

*Financial compensation for pirates: turning the world upside down or a much needed wake-up call?*

Prof. Dr. E. SOMERS

Ghent University School of Law

Toegetreden lid van de Koninklijke Belgische Marine Academie  
and

Drs. K. WILLAERT

Ghent University School of Law

1. Introduction

International law provides the international community and the shipping industry with a legal system enabling the prosecution of suspected pirates. The UN Law of the Sea Convention of 1982 (LOSC) specifically entrusts this task to the judicial organisation of the flag state of the capturing naval vessel. Art. 105 LOSC clearly identifies the flag state of the capturing vessel as the sole state to exercise prosecution rights over suspected pirates. As such it explicitly introduces an exception to the exclusive flag State jurisdiction on the high seas. Notwithstanding the restrictive scope of Art. 105 LOSC, state practice has embraced a different approach for prosecuting alleged pirates. To this end a network of so-called memoranda of understanding has been established between States in the Western Indian Ocean Region and naval States present in the area within various piracy counter active operations. This system is supported by a series of UN Security Council resolutions actively trying to motivate States to take actions against piracy in the region. The outsourcing of criminal prosecution of suspected pirates to States other than the capturing States seems, however, to contradict the relevant provisions of the LOSC. Both through a textual analysis of the key article, Art. 105, as well as on the basis of the reconstruction of the drafting history of the same article it can be concluded that the Convention precludes the transfer for reasons

of prosecution of suspected pirates to third States under the different memoranda of understanding<sup>1</sup>. Nevertheless one cannot deny the apparent emergence of a new rule of customary international law through the State practice of transfer agreements. As such alternative prosecution fora allow for a more efficient dealing with apprehended pirate suspects. Although this practice definitely enhances the possibility to bring such suspects to justice, it is not a panacea. Indeed depending on the actual evidence produced by the capturing vessel, the recipient States in the Western Indian Ocean Region will decide to accept or not accept these suspects for trial. They cannot be obliged to do so. Whenever they choose not to accept suspects for trial, the capturing vessel is left with very few alternatives. Judicial prosecution in the flag state will in most cases be countered by procedural requirements respecting human rights concerns over delays to bring a suspect before a judge. In practice suspects will simply be released which arouses some concerns within the international shipping community.<sup>2</sup>

## 2. Human rights considerations

On 4 December 2014, the European Court of Human Rights decided in *Ali Samatar and Others v. France* and in *Hassan and Others v. France* that France had violated the rights of pirate suspects and needed to pay a

- 
1. E. SOMERS, Can the Law Contribute to Solving the Problem of Piracy? In K. Bernauw et al. (eds.), *Free on Board. Liber Amicorum Marc A. Huybrechts*, Antwerp-Cambridge, Intersentia, 2011, 497-515; E. SOMERS, The Prosecution of Alleged Pirates: is Outsourcing the Solution? *Zanzibar Yearbook of Law* 2012, 355-371.
  2. Generally see: "A European Court Is Wrong about France", *American Thinker*, 22 December 2014, [http://www.americanthinker.com/articles/2014/12/european\\_court\\_wrong\\_france.html](http://www.americanthinker.com/articles/2014/12/european_court_wrong_france.html) (28 January 2015); "IMB concern over pirate payouts", *Maritime Security Review*, 29 December 2014, <http://www.marsecreview.com/2014/12/imb-concern-over-pirate-payouts/> (12 January 2015); "Second case of pirate compensation draws bitter criticism", *OceanusLive*, 11 December 2014, <http://www.oceanuslive.org/main/viewnews.aspx?uid=00000944> (20 January 2015).

compensation to these 'victims'. Both cases concerned similar situations, where Somali pirate suspects were held in custody for too long before they were formally charged or brought before a judge<sup>1</sup>.

In particular the facts are as follows.

The two cases concern nine applicants, who, in 2008, separately took possession of two French-registered ships and took their crews hostage with the intention of negotiating their release for a ransom. The applicants were arrested and held in the custody of French military personnel before being taken to France in a military aircraft. They had thus been under the control of the French authorities for four days and some twenty hours in one case (Ali Samatar and Others), and for six days and sixteen hours in the other (Hassan and Others), before being held in police custody in France for forty-eight hours and brought before an investigating judge, who placed them under judicial investigation. The charges included the hijacking of a vessel and the arrest and arbitrary confinement of a number of individuals as hostages with the aim of obtaining a ransom. Six of the applicants received prison sentences.

