nationality was derived.



Penal Code (Amendment Act) 2 of 2010

(7) Members of the Police and Defence Forces of Seychelles shall on the high seas, or may in any other place outside the jurisdiction of any State, seize a pirate ship or a pirate aircraft, or a ship or an aircraft taken by piracy and in the control of pirates, and arrest the persons and seize the property on board.

The Seychelles Court shall hear and determine the case against such persons and order the action to be taken as regards the ships, aircraft or property seized, accordingly to the law.”



Definition of Piracy

- In view of 65(4) (b), those not directly involved in the commission of illegal acts of violence are made liable.
- There must be an 'act'. One cannot be convicted for an omission.
- Penal code definition 'Piracy includes' is broader than UNCLOS which uses the words "consists in any of the following acts".
- 'Violence' – any illegal act of force, need not be of any particular severity
- 'Depredation' – covers plunder, robbery & damage.
- Principles of national criminal law to apply in interpreting the wording in S. 65

Definition of Piracy

- In several local cases, it was held that piracy can be established even if the alleged acts of violence did not succeed & no one was injured & no vessel was damaged.
 - A frustrated attempt is sufficient
- 'Private ends' are not defined.
 - Distinction: 'private motives' & 'public motives' - v - 'private' & 'political' motives.
 - Any act of violence on the High seas not sanctioned by the State is piracy
- In the 17th & 18th centuries a '*Privateer*' or '*Cosair*' acted while in possession of a *Commission or Letter of Marquee* from a Govt. or monarch to capture merchant ships belonging to enemy nations.
 - This was banned by the Paris Declaration of 1856.

Definition of Piracy

- S. 65 covers attacks from a private ship against another private ship.
- Does not cover the hijacking of a ship by its passengers or crew.
- 'Ship' not defined.
 - Does it include 'boat' or 'skiff'?
 - Suggestion to amend the law to state 'any sea going vessel'
- Crew of a Govt. ship if it mutinies and carries out attacks on other ships would commit piracy.

Definition of Piracy

- Police & Defence Forces to follow the Rules of Engagement at sea in conducting arrest of a pirate ship.
 - In *Abdukar Ahmed, 21 of 2011* - courts accepted the testimony of the officers involved in the arrest of a pirate vessel that Rules of Engagement had been followed
- Power to seize and arrest does not extend to pursuing pirates into foreign territorial waters without the consent of the Coastal State.
 - Exception - Somalia under UN Security Council Resolutions
 - Does not give jurisdiction to the arresting State to prosecute them
- No Rule of Priority between competing potential jurisdictions.
 - (a) Arresting State; (b) On the basis of nationality of the pirate; (c) On the basis of the nationality of the Victims of a pirate attack

Mens Rea of Offence of Piracy

- Essential requirement in proving piracy although the word 'intention' has not been specifically mentioned in S.65.
- S. 65(4)(b) - voluntary participation in the operation of a pirate ship,
- 'Knowledge' is an element of the offence
- Prosecution has to prove based on reasonable doubt that the act of piracy was intentional and willful and something done without any form of competition.



Attempt to commit an act of piracy

- An attempt to commit any act of piracy is criminalized.
- An attempt has been defined as:
 - “When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.
 - It is immaterial, except so far as regards punishment, whether the offender does all that is necessary [Not defined] on his part for completing the commission of the offence, or whether the complete fulfilment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.
 - It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence”.

Attempt to commit an act of piracy

- It must be established that the offender intended to commit the act of piracy.
- Recklessness does not suffice as per the English case of *Mohan (1976) QB1*.
- What amounts as 'some overt act' is debatable.
- **Question:** What would a court do in a case where some persons are found on the High seas on a boat armed with weapons and ladders?
 - Hussein Mohammed Osman 19 of 2011
 - Abdi Ali 14 of 2010
 - Ahmed Jama

Joint Enterprise Liability in Cases of Piracy

- Where persons are involved in a joint enterprise with a common intention to commit an act of piracy each of them will be liable to the same extent as those who committed the actual acts of piracy, even if they did not share the identical common intention.
- The prosecution has to establish that each of them should have willfully and intentionally assisted or encouraged the commission of the offence of piracy.



