

PROSECUTING PIRATES: LESSONS LEARNED AND CONTINUING CHALLENGES



a Research Report by
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ABOUT THE AUTHOR

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FOREWORD

Oceans Beyond Piracy is pleased to share with you this extensively researched report on prosecuting pirates by Ken Scott, a top national and international prosecutor. We are particularly happy to present the report to those of you who provided valuable information and insights during the many interviews with Ken over the past months. Since most of the interviews and research were completed late last year, we wanted to note several continuing developments:

Concerning the continuing important work of the Contact Group on Piracy off the Coast of Somalia (CGPCS):

- Portugal has assumed the chair of Working Group 2, which is now the “CGPCS Legal Forum.” The group’s work will continue, but as a virtual forum of legal experts that will continue to support and report to the Plenary. The forum can also meet on an ad-hoc basis, if and when needed.
- Working Group 5 has been renamed “Disrupting Pirate Networks Ashore,” and will continue to focus its work on tracking financial flows and prosecuting pirate kingpins. There are continuing efforts to concentrate law enforcement expertise in a dedicated, autonomous Task Force within this group.

UNODC has continued its vital work in assisting various prosecution efforts and building incarceration and other capacity. UNODC recently completed and handed over operations of the new 500-bed Garowe Prison to the President of Puntland, Dr. Abdiweli Mohamed Ali Gaas, to support the detention and trial of pirates. The prison has accepted the initial transfer of eighteen Somalis who were convicted of piracy in the Seychelles after their prosecution there.

RAPPICC continues its transition, shifting to a broader focus on transnational crime, with the help of its member countries and other organizations and changing its name to “REFLECS-3,” or the Regional Fuel Law Enforcement Center For Safety and Security at Sea, to better describe its mission.

Finally, we would be remiss not to mention the sad and tragic loss of two of our colleagues from UNODC, Clément Gorrissen and Simon Davis, in Galkayo, Puntland. Clément and Simon were helping the Somali people tackle the organized crime that is stifling much-needed development in their country. Their deaths are a tragedy not only for their families, friends, and colleagues, but also for the Somali people who so desperately need the sort of assistance that Clément and Simon were providing. We thank those who have sent their condolences to the families and colleagues.

We invite and look forward to receiving your comments on this publication, and stand ready to participate in and assist important continuing and future work on prosecuting pirate leaders.

Sincerely,

Ken Scott and Jon Huggins

EXECUTIVE SUMMARY

Maritime piracy off the coast of Somalia, in the Gulf of Aden, and in recent years, the Gulf of Guinea, has continued to develop into an international crisis involving very large human and economic costs and demanding the attention of States, international organizations, and industry around the world. A number of international organizations or groups, such as the Contact Group on Piracy Off the Coast of Somalia, the International Maritime Organization, the International Maritime Bureau, INTERPOL, the UN Office on Drugs and Organized Crime, and Europol, have taken active steps to improve cooperation and effective action among flag States, industry, military forces, and law enforcement. But while approximately 1,200 pirates have been, or are being prosecuted in various parts of the world, almost all of them have been, or are low-level skiff pirates, with the international community and only a few countries engaged in limited proactive efforts to prosecute pirate leaders and financiers.

This report analyzes information obtained from interviews of thirty-three participants in the fight against piracy in East Africa and considers other reports and materials on questions dealing with the current state of investigative and prosecution efforts related to piracy, as well as proposed future measures. Most of those interviewed expressed serious concern about the lack of progress made in bringing pirate leaders to justice. There is nearly universal agreement that an effective fight against piracy requires international effort and cooperation, but that there has been too much fragmentation and duplication and “too many different agendas” without a high-level coordinated approach targeting pirate kingpins. While many aspects of the fight against piracy have substantially improved, information-sharing, databases, and related tools continue to be problematic in important respects. There is also concern that ship owners, insurance carriers, and private security companies are often uncooperative or even counterproductive where investigations are concerned. And a substantial majority of those surveyed believe that there is no current or near-term capacity to prosecute pirate leaders or financiers in Somalia or most other regional countries.

In this report, international prosecutor Kenneth Scott recommends a more proactive, more focused, and better-coordinated approach. Most maritime piracy is organized crime and requires more sophisticated law enforcement approaches and techniques aimed at acquiring evidence against pirate kingpins, investors, and money launderers. Piracy databases should be fully assessed and coordinated, and care should be taken to eliminate duplicative efforts. Renewed and invigorated efforts must be made to develop and use insider witnesses and various means of surveillance, and to locate and obtain what paper, digital, and other documentation may exist. Information-sharing must be made simpler and easier, especially among the military and intelligence communities and law enforcement.

Finally, Mr. Scott recommends an international judicial mechanism (dubbed “International Lite”) to direct top-level investigations and prosecutions without developing a full international tribunal. Under Chapter VII of the United Nations Charter, the Security Council has broad latitude to customize an international judicial mechanism to suit the needs of the counter-piracy community. An “international lite” mechanism would consist of UN-staffed and -financed investigation and prosecution teams, a judiciary comprised of national judges with international support, and defense counsel appointed on an as-needed basis, aimed at disrupting pirate networks and bringing their leaders to justice.

“[We note with] particular[] concern” that piracy off the Somali coast is “caused by lack of lawful administration . . . which allows the ‘pirate command centres’ to operate without hindrance” and “[we] strongly urge Governments to ‘take all necessary judicial, legislative and law enforcement action’ to receive and prosecute or extradite suspected pirates and armed robbers.” International Maritime Organization Assembly Resolution A.1002 (25) (November 29, 2007).

“Countries that can do so should trace, track and freeze the assets of the backers of the pirates . . . They deserve to be brought to justice and prevented from harming their country, its economy and reputation. Impunity and lack of respect for human rights have no doubt encouraged piracy.” Ahmedou Ould Abdallah, UN Special Representative for Somalia, December 11, 2008.

“In a world where criminal groups . . . are quick to forge new alliances for mutual profit, piracy represents a major threat to international security. . . . We must follow the money! . . . [I]t is now time for the international community to integrate this fundamental financial component in its joint law enforcement strategy against maritime piracy . . .” Speech by INTERPOL Secretary-General Ronald K. Noble, January 19, 2010.

“As piracy has evolved into an organized transnational criminal enterprise, it is increasingly clear that the arrest and prosecution of rank and file pirates captured at sea is insufficient on its own to meet our longer term counter-piracy goals. Most pirates captured at sea are low-level operatives. The harsh reality of life in Somalia ensures there are willing replacements for pirates apprehended at sea. Prosecutions is one key to deterrence, but this must include the prosecution of the masterminds and funders along with the gunmen.” Speech by U.S. Principal Deputy Assistant Secretary of State for Political-Military Affairs Thomas Kelly, October 25, 2012.

“To date neither the Somali Government, the “Puntland” administration or any other local authority has seriously prosecuted and jailed any senior pirate leaders, financiers, negotiators or facilitators. The leadership of the principal piracy networks and their associates have continued to enjoy freedom and impunity and have not been hindered in their travel or ability to transfer funds.” Report of the Monitoring Group on Somalia & Eritrea, S/2013/413 (July 12, 2013), at 22, para. 65.

“In the persisting absence of serious national and international efforts to investigate, prosecute or sanction those responsible for organizing Somali piracy, the leaders, financiers, negotiators and facilitators will continue to operate with impunity.” Report of the Monitoring Group on Somalia & Eritrea (July 12, 2013), at 8.

“Since the passage of time is affecting the quality and accessibility of testimonies and evidence, the Monitoring Group reiterates the urgent need to establish a dedicated group of investigators with the mandate to collect information, gather evidence and record testimonies relating to acts of Somali piracy, including especially the identification of pirate leaders, financiers, negotiators, facilitators, support networks and beneficiaries.” Report of the Monitoring Group on Somalia & Eritrea (July 12, 2013), at 22, para. 67.

INTRODUCTION

Since 2005, there has been growing consensus and frequently recurring calls in the international community for the leaders, financiers, and land-based facilitators of modern maritime piracy to be prosecuted. There is broad recognition (at least in concept and rhetoric) that successfully prosecuting the low-level skiff pirates, while part of the equation, will ultimately have limited impact on ending or substantially reducing piracy, at least in terms of the law enforcement and prosecution components of national and international counter-piracy efforts. Indeed, one of the four priorities of the Contact Group on Piracy off the Coast of Somalia for 2013 and beyond is “[t]o strengthen and focus law enforcement efforts to disrupt pirate networks ashore, including by establishing effective information exchanges among prosecutors, investigators and private industry . . .”¹ Yet to date, with the exception of the conviction of two pirate negotiators (which might be considered mid-level management) and the recent arrest of pirate leader Mohamed Abdi Hassan (better known as “Afweyne”) in Belgium, there have been no prosecutions of higher- or top-level pirate leaders, financiers, or facilitators. While approximately 1,200 pirates have been, or are being prosecuted in various parts of the world (primarily in Somalia, 402; Kenya, 164; Yemen, 129; and Seychelles, 124),² almost none of them can be considered anything more than low-level skiff pirates. Why is that the case, and what lessons can the international community and national authorities learn from our experience fighting East African piracy, in fighting piracy elsewhere, or indeed dealing with other international and transnational crime?

In answering these questions, or at least in continuing a dialogue to answer them, several things should be noted. First, modern maritime piracy is a complex, multi-faceted problem and will only be overcome by complex, multi-faceted solutions. There is no doubt, for example, that an important part of the solution lies in giving young men in the regions experiencing a high incidence of piracy genuine alternatives to piracy as a means of livelihood. There is also no question that capacity-building is important in building and improving the law enforcement and criminal justice capacity in East Africa and Indian Ocean States, in terms of training law enforcement, building courtrooms and prisons, and addressing the various legal and logistical issues that arise in the context of cross-border transnational crime. This paper does not dismiss the importance of these and other components of an overall counter-piracy strategy. But conducting training programs and building good prisons are not the same as putting pirate kingpins on trial and in jail. The focus of this paper, therefore, is specifically (and unabashedly) on the criminal justice or law enforcement part of the counter-piracy equation: what more effective role can law enforcement and prosecutions play in creating a safe and sustainable rule-of-law environment for maritime commerce, vessels, and seafarers? Even more specifically, what more can be done to prosecute and bring to justice top pirate leaders, financiers, and land-based facilitators?

Successfully prosecuting the low-level skiff pirates, while part of the equation, will ultimately have limited impact on ending or substantially reducing piracy.

Second, the very substantial challenges and sustained effort required in investigating and prosecuting any complex organizational crime are fully appreciated. This is true whether the crime involves massive fraud at the highest levels of a corporation, public corruption in the upper echelons of government, large-scale ethnic cleansing by top nationalist politicians, drug-trafficking by international kingpins, or systematic violence at sea by top pirate leaders and financiers. In the vast majority of circumstances, such cases, even those internal to one national or domestic criminal justice system, require significant expertise, substantial resources, and sustained focus to investigate, charge, and prosecute. Looking at one current example, the recent federal indictment of SAC Capital Advisors in the United States and the

resulting guilty pleas culminated a four-year criminal investigation, which had already involved numerous SAC employees pleading guilty to insider trading charges,³ which almost certainly occurred, at least in part, as stepping stones in building a case against the company and its more senior management. The numerous challenges and difficulties confronted in such cases are multiplied in situations crossing international borders, involving multiple jurisdictional lines, different national laws and systems, seriously limited (or even compromised) law enforcement resources, and failed or significantly challenged states, some of which may even obstruct or otherwise hamper prosecution efforts. Still, to attempt to stop or substantially reduce piracy by prosecuting only the lowest-level pirates would be like trying to stop (or appropriately punish) Enron by prosecuting only the lowest-level bookkeepers, or fighting the war on illicit drugs by prosecuting only the small-time, lowest-level dealers.

METHODOLOGY AND OUTLINE

The principal focus of this paper is to provide a “lessons learned” analysis of the law enforcement and prosecution aspects of international and national counter-piracy efforts concerning maritime piracy occurring off the east coast of Africa, and in particular the coast of Somalia, since approximately 2005, with a view to improving these and other efforts against international and transnational crime in the future. It is not within the scope of this paper to provide a full history of maritime piracy, in either its older or more contemporary forms, which have been covered extensively and well in a number of publications.⁴ As background and overview, however, and to provide a foundation, framework, and context for the survey results and the observations and recommendations that follow, the paper relies on two principal sources: Robert Haywood and Roberta Spivak, *Maritime Piracy* (Oxford: Routledge, 2012) (hereafter *Maritime Piracy*) and Danielle A. Zach, D. Conor Seyle and Jens Vestergard Madsen, *Burden-Sharing Multi-Level Governance: A Study of the Contact Group on Piracy off the Coast of Somalia* (One Earth Future Foundation, 2013) (hereafter *Burden-Sharing*).

Following the Introduction and the Methodology section, this paper begins with a brief overview of modern maritime piracy, followed by a discussion of law enforcement techniques and approaches used in investigating and prosecuting complex organized crime. The core of the paper will set out the results of an extensive survey of thirty-three participants in the recent fight against East African piracy. Those interviewed included Donna Hopkins, senior U.S. State Department official and recent head of the Contact Group on Piracy Off the Coast of Somalia; Thomas Winkler, the Chair of the Contact Group’s Working Group 2 during much of its life; and Giuseppe Maresca, the Chair of Working Group 5; the United Nations Office on Drugs and Crime (UNODC); the international police and prosecution organizations INTERPOL, Europol, and Eurojust; U.S. State Department officials; various investigation and prosecution authorities in Europe, the United States, Somalia, Kenya, and Seychelles; the Seychelles Piracy Intelligence Center (SPIC); the Regional Anti-Piracy Prosecution and Intelligence Coordination Centre (RAPPICC); the International Maritime Organization; the shipping organizations INTERTANKO and INTERCARGO; and two notable maritime piracy scholars, Douglas Guilfoyle and Eugene Kontorovich.⁵

Finally, this paper takes into account the potential “Monday morning quarterbacking” involved in an effort such as this one, as well as the old saying that “hindsight is 20-20.” Both of these observations may well be true, but that is the nature of an after-action “lessons learned” project. Nothing in this paper is meant to denigrate or detract from the significant and indeed successful efforts of many talented and dedicated individuals in the fight against piracy across the entire range and nature of such efforts. Rather, the focus is on the institutions, structures, policies, and processes involved in the counter-piracy effort. Generally, the reported survey results are those which represent a consensus or majority view, or at least an important viewpoint or

observation shared by more than just one or two people. Preparation of the paper also included a review of various available reports, documentation, literature, website material and similar information related to the organizations, programs, and activities involved in recent counter-piracy operations.

THE SCOURGE OF MODERN MARITIME PIRACY AND TRANSNATIONAL CRIME

The modern world is confronted by increasing transnational threats that require robust and timely responses and repeatedly challenge the very capacity of States, individually or collectively, to address them.⁶ Indeed, collective action among States and non-State actors involves inherent and significant dilemmas in a world system built on sovereign nation-States, with no supranational authority.⁷

Perhaps surprisingly, given that it was once considered virtually a thing of the past and a subject only for Hollywood movies, maritime piracy is a prime example of such a threat. In the early 21st century, maritime piracy surged dramatically, increasing five-fold over the course of 2008 alone. According to the International Chamber of Commerce's International Maritime Bureau, ships and others engaging in maritime commerce were attacked 293 times, 49 ships were hijacked, and 889 hostages were held in 2008. Perhaps not as surprisingly, given the combination of circumstances, a large part of this increase in piracy was concentrated off the coast of Somalia, which for at least the last 20 years had been a failed state with no functioning central government and endemic lawlessness, a place "divorced from . . . the rule of law."⁸

Maritime piracy today, on anything other than its smallest scale, is a form of organized crime, involving land-based financiers and organizers, mother ship operators, suppliers, pirate crews, hostage negotiators and money launderers.⁹

As a transnational organized crime, Somali piracy entails more than armed youngsters at sea in small boats attacking ships or providing armed protection aboard hijacked vessels. The piracy business draws on a widespread network of facilitators internationally and inside Somalia from multiple layers of society. In fact, pirates and their accomplices may be bankers, telecommunications agents, businessmen of various kinds, politicians, clan elders, translators or aid workers, all using their regular occupations or positions to facilitate one or another network.¹⁰

Piracy today [is] an economy . . . which [has] taken on an industrial scope, thanks to the rapid sophistication of its methods, organizational structures and resources. Pirate behaviour -- the demand of high ransoms, use of advanced technologies and extreme talent in money-laundering -- [is] similar to that of the mafia. There's a machinery behind this and it functions quite well.¹¹

By 2009, Somali pirates were responsible for more than half of the 406 worldwide incidents of piracy and armed robbery at sea.¹² By 2010, more than 1,000 seafarers were being held hostage and the *New York Times* declared: "The Pirates are Winning!"¹³

National and international efforts to deal with modern maritime piracy date to at least 2001, with increasing attention since 2005. In November 2001, the International Maritime Organization (IMO), a specialized

United Nations agency that works closely with the shipping industry, established a Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery Against Ships.¹⁴ In adopting the Code, the IMO Assembly was “aware that, when arrests are made, some Governments are lacking the legislative framework and adequate guidelines for investigation necessary to enable conviction and punishment of those involved in acts of piracy and armed robbery against ships” and was “also convinced of the need for Governments to co-operate and to take, *as a matter of the highest priority, all necessary action to prevent and suppress any acts of piracy and armed robbery against ships . . .*”¹⁵ The IMO Assembly

urged all States, in particular coastal States, in affected regions to take all necessary and appropriate measures to prevent and combat incidents of piracy and armed robbery at sea, including through regional co-operation, and to investigate or co-operate in the investigation of such incidents wherever they occur and bring the alleged perpetrators to justice in accordance with international law . . .¹⁶

In November 2004, the UN General Assembly, in Resolution 59/24, urged States to cooperate with the IMO in combatting piracy and armed robbery at sea and to undertake capacity-building efforts to deal with piracy. In November 2005, IMO Assembly Resolution A.979(24) urged States to implement protective measures, including issuing guidance to ships and sharing information with the IMO concerning piracy incidents. By December 2006, the UN General Assembly, in Resolution 61/222, called on States to confront the increasing maritime threats through the adoption and harmonization of national laws and through the provision of enforcement vessels. A year later, in December 2007, IMO Assembly Resolution A.1002(25) expressed IMO’s “grave concern” with piracy and called for “the immediate establishment of appropriate measures to protect ships sailing in waters off the coast of Somalia from piracy . . .” The Assembly noted with “particular[] concern” that piracy off the Somali coast was “caused by lack of lawful administration and the inability of the [Somali] authorities to take affirmative action against the perpetrators, which *allows the ‘pirate command centres’ to operate* without hindrance at many points along the coast of Somalia,” and called on States to “take all necessary judicial, legislative and law enforcement action” to receive and prosecute or extradite suspected pirates and armed robbers.¹⁷

Approximately six months later, in Resolution 1816 on June 2, 2008, the UN Security Council, exercising its powers under Chapter VII of the UN Charter, made a formal finding that piracy was exacerbating “the situation in Somalia which continues to constitute a threat to international peace and security . . .”¹⁸ In Resolution 1816 and a continuing series of resolutions and Chapter VII findings, the Security Council authorized what might be considered extraordinary counter-piracy measures by UN member-states, including the use of armed force on Somalia’s sovereign territory and in its territorial waters.¹⁹ Indeed, taking all of the circumstances together, it is not an overstatement to call the piracy situation in and around the Horn of Africa a war. In fact, “[s]uch is the threat of piracy [in that region] that the Joint War Committee of Insurers in London *has declared the waters off the coast of Somalia a war zone.*”²⁰

It is not an overstatement to call the piracy situation in and around the Horn of Africa a war.