## 2.1. Ali Samatar and Others v. France

Plaintiffs in this case (*Ali Samatar and Others v. France*)<sup>2</sup> are six Somali nationals who were prosecuted in France for piratical activities. These activities date back to April 2008, when a French cruise ship (*Le Ponant*),

---

<sup>1</sup> At that time also Denmark voluntarily paid financial compensation to nine Somali pirates. See: "Denmark compensates suspected pirates for overly long detention", Reuters, 8 December 2014, <http://www.reuters.com/article/2014/12/08/us-denmark-piracy-idUSKBN0JM2A920141208> (12 January 2015).

<sup>2</sup> ECtHR, *Ali Samatar and Others v. France*, 4 December 2014.

on her way from the Seychelles to the Mediterranean Sea, was attacked and hijacked off the Somali coast.<sup>1</sup> At that moment only thirty crew members and no passengers were on board, twenty of them being French nationals. They were kept hostage for a week and finally released after payment of a ransom. Following a vigorous action of a special intervention unit of the French *Gendarmerie Nationale* (GIGN) the suspected pirates were arrested on Somali territory the same day of the release of the hostages.<sup>2</sup> Four days after they were apprehended and put under military jurisdiction, Somali authorities granted the permission to transfer them to France where they were brought before an investigative judge two days later and were accused of piratical activities. The Somali suspects appealed this decision maintaining that their arrest and detention prior to their arrival in France was illegal. However, the Paris Court of Appeal confirmed the earlier decision since the arrest had been made within the framework of an *ad hoc* cooperation with the Somali authorities as was evidenced in a diplomatic note from the *Transitional Federal Government* (TFG) to the French government.<sup>3</sup> This diplomatic message was very explicit allowing the French Navy to enter into the Somali territorial waters and to take all necessary measures, the use of proportionate violence included.<sup>4</sup> Taking into account the specific

---

1. Zie "Six Somali pirates on trial in Paris over capture of Le Ponant crew", RFI, 22 May 2012, <http://www.english.rfi.fr/africa/20120522-six-somali-pirates-trial-paris-over-capture-le-ponant> (28 January 2015).

2. Following the release of the hostages the pirates were pursued by French helicopters from a military basis stationed in Djibouti. Special forces were able to arrest six suspects after their escape vehicle was taken out by a sniper. According to local authorities the intervention resulted in three people killed and eight wounded which was strongly denied by the French authorities, See "France raid ship after crew freed", BBC News, 12 April 2008, <http://news.bbc.co.uk/2/hi/africa/7342292.stm> (28 January 2015).

3. *République française v. Ali X et al.*, Cour d'appel de Paris 6 Avril 2009.

4. The letter of 5 April 2008 mentions:

"(...) le gouvernement fédéral de transition de Somalie condamne avec force le détournement du navire français 'Le Ponant'. Il partage les inquiétudes du

circumstances of the case, the Court was convinced that the requirement of “promptness” of art. 5 ECHR was respected. Similarly, the *Cour de Cassation* denounced the arguments of the plaintiffs stating that the detention in Somalia was justified due to the waiting for the authorisation of the Somali authorities for the transport of the suspects to

---

*gouvernement de la République française au sujet du détournement du navire français et de son équipage. Le gouvernement fédéral de transition de Somalie assure les autorités françaises de son soutien total et transmet sa sympathie aux familles des membres de l'équipe enlevés.*

*Le GFT de Somalie répond de façon positive à la demande d'autorisation faite par le gouvernement français et déclare ce qui suit :*

- 1. Le GFT de Somalie autorise la marine française à entrer dans les eaux territoriales de Somalie.*
- 2. Le GFT de Somalie autorise des forces françaises à prendre toutes les mesures nécessaires – y compris l'usage proportionné de la force – dans le contexte de la crise.*
- 3. Au cours de sa présence dans les eaux territoriales de Somalie, le GFT accepte que la marine française bénéficie de l'inviolabilité personnelle de ses agents, l'immunité à l'égard des poursuites devant tout tribunal pénal, civil et administratif et l'immunité d'exécution.*
- 4. Le GFT de Somalie renonce à tous droits de recours contre les forces françaises en vue d'obtention de compensation pour des éventuels dommages et torts causés à ses biens ou à son personnel, y compris ceux occasionnant la mort.*
- 5. Le GFT de Somalie renonce à tous droits de recours contre le gouvernement de la République française dans le cas de préjudice causé aux tiers.*
- 6. Dans le cas d'une action en justice entamée pour la réparation d'un préjudice tel que celui indiqué ci-dessus, le GFT de Somalie garantira le gouvernement de la République française et agira à la place du gouvernement français si une telle procédure devait avoir lieu.*
- 7. Aussi, le GFT de Somalie autorise quelques avions militaires français à survoler le territoire de Somalie dans le cadre de cette opération.*
- 8. Cette autorisation prendra effet à partir de la date de saisie du Ponant par les pirates somaliens (4 avril 2008) et restera en vigueur jusqu'à la résolution de la crise. (...)"*  
*(See ECtHR, Ali Samatar and Others v. France, 2014, 2-3).*

