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Pirates Have Rights, Bring in the Police

A Policy Update Paper

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NOTE

This paper will also appear in CDFAI's upcoming summer edition of "The Dispatch" that will be published in June 2009.

How far we have come since the times of Hugo Grotius, Emer de Vattel, and John Locke. No longer do we make the crude distinction between *bellum*, war against a legitimate enemy, and *guerra*, war against outlaws. One man's terrorist, in our enlightened times, is another man's freedom fighter, etc., and regardless of motivation or outcome each deserves fair and equal treatment under the law.

So instead of dealing with pirates as though they were *hostis humani generis*, the common enemies of mankind, and bringing the full measure of our warships to bear on pirate skiffs and pirate sanctuaries, we now deal with piracy in the most civilized manner: as a crime deserving of an expeditious and fair trial, and pending conviction, a warm and sterile jail cell. Pirates, just like terrorists, have rights.

There was much consternation recently about the fact that upon capturing a group of pirates off the Horn of Africa, the *HMCS Winnipeg* let them go. The alleged pirates had been engaged in an attempted hijacking of a Norwegian oil tanker. They were unsuccessful and were chased throughout the night by the *Winnipeg*. Once caught, they were released and apparently even thanked the *Winnipeg's* boarding party for letting them go.

William Tetley, Professor of Maritime Law at McGill University, said to the *Globe and Mail* that "it's nuts to let them go" and accused the Canadian navy of being "caught with their pants down; they don't have any guts and neither does the Prime Minister." Michael Byers of the University of British Columbia made similar comments, correctly stating that "Canada has a legal obligation" to bring pirates to justice.

The Harper Government has been reluctant to get involved in the tricky business of bringing Somali pirates to trial, and unquestionably did err in suggesting it did not have jurisdiction to arrest and prosecute pirates. Tetley and Byers were right to point this out. But were they right in suggesting that Canada should get into the game of prosecuting the pirates of the Horn?

Supposing the Harper Government was inclined to follow the advice of Byers and Tetley, what are the policy options for Canada?

Option A: Extradition leading to trial in Canada

In this scenario suspected Somali pirates would be detained onboard a Canadian warship and then brought to a friendly port in Djibouti or Mombasa, taken into custody, and flown to Ottawa to stand trial for the crime of piracy, which under the Canadian Criminal Code carries with it the possibility of a life sentence.

As a signatory to both the United Nations Convention on the Law of the Sea (1982) and the Safety of Maritime Navigation Convention (1988), Canada would be within its rights to do this, as piracy is defined by both as a universal crime. But it would have to ensure that the extradition process happened in a way that did not run afoul of the Universal Declaration of Human Rights. At the very least the Captain of the Canadian warship and the Team Leader of the boarding party would be required as witnesses, and ample evidence would have to have been collected in a manner that would stand up in court. Failure or glitches at any step along the way could lead to an acquittal and a subsequent refugee claim. If this happened it would not be long before scores, if not generations of Somali "pirates" began throwing up their arms in front of Canadian warships begging to be brought before a Canadian court. Given that their countrymen and women routinely risk life and limb to be smuggled across the Gulf of Aden for a chance at a brighter future in Yemen, such a scenario is not particularly farfetched.

Option B: Trial in a Third Country

At the root of the piracy problem off the Somali coast is the failed Somali state, itself. There is no civil authority in that country willing to execute justice, let alone a form of justice acceptable to Western standards. Accordingly, the United States and the European Union have both signed Memorandums of Understanding with the Kenyan Government, which allow them to hand over Somali pirates to Kenyan authorities for arrest and prosecution. France has exchanged a similar MOU with the Puntland Government. The MOUs contain assurances that suspected pirates will be treated fairly and humanely. Regardless of these assurances, Human Rights Watch is not amused with the agreements.

If Canada were to exchange a similar MOU with Kenya for example, Canadian Naval Officers and boarding party members would have to be available as witnesses in person at the trials. That's Kenyan law, and it could mean extended periods ashore in Mombasa for Officers needed at sea. Aside from the obvious need to make diplomatic provisions for the observation of the human rights of the alleged pirates once they were delivered into the Kenyan justice system, this option would require admittedly less logistical acrobatics than putting on a piracy trial in Ottawa.

Neither option, however, seems particularly enticing from a political standpoint. Both scenarios are complicated and both are clearly laden with political risks. So the Harper Government, in its precarious minority situation, can be excused for steering a cautious course around this issue.

But there is a way to make either of the above policy options more viable and less risky. An RCMP detachment could be placed aboard all Canadian warships engaged in counter-piracy operations off the Horn of Africa. Trained and certified in evidence collection techniques, the RCMP detachment could take the lead of the policing element of the operations. They could also be more easily dispatched to a third country for extended periods to serve as credible witnesses in courts of law. With a proper law enforcement detachment on board, both the navy and the Canadian government could be more assured of not running aground on human rights violations when detaining suspected pirates and delivering them to justice either at home or in a third country.

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CDFAI was created to address the ongoing discrepancy between what Canadians need to know about Canadian international activities and what they do know. Historically, Canadians tend to think of foreign policy – if they think of it at all – as a matter of trade and markets. They are unaware of the importance of Canada engaging diplomatically, militarily, and with international aid in the ongoing struggle to maintain a world that is friendly to the free flow of goods, services, people and ideas across borders and the spread of human rights. They are largely unaware of the connection between a prosperous and free Canada and a world of globalization and liberal internationalism.

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