While the UN and IMO were adopting resolutions and taking some action, the surge in maritime piracy was causing dramatic increases in the economic, human, and other costs of piracy. The average ransom for a seized ship and its crew increased from approximately \$150,000 in 2005 to \$5 million in 2011.²¹ The ransoms for the *MT Smyrni*, which was released in early 2013, reportedly totaled \$13 million.²² One body of research indicates that an estimated \$300 million in ransoms was paid to Somali pirates from 2008

to 2012—a figure almost twice the amount of humanitarian assistance and development aid to Somalia during the same period.²³ A more recent World Bank study, released on November 1, 2013, indicates that between \$339 million and \$413 million was taken in pirate ransoms off the Horn of Africa between 2005 and 2012.²⁴ The estimated total global costs of East African piracy, including ransoms and other financial impacts (such as increased insurance premiums) were between \$7 billion and \$12 billion in 2010, almost \$7 billion in 2011, and approximately \$6 billion in 2012,²⁵ with the World Bank more recently pegging the global economic costs at \$18 billion a year.²⁶ The human costs have been equally sobering. As of May 2012, 3,741 seafarers of 125 nationalities had been taken hostage by Somali pirates, with some of the hostages held for as long as 1,178 days.²⁷ Hostages are generally held in dire conditions, with limited access to food, water, and medical care, and are often abused and sometimes tortured, with these tragic impacts not including the pain and suffering and economic losses suffered by their families.²⁸ In 2011 alone, 470 new hostages were added to the 645 that were being held at that time, and eight seafarers died in pirate custody. This plainly unfortunate human impact is suffered disproportionately by those in the developing world (from which 93% of all hostages are comprised), with 25% of hostage seafarers coming from the Philippines and India.²⁹

PROVING COMPLEX ORGANIZATIONAL CRIME

Organizational or organized crime can generally be described as being larger-scale, systematic crime which, in its planning, preparation, execution, and concealment, involves multiple persons acting in an organized, often hierarchical way, ranging from the most simple organizations to those which are as complex as multinational business organizations—all of which describe maritime piracy. In most (if not all) organized crime situations, the ultimate goal of law enforcement is to prosecute and convict those in the top echelons of the organization—the kingpins, rather than the mere foot soldiers or small fish.

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Most, if not all, criminal investigations and prosecutions involve at least two questions: (1) was a crime committed (and can it be proved in court, according to the standard of proof and rules of procedure and evidence)? and (2) who committed, conspired, aided and abetted or is otherwise responsible for that crime (and again, can such commission or responsibility be proved in court)? The first question might be stated as “Was Crime A committed at Location B on Date C?” Dealing with this question will generally involve the proof of any jurisdictional or common elements, as well as the elements of that particular crime. The second question is: “Having established that Crime A was committed, did Person D commit, conspire to commit, or aid and abet the crime, or is he or she otherwise, on some legal basis, responsible for the crime?” In a significant number of cases concerning many areas of crime, it is often relatively easy (or at least easier) to prove that a crime was committed—e.g., there may be little or no doubt or difficulty in proving that a Tutsi or Bosnian village was attacked and atrocities committed on a particular date, or that a ship was boarded at a particular grid reference and hostages taken. The more difficult task is proving the criminal responsibility of the higher-level culprits; in linking the corporate executive to the cooked books, the national politician to the ethnic cleansing of a local minority village, or a land-based pirate leader to an act of piracy 100 miles out at sea, where the executive, politician, or pirate leader did not personally cook the books, torch the village, or seize the ship.

In many such cases, two different types or categories of evidence will be needed in order to prosecute a case successfully. The firsthand accounts of immediate victims and eyewitnesses (such as seafarers or first responders) or overhead imagery of a criminal event (by a satellite, drone, or aircraft) may prove that a crime was committed (and even identify the physical perpetrators), but contribute little or nothing to proving the responsibility of those at higher levels in the criminal chain of command. Using a war crimes example, evidence given by a Muslim victim or a Serb foot soldier in a Hague courtroom that a particular village in Bosnia was attacked on a particular date was generally of little or no value in proving that Slobodan Milosevic, at the highest political level, hundreds of miles away in Belgrade, was responsible and should be punished for the attack. Photographic or video evidence of destroyed villages and exhumations of mass graves, while often important as evidence proving that a crime was committed, usually provides few direct links to higher-level perpetrators. To prosecute and convict the higher-level culprits—that is, to convict the corporate executive, national politician, or pirate leader—a different or additional type of evidence is necessary, often from different sources.

In discussing these matters as they relate to piracy, and concerning the pirate hierarchy or chain of command, three basic levels of pirate actors can be identified: (1) the foot soldier—that is, the skiff pirate with an AK-47 or rocket-propelled grenade who boards the attacked ship; (2) middle management—those who operate higher up on the organizational chart, primarily on land, to facilitate and accomplish the pirate enterprise, such as ransom negotiators and land-based suppliers; and (3) the top pirate leaders and financiers: the kingpins. The eyewitness testimony of victimized seafarers, combined with overhead video images, may well convict the pirate foot soldiers apprehended by international navies at sea but provides no evidence for moving up the chain of command. Audio recordings of a pirate ransom negotiator engaged in telephone conversations with the ship’s owner or insurance carrier to negotiate a ransom may result in that negotiator going to jail, if identified and captured, but will not, without more evidence, convict the pirate kingpin. (Of course, and as discussed below, lower-level evidence can provide the foundation for, or be a stepping stone to, additional evidence and higher-level culprits.)

For these and other reasons, it is accepted law-enforcement wisdom that convicting higher-level criminals on the basis of what prosecutors sometimes call a purely “historical case” (that is, from an entirely after-the-fact, outside-looking-in perspective), while not impossible, is usually very difficult. To overcome these difficulties, one or more of four investigative techniques or categories of evidence are usually needed, together with a particular approach and organizational structure: (1) a proactive, top-down approach; (2) the development of insider evidence; (3) the carrying out of an undercover investigation; (4) the use of various forms of electronic or communication surveillance or interception; (5) the collection of contemporaneous documentary evidence, especially from inside the criminal organization; and (6) the use of dedicated and focused units, adequately resourced.

(1) Proactive Top-Down Investigations

Reactive approaches to criminal investigation typically attempt to build cases from the bottom up, based on or in reaction to a specific criminal incident. The First National Bank is robbed and investigators try to figure out who did it and how, and on what evidence the culprits can be convicted. A proactive top-down approach is something quite different. In many situations involving organizational or organized crime, at least some of the top bad actors, while presumed innocent, are widely known or suspected even if there is not sufficient admissible evidence to prove their criminality in court. Based on such information or “intelligence,” proactive investigations are focused from the top down, looking to build cases against the suspected criminal leaders, consistent, of course, with due process, the rules of evidence, and procedure and ethical considerations.

(2) Insider Evidence

Insiders are past or present participants in the particular criminal activity or organization being investigated. Insider evidence is witness or testimonial evidence obtained from such participants. While such evidence can be helpful at any level (in simplifying the proof of the crime itself), it is especially valuable from middle managers and higher-level insiders who can explain the structure and processes of the criminal organization, how orders or directions flow down the chain of command, and how reports and information are communicated upward to persons higher in the organization. In climbing the organizational ladder, foot soldier evidence may be essential or at least very helpful in charging and convicting the lower-level or mid-level managers; lower-level managers and facilitators are important to prosecuting middle managers; and middle managers and top lieutenants are almost always essential in prosecuting and convicting the kingpins, especially in the absence of one or more of the other types of evidence identified above and discussed below, such as intercepted communications involving the top leader him- or herself or internal documents directly or indirectly (with other evidence) incriminating the criminal leader.

Insider evidence is especially valuable from middle managers and higher-level insiders

Insider witnesses were often the most important witnesses in cases at the International Criminal Tribunal for the Former Yugoslavia. Subordinate officers, for example, often gave testimony implicating their military superiors, while insiders (political or military) gave evidence concerning the internal conversations and decisions of one side or another. While such witnesses were often hostile to the prosecution and identified very closely with those “on their own side” or of their own ethnicity and were reluctant to give evidence against them (where a lower-level Croat officer, for example, was called to give evidence against a Croat commanding officer), such evidence was often ultimately forthcoming and was vital at trial in proving the links to and responsibility of higher-level culprits and indeed the very persons who, according to Security Council mandates, the tribunal was supposed to prosecute, as opposed to the “small fish.”

There are various ways in which insider evidence might become available to law enforcement. First, an innocent (or mostly innocent) person involved in the relevant organization or activity may discover criminality (or a type or level of criminality) that he or she was previously unaware of and report his or her information to the police or other authorities. Second, a person who may have knowingly engaged in or assisted criminal activity in the past may have a change of heart and decide that he or she, rather than continuing to participate in or assist the criminal activity, wants to assist law enforcement in discovering and stopping it. Third, there is often, fortunately, little honor among thieves, and former partners in crime may turn on each other for all sorts of reasons, like a disgruntled corporate employee who, in his view, has been mistreated or let go after being what he thought was a loyal but not so innocent cog in the criminal machinery. And fourth, and perhaps most common, an insider turns “state’s evidence” or becomes a “Crown witness” when he or she is prosecuted or threatened with prosecution for his or her own role in the crime and he or she hopes or seeks to obtain more lenient treatment in exchange for his or her cooperation, which includes giving evidence against others, including Mr. Big. In law enforcement circles, the development of insider evidence in this way is often known as “flipping,” in terms of the witness flipping or changing sides.³⁰

(3) Undercover Investigation

An undercover investigation is a way to obtain inside evidence where the insider is either an infiltrating law enforcement agent or a person who is already inside the organization who agrees to stay inside (unbeknownst to his conspirators or colleagues) as a way of obtaining evidence and as part of an arrangement with the authorities. An undercover operation, of course, may require sophisticated and disciplined law enforcement techniques and personnel, and especially in relation to violent crime, can be a dangerous activity. But again, to acknowledge these realities is not to say that it cannot or should not be done.

(4) Electronic or Communication Surveillance or Interception

This important category of evidence includes all manner and means of intercepting or capturing communications, including face-to-face conversations, telephone calls, radio traffic, e-mails, texts, and other social media messaging. A face-to-face conversation might be recorded by a party to the conversation “wearing a wire,” and telephone and similar communications may be intercepted by means of wiretaps. Further, in this day of satellites, drones, and similar technology, there may be a wide array of possibilities for monitoring and intercepting communications. It goes without saying that capturing an incriminating communication in the pirate leader’s own words is worth its weight in pirate treasure. Further, and lest there be misunderstandings, the content of intercepted communications need not be expressly inculpatory, in the sense, for example, that an explicit order was given to attack a ship or “kill all the hostages.” Less explicit communications may prove important characteristics about organizational structures and processes, provide insights into “command and control,” prove knowledge of important events or circumstances, or might even be as valuable as physical evidence in proving the “known voice” of a particular pirate leader.³¹ Of course, depending on the circumstances, the use of various intercept technology may need to comply with national and/or international law, and the admission of such evidence in court must satisfy applicable evidentiary and procedural rules.

(5) Significant Contemporaneous Documentary Evidence, Especially from Inside the Criminal Organization

Investigators and prosecutors love to follow ‘the paper trail’

Investigators and prosecutors love to follow “the paper trail” (and also “the money”) when and where such trails exist and can be discovered and obtained, because documents, papers, and financial transactions can be compelling and highly incriminating evidence. Among other things, documents are akin to physical evidence in that they are generally prepared and communicated contemporaneously with the events under investigation, and are not dependent on witness memory months or even years after the events in question. Documentary evidence is especially valuable when it consists of a criminal organization’s own documents (including correspondence and other communications, orders, reports, operational logs, transport records, financial books, calendars, agendas, internal notes, and diaries). In effect, such items are the documentary version of insider evidence, in the form of documents rather than insider testimony.³² Records of e-mails and texts (made available after the fact by service providers) cross over from communication intercepts to documentary evidence. Apart from an organization’s own “inside” documents, third-party documents can also be very important evidence; examples are bank records, police and incident reports, reports by international monitors, etc. Documents may be obtained in any number of ways; consensually (by those willing to turn them over voluntarily), or by subpoena, search warrants, and other court orders.

(6) Dedicated, Adequately Resourced Units

Apart from or in addition to investigative techniques, most national law enforcement and prosecution authorities find it useful and productive to form specialized or dedicated units concerning particular types of crime that at any given time are afforded particular focus or priority, whether over a sustained period of time (or even as a permanent form of organization) or a more limited temporal basis, and as distinct from the more “usual” day-to-day or ordinary crime. In the United States at the Department of Justice, both at headquarters and in the field, there are, for example, organized crime sections and strike forces, drug task forces, counter-terrorism sections and a human rights and special prosecutions section. In the United Kingdom, there are such things as the Serious Fraud Office and the Serious Organized Crime Agency. The Netherlands’ criminal justice system has a National Prosecutor’s Office that “confronts transnational criminal organizations that otherwise appear untouchable,”³³ including those engaging in terrorism, human trafficking, and maritime piracy and war crimes, and there is also an international crime police team. History and experience have shown, in multiple national systems, that in order to make a real dent in such areas of crime and criminal activity, substantial resources need to be organized and dedicated on the basis of priority and directed in a focused, targeted way in conducting complex, sophisticated, and longer-term investigations and prosecutions.

THE CONTACT GROUP ON PIRACY OFF THE COAST OF SOMALIA

On December 16, 2008, U.S. Secretary of State Condoleezza Rice, in announcing that “the United States intends to work with partners to create a Contact Group on Somali piracy,” told the UN Security Council that the international response to piracy “has been less than the sum of its parts.” Expressing concern about the impunity being enjoyed by pirates (and especially pirate leaders), Secretary Rice expressed the hope that Security Council authorizations would allow States to “*pursue pirates into their places of operation on land,*” [as] [h]istory has demonstrated again and again that maritime operations alone are insufficient to combat piracy.”³⁴ On the same day, as part of Resolution 1851, the Security Council established the Contact Group on Piracy off the Coast of Somalia (the “Contact Group” or “CGPCS”) as a voluntary international mechanism intended to facilitate the collective efforts of States, international organizations, industry, and nongovernmental organizations to address maritime piracy emanating from Somalia as a threat to international peace and security, regional stability, and trade.³⁵ Since January 14, 2009, the Contact Group has been a “coalition of the willing” based on the voluntary cooperation of more than 60 countries and organizations. It has seen itself as a forum to facilitate discussion and coordination of actions to suppress piracy as part of a broader international effort to “secure peace and stability in Somalia.”³⁶

The Contact Group initially established four working groups to address specific issue areas: “1. naval and capacity-building coordination and information sharing; 2. legal and judicial issues; 3. shipping industry self-protection; [and] 4. messaging and public information efforts . . .”³⁷ From the beginning, the Contact Group recognized the need for “better operational information in order to address the problem of piracy” and called on its members to contribute both information and surveillance assets to the collective effort.³⁸

³⁹ While Working Group 2 (concerning legal and judicial issues) has been considered one of the more effective working groups and has tackled a number of legal issues from the beginning, for most of its life to date it has focused primarily on the volume prosecution of the lowest-level pirates. The development of another law-enforcement/prosecution group, more focused on higher-level prosecutions, did not evolve until later and will be discussed in another part of this paper.

The Contact Group faces limitations similar to those of the UN and other international organizations in that it has no police powers, no power to make binding decisions or enforce compliance, and its ability to mobilize action is relatively weak.⁴⁰ It is “organized volunteerism.”⁴¹ According to James Hughes, the chair of Working Group 1, “[the Contact Group] is not so much a forcing mechanism; it’s a peer pressure mechanism.”⁴² Put another way, the Contact Group exercises most of its influence by “cheerleading” (that is, naming-and-praising) and perhaps to a lesser extent, “naming-and-shaming.”⁴³

In further discussing the Contact Group in the course of this paper, it should be noted that the Contact Group’s mandate and activities are broader than what might be considered law enforcement and prosecution, as illustrated by the various working groups’ issue areas, and that these other areas are mostly beyond the scope of this paper.

THE CONSIDERATION OF JUDICIAL MECHANISMS

Soon after the Contact Group started its work in January 2009, a principal subject of discussion both there and at the UN was whether the international community should establish, or support the establishment of, one or more counter-piracy courts or judicial mechanisms other than, or in addition to, the general jurisdiction trial or first instance courts in the UN member States most directly impacted by piracy or involved in counter-piracy efforts. On April 27, 2010, the Security Council, by means of Resolution 1918, asked the UN Secretary-General to present a report on possible options “to further the aim of prosecuting and imprisoning persons responsible for acts of piracy . . . [including] options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal . . . , taking into account the work of the Contact Group . . . ”⁴⁴

The Secretary-General transmitted his report to the Security Council on July 26, 2010, setting out and considering the advantages and disadvantages of seven options:

9. Three categories of possible models for a new judicial mechanism were identified: an international tribunal; a regional tribunal; and a tribunal based in the national jurisdiction of a State in the region. Under the first category, the possibilities identified were an international tribunal established pursuant to a Security Council resolution adopted under Chapter VII of the Charter of the United Nations, or a ‘hybrid’ tribunal following the model of the Special Court for Sierra Leone or the Special Tribunal for Lebanon, based on an agreement with the United Nations. Under the second category, the possibilities identified were a regional tribunal established through a multilateral agreement negotiated among the States of the region, or the use of an existing court, such as the African Court on Human and Peoples’ Rights, located in Arusha, Tanzania. It was noted that the time required to negotiate the appropriate treaty basis for either of these options might be considerable. Under the third category, the possibilities identified were a Somali court located in a third State in the region, or a special piracy chamber within the national jurisdiction of a State in the region. It was recognized that the Somali court option would have the advantage of enabling Somalia to play a direct part in the solution to prosecuting acts of piracy. However, the fractured nature of the law on piracy in Somalia, and significant issues concerning Somali judicial and prosecutorial capacity, meant that this option may be unlikely to be viable at present.

10. The option of a specialized piracy chamber within the national jurisdiction of one or more States in the region, supported by financial or technical assistance by the international community, was considered to follow the precedent of the Bosnia War Crimes Chamber. The Chair [of Working Group 2] noted in his conclusions of the meeting in November 2009 that this would be the most feasible model, depending on one or more regional States, including Somalia, being willing and able to undertake prosecutions when it becomes possible.⁴⁵

Overall, there was reasonably early recognition that neither the International Criminal Court (ICC) in The Hague nor the International Tribunal for the Law of the Sea (ITLOS) in Hamburg, nor the African Court on Human and Peoples' Rights (ACHPS) in Tanzania, presented attractive or likely practicable options as a counter-piracy judicial forum. Chief among the reasons was that all of these bodies are treaty bodies and adding piracy to their jurisdictions would almost certainly involve long and difficult treaty negotiations that might take years, if successful at all. In addition, neither ITLOS nor the ACHPS are criminal courts.⁴⁶ Although "[m]any analysts believe[d] that in the absence of states' ability to prosecute [such crimes], the most effective venue for piracy cases [would be] an international court," since "piracy is an act that directly affects global interests and is often committed in the global commons,"⁴⁷ the considering UN bodies and groups decided relatively early in the process that a Chapter VII international tribunal was not the right fit and "[was] not likely to be among the most cost-effective [options]."⁴⁸ This paper will return to this decision following a brief account of the options that were further considered, at least on paper or as continuing proposals.