France.<sup>1</sup> Finally four suspects were condemned to prison sentences and two others were acquitted.<sup>2</sup>

## 2.2. Hassan and Others v. France

In the other case before the European Human Rights Court (*Hassan and Others v. France*)<sup>3</sup> three other Somali nationals had been prosecuted in France on charges of piracy. They were charged with the hijacking of the French yacht *Carré d'As* in September 2008 and the robbing and taking hostage of the French crew. Two weeks after the attack, French military forces were able to arrest the pirates and to release the hostages<sup>4</sup>. This action took place within the Somali territorial sea in line with the UN Security Council Resolution 1816<sup>5</sup>. The suspects were kept on board a French war ship for six days and afterwards transferred to an army basis in Djibouti from where to be flown to France the next day. As in the previous case the Somali authorities waited several days before giving their consent to transfer the pirate suspects. After two days upon arrival in France the suspects were led before an investigating judge and arrested on suspicion of piracy. The three plaintiffs appealed this

---

1. *République française v. Ali X et al.*, Cour de Cassation 16 Septembre 2009, nr. 09-82777.

2. *République française v. Ali X et al.*, Cour d'Assises de Paris 14 Juin 2012; "Prise d'otages du Ponant: Trois des 6 accusés peuvent sortir de prison", RTL, 15 June 2012, <http://www.rtl.be/info/monde/france/prise-d-otages-du-ponant-trois-des-6-accuses-peuvent-sortir-de-prison-296098.aspx> (28 January 2015); "La nouvelle vie parisienne des 'pirates' du Ponant", Direct Matin, 25 June 2012, <http://www.directmatin.fr/france/2012-06-25/la-nouvelle-vie-parisienne-des-pirates-du-ponant-42699> (28 January 2015).

3. ECtHR, *Hassan and Others v. France*, 2014.

4. See "French hostages freed in gun-battle with pirates", CNN International, 16 September 2008, <http://edition.cnn.com/2008/WORLD/africa/09/16/somalia.pirates/index.html?ref=nextin> (12 January 2015). Six Somali nationals were arrested, including the three plaintiffs whilst one of the pirates was killed in the exchange of fire.

5. UN Doc. S/RES/1816 (2008).

decision but the *Cour d'appel de Paris* declined the appeal maintaining that the measures taken were in conformity with Security Council Resolution 1816. The deprivation of their liberty and the subsequent holding in custody before their arrival in France was not considered to be a violation of art. 5 ECHR taking into consideration the totally extraordinary circumstances of the case.<sup>1</sup> Finally the *Cour de Cassation* confirmed the previous decisions.<sup>2</sup>

### 3. The Judgements of 4 December 2014 of the Court

Following the exhaustion of the French local remedies available to the suspects, they turned towards the European Court on Human Rights claiming that France had violated art. 5 ECHR. In the case of Hassan and Others the plaintiffs argued that art. 5 § 1 ECHR had been violated (right not to be deprived of liberty but in specific cases) and in both cases a violation of art. 5 § 3 ECHR was brought forward (requirement of promptness).

In its judgements of 4 December 2014 the ECtHR concluded indeed that there had been a violation of art. 5 § 1 ECHR in the Hassan and Others case and of art. 5 § 3 ECHR in both cases.

With respect to the violation of art. 5 § 1 ECHR the Court was of the opinion that there had been “plausible reasons” to suspect the applicants of committing offences and they had been arrested and detained for the purpose of being brought before the competent legal authority, within the meaning of art. 5 § 1 of the Convention. In addition, in the light of UN Sec. C. Resolution 1816 and its clear aim – to repress acts of piracy and armed robbery off the coast of Somalia – the French authorities’ intervention in Somali territorial waters to arrest individuals

---

<sup>1</sup>. *République française v. X Yakoub et al.*, Cour d'appel de Paris 6 Octobre 2009.