Joint Enterprise Liability in Cases of Piracy

- Does mere presence on a pirate ship suffice?
- What do we require?
 - Evidence of a participatory presence by each accused
- A common challenge?
 - Difficulty in identifying and individualizing the participatory conduct of each of the persons, where several persons are found on a pirate ship.



Joint Enterprise Liability in Cases of Piracy

Case Examples

- In *Mohamed Ahmed Ise* 70 of 2010:
 - 'It is immaterial if the prosecution does not point out who specifically did what from the Pirate Action Group, as long as it is proved that an accused was party to the joint accomplishment of this criminal object, and that his will contributed to the wrong doing which in law makes him responsible for the whole crime as though performed by himself alone.
- Analysis:
 - Evidence shows there was a division of labour, but all aimed at one common result and for private ends.
 - Each is equally culpable for the actions of his confederates'.

Joint Enterprise Liability in Cases of Piracy

Case Examples

- The *Republic v Ali Galwe Mowlid 31 of 2012 & Abdirahaman Nur Roble 54 of 2012*
 - Convicted all the accused apprehended on board the pirate vessel merely on the basis of having been found together on board that vessel.
 - None of accused was identified as having played any particular role.
- The *Republic v Basir Nur Mohamed*
 - Of the 25 pirates arrested on board the vessel 'Tahiri' ,only 4 were brought to Seychelles to face trial. The other 16 were sent to Kenya for prosecution.
 - Only 5 of the 25 pirates were armed but there was no evidence about their identity or the role played by the 4 accused who were tried in Seychelles.

Secondary Party Liability in Cases of Piracy

- Any type of assistance voluntarily given before or at the time of the act of piracy would amount to enabling or aiding another person to commit the offence.
 - Need to establish the casual link between assistance and commission of the offence
- Mens Rea: An intention to aid (or encourage) as well as knowledge of circumstances' has to be established.
 - Acts of assistance and encouragement with a view to encourage or assist the commission of the offence
 - Aide/encourager should know he is encouraging or assisting the offence of piracy

Offence of Voluntary Participation

Section 65(4)(B)

- If the Prosecution were to rely on a prosecution based on section 65(5)(a) they will have to prove, not only,
 - Ship had been used to commit any of the acts referred to in section 65 (4),
 - Ship remained under the control of the persons who committed those acts when they voluntarily participated in the operation of the ship.
- 65 (5) (b) Where the accused had knowledge when they voluntarily participated in the operation of the ship, that it was intended by the person in dominant control of the ship, to use it for the purpose of committing an act of piracy
- Mere suspicion that it is a pirate ship will not suffice.
- Case of *Mohamed Abdi James* 53 of 2011
 - Accused needs to be aware of the nature of what they were involved in/
 - Or the purpose of their enterprise



Presumption of Piracy

- No provision for a presumption of piracy against person found in the high seas while being in possession of piratical implements or those found cruising in skiffs in suspicious circumstances in the high seas plagued by pirate attacks.
 - Case of Republic vs Mohamed Abdi Jama 53 of 2012 versus U.S. SC case of Ambrose Light
- Article 15 of the United Nations Security Council Resolution (UNSCR) No 1846 of 2 December 2008
 - State has the power to create offences and establish jurisdictions in order to suppress and deter piracy