Adding piracy to treaty bodies would almost certainly involve long and difficult treaty negotiations

Following a debate in the Security Council on August 25, 2010, Secretary-General Ban Ki-moon commissioned a report by his Special Adviser on piracy, Jack Lang, which was submitted to the Security Council on January 25, 2011.⁴⁹ The Lang Report, noting "the urgent need to combat the impunity of pirates"⁵⁰ and observing that "[t]he lack of consensus in the Security Council over which solution to choose mean[t] that the more radical options ha[d] been put to one side,"⁵¹ recommended "the establishment, within eight months, of a court system comprising a specialized court in Puntland, a specialized court in Somaliland and a specialized extraterritorial Somali court that could be located in Arusha, United Republic of Tanzania," possibly using the facilities of the International Criminal Tribunal for Rwanda (ICTR).⁵² The estimated cost of establishing and operating the three courts over the first three years was approximately \$25 million.⁵³ Even early on, it was anticipated that each of these venues would involve substantial international components, including funding, experts, and various other support, with the extraterritorial court in Arusha in particular "act[ing] as a focal point for regional and international support for the rule of law in Somalia . . ."⁵⁴

The Lang Report was followed by another Security Council resolution (No. 1976) on April 11, 2011, and another report of the Secretary-General on June 15, 2011,⁵⁵ which essentially proposed capacity-building in regional national courts and a specialized regional court, which might put more of its focus on the prosecution of pirate leaders and financiers. Importantly, the UN's assessment that Puntland and Somaliland trial courts might be able to conduct piracy trials compliant with international standards by approximately June 2014 focused only on the prosecution of "*low-level suspects rather than on more complex cases of financing and planning piracy.*"⁵⁶ By contrast and of particular interest, the Secretary-General's report stated, in reference to a possible specialized extraterritorial court:

A key question would be whether the extraterritorial court should have jurisdiction to prosecute large numbers of low-level perpetrators of acts of piracy, a more limited number of financiers and planners of piracy, or both. Whatever the jurisdiction of an extraterritorial court, consultations conducted by the Office of Legal Affairs indicate a widely held view that information sharing, *and the investigation and prosecution of the financiers and planners of piracy by States*, would be both a strategically effective and cost-effective means of supplementing current prosecution efforts.⁵⁷

The June 15 report reveals, therefore, a two-part piracy prosecution strategy: (1) building capacity to prosecute low-level pirates in Somali and other regional State courts (whether general or specialized); and (2) supplementing these local efforts with investigation and prosecution of the financiers and planners of piracy by a specialized extraterritorial court and/or States outside the region. In point of fact, and while all of these discussions were continuing, none of the regional States, including Somalia, Kenya, and Seychelles, would accept specialized piracy courts or an extraterritorial Somali court in their jurisdictions, with the exception of Tanzania (which was willing to consider use of the ICTR facilities in Arusha as part of an extraterritorial court).⁵⁸

In summary, while a number of general jurisdiction trial or first instance courts in the East Africa/Indian Ocean region have now handled a number of piracy cases, no international tribunal or hybrid court was created, no extraterritorial Somali or regional court was established, and no specialized or dedicated courts were set up in the regional systems.

FIGHTING PIRACY: SURVEY RESULTS AND LESSONS LEARNED

The Law Enforcement and Prosecution Effort to Date—Low-Level Pirates:

In the earlier years of international and national efforts against East Africa's piracy, there was no significant, focused, or sustained law enforcement or prosecution interest.

Approximately 1,200 cases of piracy in East Africa have been brought in various jurisdictions and have either been completed or are in progress, with a substantial majority of these cases having been brought between June 2009 and June 2012. Most were brought in the East Africa/Indian Ocean region (including Yemen).⁵⁹ The UNODC has actively supported about 300 of these cases at an estimated cost of approximately \$30 million. With very limited exceptions, the cases against East Africa's pirates have focused on the lowest-level pirates, with the highest-level pirates convicted to date being the pirate ransom

negotiators in *United States v. Shibin* and *United States v. Ali*. Apart from the recent arrest of Mohamed Abdi Hassan in Belgium, no pirate kingpins—neither top leaders, facilitators, nor financiers—have been prosecuted. While those outside law enforcement, and even outside a particular case or investigation, cannot know the sensitive details of ongoing investigations or the content of sealed indictments or arrest warrants, available public information and careful, non-compromising conversations have provided a substantial window into the current state of play. The identities of some alleged or suspected pirate leaders and organizations are publicly known, for instance,⁶⁰ as are the existence of arrest warrants and INTERPOL “Red Notices” in some cases.⁶¹

In the earlier years of international and national efforts against East Africa's piracy, there was no significant, focused, or sustained law enforcement or prosecution interest. A substantial number of those surveyed

indicated that the law enforcement component of counter-piracy efforts was slow to develop, with no real interest in prosecution. In fact, the military dimension of counter-piracy efforts on Africa's east coast (involving various cooperating national navies, operating via NATO, the EU, or otherwise) developed before, and largely independent of, any focused or deliberate law enforcement effort. The law enforcement/prosecution effort that followed was largely an afterthought and was entirely reactive, in response to the military interdiction of low-level pirates at sea and the sheer necessity of doing something with them. The *de facto* law-enforcement regime that developed in these circumstances involved a three-part process which has remained essentially the same ever since: (1) patrolling naval forces interdict suspected pirates at sea, either during or after a pirate attack or attempted attack; (2) the apprehended suspected pirates, after the disposal of their arms and the destruction of their skiff, are either released on shore (as part of the catch-and-release practice), or, pursuant to transfer agreements, transported to regional States for prosecution;⁶² and (3) if and when they are convicted, many of the pirates are transferred to Somalia to serve their sentences. Thus, the international community's law-enforcement model was, and remains, a predominantly reactive, decentralized, horizontal model, involving a group of roughly equal national and organizational peers, relying largely on regional States and consisting entirely of "volunteers," with no entity providing central direction, structure, or processes other than a common goal of "fighting piracy."

While the Contact Group, using or supporting the described reactive, horizontal, and largely regional model, has been successful in dramatically increasing the number of low-level pirate prosecutions from virtually zero to the approximately 1,200 mentioned above, a high percentage of interdicted pirates still are not prosecuted.⁶³ In short, even today, no particular country (with the possible exception of Seychelles and perhaps Kenya) has any real appetite for prosecuting pirate cases unless there is a strong national nexus and a perception of significant pressure or a particular need to do so, usually, if not only, in response to a specific incident. A large number of those surveyed indicated that in this fundamental respect there has been only modest progress from five or six years ago, with the first question concerning virtually every pirate incident today still being "Is anyone interested in prosecuting this attack, or willing to?" with the frequent answer being "No."⁶⁴ As one community participant put it (and this response was repeated or paraphrased by many): "Someone has to open a case and very often no one is interested in, or willing to do so." While not employing the same words, many of those surveyed said that, in some significant sense, a country must almost be "forced" to bring a case by either its own perceived interests or in response to external pressures of one sort or another.⁶⁵

One of the specific shortcomings in the earlier days of the most recent counter-piracy efforts in East Africa was a failure to train and equip the military interveners for required law enforcement procedures, in terms of arrests, collecting evidence, and taking statements, although this situation appears to have substantially improved. Another limiting factor concerning law enforcement efforts in the East Africa/Indian Ocean region is that most national prosecutors and investigators are not trained for or experienced in conducting complex, targeted, proactive investigations into organizational crime. As one community participant stated, most regional or local prosecutors are only concerned with "the six poor bastards standing in front of them."

The natures of the prosecution cases and the evidence used in the vast majority of piracy prosecutions to date, especially in the region, have been fairly basic and straightforward, largely based on eyewitness testimony from victims (primarily seafarers) and first responders (that is, the on-scene/intervening/apprehending military and/or law enforcement personnel). Photographs and other visual imagery obtained in the course of the pirate incidents also are frequent parts of the prosecution cases. In the past several years, aerial patrolling and surveillance technology in the region have improved to the point that there is

very often a complete video record of a pirate incident from beginning to end, including the apprehension of the suspected pirates, which substantially simplifies the prosecution case. Indeed, the UNODC reports that there have been no pirate acquittals in Kenya due to lack of evidence.

Prosecution evidence has also included evidence collected as part of the crime scene investigation conducted when an attacked or seized ship is released or otherwise recovered from pirate custody, and sometimes evidence obtained from seized or recovered cell phones used by the pirates. Crime scene investigations have generally improved but are still inconsistent in quality, depending on who conducts the investigation. INTERPOL has improved crime scene investigations by acting as a central coordinator or facilitator, often working closely with the U.S. Naval Criminal Investigative Service (NCIS). The NCIS has a forward-operating base in Bahrain and has largely become the crime scene investigator of choice or default, especially where no national authority indicates an interest and/or capacity to intervene. It is generally considered that NCIS conducts professional, effective investigations and has improved the quality of crime scene investigations. In some situations where NCIS, for whatever reason, has not been available or called in, the crime scene investigation has often involved cobbling together an *ad hoc* team from whatever available resources can be assembled, with mixed results. Where both become involved, there is sometimes friction between national law enforcement authorities and international investigators. When the crime scene investigation is conducted by national authorities, there is often less chance that the information will be shared with other organizations and agencies.

An important but perhaps overstated obstacle to prosecuting more pirates outside the region of East Africa, and especially in Europe, is a concern that suspected pirates transported to European countries for prosecution will seek asylum or otherwise remain in the country if their cases are dismissed or they are acquitted, or when they are released from completed prison sentences or otherwise returned to the local nation's population, rather than their being repatriated to their home countries. One counter-piracy community member said that this is the “deep, dark [but apparently open] secret”—no one wants the apprehended, processed, or released pirates staying in their country. As noted, some observers believe that, at least legally, this concern is overstated, but in the real world and whatever the legal niceties, governments may be reluctant to return persons to difficult regional environments.⁶⁶ Putting aside the legal debate, European and other countries might have a stronger argument on this point if large numbers of East African pirates were being prosecuted in their national systems. When the numbers, however, are eight or nine or even twenty-five or forty, the impact on a country's immigration issues seems fairly negligible and the expressed concern sounds more like an excuse to not prosecute pirates.

Several community members indicated that another ongoing issue in maritime piracy cases is finding witnesses and getting them to court, especially in national systems, including most common law countries, where live in-court testimony is the general practice. Finding seafarer witnesses some months or years after the event in question can be a serious challenge, and if they are found, the seafarer and his employer (which may or not be the same shipping company as it was previously) may have little or no desire to appear (or to have an employee appear) in a courtroom a thousand miles away. There is also a fairly common perception that many seafarers are not treated particularly well by their employers or home countries before, during, or after their involvement in a piracy incident,⁶⁷ which further reduces any desire or incentive they may have to give testimony in a distant courtroom.

The Law Enforcement and Prosecution Effort to Date—Pirate Leaders and Financiers:

A substantial number of counter-piracy participants, approaching (if not constituting) a consensus, confirmed that counter-piracy efforts concerning the east coast of Africa have not resulted in any pirate leaders or financiers being prosecuted or convicted to date, although the recent arrest of Mohamed Abdi Hassan is a start in this direction. Community participants, including some of the senior and most experienced leaders, assessed that international and national prosecution efforts have been “very disappointing,” “pretty pathetic,” “modest to poor,” and “not a success story,” with a “paucity” of higher-level prosecutions to date. In terms of such prosecutions, one senior participant stated that he is “disappointed to see how little hands-on progress has been made,” while another said that the high costs of counter-piracy efforts to date have been “disproportionate to the results achieved.” Still another participant stated that there has been a “mismatch” of efforts: “There was a lot of emphasis on prosecuting the skiff pirates rather than on disrupting pirate networks and going after higher-value targets. We focused on the wrong population.” Another observer noted that the prosecution of low-level pirates to date was a matter of “picking the low-hanging fruit,” which another said has been “a mistake.” “In dealing with the urgency of pirates at sea, the international community took its eye off the ball, concerning the organized crime dimension.” Consistent with these assessments, several community members stated that while the reactive, horizontal approach has been successful in prosecuting a relatively large number of lower-level pirates, that approach is limited and “can only take you so far.” In sum, “the international community has not been successful in bringing [pirate leaders and financiers] to justice . . .”⁶⁸

A few of those surveyed, while respectful of their colleagues, said that the international community’s twin emphases on international development programs (i.e., capacity-building) and naval patrolling is not really surprising, as that is what most senior politicians, diplomats, and international organization officials (especially those dealing with international development and humanitarian relief) “know” and are comfortable with. Very few foreign service personnel or humanitarian aid representatives have any background, experience in, or knowledge about investigating and prosecuting sophisticated legal cases dealing with complex organized crime, but they often have some experience or familiarity with drafting treaties, providing international aid or sending in the marines. On the military side, given the lack of regional capacity to do so, it was inevitable that national naval forces from outside the region would take on the principal role in interdicting pirates at sea. And for the most part, military people did what military people do (and are supposed to do). By contrast, law enforcement really became involved only when skiff pirates were apprehended at sea and the navies began to ask the question, “What do we do with them now?” which, in turn, actually reinforced the focus on prosecuting the lowest-level pirates, since they were the ones being apprehended and waiting to be processed. A few of the more specifically law enforcement- and prosecution-oriented participants in the Contact Group’s working groups said that they were surprised that the meetings (especially in the earlier days) were dominated by foreign service personnel and international organization representatives who had little to contribute in terms of law enforcement and criminal investigation or prosecution. Indeed, it is noteworthy that while the Contact Group identified “tracking financial flows related to piracy” as one of its six initial “focus areas” in January 2009,⁶⁹ it did not add a fifth working group—dedicated to “disrupt[ing] . . . the pirate enterprise ashore, through identifying and disrupting the financial networks of pirate leaders and their financiers”—until two-and-a-half years later, in July 2011,⁷⁰ almost ten years after the IMO, in November 2001, called for the prosecution of pirates “as a matter of the highest priority.”⁷¹ The fifth working group was not implemented earlier based on the opposition of some States that had expressed concerns about the feasibility of the group and about sharing sensitive information and intelligence,⁷² another important

Community participants complained that policy- and decision-makers ‘don’t get it’

issue addressed below. Evolution to a more law-enforcement/prosecution subgroup has continued, with additional efforts to move forward with such a group having been made at working group meetings in Copenhagen in April 2013.⁷³

Even with the passage of time and the increasing recognition—at least in concept or rhetoric—that more sophisticated, proactive efforts were, and are needed to build cases against pirate leaders, community participants complained that policy- and decision-makers “don’t get it” (that is, most politicians and diplomats have no real understanding of the investigative/prosecution effort that is required to make such cases) and/or they “don’t fund it” (in terms of providing the necessary structure, tools, and resources to get the job done).⁷⁴ Senior decision-makers and donors must genuinely recognize that in building complex leadership cases, evidence from victims and most of the lowest-level pirates, crime scene evidence, and even video-recordings of the crime itself generally provide little or no evidence against pirate leaders. They must then commit to supporting and funding more sustained, proactive, and sophisticated investigations.

One community member observed that the real problem is not a lack of information, but a lack of focus and organization

While information from several of those surveyed suggests that there may be (or may have been) approximately a dozen high-level pirate leaders or financiers, there appear to be mixed views on the scope, depth, and accuracy of the counter-piracy community’s knowledge of the piracy organizations and operations. Some suggested that while significantly more is known today than was known several years ago, there are still substantial gaps and there is no really reliable, coherent picture, especially on the financial

side, in terms of the movement and disposition of pirate proceeds.⁷⁵ As one community leader put it, “there are islands of good knowledge, with some missing links.” On the other hand, some community members say that the pirate structures “are not particularly sophisticated or surprising, and most of the pirate leaders are known.” Still others indicated fairly extensive knowledge of the pirate leaders, their networks, and the distribution of ransoms, as set out, for example, in the *Report of the Monitoring Group on Somalia pursuant to Security Council resolution 1853*, S/2010/91 (March 10, 2010), at pages 35–43, and in the recent World Bank Report, *Pirate Trails*, at pages 29–32.⁷⁶ One community member observed that the real problem is not a lack of information, but a lack of focus and organization: “What is needed is a coordinated approach to building cases.”

Even assuming some level of understanding and political will in some State governments and international organizations, the prosecution of pirate leaders and financiers is made substantially more difficult by (1) the international, cross-jurisdictional nature of the underlying conduct and related behavior; (2) the lack of interest, willingness, and/or capacity of some States, officials, or branches of commerce to actually take some action to assist investigations; (3) the existence of strong clan and tribal systems and powerful loyalties in some regional countries; (4) worse yet, the existence of extensive corruption and inter-connecting complicit relationships with government officials and political and financial elites in the regional countries;⁷⁷ and (5) the use of cash and non-conventional financial transactions which leave few of the more-traditional paper, electronic, or other trails.

Despite this overall assessment, it should be noted that there have been, and are, in fact, a small number of more extensive investigations targeting East African pirates and facilitators at some higher levels, primarily involving (1) investigations based on ongoing, *ad hoc* cooperation involving U.S., European, and Seychelles authorities, (2) the Belgian investigation leading to the October 2013 arrest of Mohamed Abdi Hassan; and (3) an 18-month-long joint Dutch-German investigation assisted by Europol and Eurojust called “Nemesis,”⁷⁸

which has recently ended due to a lack of funding, but with charges still expected. Indeed, nothing in this paper is meant to imply that some higher-level pirates have not been investigated or charged, although it remains true that, except for the arrest of Mohamed Abdi Hassan, none have been prosecuted to date. The fact, however, that those criminal charges which *have* been brought and those arrest warrants which *have* been issued have not resulted in the prosecution of a single pirate leader or financier, except Mohamed Abdi Hassan—who was arrested in Belgium, not Somalia—is itself an indication of important shortcomings in the existing law enforcement apparatus or efforts to date, especially in terms of making arrests in Somalia. Several higher-level community participants suggested rather forcefully that senior international authorities should put the relevant arrest warrants squarely in front of senior Somali officials and demand that action be taken: “Here’s an arrest warrant—what are you going to do about it?” Indeed, hundreds of millions of dollars of international assistance should buy some cooperation. As for charged, higher-level pirates who move internationally, several persons confirmed that better, faster communication and coordination is needed in order to catch them when there is an opportunity to do so.

The Impact of Law Enforcement Efforts to Date:

Unfortunately, given the aforementioned circumstances and considerable challenges, and despite the dedicated efforts of a number of individuals, law enforcement and criminal justice efforts to date have not been a major factor in reducing maritime piracy on Africa’s east coast. Instead, a large number of those surveyed agreed that, to the extent that there has been a substantial decline in successful pirate attacks in East Africa, it is primarily due to three factors: (1) more effective international naval patrolling; (2) fuller implementation of best practices and countermeasures on ships transiting the area;⁷⁹ and (3) use of private armed security. From the perspective of accountability, the Monitoring Group on Somalia and Eritrea reported on July 12, 2013 that the principal pirate leaders and their associates continued to enjoy impunity and had “not been hindered in their ability to travel or transfer funds.”⁸⁰ Prosecuting pirate kingpins would make law enforcement a much more significant factor.