<sup>2</sup>. *République française v. X Yakoub et al.*, Cour de Cassation 17 Février 2010, nr. 09-87254.

suspected of committing acts of "piracy" on the high seas against a French vessel and French citizens had been "foreseeable". The applicants had been able to foresee, to a reasonable degree in the circumstances of the case, that by hijacking the French vessel and taking its crew hostage they might be arrested and detained by the French forces for the purposes of being brought before the French courts. However, the French law applicable at the relevant time to the situation of individuals arrested by French forces for acts of piracy on the high seas did not include any rule defining the conditions of deprivation of liberty that would subsequently be imposed on them pending their appearance before the competent legal authority. Consequently, the legal system in force at the relevant time did not provide sufficient protection against arbitrary interference with the right to liberty and security which led to the conclusion that art. 5 § 1 ECHR had been violated.

Concerning the violation of art. 5 § 3 of the Convention the Court argued that its case-law to the effect that periods of two or three days before the initial appearance before a judge did not breach the promptness requirement under art. 5 § 3 was not designed to afford the authorities an opportunity to intensify their investigations for the purpose of gathering the requisite evidence on the basis of which the suspects could be formally charged by an investigating judge. It could not be inferred from that case-law that the Court sought to afford the domestic authorities an opportunity to build the case for the prosecution as they saw fit. The French Government's argument that the applicants' period in police custody had been necessary for the purposes of the investigation was therefore not withheld by the Court.

Consequently the Court decided that there had been a violation of art. 5 § 3 of the Convention on account of the fact that on their arrival in France, the applicants, who had already been detained for long periods, had been taken into police custody rather than being brought



“promptly” before a “judge or other officer authorised by law to exercise judicial power”.

Following the finding of a violation of art. 5 § 1 and art. 5 § 3 ECHR the Court decided that France had to pay a financial compensation to the applicants.

#### 4. Concluding comments

As might have been expected, the judgements of the Court in the two cases mentioned, nurtured a wide spread and sincere indignation within the shipping industry. Taking into account the great difficulties encountered in arresting, prosecuting and sanctioning pirates<sup>1</sup> this outcry over the Court’s position did not come as a surprise. Awarding a financial compensation to convicted pirates was considered to be quite incomprehensible at least. However the findings of the Court could also be seen as a well-needed wake-up call to respect the fundamental rights guaranteed by the ECHR. In particular concerning the right to liberty of art. 5 ECHR and the restrictions thereof, it is in every one’s interest that such basic freedom is being scrupulously upheld also by international

---

<sup>1</sup>. See: A. ADEMUN-ODEKE, “Jurisdiction by Agreement over Foreign Pirates in Domestic Courts”, *University of San Francisco Maritime Law Journal* 2011, 35-64; R. P. KELLEY, “UNCLOS, but No Cigar: Overcoming Obstacles to the Prosecution of Maritime Piracy”, *Minnesota Law Review* 2010, 2285-2317; E. KONTOROVICH, “A Guantanamo on the Sea: The Difficulties of Prosecuting Pirates and Terrorists”, *California Law Review* 2010, 262-266; J. A. ROACH, “General Problematic Issues on Exercise of Jurisdiction over Modern Instances of Piracy” in C. R. SYMMONS (ed.), *Selected Contemporary Issues in the Law of the Sea*, Leiden, Martinus Nijhoff Publishers, 2011, 128-131; E. SOMERS, Can the Law Contribute to Solving the Problem of Piracy? K. Bernauw et al. (eds.), *Free on Board. Liber Amicorum Marc A. Huybrechts*, Antwerp - Cambridge, Intersentia, 2011, 497-515; E. SOMERS, The Prosecution of Alleged Pirates: is Outsourcing the Solution? *Zanzibar Yearbook of Law* 2012, 355-371.

courts. Even in the absolutely justified fight against piracy at sea, rules and standards inextricably linked with the rule of law must be observed. Perhaps the judgements of the Court can remind States that fundamental human rights cannot be set aside even for a just cause.<sup>1</sup> Although some may consider the procedural aspects dealt with in both cases to be of a mere trivial nature, practice has demonstrated that other problematical behaviour occurred in the fight against piracy. Trigger-happy military and private security forces, brutalities, torture and degrading detention of (alleged) pirates are all issues that have occurred in the past decennium.<sup>2</sup>

The right to liberty is of a fundamental nature and one can only be deprived of that liberty in specific cases and in accordance with a procedure prescribed by law. The findings of the Court in the Hassan and Others case that the French legal system did not provide sufficient protection against arbitrary interference however, is open to criticism and cannot be supported. In fact the Court has in its case-law clearly indicated that the provisions of the 1982 Law of the Sea Convention with

---

1. See: "Why Pirates Received Compensation", *Maritime Security Review*, 10 December 2014, <http://www.marsecreview.com/2014/12/why-pirates-received-compensation/> (15 January 2015).