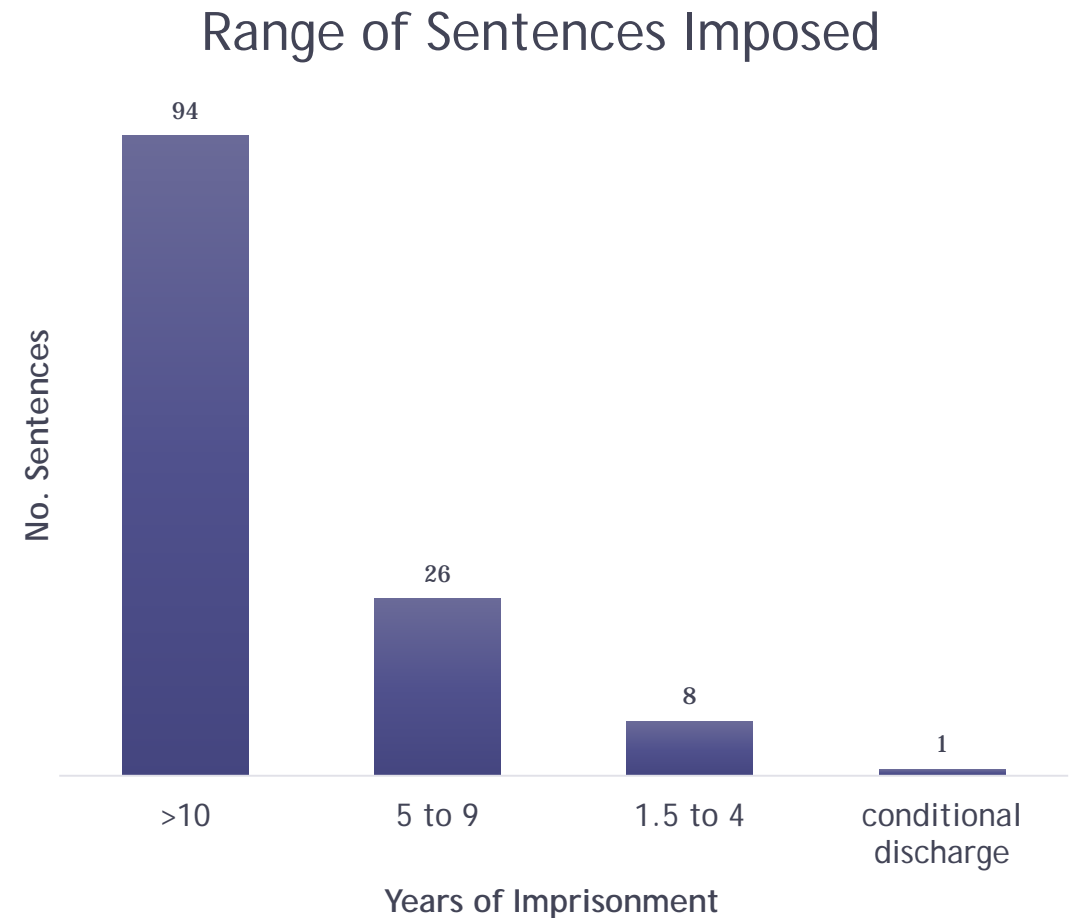


Presumption of Piracy

- Existing offences in the Penal Code and on the basis of presumptions
 - Misdemeanor of being determined to be a rogue and a vagabond
 - Felony of being found at night in possession of housebreaking instruments
- The US cases of *Sarah, Weathergage, and Kate*
 - convictions for slavery were based on the finding in the ship of equipment that could be commonly used for slavery.
- Seychelles: *Mohamed Abdi Jama 53 of 2011*:
 - it was held that carrying articles used in slave trade is analogous to being in possession of piracy equipment'
 - conviction was based on the type of ladders

Sentencing

- The punishment for any act of piracy or an attempt, conspiracy, incitement, aiding and abetting, counseling or procuring the commission of an offence of piracy, carries a sentence of imprisonment for 30 years and a fine of Seychelles R1 million.
- The sentences imposed on those convicted of piracy have ranged between 1.5 and 24 years
- No imposition of fines



Sentencing: Factors taken into consideration

•Age of the accused?

Antecedents – first time offenders?

Socio-economic reasons?

Impact on tourism, fishing, transport, trade, investment and marine safety?

Resources for surveillance and apprehension of offenders?

Did the pirates succeed in taking control of the ship?

Was ransom asked for and paid?

Did they injure or intimidate the crew or cause damage to the ship?

Was the crew used as human shields?

Did the pirates retaliate before capture?

Type of weapons used?

Physical and emotional effects of the attack?



Factual and legal issues in piracy cases:

Age of the Accused; Confusion regarding identity and names



- The Children Act provides
“No child (below 18 yrs) shall be prosecuted for any offence except—
 - (1) The offence of murder or an offence for which the penalty is death; or
 - (2) On the instructions of the Attorney General”.
- Issues in differentiating and identifying pirates involved in specific attacks, where several pirates are arrested simultaneously at different operations and placed together
 - Identifying photographs at time of arrest

Characteristics / Common Trends

Pirate Action Group

- Mother Vessel “Dhow”
 - Carries fuel, food and supplies
- Smaller Attack skiffs (about 2 or more)
 - Used to execute the attack
- About 10 people