The Use of More Proactive, Sophisticated Law Enforcement Methods:

To date, counter-piracy law enforcement has had only limited success, spread over several national jurisdictions, in developing and using insider witnesses. Surveyed community participants, who were appropriately discreet on this topic, either knew of no successful development or use of insider witnesses to piracy, or were only aware of such insiders being developed in a very few instances.⁸¹ In these instances, however (and again as very generally described), this small group of insiders seemed to have provided valuable information and services, so efforts to develop them have been worthwhile. Altogether, there are insufficient indications that law enforcement authorities dealing with maritime piracy have tried hard enough and long enough to develop this important source of frequently necessary and often compelling evidence. One concern among some community members has been that developing suspected or convicted pirates as cooperating witnesses—i.e., turning them into a “Crown witness” or “state’s evidence”—is somehow unsavory or something not to be done. A number of people also indicated a concern (or gave as a reason for the limited success in developing insider witnesses) that Somalia’s strong clan system and loyalties make it difficult to develop such witnesses. Both of these will be addressed in the recommendations that follow.

To public knowledge, there have not been any undercover investigations into East Africa’s piracy (where such an investigation might have become publicly known, for example, in the course of a subsequent

piracy prosecution). Of course, if there are any active, ongoing undercover investigations, those outside the particular investigation would not expect to know about or comment on them.

Generally, metadata is easier to obtain, both legally and otherwise, than content is

Communication intercepts (“signal intelligence”) and other electronic surveillance and monitoring, again with limited exceptions, have not been successfully used in investigating and prosecuting piracy. Information concerning wire or digital communications is generally of two sorts: (1) information indicating the fact that communication took place and the

details of it—i.e., the date and time of the call (or other communication), the originating number of the call (and its location), the number called (and its location), and the duration of the call (e.g., 15 minutes), all of which is sometimes known as “metadata”; and (2) communication content—that is, what Caller A said to Called B and what B said in return. Metadata can be very helpful investigative information and also important evidence, but it is not the same as getting the communication’s content. Generally, metadata is easier to obtain, both legally and otherwise, than content is. To date, to the extent that audio recordings of communication content have been used in bringing indictments and prosecuting cases, these have been almost (if not entirely) consensual recordings of ransom negotiation conversations, recorded on the consenting shipping or insurance company’s end of the conversation.⁸² While such recordings are important (certainly as evidence against the negotiator), they are not the sort of interceptions or surveillance (“wiretapping” or non-consensual third-party interception of communications) that are likely to capture communication content involving or directly implicating the top pirates and financiers themselves. To the extent that any of this non-consensual interception has occurred (and many in the counter-piracy community believe that it has), it is likely being carried out by military forces and/or the intelligence community and unfortunately, this information or evidence is rarely, if ever, shared with law enforcement.⁸³ One type of communication content that may be easier to obtain is text messages and/or emails stored in recovered or seized pirate cellphones, depending on who takes possession of the phones and whether they are made available.

Documentary evidence, especially from inside the criminal organization, can be highly important evidence. East African piracy appears to rely heavily on oral communications and non-conventional financial transactions, and most of those surveyed considered there to be not a lot of documentary evidence “out there.” Some documentary evidence has been recovered in the course of crime scene investigations on recovered vessels, but for the most part, such documentation does not appear to have played a significant role in piracy prosecutions. To date, fingerprints and DNA recovered from papers left behind on seized ships, which are more akin to physical than documentary evidence, have probably been as important or more important than the contents of those papers. This finding likely follows in part from the fact that the lowest-level pirates have primarily been prosecuted, with those being exactly the pirates least likely to put much on paper. At higher levels, some recordkeeping and documentation must exist.

Other findings, again with limited exceptions, indicate that most of the investigations to date have been reactive and were approached from the bottom up, rather than the top down, and most investigations continue to be pursued individually by distinct law enforcement organizations, rather than cooperatively. Again, to the extent that almost all investigations and prosecutions to date have concerned only low-level pirates and have been based on particular incident evidence, this is not surprising.

All of the more advanced law enforcement techniques and categories of evidence, except for the rare windfall, require a serious sense and priority of mission, the necessary professional expertise, and mission leadership and operational direction, with commitment of significant resources and focus sustained over time. With some

exceptions, these elements have largely been missing and do not appear to exist at an institutional (rather than an individual) level at the present time, with no pirate leaders or financiers convicted to date.

Legal and Jurisdictional Issues:

Most of those interviewed believe that despite the work of the past several years there continue to be significant legal and jurisdictional obstacles to more efficient and effective counter-piracy work.⁸⁴ At the same time, a significant number also believe that for the most part, the legal challenges involved in law enforcement efforts are not the core reasons why counter-piracy prosecutions, and especially those of pirate leaders, have not been more efficient or effective.⁸⁵ An equal or more important issue, despite the rhetoric, is whether modern piracy is truly taken seriously, in terms of the lack or inconsistency of political will to address it fully, as well as the structures and approaches used in addressing it to date.

In terms of needed law or system reforms, the suggestions range from very fundamental changes (including a substantially new “law of the sea,” at least in terms of maritime crime, and a new system for registering, flagging, and regulating ships and shipping, abandoning the current system in whole or part, especially flags of convenience),⁸⁶ to more specific tweaking. Anyone who has labored in the vineyards of the UN Convention on the Law of the Sea (UNCLOS), the Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA), and other international and national laws (and/or regimes related to maritime crime and piracy) will likely agree that the juridical framework and procedures for dealing with such crime can and should be substantially improved. Relevant questions include: What is currently the accepted scope of universal jurisdiction in terms of piracy and related offenses, and how does international law contemplate dealing with land-based pirate leaders and facilitators, if at all? Many existing laws and approaches are outdated and are a poor fit with modern realities.

Apart from these broader issues, there are still serious challenges to getting adequate piracy laws on the books of many countries. The fact that the UN Secretary-General, in October 2013, was still “encourag[ing] Somali authorities to [take the most basic steps in passing] all relevant legislation to facilitate the prosecution of individuals suspected of piracy”⁸⁷ indicates woefully slow progress since the repeated public declarations, now many years in the past, that piracy had to be fought urgently as a top priority. And even where piracy laws are adopted, that does not mean that they will be seriously implemented and enforced. Somalia does not have extradition treaties and is not a party to mutual legal assistance arrangements. While this does not mean that indicted pirates may not be turned over, simply on the basis of comity, or that various forms of assistance may not be provided by one means or another, this state of affairs is nonetheless surprising since it concerns a failed State which has been in international receivership for a number of years and involves a much-publicized area of allegedly serious international crime.

There are still serious challenges to getting adequate piracy laws on the books of many countries

One community member suggested developing a “universal MLAT” (Mutual Legal Assistance Treaty) process by which MLAT requests or orders would create a universal obligation to comply with them, rather than there being a need for multiple individual requests and orders.

A serious issue raised by several community participants is that sentences in a number of countries that have prosecuted pirates have been short. In Europe and Africa, a number of piracy sentences have been

as short as four-and-a-half to five years of imprisonment.⁸⁸ While these sentences, once again, relate only to low-level pirates, there are at least two serious issues arising from such sentences, apart from concern that the sentences themselves are deficient in terms of the crime.⁸⁹ First, as discussed previously, when states engage in a cost/benefit calculation to determine whether prosecuting piracy cases is “worth it,” the prospect of spending substantial time, precious effort, and scarce resources to possibly obtain, when all is said and done, a four- or five-year sentence may, in many situations, lead to the answer being “no.” Second, in those States where any sort of plea negotiation may come into play (e.g., where an accused pirate might plead guilty and agree to cooperate in exchange for a reduced sentence), a “worst-case scenario” of a three-to-five year sentence, if the charged pirate goes to trial and is convicted, leaves little negotiating room or incentive for the accused pirate to plead guilty.

While not dismissing any of these issues, and in looking at some of the more usual concerns (such as establishing the identity and age of young piracy suspects), from the perspective of prosecuting higher-level land-based pirates, there is probably less basis for genuine concern that these matters present major obstacles to serious efforts to prosecute pirate leaders. One community member commented that jurisdiction is actually rarely an issue, stating “there will almost always be jurisdiction somewhere, or in several places. It’s really a question of the political will to prosecute these cases.”⁹⁰ Dedicated and creative prosecutors will almost always find ways to bring cases, under international and/or national law, in one forum or another. Two exceptions, and significant ones, concern the inability to prosecute cases in Somalia against pirate leaders located there, and the inability and/or unwillingness of Somali authorities to execute arrest warrants against pirate leaders. If the international community and its constituent states are serious about prosecuting pirate leaders rather than foot soldiers, they will find a way to do so.

Fragmentation, Duplication, Lack of Coordinated Focus:

An effective fight against maritime piracy must be an international effort

Virtually everyone in the counter-piracy community agrees that an effective fight against maritime piracy must be an international effort. At the same time, there is broad consensus that current international and national counter-piracy efforts are too fragmented, involve too much duplication and competition (including for funding), and lack a coordinated focus and direction.⁹¹ Perhaps not surprisingly, a number of community members indicated that “a lot of politics” are involved. “There are too many different agendas,” “it’s all empire building,” and there are too many “turf issues.” “It’s your classic international aid and development scenario.” “There is not always an appetite for advice.” “Too much talk, not enough action.” One community leader stated clearly, “Unless there is better organization and focus, we will not get to the pirate organizers, except by chance.” Another panel member said, “Someone has to make [prosecuting pirate leaders] their mission, and it’s not happening now.”

As discussed, no effective law enforcement system approaches the investigation and prosecution of particularly important and often complex crimes on a disparate, reactive, and bottom-up basis. There are, instead, dedicated, specialized units dealing with such things as organized crime, terrorism, and complex white-collar crime. No serious law enforcement effort leaves important, high-priority crimes to general-jurisdiction “catch-as-catch-can” operations, and there is no reason to believe that such a disparate, reactive, catch-as-catch-can (or catch-and-release) effort will be any more successful at the international or transnational level, but that is essentially what has been done. Counter-piracy participants said repeatedly that “there needs to be a centralized gatherer of information” and “some central coordination.”⁹² One community member said, “What we really need is a global strike force.”

It is especially noteworthy, in this context, that the Contact Group, at its first plenary meeting in January 2009, initially identified “establishing a counter-piracy coordination mechanism” as one of its six “focus areas.”⁹³ Unlike the working groups formed in January 2009 to address four of the focus areas, however, and the fifth group formed in July 2011 to look at pirate leaders and financial flows, no group was ever formed to address a coordination mechanism and no “counter-piracy coordination mechanism” was ever established.

There is no single consistent or shared “standard operating procedure” for almost anything. Rules and practices vary. “[T]he lack of standardization of evidence gathering and sharing makes it difficult to produce the full range of evidence in court.”⁹⁴ There is a lack of consistency and transparency, resulting in process uncertainty, substantial inefficiency, higher costs and less effectiveness. “Much of the lack of clarity surrounding the legal side of piracy stems from the confusion surrounding overlapping jurisdictions. . . . This creates a vacuum of accountability and has often allowed pirates to be released without standing trial or being held accountable for their crimes.”⁹⁵

The shipping industry gives voice to these concerns in saying that what the industry would like is a “one-stop shop” where it can provide information, bring questions, and provide assistance to one point of contact with one set of rules and procedures. Some States have favored increased centralization, at least in some respects, while others have been opposed. Some members suggest that decentralized efforts are more “scalable” to different needs and levels of activity.

There have been problems with slow response times among fragmented authorities, especially in getting the right information to the right people at the right time. One example concerns an opportunity to arrest a higher-level piracy suspect who was moving internationally, an opportunity which was lost by the time the necessary information could be obtained and law enforcement actions coordinated. On the other hand, INTERPOL’s increased partnership with NCIS in terms of more effective crime scene investigations has been a positive development.

All of these findings confirm what the Lang Report concluded in January 2011, almost three years ago: “The large number of actors implicated in the fight against piracy can at times be dizzying. Using the orchestra as a metaphor, each instrument must have a score that is in harmony with the ensemble, while the ensemble, in turn, must be led by a conductor.”⁹⁶ In this regard and in response to this finding, the Lang Report recommended that “[t]he Secretary-General, acting in close consultation with his Special Representative for Somalia, should contemplate the establishment of an *institutional structure* to facilitate the implementation of [Security Council resolutions] under the aegis of a *high-level eminent personality* with vast United Nations experience.”⁹⁷

Several community members expressed concern that many of the organizations and agencies involved in counter-piracy work have never set foot in the region. Several community members commented that one cannot sit in the capitals of first-world countries and accomplish what needs to be done. Other community members noted that there are frequent “disconnects” between what first-world prosecutors and investigators talk about and the on-the-ground realities in the region—“Some of the prosecutors at the meetings talk about sophisticated surveillance systems, when the guys in Kenya are worried whether they have enough petrol to put their patrol boats to sea.”

The investigation and prosecution of pirate kingpins is also hindered by the rotation of engaged diplomatic and military personnel, who are often assigned to a particular duty station or task for a relatively short period of time and are then rotated to another location or different duties at about the time when they might be most effective in their piracy work.

Information-Sharing:

There is an interesting juxtaposition of views here. On the one hand, a number of community members commented that the counter-piracy law enforcement community is fairly small, somewhat tight-knit, and enjoys the highest levels of cooperation that some of them have ever experienced in a multi-organizational or international setting. At the same time, there was a widely-held view that information-sharing continues to be problematic. A good measure of this appears to be due to the fragmentation and “turf” (or competition) issues mentioned above.

Apart from the more specific challenges addressed below, the information-sharing problems seem to be at their worst in the earliest phases of what may eventually become an investigation. The view was expressed several times that “once a case is actually charged and in court, everyone pretty much knows about it and there are rules and procedures for getting things done. But what do you do with information when you don’t even have a suspect yet?” A cell phone is found or seized somewhere—what do you do with it? Who gets the downloaded information? Who analyzes it? How do you connect the dots when you don’t yet know what the dots are?

Information-sharing problems seem to be at their worst in the earliest phases of what may eventually become an investigation

Counter-piracy community meetings for the purpose of sharing information and discussing common issues and solutions seem to occur only at the widest international level in the Contact Group’s working group meetings. Apart from these, there appears to be primarily a continental European group, with information exchange and coordination facilitated by Europol and Eurojust, and a regional East Africa/Indian Ocean group which holds meetings from time to time. As mentioned, counter-piracy community

members in the East Africa/Indian Ocean region feel that there is a disconnect between the European and North American communities and what happens in the region and that the two groups need to engage in more interaction. To date, UNODC appears to be the most effective in coordinating its work in Europe, based in Vienna, with its work in Nairobi and the wider region. Still, many well-intentioned African representatives return home from international conferences and meetings with no real authority or ability to do anything better or different.

Apart from these more general (but nonetheless important) concerns, there was significant consensus in the community about four larger and more challenging issues concerning the exchange of information: (1) the strict European (and perhaps other national) laws on information protection and sharing; (2) the interface (or lack thereof) between the military and intelligence communities, on one hand, and the law enforcement/prosecution community on the other; (3) the “feeding,” management, and use of law enforcement databases; and (4) obtaining full cooperation and information from the shipping and insurance industries.

As to the first of these concerns, many privacy laws and information-sharing regimes, particularly in the European Union, are rather draconian and make it very difficult to share information with and among law

enforcement and prosecution authorities. Some countries, such as Italy, have apparently been cut out of the loop because their national privacy, confidentiality, and information-sharing laws do not (allegedly) satisfy European requirements. One leading community member believes that European laws, information regimes, and judicial systems need to be substantially improved to make law enforcement-related information exchanges much easier and more fluid, as well as to allow for the more efficient transfer and use of evidence in multiple jurisdictions.

Law enforcement's second major obstacle to obtaining helpful evidence and information involves information-sharing between the military and intelligence communities and the law enforcement community. There is knowledge, or "an educated guess," on the law enforcement side, that military forces and intelligence services in the East Africa/Indian Ocean region collect extensive information through various forms of communication, imagery, and other surveillance and interception that would be helpful to law enforcement authorities,⁹⁸ but such information or evidence is never (or rarely) shared. There is wide concern among those in law enforcement that too much military and intelligence information is routinely classified or over-classified when it should be shared. Most of those surveyed were realistic in their understanding that concerns about terrorism and other national and international security issues may take precedence in many situations, but they nonetheless said they believe that much information is over-classified and that larger amounts of helpful information could be shared with law enforcement in ways that would not compromise other concerns.

One community member hit the nail on the head in saying that fighting piracy "is dealing with crime by military means" and that the challenges in the interface between and the information-sharing among the military, intelligence, and law enforcement communities should have been foreseen and dealt with "at the very beginning" by memoranda of understanding and other arrangements. The fact that they were not is further evidence that law enforcement efforts were not integrated into the overall program from the beginning and that they have been too much of a relatively late-developing, "add-on" feature. Through persistent individual efforts, there has been limited success in breaking through the military/intelligence barrier, with one leading member indicating having been "fighting" about this issue for more than three years.

A third substantial issue regarding information-sharing and management concerns law enforcement-oriented databases that have been or are proposed to be used in connection with counter-piracy efforts. The principal international piracy database that has been used in the past few years is an INTERPOL database that was largely funded and built by the U.S. government and then moved to INTERPOL's Lyon, France headquarters.

Due to increased concerns about the database's effective operation, its management was returned to INTERPOL's U.S. National Central Bureau in Washington, D.C. in mid-2013. A number of community members expressed concerns about the consistent and timely entry of information into the database, the sourcing, reliability, and quality of the entered information, and difficulties in running productive searches. Europol also operates a piracy database used primarily by EU states and about which there was less discussion. With the establishment of the RAPPICC in Seychelles in March 2013, there have been questions about the relationship or interaction between INTERPOL and its database and any database or analytical tools that may be set up or used by RAPPICC. There is overall concern about the relationships between the various database efforts, potential duplication and overlap, and efficiency and reliability issues.

Information and 'intelligence' are very often not the same as 'evidence.'

The fourth major issue concerning information-sharing is addressed below in connection with the shipping and insurance industries.

Before leaving the topic of information-sharing, it can never be forgotten that information and “intelligence” are very often not the same as “evidence.” What prosecutors need in order to convict pirate kingpins is evidence admissible in court, according to the requirements of national or international law and evidentiary rules and procedures, which means that prosecutors are sometimes less impressed by “information.” Rumors and what “everyone knows” are not evidence. Entering information into a database and sending intelligence is the relatively easy part, and pushing the real evidentiary work down to the local prosecutor is not particularly helpful. Information must be tested, developed and corroborated, and checked against applicable rules for admissibility in court.

Information Synthesis and Analysis:

If information-sharing has been less than perfect, then information synthesis and analysis may be even more serious issues. Sharing information is not productive unless someone does something with it as part of a process of synthesizing and analyzing the information. One community member stated, “There needs to be more joined-up thinking and less emphasis on individual turf.” A recurring query and concern from the shipping industry has been, and continues to be: “Assuming that there is good cooperation and information exchange between ship owners and law enforcement, what happens after all of our effort in collecting the information?” And the next industry statement is usually: “We don’t see anything happen, so what’s the point?”