2. See the reports of Human Rights at Sea organization. Also: C. G. BERUBE & P. CULLEN, *Maritime Private Security: Market Responses to Piracy, Terrorism and Waterborne Security Risks in the 21st Century*, London, Routledge, 2012, 86-87; J. HARRELSON, "Blackbeard Meets Blackwater: an Analysis of International Conventions that Address Piracy and the Use of Private Security Companies to Protect the Shipping Industry", *American University International Law Review* 2010, 283-312; J. H. HOHENSTEIN, *Private Security Companies at Sea: Unseen and Unregulated*, 2007; M. L. MINEAU, "Pirates, Blackwater and Maritime Security: The Rise of Private Navies in Response to Modern Piracy", *Journal of International Business and Law* 2010, 63-78; A. MURDOCH, "Recent Legal Issues and Problems Relating to Acts of Piracy off Somalia" in C. R. SYMMONS (ed.), *Selected Contemporary Issues in the Law of the Sea*, Leiden, Martinus Nijhoff Publishers, 2011, 163-164; M. ROUGER, *La piraterie maritime*, Brussel, Larcier, 2011, 145.

respect to piracy do meet the *sufficient legal basis* test of art. 5 § 1 ECHR.<sup>1</sup> Taking into account the very specific and difficult circumstances which have been recognised by the Court, it is slightly puzzling why then after all it found art. 5 § 1 ECHR violated. One could have expected the Court to take a more understanding position in order not to endanger the global fight against a crime for which international law provided universal jurisdiction (art. 105 LOSC).

Dealing, with the “promptness” requirement of art. 5 § 3 ECHR the Court seemingly did not have a problem with the overseas detention period which was justified because of the exceptional circumstances. Basically only the fact that the suspects were held for more than 24 hours in France until being brought before a judge, was not acceptable to the Court. Some might consider this to be unreasonable and even unworldly but that does not make the Court’s position legally incorrect. Indeed, States have been confronted with the requirement of “promptness” on many occasions before and the views of the Court have been made very clear.<sup>2</sup>

The State itself was to be blamed since State authorities’ actions were at the basis of the violation. Previous case law as well as the factual circumstances in *Ali Samatar and Others v. France* and *Hassan and Others v. France* demonstrated that it was surely possible to meet the “promptness” requirement. Each and every State attempting to prosecute suspects of piracy actions must make it a priority to bring such suspects without delay before a competent judicial authority. As such conformity with art. 5§3 ECHR will be guaranteed and most probably

---

<sup>1</sup>. *Medvedyev and Others v. France*, 2010; Further on art. 5 *Rigopoulos v. Spain*, 1999; *Vassis and Others v. France*, 2013.

<sup>2</sup>. See the ECtHR cases *Rigopoulos v. Spain*, 1999; *Vassis and Others v. France*, 2013.

appreciated by the ECtHR if ever a case will be brought to Strasbourg. It may be wise to facilitate the first appearance before a judge using present-day communications systems (video link; skype, face time etc.) on board warships and in overseas military basis even if that requires updating national legislation.

The ECtHR's decision to award a financial compensation in these cases might be deplored. The Court's procedural regulations allow that States are found to have violated fundamental human rights as guaranteed by the ECHR, without necessarily obliging them to pay a monetary reward. Deciding that there was a violation of the relevant articles of the Convention could have sufficed. It was not at all necessary to provide convicted criminals with a financial compensation understandably leading to stern criticism within the international shipping community and giving the impression that the ECtHR is not in touch with everyday reality as far as the risks of international navigation are concerned.

Finally, it is suggested that the SUA Convention could serve as a valid alternative to bestow jurisdiction to prosecute suspected pirates in States not being the flag States of the capturing naval ships, notwithstanding that this convention does not provide for universal jurisdiction. Capturing of suspect ships on the high seas remains subject to flag state authorisation which under the 2005 SUA Protocol can be presumed under certain conditions. Under the convention contracting parties cannot refuse to accept suspects of convention crimes and they have a conventional duty to either prosecute or extradite. Prosecution of art. 101 LOSC piracy could therefore as well (or better) be dealt with under the SUA Convention than under the transfer agreements since among the States that have concluded such agreements, only Somalia is not a contracting party to the SUA Convention.