Common attack pattern

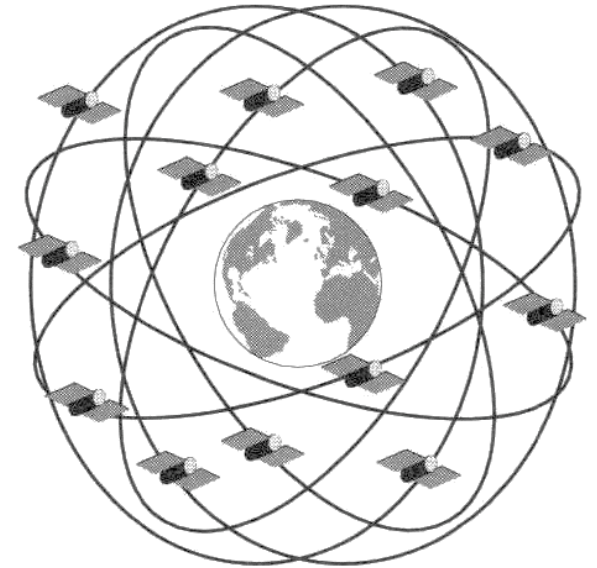
- Attack skiffs emerge from same direction, side by side
- Firing automatic machine guns
- Attack from starboard and portside
- Use hooked ladders to climb aboard

Other factors to consider

- Location – how far from the coast?
- Absence of evidence of fishing

Evidence obtained from GPS

- Method of establishing the location of a vessel at a given time by longitudinal & latitudinal coordinates.
- Admissible = Evidence from computer device or a mobile phone
- Data is downloaded from or extracted from the device, explained by an expert.
- Susceptible to inaccuracies based on flaws inherent in the technology itself and intentional tampering.
- Take reading from satellites – v- input from a person: Does not contravene hearsay rule



Chain of Evidence



Evidence of officers

- Who seized pirate vessels/pirates
- From custody to being produced in court

Photographic Evidence

- Helicopters used in combating piracy
- High-definition and integrated sensors (cameras)

Person who custody of GPS

- From time of its seizure up to trial

Compliance with Constitutional Provisions

- **Article 18(3) of the Constitution: Right to be informed;**
 - At the time of the arrest or detention or as soon as is reasonably practicable
 - In a language that the person understands
 - Right to remain silent
- **Article 18(5) :** “A person who is arrested or detained, if not released, shall be **produced before a court within twenty-four hours of the arrest or detention** or, having regard to the distance of the place of arrest or detention to the nearest court or the non-availability of a judge or magistrate, or force majeure, as **soon as is reasonably practicable** after the arrest or detention”
 - Difficulty in piracy cases where accused are arrested far away from the shores of the Seychelles.
 - Compliance with this provision is dependent on what is “reasonably practical”

Compliance with Constitutional Provisions

- **Article 19(2)(d): Right to be defended by a legal practitioner**
 - All persons accused of piracy have been defended by Seychellois lawyers [Legal Aid Act].
 - Funding for payment of lawyers' fees provided by UNODC
 - In *Liban, Mohamed Dahir and 12 others*:
 - 2 accused rejected services of the defence counsel and demanded lawyers from Somalia. Court did not accede to this demand
- **Article 19(2)(e): Right to obtain the attendance and carry out the examination of witnesses**
 - In *Liban Mohamed Dahir and 12 others*:
 - One of the accused wanted to call 29 witnesses from Somalia to testify on his behalf
 - Request was not granted by Court as he neither provided the list of names nor the addresses
- **Article 19(2)(f) : As far as is practicable, have without payment the assistance of an interpreter if the person cannot understand the language used at the trial of the charge.**
 - All the trials have had Somali interpreters
 - Foreigners who testified in piracy trials have had Spanish or French interpreters

Conclusion

“From a stage, where the laws on piracy were not clearly defined and jurisdiction to deal with acts of piracy committed outside its territorial waters not having been spelt out in its laws, the Seychelles has come a long way in the fight against piracy by amending its laws and prosecuting over 150 pirates in accordance with the basic norms of criminal procedure and rules of evidence.

Undoubtedly there is room for improvement in ensuring a fair trial to those accused of committing acts of piracy in accordance with international standards of human rights and fair trial procedures. Derogation from them should not be justified in the name of fighting piracy.”

Anthony F. T. Fernando

“ An Insight into Piracy Prosecutions in the Republic of Seychelles”

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Questions & Comments?
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