Apart from a few individual prosecutors, investigators, and analysts working together on particular investigations, either within a single national system or across national systems, there has not been, and does not appear to be at the present time, an effective coordinated or centralized multi-national program or effort to synthesize and integrate law enforcement information in building cases against pirate leaders and financiers.

Shipping and Insurance Companies:

There is still widespread concern in the law enforcement community that ship owners, insurance carriers, and private security companies are often uncooperative and even obstructive in the investigation and prosecution of maritime piracy. Most shipping companies are eager to get on with business and get vessels that have been attacked and released back to sea as quickly as possible, and do not understand or appreciate the difficulties, logistics, and timelines of criminal investigations and cases. Many law enforcement officials believe that ship owners, insurance carriers, and related business interests use unjustified and inappropriate claims of “proprietary information” in order to block the sharing of information. There is a common perception that the insurance companies and private security businesses have their own separate agendas and financial incentives and that they want to control the flow of ransom and piracy incident information in order to promote their own commercial interests, since “inside information,” contacts, and insights translate into dollars, pounds, and euros for them. There are, of course, exceptions, and some shipping companies are better than others, in terms of their level of cooperation.

A particular aspect of reporting or information-sharing in which industry cooperation may actually be declining is in the reporting of pirate attacks, especially unsuccessful attacks. Some community members

expressed concern that the shipping industry has become more reticent and less reliable about reporting pirate attacks where the attacked vessels had private armed security onboard, based on concerns about possible legal liability related to the use of force.⁹⁹ One community participant said, “A lot of shipping companies are not reporting armed personnel on their ships, even though they are supposed to.”

Representatives of the shipping industry respond that these concerns or criticisms are not justified. They say that the shipping industry, in the earlier years of the recent bout with maritime piracy, had an “open door” policy and only wanted rules and assurances about how industry information would be managed and used. In the earlier years, they say, most law enforcement authorities did not show any interest in these matters and the shipping industry ultimately turned to INTERPOL, in which they found a more interested and willing partner. Shipping companies say they are concerned with the amount of time and effort involved in assisting investigations, especially when they feel that often “nothing comes of it.” They also express concern about getting multiple (and often conflicting) requests and competing demands from different law enforcement authorities. As mentioned above, what the shipping and insurance industries would like is a “one-stop shop” where all of these matters can be handled or dealt with at one point of contact.

As do all citizens (personal or corporate), the shipping, insurance, and security companies have an important duty to cooperate and assist law enforcement authorities in the investigation and prosecution of crime, and ultimately, law enforcement and prosecutors, not the private companies, are in charge, or should be. At the same time, the shipping companies have a reasonable interest in wanting to deal with professional, efficient, and coordinated law enforcement authorities who appreciate their legitimate business interests.

Regional Capacity and Enforcement:

There are two dynamics at work concerning the investigation and prosecution of maritime piracy in national systems in the East Africa/ Indian Ocean region. Some members of the counter-piracy community feel strongly that law enforcement efforts should emphasize and give priority to regional domestic systems, while others believe that the international community should not put so much of the counter-piracy burden on regional systems, or at least not without very substantial international support.¹⁰⁰ Unfortunately, there is often little interest or political will among government officials in the most affected East African countries to seriously investigate and prosecute piracy, especially pirate leaders who may be part of, or closely linked to and protected by national elites. There are high levels of corruption in some of these countries, extending into law enforcement itself, which further complicates or even compromises the capacity of these systems to prosecute—or even to substantially assist with the prosecution of—pirate leaders.¹⁰¹ As mentioned in another context, many regional representatives who attend international conferences and meetings return home to national systems in which they have no real authority or ability to change or improve their systems. In addition, each country has its own system, deals with its own particular issues, and attaches varying levels of priority to counter-piracy efforts.¹⁰²

Each country has its own system, deals with its own particular issues, and attaches varying levels of priority to counter-piracy efforts

A substantial majority of community members believe that there is no current or near-term capacity to prosecute pirate leaders or financiers in Somalia. The Somali government has little authority outside

Mogadishu and no ability or apparent inclination to take on politically- and financially-connected pirate leaders and investors. In fact, in its report *Preliminary Observations on Responses to Organized Crime* (2010), the Institute for Security Studies in South Africa (ISS) assessed that there was no existing capacity in East African/Indian Ocean States to tackle serious transnational organized crime: “[T]here is general consensus that law enforcement agencies [in the region] do not have the required capacity . . . the personnel lack[] the necessary skill sets . . . the major deficiency is the prevalence of responses to crimes that are not adequately informed, not integrated, and not well resourced.”¹⁰³ One observer said in February 2011 that the “restoration of law and order in Somalia remains illusory.”¹⁰⁴ An important counter-piracy leader put it strongly in saying that “the international community needs a reality check” if they think pirate leaders can be prosecuted in Somalia in the near future; “that’s at least ten years away.”

Kenya and Seychelles are the two regional States that have had the most success in prosecuting lower-level pirates and they are generally the key law enforcement and judicial actors in the region. While Kenya has sometimes been considered “the lead prosecutor of suspected pirates,”¹⁰⁵ a significant number of community members expressed the view that the judicial process in Kenya, at least concerning piracy cases, has been “challenging.” By at least 2009, Kenya had already become an important part of combined national and international efforts to prosecute pirates in the region of East Africa. But in 2010, Kenya indicated on two occasions that it was terminating its agreement with the European Union, the United Kingdom, the United States, and other countries to accept suspected Somali pirates for prosecution, or would otherwise cease doing so, on the grounds that the nation was bearing an excessive part of the counter-piracy burden and was not receiving sufficient assistance.¹⁰⁶ After receiving international assurances of additional support, Kenya has continued to accept transferred pirates for prosecution on an *ad hoc* basis. In November 2010, a Kenyan trial court ruled in the case *In re Mohamud Mohamed Hashi, et al.*, that Kenya had no jurisdiction to prosecute crimes occurring outside Kenya’s territorial waters, which threw a substantial wrench in the counter-piracy prosecution machinery.¹⁰⁷ Fortunately, in October 2012, the Kenyan Court of Appeal in Nairobi reversed the lower court decision and confirmed that Kenya has jurisdiction to prosecute piracy occurring in international waters. A number of surveyed counter-piracy participants indicated that there is no prospect of prosecuting pirate leaders or financiers in Kenya in the near future.

On the other hand, and despite the ISS assessment, a number of community members believe that higher-level pirates can be prosecuted in Seychelles, with substantial international assistance. The Seychelles islands’ piracy effort has been the most proactive in the region, with its own Seychelles Piracy Intelligence Centre (SPIC) doing solid work. As discussed below, the Regional Anti-Piracy Prosecutions and Intelligence Co-ordination Centre, a partnership involving the United Kingdom, Seychelles, The Netherlands, the United States, and Australia, officially opened in Seychelles in March 2013, and SPIC and RAPPICC are building a closer, more effective working relationship. As of late 2013, RAPPICC was slated to become part of a new Seychelles government agency called the Transnational Crime and Maritime Security Centre, with a broader focus on transnational organized crime and maritime security, including piracy.

The other countries in the East Africa/Indian Ocean region which have had some training and/or experience in prosecuting piracy cases include Mauritius and Tanzania. Mauritius is currently prosecuting 12 suspected pirates apprehended by EU naval forces. Tanzania has agreed to take piracy cases and there has been some training and other efforts there, but no prosecutions to date. As of December 2012, Yemen and India had prosecuted (or were prosecuting) 129 and 119 piracy cases, respectively,¹⁰⁸ but neither country was featured in survey conversations in response to general questions concerning regional counter-piracy efforts and the contributions by various countries.

Other National Counter-Piracy Efforts:

Outside the East Africa/Indian Ocean region, in Europe and North America, the most active law enforcement and prosecution efforts, according to those surveyed, are in the United States, the Netherlands, Germany, and Belgium, with other countries also making contributions. Some countries, such as the United Kingdom and Denmark, do not prosecute any piracy cases in their national systems.

In the United States, maritime piracy policy is primarily set and implemented by the State Department and the Department of Defense.¹⁰⁹ The State Department's capable Donna Hopkins, who is Coordinator of the Counter Piracy and Maritime Security section in the Bureau of Political-Military Affairs, has played a leading role together with other State Department personnel. In the Justice Department, piracy cases are monitored by the National Security Division's Counterterrorism Section, and are primarily investigated and prosecuted in field offices in the Eastern District of Virginia, the District of Columbia, and the Southern District of New York. The principal investigative and prosecuting agencies are the United States Attorney's Offices (in the above districts), the NCIS, and the Federal Bureau of Investigation. The U.S. has convicted the highest-level pirates to date—two pirate ransom negotiators—and is believed to be engaged in ongoing investigations against possible pirate leaders. As mentioned elsewhere, NCIS, with a forward office in Bahrain, has taken a productive lead role in international piracy crime scene investigations, working with or through INTERPOL.

The Dutch have been active in prosecuting piracy through the National Prosecutor's Office and the key work of prosecutor Henny Baan. In addition to prosecuting other piracy cases to date, the Netherlands and Germany have been involved in a significant joint investigation against higher-level pirates, called "Nemesis," which is supported by Europol, Eurojust, and INTERPOL. Germany has also been involved in other investigations. Belgium, Denmark, and Italy have also been active in investigating, prosecuting, and/or supporting piracy cases, with the notable recent arrest of Mohamed Abdi Hassan in Belgium. In Asia, Japan and South Korea have been the most active in prosecuting piracy cases.

The Contact Group on Piracy Off the Coast of Somalia:

Given its nature and circumstances, and faced with considerable limitations, the CGPCS has been effective on a wide range of fronts. In its broadest scope, it has succeeded in building and fostering an ongoing counter-piracy community and providing a venue or vehicle for better communication and information-sharing, which is no small accomplishment. On the law enforcement/prosecution side, in particular with reference to Working Groups 2 and 5, it has succeeded in improving and facilitating the prosecution of pirates interdicted at sea, substantially contributing to the overall prosecution effort in connection with the approximate 1,200 prosecutions to date. Community members believe that much of the Contact Group's success has been due to its having a clear, shared goal from the beginning, and that the group has been most remarkable in its flexibility, its relative informality, and its inclusion of a wide range of stakeholders, including industry and non-government organizations. A number of people specifically commented that much of the Contact Group's strength or advantage has been in avoiding or cutting through UN bureaucracy, official channels, and diplomatic formalisms.

The CGPCS has been effective on a wide range of fronts

In the earliest days of the CGPCS, the law enforcement-related working groups suffered a common phenomenon among international conferences and "states-parties" gatherings: being heavy on foreign-service representatives and academics and light on criminal law practitioners. Working Group 2, however,

under its capable Chair, Danish Ambassador Thomas Winkler, took on an increasingly practical and pragmatic character and its membership over time has evolved, with an increasing number of prosecutors and investigators. At the same time, Working Group 2 was in basically the same situation as law enforcement generally; being behind the curve and playing catch-up in a generally reactive mode: “The navies are apprehending pirates at sea, what do we do with them?” “How do we get apprehended pirate suspects before a judicial officer?” “What do we do about underage pirates?” “What do we do about evidence collection?” etc. In response, Working Group 2 and its members worked successfully to produce some guidance for investigations and prosecutions, including a “prosecutor’s toolkit.” Working Group 2 must also be commended for its work, with others, in putting transfer agreements in place that provide for the transfer of apprehended suspected pirates to various national jurisdictions for prosecution, and for other agreements for transferring convicted pirates from prosecuting jurisdictions (e.g., Seychelles) to Somalia for the purpose of serving their sentences. Working Group 2 has also wrestled with the issue of private armed security on vessels.¹¹⁰ Working Group 5, with an evolving mandate to focus on pirate leaders and networks, was slow in getting established, and it must be remembered that neither Working Group 2 nor Working Group 5 are operational—that is, they do not themselves investigate or prosecute pirates, but at best only coordinate, share information, and encourage. Dealing with the financial side of piracy, in terms of tracking its profits or proceeds, has been especially difficult. As of 2013, a more specifically law enforcement/prosecution-oriented group has been in the process of becoming established as part of the existing groups or perhaps as a spin-off.

Several community members indicated that the principal value of the Contact Group has been in some of the working groups, and that overall, most of the plenary sessions have added little value. During most periods, there was no real direction from the plenary, and most of the plenary meetings quickly became routine and provided few fresh ideas.¹¹¹ One member summed this up by saying that most of the plenary meetings were “little more than diplomats reading prepared statements.”

Like all volunteer organizations, the Contact Group is ultimately dependent on the goodwill and contributions of its members.

Of course, as mentioned, the Contact Group is essentially a volunteer organization with limited ability to focus on and drive action. Like all volunteer organizations, it is ultimately dependent on the goodwill and contributions of its members, some of which are more effective than others. As one community member stated, “you are dependent on the states and other members, on people actually doing something.” While there are benefits to cheerleading and to some degree of peer pressure,

“it is important not to overstate the extent to which naming and shaming have generated compliance” with international programs and activities to improve counter-piracy efforts, such as improving national piracy laws and implementation of best practices.¹¹² A possible shortcoming of the Contact Group’s more informal approach is the absence of a regular process for feedback or evaluation. Concerns have also been expressed about whether the Contact Group has, or will have, sufficient institutional memory for its positive aspects and lessons learned to be carried forward.

UNODC:

The UN Office on Drugs and Crime, headquartered in Vienna, Austria, launched its Counter-Piracy Program in May 2009. While it is not a police or prosecution office, UNODC has played a major role in counter-piracy efforts, with some of those surveyed considering UNODC to have played the lead law enforcement role, albeit in a capacity-building arena. UNODC’s counter-piracy work has involved three objectives: (1) supporting “fair and efficient trials and imprisonment of piracy suspects in regional countries”; (2) “humane and secure imprisonment in Somalia”; and (3) “In the longer term[,] fair and efficient trials in Somalia itself

(mainly taken forward by [the UN Development Program], but with UNODC support).”¹¹³ UNODC is widely considered successful in its regional capacity-building and in its support for the prosecution of low-level pirates, with its counter-piracy budget growing from approximately \$6 million several years ago to \$200 million in 2013. It has been helpful in drafting and implementing detainee and prisoner transfer agreements, conducting regional training programs, providing funds for defense counsel for suspected pirates, and facilitating the transportation of witnesses to regional court proceedings. Several leading community members singled out UNODC’s Nairobi office as particularly successful for being in the region, taking practical steps on the ground, and cutting through red tape. While UNODC believes that pirate leaders and financiers should be prosecuted, and has, for example, worked with the World Bank in efforts to track piracy-related financial flows, it is not an investigative or prosecution agency and the prosecution of pirate leaders has not been a central part of its mission.

INTERPOL:

INTERPOL is an international intergovernmental organization which facilitates international police cooperation. It is not an operational law enforcement agency and has no police powers of its own. It created a Maritime Piracy Task Force in January 2010, seeking to fill “an important institutional gap that also plugs knowledge gaps about pirate networks.”¹¹⁴ While its counter-piracy unit is small, INTERPOL has played an important role as a conduit between law enforcement and the shipping industry and in improving and coordinating crime scene investigations with NCIS. As discussed, however, the INTERPOL database has been problematic. A number of those surveyed complained about the process of getting data into the system, the reliability of the data, and the difficulty of conducting searches, with one member summarizing the community sentiment as being “confidence in the [INTERPOL] system has substantially declined.” As a result, the database’s management was returned to Washington, D.C. in July 2013, but resources for operating the system appear to remain limited.

INTERPOL has engaged in Evidence Exploitation Initiative (EVEXI) projects to “[provide] regional investigators with an INTERPOL-supported procedure for intelligence gathering, evidence collection and information sharing.”¹¹⁵ These or related efforts also involve the debriefing of released hostages.¹¹⁶ The first of these projects, called EVEXI-1, involved East Africa-region states and was completed some time ago, with EVEXI-2 recently begun in collaboration with Kenya, Seychelles, Somalia, Mauritius, and Tanzania. Prior to the establishment of RAPPICC, INTERPOL worked with authorities in Seychelles (including the SPIC) to collect a variety of evidence, but most community members surveyed were not familiar with any INTERPOL synthesis or analysis of counter-piracy information and evidence.

Europol and Eurojust:

Europol is an organization similar to INTERPOL, acting in a criminal intelligence, information-sharing, and coordination role, obviously focused on the European Union. While it is not itself an operational law enforcement body, it is more closely involved in investigations and investigation-related analysis and support work than INTERPOL is, at least in the area of maritime piracy. Europol has an analytical group dedicated to piracy, and operates and collects information for its own piracy database. For the past 18 months, it has provided active, hands-on support and analysis to the joint Dutch-German investigation “Nemesis.” Eurojust, in turn, is the prosecution counterpart to Europol, facilitating cooperation between European prosecution authorities. Eurojust facilitates an annual coordination meeting among its members related to piracy prosecutions, and recently issued a monitoring report on piracy cases and best practices.

RAPPICC:

The Regional Anti-Piracy Prosecutions and Intelligence Coordination Centre officially opened in Seychelles in March 2013, pursuant to a Memoranda of Understanding between the UK and Seychelles. Other international participants in and supporters of RAPPICC include Australia, the Netherlands, and the United States. Various RAPPICC constitutional documents describe three objectives or functions: (1) “To catalyse and facilitate the sharing and development of intelligence”; (2) “To support investigations and prosecutions”; and (3) “To build capacity, competence and capabilities” in the Indian Ocean/East Africa region.¹¹⁷ Like INTERPOL and Europol, RAPPICC has been, until recently, an intergovernmental information-sharing and coordination body with no police powers of its own. The UK has seconded two prosecutors to RAPPICC who assist and participate in piracy prosecutions in the courts of Seychelles. Apart from intelligence-gathering and capacity-building, a principal concept behind RAPPICC is that it will integrate and coordinate international and regional actors in assembling intelligence and evidentiary packages that will be provided to national law enforcement authorities for further investigation and prosecution.¹¹⁸ While there is significant community consensus that an international focal point for synthesizing pirate information and evidence has not existed to date and is clearly needed, the community largely considers RAPPICC to be a new unknown and has expressed concerns about the possibility of additional duplication and fragmentation of counter-piracy efforts. As of late September 2013, RAPPICC was transitioning from being an intergovernmental organization to being a government agency of Seychelles, with a broader mandate which will still include piracy issues.

THE COSTS AND LIMITS OF CAPACITY-BUILDING

Early in the recent era of the continuing fight against piracy, it was widely recognized that Somalia especially, but also Kenya, Seychelles, and other regional states, lacked the naval, law enforcement, and judicial capacity to deal with maritime crime in and around their territorial waters. In both Somalia and Nigeria, which has a substantial history of maritime crime and where the highest incidence of maritime crime is now occurring, “[c]rime and corruption on shore are rampant,” despite billions of dollars in past international aid, capacity-building, and assistance.¹¹⁹ Despite or because of this, the international community, either deliberately or by default, made a decision to base the counter-piracy law enforcement and prosecution effort primarily in the general, non-specialized local courts in the national criminal justice systems of East Africa and the Indian Ocean—even knowing that there was not, and would not be at any reasonable foreseeable time, any capacity in those national systems to investigate, prosecute, and convict pirate leaders and financiers. As UNODC’s Alan Cole, one of the most effective actors in the counter-piracy community, has stated, the international community’s “use of the Regional Prosecutions Model was adopted largely by default,” and it “cannot address the apparent impunity of those who organize piracy.”¹²⁰

Capacity-building can be, and often is, expensive, time-consuming, difficult, and even violent

While a number of important factors support capacity-building, such as nation-building and regional security, capacity-building can be, and often is, expensive, time-consuming, difficult, and even violent, often requiring substantial and sustained political and financial commitments, all with uncertain results.¹²¹ In fact, “[s]ome efforts, such as the major focus on making regional states responsible for adjudicating the piratical activities of other neighboring states, are not supported by maritime tradition, international treaty obligations, or even a reasonable expectation that they can develop the capacity needed for an effective response.”¹²²

Prosecuting complex, organized crime cases (which piracy leadership cases are, or would be) while at the same time satisfying increasingly stringent due process and fair trial standards often poses significant challenges for advanced justice systems, let alone for struggling or less developed systems.¹²³ Moreover, and apart from the costs of developing and operating a more advanced legal system, complex organizational crime leadership cases are not the sort of cases that less developed systems and less experienced prosecutors should cut their teeth on. Indeed, some observers have raised serious questions around whether relying on capacity-building to deal with piracy in a place like Somalia is even realistic:

The enormous challenges associated with re-establishing a failed state in general (much less the specific challenges found in Somalia) make [the] recommendation [to rely primarily on local capacity-building] somewhat facetious. While coastal governance is critical for the long-term suppression of piracy, the actual on-the-ground facts of any specific failed state may make it impossible to create in any reasonable time.¹²⁴

A closer look at the part of Somalia known as Puntland illustrates the full extent of these challenges. Puntland's criminal justice system (which, as of June 2011, included 86 judges, 10 prosecutors, 150 criminal investigators, and a small number of defense counsel) has faced severe obstacles including a lack of formal legal training, the lack of secure, properly equipped courtrooms and other infrastructure, and inadequate information technology and forensic equipment.¹²⁵ As of June 2011, five Puntland judges had law degrees, 10 had degrees in sharia law, and 17 had completed UN-accredited legal training. Most of the prosecutors did not have law degrees,¹²⁶ and the UN Development Program funded the region's legal aid program, with eight lawyers.¹²⁷ The security situation for judges and prosecutors has been a major concern, with seven judges and prosecutors having been assassinated since 2009, with others having had narrow escapes. There are ongoing, serious concerns about bribery.¹²⁸ As of June 2011, there was insufficient prison capacity, and the prison space that did exist did not meet international standards in terms of basic medical facilities, water, sanitation, and trained staff.¹²⁹ The UN estimated in June 2011 that a three-year program to bring the justice systems in both Puntland and Somaliland (another self-declared autonomous region of Somalia) up to international standards would cost more than \$24 million, not including salaries and other costs of Somali personnel.¹³⁰

The United Nations knew that the \$24 million three-year effort *would not give Puntland and Somaliland any capacity to prosecute more complex cases*. In his report in January 2012, the Secretary-General stated very clearly that increasing Somalia's capacity *to even the basic level* "is a major, long-term challenge. *To investigate or conduct more complex prosecutions involving those suspected of financing, planning or organizing acts of piracy would be even more challenging.*"¹³¹ Indeed, the Secretary-General said in June 2011:

[T]he training necessary [to investigate and prosecute more complex cases] would need to come at a later stage [sometime after early- to mid-2014], when training . . . is at a more advanced stage. In addition, effective prosecution would require broader criminal legislation, including crimes of extortion, kidnapping, conspiracy and money-laundering. Given the fact that, thus far, [Somalia's] Transitional Federal Parliament and the regional parliaments have not adopted effective anti-piracy legislation, [the UN] considers that adoption of legislation covering these more complex crimes is unlikely at this stage.¹³²

The counter-piracy program in Seychelles demonstrates how extensively their piracy effort has already been internationalized, with no less appreciation for the work and dedication of the authorities there.¹³³ As of January 2012, the Attorney General's Chamber of Seychelles had six prosecutors, including the

Attorney General himself, who had prosecuted one of the eight piracy cases prosecuted in Seychelles up to that time, with the other seven cases prosecuted by the two prosecutors seconded to the Seychelles by the United Kingdom. UNODC has largely equipped and funded the entire program. UNODC has provided training on the law of the sea, evidence, and the handing over of suspect pirates; provided funding to support the UK prosecutors; and provided information technology resources, office equipment and training-related travel expenses. UNODC also reviews Seychellois piracy legislation, provides judicial training and transcription services, provides travel funding for witnesses, pays court interpreters, and funds the legal aid program that provides defense representation to accused pirates. As of January 2012, and subject to the receipt of funding from the Piracy Trust Fund, UNODC had committed to building a new courtroom in Seychelles primarily for piracy cases, and also provided part of the funding to refurbish the single prison there. A Secure Incarceration Unit, built by UNODC, provides an additional 60 prisoner spaces. UNODC assessed in 2012 that Seychelles would need another piracy judge, who “would need to be recruited internationally.”¹³⁴

In addition to all of this, the European Union launched another law enforcement capacity-building program in the East Africa/Indian Ocean region in May 2013, worth approximately €37.5 million (or approximately \$52,087,500).¹³⁵

Despite these honorable efforts and the investment of substantial resources, “onshore development in Somalia has not yielded significant fruit.” A joint World Bank-UNODC-INTERPOL report concluded in November 2013 that Somalia “remains extremely fragile, fluid, and uncertain, and only time will tell whether the progress [made] can be sustained over the long term (World Bank 2013, 2). Even in Kenya and Seychelles, “[law enforcement and judicial] capacity . . . remain[ed] extremely small” in 2012.

In the meantime, and absent the development of an international mechanism and/or more proactive prosecution efforts outside the region, the vast majority of pirate prosecutions remain focused on low-level pirates in local courts and “the maritime industry is left with legal recourse to only those governments least able to arrest and prosecute pirates.”¹³⁶ The continued reliance on regional states that have limited genuine willingness and/or capacity to tackle piracy, which in some places involves severe corruption and compromised justice systems, also impacts the cooperation and information-sharing regimes as the shipping and insurance industries may be reluctant to report and share all of their information, especially sensitive information. Likewise, just as states engage in cost/benefit analyses on whether pirate-related law enforcement is “worth it” when only low-level pirates (and only a small percentage of those) are prosecuted and many receive light sentences, the shipping industry does the same, so that such circumstances become a disincentive to cooperate.

A serious global commitment to the rule of law also calls for genuine accountability

Historically, when coastal and flag states have failed to deal effectively with pirates, “the last line of defense . . . has traditionally been self-defense by merchant ships . . . [which] can be described as privatizing the solution,” and in fact, this is largely what has occurred in terms of private armed security, which raises its own set of challenging issues. “Privatizing models tend to emphasize avoidance and defense over capture and prosecution.”¹³⁷ While avoidance is generally a good thing and an ounce of prevention is worth a pound of cure, a serious global commitment to the rule of law also calls for genuine accountability for both those suspected pirates who succeed (at least for a time) and for those who try their hands at transnational crime, imposing significant costs and burdens on commerce, whether or not they succeed individually.

A FINAL CONCERN

It is important to note a final concern. A substantial number of surveyed community members, including some of the community's senior leaders, expressed serious concern that with the substantial decrease in pirate activity on Africa's east coast in the past eighteen months, with no successful attacks reported, there will be, or already is, sharply declining national and international interest and political will to continue investigations that might lead to prosecutions of pirate leaders and financiers.

The Monitoring Group on Somalia & Eritrea stated on July 12, 2013:

The continuing decrease in the number of high-profile hijackings will probably weaken any resolve to investigate and prosecute the pirate leadership, in Somalia and abroad . . . [This] will inevitably lead to impunity for those who made the most profit from and bear the greatest responsibility for an international crime, and who are now pursuing alternative organized criminal activities. Since the passage of time is affecting the quality and accessibility of testimonies and evidence, *the Monitoring Group reiterates the urgent need to establish a dedicated group of investigators with the mandate to collect information, gather evidence and record testimonies relating to acts of Somali piracy, including especially the identification of pirate leaders, financiers, negotiators, facilitators, support networks and beneficiaries.*"¹³⁸

It would have been plainly unacceptable for senior political and military leaders in the former Yugoslavia and Rwanda to have escaped being held accountable because the conflicts or atrocities had, for whatever reason, come to an end or been reduced to some "acceptable" level. Indeed, the prosecutions and convictions of many of the political and military leaders in the former Yugoslavia have taken place since the Dayton Accords and the end of the war, with the Bosnian Serb political and military leaders Radovan Karadžić and Ratko Mladić on trial in The Hague today. At a possibly more mundane level, not prosecuting pirate leaders and financiers now would be tantamount to not prosecuting the leaders of a bank robbing organization just because, at least for the time being, it seems that bank robberies may have stopped (or at least moved to another city, or part of the city).

RECOMMENDATIONS

The following recommendations are based on the survey of the counter-piracy community and other reviewed materials and information. To the extent that some of the recommendations may be considered untimely or no longer practical concerning the fight against East African piracy, they might be considered more broadly in the fight against piracy in West Africa and elsewhere, and against transnational and international crime generally.

Starting points:

1. Continuing experience with the establishment of international tribunals and other international efforts or programs having, or which should have, a significant law enforcement, criminal law, or prosecution component, including the efforts concerning maritime piracy since 2005, has demonstrated that highly-qualified law enforcement and criminal law practitioners with practical experience need to be at the table

and significantly involved in all planning and discussions from the beginning. The international community was too slow in bringing law enforcement on board in early counter-piracy efforts, and law enforcement was too slow in getting involved.

2. In dealing with international and transnational crime, the international community should take a more robust, less hesitant role in situations that substantially implicate and impact the global commons and global interests, where the states most directly involved or in closest geographic or other proximity to the matter have been unable and/or unwilling to deal with it effectively. As other observers have stated, it is “vital to address the global problem of piracy when a state, for whatever reason, fails to adequately suppress piracy from its shore.”¹³⁹ There is good support in international principle and practice for a “right to juridical intervention” in the face of such substantial failure and tremendous economic and human costs. The complementarity principle, as considered by the International Criminal Court, and the international community’s responsibility to intervene, as part of the Responsibility to Protect, support this notion. As set out in the ICC Statute at Article 17, the ICC may investigate and prosecute a “situation” where a relevant state “is unwilling or unable genuinely to carry out [an] investigation or prosecution.”¹⁴⁰ Likewise, the Responsibility to Protect calls for “[t]imely and decisive” action “when a State is manifestly failing to” meet its obligations.¹⁴¹ For many years up to and including the present time, Somalia has been unable and/or unwilling to deal with a criminal situation that has major global impact, which provides, and has provided, ample basis for more vigorous international action.

A fundamentally different law enforcement/prosecution approach:

3. While regional courts may, and should, continue to prosecute interdicted low-level pirates, the principal and high-priority focus of counter-piracy prosecutions should shift fundamentally to the prosecutions of pirate leaders, organizers, and financiers. A significant number of community participants acknowledged that the horizontal, reactive, and bottom-up approach to anti-piracy law enforcement efforts “can only take you so far.” This approach should be substantially replaced by a more proactive, top-down approach. Pirate kingpins must be purposely targeted and pursued on a high-priority, adequately resourced basis, not as an add-on to more ordinary, reactive cases against low-level pirates.

4. This proactive, more focused law enforcement approach should be more centralized or at least better coordinated. The prosecution effort should take on more of the character of a strike force, with dedicated units and resources. There needs to be a true international focal point with a significant degree of *bona fide* police authority and high-level political influence. The most telling community comments in this respect were “Unless there is better organization and focus, we will not get to the pirate organizers, except by chance,” “Someone has to make [prosecuting pirate leaders] their mission, and it’s not happening now,” and “What we need is a global strike force.”¹⁴² Participants at the September 26, 2013 meeting of the Intergovernmental Authority on Development in New York “emphasized the regional dimension of the challenges to peace and stability in Somalia and noted that a more structured cooperation among countries in the Horn of Africa [is] key to tackling transborder issues such as terrorism, piracy and trafficking.”¹⁴³

More intensive and extensive use of sophisticated law enforcement techniques:

5. Counter-piracy law enforcement must use different, more sophisticated law enforcement techniques involving different approaches and the acquisition of different kinds of evidence. While some of these techniques have been used to some extent, and sometimes to good effect, there must be renewed, reinvigorated, and more

extensive use of them on a high-priority, adequately resourced basis. It is not nearly enough for this to be recognized at the more operational levels—such recognition may already exist. For counter-piracy law enforcement efforts to succeed, senior decision makers and funders must recognize that in building complex leadership cases, the more routine types of evidence from victims and crime scenes are of little value. This recognition at senior levels must be followed by structural commitments, sufficient resources, and sustained action.

6. One obstacle to the development and use of insider witnesses has apparently been (or was for a time) a resistance of this practice by some members of the counter-piracy community, who perhaps viewed it as something unsavory or undesirable. While it must be done appropriately, with professional direction and caution, the development and use of insider evidence must be understood to be a widely accepted and often necessary law enforcement practice.¹⁴⁴

7. Although the lowest-level pirates will often provide little value in an effort to move up the organizational ladder (because of their own low position and their limited knowledge of what goes on above their level), there will be, and have been, instances in which a pirate foot soldier provides important evidence connecting the crimes at sea to higher-level culprits. What is most needed is access to mid-level pirate managers, who can provide important inside information leading to the higher-level pirates and financiers. There was a mix of positions taken among those surveyed on whether an increased focus on mother ship operators and land-based suppliers would be productive, but it seems that such persons would likely have more useful information, in terms of building cases against higher-level pirates, than the typical skiff pirate would.

8. While Somalia's clan system and strong clan loyalties are indeed a complicating factor, cooperating insiders have been successfully developed in other difficult, hostile situations, and in organized crime and war crime cases in which people from one group have demonstrated strong loyalties to other people of their same political orientation or ethnicity, or who were otherwise "on their side," but have nonetheless ultimately provided important evidence against them.

9. The development and use of insider witnesses may require implementing a witness protection program. If no such protections have been required or afforded to date (or no such program put in place), it may indicate that the risks involved in cooperation are not as great as might have been thought, or demonstrate that counter-piracy law enforcement programs and efforts to date have been deficient, and/or explain why more insider witnesses have not been successfully developed. A witness protection program should not be viewed as something exceptional, but should be seen as a positive badge of a serious commitment to prosecuting piracy's leaders.

10. An important law enforcement technique that can probably make the biggest difference in prosecuting pirate kingpins is communication surveillance and interception, especially by means which capture not only the existence of communications, but their content. Probably the biggest game-changer would involve greater access to and use of signal intelligence conducted by military and intelligence services, which will be touched upon more generally in subsequent discussion.

11. The perception may be that conducting an undercover operation in a failed or struggling state, or one in which there is extensive corruption, even in law enforcement organizations, would be too difficult

and possibly too dangerous. Nevertheless, such operations have been successfully conducted in similarly dangerous, violent contexts, the various difficulties notwithstanding. Such operations related to piracy investigations should not be automatically ruled out, as they may well have potential value in particular situations or circumstances.

12. Although there are reasons to question the amount of documentary evidence that exists in relation to piracy cases, especially at the lower levels, efforts to locate and obtain such evidence should not be abandoned. Some documentation has been found on released ships, and there is reason to believe that at least at some higher level, there must be some paper, electronic, or other trail concerning piracy operations, financing, profits, and laundering. Law enforcement should reinvigorate efforts to find such evidence, including written communications and records of phone traffic, emails, and text messages. Many of those accused in both national and international courts have been convicted based in substantial part on pieces of paper that no one thought existed. The thinking may be that the environment is too hostile in Somalia for a law enforcement team to execute search warrants, but warrants and searches were conducted in a number of similarly hostile situations in the Balkans under international military protection.

13. More advanced investigative techniques require a serious sense and priority of mission, mission leadership and direction, the necessary professional expertise, sustained focus over time, and a significant resource commitment. These characteristics and resources are much less likely to be found in law enforcement efforts based on a disparate, reactive, case-by-case approach.

More genuine cooperation, less fragmentation, better information-sharing and analysis:

14. While counter-piracy cooperation was, in some respects, reported as being very good, there were also significant comments by a number of community members that there are too many different agendas, “a lot of politics,” too much competition, and too much “empire building.” Parallel sets of similar but largely independent activities play into these concerns, which would be improved by more coordination. Fragmentation, duplication, and false steps are not “no harm, no foul.” Too many organizations, like too many cooks, is not a “more the merrier” situation, but one which fosters duplicated efforts, strategic and tactical conflicts, added costs and reduced efficiency and effectiveness. Failed or less-than-effective solutions siphon away and dissipate precious political support and scarce resources. Patting ourselves on the backs for adopting yet another piracy code of conduct at an international conference and then going home thinking we have done enough may sap the political will and moral courage to do things that would, in fact, make a difference.

15. Aerial surveillance by drones and otherwise, as reported on almost daily on CNN, the BBC, and Al Jazeera, cannot be considered a secret capability that must be protected from disclosure. High-priority efforts should be made at the highest levels to improve, on an institutional basis, the interface between military forces, intelligence services, and law enforcement, including an effort to dramatically reduce the over-classification of information and the creation of an easier, smoother interface for sharing information, including all forms of surveillance. Given the competing demands on military assets and the considerable expense of naval deployments, more effective information-sharing would also be substantially in the interest of the various states contributing such assets, since prosecuting and convicting pirate kingpins would go much further toward ending or reducing deployments and freeing up military assets than the *ad infinitum* catch-and-release or prosecution of skiff pirates.

16. The shipping and insurance industries must fully cooperate with law enforcement. Unfortunately, it appears that industry information-sharing may, in some respects, be getting worse rather than better, based on both motives of profit and concerns about legal exposure. While law enforcement should be professional, responsible, and reasonably alert to legitimate industry interests, cooperation with law enforcement is not (and should not be) based on the attitude that the industry is doing law enforcement authorities a favor by “agreeing” to cooperate, when in fact industry is obligated to cooperate (as any citizen is). Where cooperative efforts fail, law authorities should take more serious measures to ensure that industry provides the needed information.

17. Beyond the military, intelligence community, and industry interfaces, information-sharing among law enforcement agencies should be made simpler and easier. European laws need to be reformed to allow for more effective and efficient information-sharing for law enforcement purposes. Mutual legal-assistance treaty arrangements and processes need to be liberalized and made less cumbersome.

18. Piracy-related databases must be fully assessed and coordinated. Duplication should be avoided wherever reasonably possible, and where there is duplication, there should be reason for it and an understanding of both its benefits and pitfalls. Information being entered into a database must be quality-controlled, sourced, and have some indicia of reliability. Efforts should be made to preclude the same information being entered several times due to a second or third law enforcement agency simply repeating or feeding back the same information.

19. The proper entry of information into a database, while important, is of limited value if the information is not synthesized and analyzed. Apart from a few specific teams working together, there is no apparent centralized or coordinated multi-national program or effort aimed at synthesizing and integrating law enforcement information in the course of building cases against pirate leaders and financiers. Unless there is a clear determination that this can be done only by individual teams working individual cases (and there would almost certainly be fine-tuning by individual teams in any event), analytical capability should be put in place to conduct and share analysis across various offices and systems.

20. Better communications and fewer “disconnects” between first-world investigators and prosecutors and those in relevant regions are needed. Talking to local authorities about certain law enforcement techniques used in the U.S. or Europe (without equipping them and offering meaningful training) doesn’t necessarily contribute much value when the local authorities are more worried about whether the copy machine is working or whether there is enough fuel to put their few patrol boats to sea.

21. More effective information-sharing would be facilitated by more standardized, consistent practices and forms, which, for example, would allow a particular type of report to more easily cross national and institutional borders from one system to another with little or no adjustment or retooling.

Serious consideration of an international mechanism:

22. Concerning maritime piracy generally—whether in the Gulf of Aden, the Gulf of Guinea, or elsewhere—adoption of an international criminal justice mechanism should be seriously considered, or reconsidered, in the fight against piracy and other international or transnational crime.¹⁴⁵ “Tribunal

fatigue” notwithstanding, there are and will be times and circumstances in which a focused international tool is needed, and there is ample authority and scope for shaping that tool to the situation at hand. Having a Security Council-appointed international prosecutor would go a long way toward accomplishing or facilitating many of the recommendations made here by providing a high-level international focal point for counter-piracy efforts with real police powers and a solid pulpit for strategic direction, improved coordination, and less fragmentation. The integration of a single international piracy code and a single set of procedural and evidentiary rules, promulgated pursuant to Chapter VII, would make counter-piracy efforts more effective, clearer, and a more efficient regime. An outline for a possible “international lite” mechanism is set out below.

Other matters:

23. Senior international authorities should put concerted and sustained pressure on Somali authorities to execute arrest warrants. If Somali authorities are unwilling and/or unable to arrest indicted pirates, international operations to bring indicted pirates into custody should be considered. While no one suggests that arresting a pirate leader rises to the level of apprehending Osama bin Laden, it is difficult to believe that apprehending pirate leaders in Somalia would be impossible, if they were considered sufficiently important.

24. While it appears that crime scene investigations have generally improved, especially where NCIS is involved, there is room for wider continuing improvement and standardization of procedures.

25. Although it appears that most, if not all, needed or desired witnesses have ultimately been found in connection with most prosecutions and trials, a central system should be put in place to track seafarer and victim witnesses.

A PROPOSED “INTERNATIONAL LITE” MECHANISM

The proposal or option for an international piracy tribunal along the lines of an International Criminal Tribunal for the Former Yugoslavia (ICTY) or a Special Court for Sierra Leone—although the subject of some lingering discussion—was discarded relatively early in the international community’s consideration of what new or additional judicial mechanisms might be helpful or productive in the ongoing fight against modern piracy. In looking at this decision and reconsidering the possibility of an international mechanism, it should be observed, based on a review of the various statutes and agreements establishing international tribunals and special courts over the past 20 years, that the Security Council’s powers and abilities to establish international courts or Chapter VII mechanisms are significant, with a wide range of possibilities and variations to fit different circumstances. They needn’t be, and in fact have not been, cookie-cutter. International courts have been established (1) as fully owned and operated Security Council bodies (the ICTY and ICTR); (2) as UN-assisted hybrid tribunals, with varying levels of UN participation and degrees of relationship to, or integration with, national laws and domestic structures (the Special Court for Sierra Leone, applying both international and Sierra Leonean law; the Special Tribunal for Lebanon, applying only Lebanese criminal law; and the Extraordinary Chambers in the Courts of Cambodia, located entirely within Cambodia’s national judicial system, applying both international and Cambodian law, as an internationalized domestic criminal court); and (3) as instruments of UN and/or international administrations (the special panels of the United Nations Transitional Administration in East Timor; the trial panels of the United Nations Interim Administration Mission in Kosovo; and the War Crimes Chamber of the State Court of Bosnia and Herzegovina, as a special chamber in Bosnia’s national system, established by national law, with initially extensive and then declining

international involvement).¹⁴⁶ In short, there is substantial scope for significant variation and creativity for those willing to consider the possibilities.

This paper acknowledges that the political realities of “tribunal fatigue” in 2009–2011 indeed weighed heavily against the establishment of a piracy tribunal—or perhaps any other international tribunal—at that time.¹⁴⁷ On the other hand, most if not all of the arguments made or factors considered in opposition to such a tribunal, on their merits, very largely missed the mark, were overstated, or did not consider a sufficient range of options. Again, while recognizing the significance of tribunal fatigue, one can hardly review the reasons against an international mechanism without perceiving that this was a conclusion in search of justifications, or at least a conclusion based on far broader (or different) policy or political considerations from those stated.

Most if not all of the arguments made or factors considered in opposition to an international tribunal very largely missed the mark, were overstated, or did not consider a sufficient range of options.

First, a major argument cited against an international tribunal was that piracy was, or is not, a serious enough crime to warrant an international mechanism. The Secretary-General said in July 2010:

[T]he crime of piracy is of a different nature and scope [than] the serious international crimes normally dealt with by international tribunals, and . . . suspected pirates brought before any such new international tribunal would be unlikely to meet the criterion of being the ‘most responsible’ for the crimes in question, which is a threshold applied by most of the current international tribunals.¹⁴⁸

This conclusion is fundamentally contrary to the myriad public statements and official declarations made over the course of a decade that modern maritime piracy is a horrible global scourge with massive human and economic costs, is a major threat to international commerce, and is, at least regionally, a threat to international peace and security. The Security Council has made repeated Chapter VII findings or declarations concerning Somali piracy, calling for a large international military response with at least three naval task forces steaming up and down Africa’s east coast at considerable effort and costing more than *\$1 billion a year*,¹⁴⁹ and, whether it was actually implemented or not, has urged a robust international and national law enforcement response to piracy. Moreover, the crimes of piracy (and related maritime crimes) take place, in whole or in part, in (or immediately proximate to) the global commons, in true international space, as opposed to crimes which actually took place squarely within the recognized borders of Bosnia, Sierra Leone, Rwanda, and Lebanon.¹⁵⁰ Further, and as discussed below, an international piracy mechanism’s mandate could be limited to, or place its emphasis on, the “most responsible” persons, rather than the more ordinary, low-level pirates. Any assessment that piracy is “not a serious enough crime” raises again the question of whether piracy is truly a scourge or only, in fact, a nuisance to largely be tolerated (except when one of your own treasure ships is taken, and then a frigate is sent after the boat pirates but never their bosses).

A second false premise in the arguments against an international piracy mechanism is that such a tribunal, unlike all of the other international tribunals, would be faced with a huge volume of cases and “would be addressing a different situation to that addressed by the existing United Nations and United Nations-assisted tribunals,” involving “ongoing criminal activity, and potentially a large caseload.”¹⁵¹ These

statements are entirely incorrect. First, at least the ICTY, for example, operated during “ongoing criminal activity,” with the conflict in the former Yugoslavia going on and continuing after the time at which the tribunal was established. The horrific crimes in Srebrenica, for example, did not occur until July 1995, more than two years after the Security Council resolution establishing the tribunal, and crimes in Kosovo were also charged and prosecuted in real time. Second, both the ICTY and ICTR also faced, potentially, a huge volume of cases and potential offenders, given the magnitude, scope, and nature of the Yugoslav and Rwandan crimes, until their mandates were amended or clarified to indicate that their focuses should be on the most senior responsible persons for the most heinous crimes. The important point is that, in terms of all of the international and international-assisted tribunals to date, the size and nature of an international mechanism’s docket are entirely determined by the terms of its mandate and jurisdiction, and a piracy tribunal was, or would have been, no different. This, in fact, was recognized, but apparently discarded or forgotten in the discussion documents:

[It would need to be determined whether an international tribunal’s jurisdiction] should extend to all persons committing piracy and armed robbery at sea, or whether it should be restricted to a category of the ‘most responsible’, e.g., those who finance or plan acts of piracy. A related question would be whether, if the jurisdiction is not so restricted, the tribunal should be obliged to accept all transfers of suspects apprehended by patrolling naval States.¹⁵²

As mentioned, all of the international tribunals have focused on a limited docket, generally against high- (or higher-) level suspects, and none have been commissioned to prosecute foot soldiers. Note, for example, the following language about the ICTY and ICTR:

Since 2004, ICTY and ICTR have been directed to concentrate their efforts on the senior leaders suspected of being most responsible for crimes within their jurisdiction, with a view to the referral of accused not bearing this level of responsibility to competent national jurisdictions. In practice, therefore, prosecutions are concentrating on the military or political leaders who planned or ordered crimes to be committed, rather than on those who committed offences on the ground.¹⁵³

An international mechanism should not be required to accept all potential cases or to process all apprehended piracy suspects.

The ICTY indicted 161 persons, and the ICTR indicted 92 individuals.¹⁵⁴ The jurisdiction of the Special Court for Sierra Leone was limited to “persons who bear the greatest responsibility” and the court indicted 13 persons.¹⁵⁵ The Special Tribunal for Lebanon also has limited jurisdiction, primarily concerning a specific event,¹⁵⁶ and has indicted five persons.¹⁵⁸ The Extraordinary Chambers in the Courts of Cambodia “is likely to try around 10 individuals considered to be senior leaders and those most responsible.”¹⁵⁸ There is no reason to think that a piracy tribunal’s mandate or jurisdiction would not (or could not) be similarly limited. A rough but educated prediction might indicate that no more than 30 to 50 higher-level pirates, financiers, and other facilitators would likely be prosecuted by an international court.

An international mechanism should not be required to accept all potential cases or to process all apprehended piracy suspects. As is the case with a number of the existing tribunals, including the ICTY, ICTR, and the Sierra Leone and Lebanon tribunals, an international mechanism should have concurrent jurisdiction with national courts, with the ability to assert primacy,¹⁵⁹ in order to protect its docket as well as prosecution

priorities and strategy.¹⁶⁰ Care should also be taken not to constrain an international mechanism too strictly, as building leadership cases involving organizational crime almost always requires prosecuting at least a few smaller- and medium-sized fish.

This does not mean that there would be no mechanisms for prosecuting a larger volume of lower-level pirates. Such pirates could continue to be prosecuted in regional state courts, or in other national courts.¹⁶¹ The overall counter-piracy arrangements could still involve one or more specialized or especially-supported national courts in the region, just as the War Crimes Chamber of the Bosnia State Court has prosecuted a significant number of suspected war criminals, including lower-level suspects referred by the ICTY or which the ICTY, given its mandate, would never have prosecuted (or that, given the volume and time limits, the ICTY was not able to prosecute). In fact, the Bosnia War Crimes Chamber began functioning in 2005 with extensive international participation and assistance for the specific purpose of prosecuting suspected war criminals not prosecuted by the ICTY:

[The jurisdiction of the Bosnia War Crimes Chamber] is limited to offences committed within Bosnia and Herzegovina, and include indictments referred from ICTY in accordance with Rule 11 *bis* of the ICTY Rules of Procedure and Evidence (i.e., the accused not meeting the threshold of being senior leaders most responsible), other cases investigated but not indicted by the ICTY Prosecutor, and cases investigated nationally by the Bosnian authorities. The Bosnia War Crimes Chamber deals with a very high volume of cases. As of 30 April 2010, there were 439 cases before the Bosnia War Crimes Chamber. It has been estimated that around 6,000 accused fall within its jurisdiction in total.¹⁶²

Another factor stated against having an international mechanism is that it would take too long, or be “time-consuming” to set up.¹⁶³ Again, this is not correct. The international tribunals or UN-assisted courts which have taken the longest to stand up were those established by treaty or agreement. It took approximately two years to negotiate and operationalize the Sierra Leone Special Court. It was three years from the time that an initial Security Council request for a tribunal was made until the Special Tribunal for Lebanon began to function in March 2009; and it took nine years for the Extraordinary Chambers in the Courts of Cambodia to begin functioning, in 2006.¹⁶⁴ By contrast, “[t]he time periods for [the] ICTY and ICTR [which were not established by treaty, but pursuant to the Security Council’s Chapter VII powers] were the shortest.”¹⁶⁵ Each statute was drafted in 60 days and both tribunals were operating approximately one year later.¹⁶⁶ It can take considerably longer, of course, to build capacity in national courts, to uncertain ends. The Secretary-General’s June 2011 report estimated, for example, that it would take three years and considerable international investment before Somali courts would be able to prosecute and try, in accordance with international standards, even the lowest-level pirates.¹⁶⁷

Any questions about an international mechanism’s temporal or geographic jurisdiction could be easily answered in setting out in a measure establishing such a mechanism, as all other international tribunals to date (except for the ICC) “have a limited temporal jurisdiction, and either a limited geographical jurisdiction, or a jurisdiction limited to specific events.”¹⁶⁸ “As the [Security Council] would be acting under Chapter VII of the [UN] Charter, it would be able to determine these matters.”¹⁶⁹ There would be a full range of options: a piracy tribunal could have global geographic reach (consistent with universal jurisdiction), concerning piracy anywhere, at any time, within any determined statute of limitations or other temporal limit. Or it could, for example, be limited to piracy in the Gulf of Aden since January 1, 2005 (or 2001 or 2010). Legally and conceptually, there is no particular hurdle to setting the mechanism’s temporal or geographic boundaries.

Questions have been or might be raised about the substantive and/or procedural law that an international mechanism would apply. The Secretary-General reported as long ago as July 2010, concerning an international mechanism established pursuant to Chapter VII:

It would fall to the Security Council to negotiate and adopt a statute governing the tribunal’s jurisdiction, including the crimes. The crime of piracy is well established under the United Nations Convention on the Law of the Sea and customary international law and should not present a difficulty of definition. However, if the jurisdiction were to include crimes of financing and organizing acts of piracy and armed robbery at sea, which are not established under the Convention, definitions would need to be negotiated by the Security Council.¹⁷⁰

While prosecutions based largely on UNCLOS and SUA might not be perfect, there is a wide, if not unanimous view that those treaties provide at least the basic tools for effective prosecutions, and SUA, in fact, could probably be used in more proactive, effective ways. Further, “[t]he instruments in place for combating other types of organized crime, such as drug trafficking [and the Convention on Transnational Organized Crime], could also be used to counter piracy.”¹⁷¹ Most planning, facilitating, and similar conduct could be completed under principles now widely adopted and used for almost twenty years in the various international criminal courts, such as the concepts of a “joint criminal enterprise” or behavior by two or more persons pursuing a “common purpose” (where either the purpose or objective pursued and/or the behavior used in pursuing such purpose or objective is criminal) or by aiding and abetting. Procedural and evidentiary rules could easily be fashioned from the various tribunal statutes and rules, and also to the extent that any such or similar rules have become (or might become) customary law.¹⁷²

The reasonable but higher costs of even a modest-sized mechanism would still be dramatically less than the economic and human costs of piracy

Another objection to an international piracy tribunal concerns its possible costs, based on experiences with the other international courts.¹⁷³ Among all of the concerns, this is perhaps the most valid one, but it need not be a showstopper. First, rhetoric concerning the importance of prosecuting pirate kingpins and financiers must be given real meaning, backed by genuine political and resource commitments. Second, there is no such thing as a free lunch, and it must be recognized that both capacity-building and national prosecutions are also expensive and often to uncertain, perhaps less-than-productive ends. Third, as discussed below, an international mechanism need not be a full-fledged ICTY-like tribunal. Fourth, there may be creative ways to at least supplement funding by UN Member states. And fifth, the reasonable but higher costs of even a modest-sized mechanism would still be dramatically less than the economic and human costs of piracy.

The fact that no pirate leader has been convicted to date and the need to put stronger prosecutorial force and real political will behind the continuing rhetoric speaks for itself. One needs only to look again at the recent assessment of the International Monitoring Group on Somalia and Eritrea:

To date neither the Somali Government, the “Puntland” administration or any other local authority has seriously prosecuted and jailed any senior pirate leaders, financiers, negotiators or facilitators. The leadership of the principal piracy networks and their associates have continued to enjoy freedom and impunity and have not been hindered in their travel or ability to transfer funds.¹⁷⁴

In the persisting absence of serious national and international efforts to investigate, prosecute or sanction those responsible for organizing Somali piracy, the leaders, financiers, negotiators and facilitators will continue to operate with impunity.¹⁷⁵

[I]nvestigative and judicial responses have been far too limited if existing at all. The lack of political will stems from limited financial resources, jurisdictional barriers, differing national interests and agendas and even domestic electoral motivations.¹⁷⁶

Since the passage of time is affecting the quality and accessibility of testimonies and evidence, the Monitoring Group reiterates the urgent need to establish a dedicated group of investigators with the mandate to collect information, gather evidence and record testimonies relating to acts of Somali piracy, including especially the identification of pirate leaders, financiers, negotiators, facilitators, support networks and beneficiaries.¹⁷⁷

Second, as discussed, building capacity in national systems is also very expensive and takes considerable time, and even then, may or may not lead to the desired results. Despite the investment of tens if not hundreds of millions of international dollars and other substantial resources, “onshore development in Somalia has not yielded significant fruit,” and as of mid-2011, it was estimated that it would require another three years and \$25 million in Puntland and Somaliland alone to prosecute the lowest-level pirates in accordance with international standards. In addition, at least as of early 2012, “the [law enforcement and judicial] capacity of both [Kenya and Seychelles] remain[ed] extremely small.”¹⁷⁸ In short, with the possible exception of Seychelles, there is no reasonable prospect of top pirate leaders and financiers being prosecuted in the region any time soon.

The third response to the “high cost” argument is that an effective international mechanism need not be a full-blown ICTY or ICC tribunal or even a smaller project like the Sierra Leone and Lebanon tribunals. As noted previously, there is sound authority for a wide range of mechanisms and ample scope for variation and creativity for those willing to consider the possibilities. An international piracy mechanism would (or could) begin with the Security Council using its Chapter VII powers to enact a piracy statute, incorporating applicable international law, and drawing on the extensive precedent from other tribunal statutes and practices.

An effective international mechanism might be as small as a prosecution office with a lead prosecutor and a small number of other prosecutors, investigators, analysts, and others. Housing and equipping such a unit would not be terribly expensive, or be intrusive to a host country. The lead prosecutor would be given the maximum police powers and investigative tools provided or allowed by international law, including the power to subpoena or summon witnesses, the power to issue subpoenas or seek court orders for the production of documents and other evidence, the ability to obtain and execute search warrants, and the ability to prepare indictments and to seek and obtain arrest warrants.¹⁷⁹ A small number of judges—perhaps three—would be appointed to act as pretrial judges for the purpose of receiving and acting on applications for investigation-related court orders, search warrants, and perhaps some but not all subpoenas (with the prosecutor him- or herself having some subpoena or summoning power), and also confirming or issuing indictments and arrest warrants. The three judges would remain in place in their national systems and continue to carry, if necessary, a reduced docket of national cases, with their national systems agreeing to accommodate their piracy-related workload, which during most periods would likely be limited, and with the national system considering such an arrangement a form of in-kind support to the international program, and/or with the international mechanism providing a portion of the

judges' overall compensation or a supplement to their national compensation. One of the three judges would be named the Presiding Judge, and would be provided with a small additional administrative staff to act as a registry in receiving filings, etc. and also be provided with an additional legal officer or two, all funded by the international mechanism. There would be no physical tribunal courthouse and much could be done digitally and by video-link. Once a procedure involving a pretrial judge confirms an indictment prepared by the prosecutor, arrest warrants would be issued and a sufficiently equipped and secured courtroom would be designated or made available in a national court system, either in the region or elsewhere, and the ancillary services, such as the detention facility, would be provided by the same national system, with selection of a national system requiring clear compliance with international standards. Provisions and funding would be provided for defense counsel where not privately arranged.

Cases could be tried to a judge or panel of judges from the national system, applying the international piracy statute and the international mechanism's procedural and evidentiary rules, based on and adapted from the rules of procedure and evidence used at other international criminal tribunals. Here again, there could be variations, with one or two of the pretrial judges, or different additional international judges, sitting in combination with one or two national judges, in an agreed ratio, to form a three-judge trial panel. Appeals could either proceed through the national system or involve a different set of designated international judges, who would also keep their day jobs and who would not need a standing or dedicated courtroom in order to occasionally hear appeals in a national courthouse. An advantage of having a separate appellate panel of international judges would be the development of a consistent body of substantive and procedural piracy law. As with all of the existing tribunals to date, sentences final on appeal would be served in national systems.¹⁸⁰

The international mechanism would fund, or provide supplemental funding to, all of these elements and processes, including, e.g., funding to support the pre-trial detention or other supervision of indicted pirates in national facilities.

The foregoing is only a beginning outline of a possible international mechanism that would be much smaller, more streamlined, and less expensive than an ICTY-type tribunal, and is simply to illustrate the possibilities. More or different components and processes could be added or subtracted as determined in the process of establishing the international mechanism and adopting its statute and rules. Indeed, another value or advantage of such an approach would be its flexibility. If it were determined, for example, that there were advantages in repeatedly basing the cases in two or three selected national systems, as opposed to a wider rotation or distribution, that could be put in place. "Recruiting" international judges and making other arrangements in connection with such a system would be minimally (if at all) different from the sort of international participation and assistance contemplated in various reports of the Secretary-General and related documents.¹⁸¹

In addition to funding an international mechanism as part of the UN budget (which is funded through the assessed contributions of member states), options could and should be explored for collecting contributions from flag states and the shipping industry, especially from those flag states which otherwise take very little action in and provide little or no resources to international counter-piracy efforts.¹⁸² As the Lang Report stated, counter-piracy funding "could originate from private shipping companies, shipowners and insurance companies . . . -- which would be to their own benefit -- rather than falling back on the pretext that such efforts should come from Governments only."¹⁸³ There is no reason for flag states or others to be allowed a "free ride" from the global commons.

Finally on the matter of cost, even assuming the costs of a modest-sized international mechanism at some reasonable level, such costs would be far less than even the lower \$6.6 billion estimate of the total cost of piracy in 2011 alone,¹⁸⁴ not to mention the World Bank’s substantially higher \$20 billion a year estimate of costs, or the substantial human costs.

Another mischaracterized assumption about a Chapter VII, UN-owned international mechanism is that “it would be entirely international, with all of its judges, prosecutors and staff selected by the United Nations.”¹⁸⁵ While it would likely be true that the mechanism’s judges, prosecutors, and other senior staff would ultimately be designated by the UN and at least partly funded by the UN, nothing would prevent the UN or the international mechanism from drawing substantially on personnel from the regional states, which would also build capacity in the region.¹⁸⁶

Any concern that an international mechanism would be “heavily dependent on cooperation by States to be able to investigate and secure the arrest and transfer of indictees”¹⁸⁷ is no different than the realities confronting all of the international tribunals and special courts, and in fact is not substantially different from the current situation, as all of the regional and more distant states and all of the involved international organizations, such as INTERPOL and UNODC, are heavily dependent on—or in fact rely on—international and multistate cooperation. Under Chapter VII, the Security Council can *require*, not merely suggest, that member states cooperate with an international mechanism.¹⁸⁸ If anything, an international mechanism with subpoena power and the maximum police powers that an international body can be given would be *less* dependent on cooperation than many of the community participants are now. Requests to states and others for cooperation and production of evidence would not be based (or not only based) on mutual legal assistance treaties or similar processes, but, as with the ICTY and ICTR, would operate pursuant to the powers vested in the international mechanism by the Security Council action establishing that mechanism, binding on all member states.¹⁸⁹

Arrangements for pre- and post-trial transfers of suspected and convicted pirates and the service and enforcement of prison sentences in state systems would not be substantially different from the situation now, with pirates convicted in Seychelles, for example, being transferred to Somalia; and again, that is no different than the situation with the ICTY, ICTR, and other tribunals. In fact, if anything, the transfers would more straightforward, as flowing directly from the international mechanism’s statute and member states’ international law obligations to carry out their duties as UN members.¹⁹⁰ Given the international mechanism’s focus on a relatively small number of pirate leaders and financiers, there would be no need to transfer a large number of convicted persons in order for them to serve their sentences.

Finally, it has been noted that, as to “all tribunals that are not of a permanent character, there will inevitably be a need to consider a strategy for the completion of the tribunal’s work . . .”¹⁹¹ Putting aside whether there might be a more or less permanent need for a piracy mechanism, there is nothing particularly difficult or troubling about the possible need for a completion strategy. Even without having any pre-determined “completion date” in mind, it would be easy enough to conduct periodic reviews of a mechanism’s progress in prosecuting a limited number of pirate kingpins and estimate a reasonable completion schedule.

Many of the arguments against an international mechanism were simply not well-founded.

In sum, many of the arguments against an international mechanism were simply not well-founded, none of the arguments were (or are) particularly compelling, and none of the issues (if any) are especially difficult to fix or overcome.¹⁹²

A Chapter VII international piracy mechanism, unlike INTERPOL, UNODC, or RAPPICC (at least in its form up until now), would have actual investigative and prosecution powers (such as the ability to summon witnesses, to conduct non-consensual searches, and to require the production of evidence), the ability to bring indictments and obtain arrest warrants, and the ability to prosecute, convict, and sentence pirates. While national authorities would also retain full power to investigate and prosecute pirates, the appointment of an international prosecutor would provide a conductor for the Lang Report’s orchestra and the sort of “high-level eminent personality” to bring direction, focus, and an overall prosecution strategy to counter-piracy efforts.¹⁹³ An international mechanism with its own statute and procedural and evidentiary rules could serve as a model and additional impetus for standard, consistent practices and the development of such tools as a model case report. Drawing on the experience of the various international tribunals, an international mechanism would be more open to video-link and written testimony, for example, which many national courts apparently continue to resist. The possibly limited direct resources of a smaller international mechanism could be augmented or leveraged by national prosecutors, investigators, and analysts working on investigations and cases as a team, which, by this and other arrangements, could also build capacity in the region.

The recognized benefits of dedicated resources, specialization, and repeat experience in the modern world include the development of professional expertise, more effective and efficient practices, and economies of scale, which apply in the law enforcement and prosecution arenas as much as anywhere else. With no capacity in the East Africa and Indian Ocean region to prosecute pirate leaders and financiers, with the volume of piracy prosecutions in any one jurisdiction outside the region still quite low (with “most [or at least many] prosecuting nations hav[ing] not completed more than one or two cases, if any”¹⁹⁴), with possibly significant intervals between piracy prosecutions in any one jurisdiction outside the region, and still not a single completed prosecution of a pirate leader or financier, there is, despite a current handful of talented prosecutors, very little opportunity for the development of such expertise, practices, and economies, which an international mechanism would facilitate.

Another likely (or desirable) benefit of an international mechanism would be greater consistency in sentencing and the emergence of a more unified sentencing regime; there is a current disparity in pirate sentences, which over a number of jurisdiction range from two years to life.¹⁹⁵

Finally, an international focal point with Security Council authority and police powers would bring increased pressure on Somalia to apprehend and turn over indicted pirate leaders and facilitators and to bring an end to *de facto* impunity.

CONCLUSION

Modern maritime piracy presents a number of political, socioeconomic, and institutional challenges, and successfully addressing them undoubtedly requires a sustained multi-faceted approach. Law enforcement (including prosecution) is only one of these facets, but it is—or can be—an important one. By its very nature, maritime piracy is the ultimate for-profit international crime: First, although we can (and should) be mindful of the political and socioeconomic causes and conditions that often underlie and contribute to piracy, there is no moral gray area about piracy itself. While international officials and national leaders can debate climate change and other global issues, there can be no real disagreement that armed violence at sea by which ships are seized and human beings are taken hostage is crime that must be addressed. Second, the global economic and human costs of piracy are both very large and unacceptable in a world where 80% of international trade

is conducted by sea.¹⁹⁶ Third, piracy generally occurs in whole or in part in international space, outside the territory of any single country, and even when some or all of it occurs in territorial waters, it directly involves and substantially impacts international commerce moving out of, into, or across international waters. And fourth, the nature of both maritime shipping and piracy virtually require an international approach. The actors and victims in a single pirate incident may literally comprise a global village, involving a ship owner of one nationality, a ship registered or flagged in another state (often a flag of convenience which has no other real connection to the ship or its operation or protection), a master and crew of seafarers of multiple other nationalities, and pirates from yet another state apprehended at sea by first responders of still other nationalities. Pirate proceeds may then be laundered, concealed, and spent in one or more additional states. Where piracy occurs in the global commons, any particular state with the actual capacity to investigate and prosecute an incident may only be motivated to do so in the relatively rare instance that one of its own ships is attacked, and on a reactive, incident-specific basis, with that state and other states generally hoping for a free ride, hoping that someone else will deal with the matter, especially concerning the more-difficult-to-prosecute pirate kingpins, rather than the particular skiff pirates who attacked the particular ship on the particular day. If the international community cannot find a true international response to maritime piracy, one wonders whether there can be a true international response to any international or transnational crime, with the exception of genocide, crimes against humanity, and war crimes. Stated the other way around, maritime piracy probably provides the best opportunity for the international community to fashion a true international response to what is first and foremost an organized for-profit crime, rather than a political, religious, or ethnic conflict.

There is no shortage of chest-thumping rhetoric about our need to deal with modern piracy, about our need to “follow the money,” or about our need to put pirate kingpins in jail. Official statement after statement, keynote speaker after speaker, and special report after report have made clear that “the arrest and prosecution of rank and file pirates captured at sea is insufficient” and that prosecutions, if intended to make a difference, must include “the masterminds and funders along with the gunmen.”¹⁹⁷ In combating piracy, however, the

If the international community cannot find a true international response to maritime piracy, one wonders whether there can be a true international response to any international or transnational crime.

international community has made policy choices that put international aid and naval patrolling before a law enforcement effort focused on pirate kingpins. Capacity-building was chosen when it was known that Somalia and other regional countries did not have, and would not have in the near future, any capacity to investigate and prosecute pirate leaders. Nation-building and international development may be, and often are, worthy goals, but just as cooperation should not become its own goal for its own sake, the wider efforts at capacity-building, in terms of dollars spent and hours and sweat invested, should not be allowed to cover up a less-than-effective law enforcement strategy. To date, no regional state has tried or convicted a single pirate leader. Naval patrolling, by its very nature, deals with interdiction at sea, and has little to do with prosecuting land-based pirate kingpins (except to the extent that apprehended low-level pirates may occasionally provide evidence leading up the pirate network ladder). In fact, interdiction at sea and regional prosecution are the two parts of an international counter-piracy strategy focused on the volume prosecution (but very often catch-and-release) of the lowest-level pirates. Any reliance on first-world states to mount sustained, adequately resourced and proactive investigations against pirate leaders has mostly been misplaced, given that the prosecution effort in most countries (despite the individual efforts of a few talented prosecutors, investigators, and others) has been reactive, incident-specific, and with no prioritized focus or program, while other maritime countries prosecute no cases at all. Most international counter-piracy efforts have been fragmented, often competitive and sometimes duplicative, with no international authority or focal point setting a direction, directing traffic, or leading the sort of

sustained, targeted investigations that individual states have not been inclined or well-resourced enough to pursue. Borrowing a phrase from former Secretary of State Rice, the impact of the fight against piracy to date, at least concerning the prosecution of pirate leaders, “has been less than the sum of its parts.”¹⁹⁸ Or, to paraphrase the Lang Report, the counter-piracy law enforcement orchestra is badly in need of a conductor.¹⁹⁹

Of course, the obvious response to this assessment is the assertion that counter-piracy efforts on Africa’s east coast have actually been successful, in that a successful attack has not been reported in those waters for well over a year. Fair enough. But whether that remains the situation in the long term has yet to be seen, with the UN only recently concluding, in October 2013, that “the situation with regard to the rule of law, security, development and governance in Somalia that . . . allowed piracy to arise has not changed sufficiently so as to deter criminals from attacking ships and holding seafarers hostage for ransom.”²⁰⁰ This conclusion is shared by a number of people in the counter-piracy community, exemplified by the statement that “nothing significant has actually changed; if the navies leave and industry drops its guard, piracy will break out again like a bad rash.” There are also concerns that pirate attacks in the region have begun to be under-reported,²⁰¹ perhaps from a profit- or cost-based desire to change the perception of, and lower the costs and inconveniences of, counter-piracy measures, and/or because of liability concerns related to the use of private armed security. While piracy on Africa’s east coast has substantially declined, until pirate groups are disbanded and the criminal networks are disrupted, as long as Risk Area designations remain in effect and private armed security is believed to be needed, until all hostages are released and seafarers can travel confidently through high-risk areas, piracy is not over. And even if Somali piracy has declined, it may only mean, unfortunately, that piracy’s latest hotspot has simply moved (or expanded) to Africa’s west coast.

It may also be that the international community has obtained as much law enforcement as it cares to, or is willing to pay for: “We prosecuted a few pirates, life goes on.” But it would add insult to injury to allow the enriched kingpins of a \$413 million kidnap-for-ransom business having global economic impacts of at least \$20 billion between 2010 and 2012 alone,²⁰² as well as unquantifiable, but plainly unacceptable human costs, to walk away, or go on to their next criminal activity,²⁰³ with impunity. As the U.S. Court of Appeals for the District of Columbia Circuit stated in *United States v. Ali*, “it is self-defeating to prosecute those pirates desperate enough to do the dirty work but immunize the planners, organizers and negotiators who remain ashore.”²⁰⁴

The international community, like all of us, can learn from experience. What seemed like a good approach (or approaches) four or five or seven years ago may look different today. Information, costs, benefits, and circumstances may change so that a policy calculation made today, using new information and insights, may produce a different policy and a new or modified plan going forward.

Secretary-General Ban Ki-moon told us again on October 15, 2013, that “[i]t is important to demonstrate to pirates that they will be prosecuted and brought to justice, particularly in accordance with paragraph 16 of Security Council resolution 2077 (2012),”²⁰⁵ which calls for “all efforts [to be made] to bring to justice those who are using Somali territory to plan, facilitate or undertake criminals acts of piracy.”²⁰⁶ We are repeatedly told, in fact, that the rule of law is a fundamental tenet in humankind’s continuing march toward better governance, freedom, prosperity, and peace, and part of the rule of law is that those who break the law should be held accountable. It is not too late to hold pirate kingpins accountable, if there is the political will to do so.

NOTES

- 1 *Contact Group on Piracy Off the Coast of Somalia* website, “About CGPCS, Mission,” <http://www.thecgpcs.org/about.do?action=mission> (July 29, 2013) (hereafter “Contact Group website”) (emphasis added).
- 2 *UNODC Piracy Programme*, Issue 10 (December 2012), at 9-10.
- 3 “SAC Capital Pleads Guilty in Criminal Court,” *Reuters*, November 8, 2013; Press Release, United States Attorney’s Office for the Southern District of New York, July 25, 2013; U.S. News & World Report, July 25, 2013, <http://www.usnews.com/news/newsgram/articles/2013/07/25/feds-file-criminal-charges-against-sac-capital-advisors>.
- 4 See, e.g., Roger Middleton, Piracy in Somalia: Threatening Global Trade, Feeding Local Wars” (Chatham House briefing paper, Africa Programme, October 2008); Martin N. Murphy, *Somalia: The New Barbary? Piracy and Islam in the Horn of Africa* (Hurst, 2010); Eugene Kontorovich, “‘A Guantanamo on the Sea’: The Difficulty of Prosecuting Pirates and Terrorists,” *California Law Review* 98 (2010); Douglas Guilfoyle, “Counter-Piracy Law Enforcement and Human Rights,” *International and Comparative Law Quarterly* 59 (2010); *The Pirates of Somalia: Ending the Threat, Rebuilding a Nation* (World Bank, 2013), <http://www.worldbank.org/africa/piratesofsomalia>; Ved Nanda, “Maritime Piracy: How Can International Law and Policy Address this Growing Global Menace?” (*Denv. J. Int’l Law & Policy*, February 2011) (“Global Menace”); Kaija Hurlburt and D. Conor Seyle, *The Human Cost of Somali Piracy, 2012* (Oceans Beyond Piracy, 2013), http://oceansbeyondpiracy.org/sites/default/files/hcop2012forweb_6.pdf.
- 5 The interviews were conducted under the “Chatham House Rule,” which provides that those involved in a conversation or meeting “are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed,” or at least not without further permission, “as an aid to free discussion.” See the Chatham House website, www.chathamhouse.org/about-us/about-chatham-house.
- 6 *Burden-Sharing*, at 7.
- 7 *Burden-Sharing*, at 11.
- 8 *Piracy Off the Somali Coast*, 2 (November 21, 2008), available at http://www.imcsnet.org/imcs/docs/somalia_piracy_intl_experts_report_consolidated.pdf, at 33.
- 9 See, e.g., *Transnational Organized Crime in Eastern Africa: A Threat Assessment*, United Nations Office on Drugs & Organized Crime (September 2013) (identifying maritime piracy as serious organized crime and, aside from foreign aid and remittances, Somalia’s largest source of foreign exchange), http://www.unodc.org/documents/data-and-analysis/Studies/TOC_East_Africa_2013.pdf; *Pirate Trails: Tracking the Illicit Financial Flows from Pirate Activities Off the Horn of Africa* (World Bank [together with the UN Office on Drugs and Crime and INTERPOL’s Maritime Piracy Task Force], 2013) (“*Pirate Trails*”) at 2-3, 10-15, 47-50 (Somali piracy is carried out by criminal networks involving financiers, organizers, mother ship operators, suppliers, pirate crews, hostage negotiators and money launderers); *Speech by U.S. Principal Deputy Assistant Secretary of State, Bureau of Political-Military Affairs, Thomas Kelly, October 25, 2012* (“As piracy has evolved into an organized transnational criminal enterprise, it is increasingly clear that the arrest and prosecution of rank and file pirates captured at sea is insufficient on its own to meet our longer term counter-piracy goals”); Pierre St. Helaire [Head of INTERPOL’s Maritime Piracy Task Force], “Somali Piracy: Following the Paper Trail” (June 2012) (organized pirate criminal networks include leaders, organizers organizers, negotiators and investors, in terms of the “organization, financing, and implementation of acts of piracy”); S. Percy & A. Shortland, *The Business of Piracy in Somalia* (2011), at 14-23, https://www.diw.de/documents/publikationen/73/diw_01.c.358500.de/dp1033.pdf; *The Globalization of Crime, A Transnational Organized Crime Threat Assessment*, United Nations Office on Drugs & Organized Crime (2010), at vii, 11, 193-99; Security Council Resolution 1950 (2010) (urging a more effective fight against piracy as organized crime).
- 10 *Report of the Monitoring Group on Somalia & Eritrea (July 12, 2013)*, at 23, para. 68.
- 11 UN Press Statement, Press Conference by Special Advisor on Legal Issues Related to Somalia Piracy, January 25, 2011.
- 12 The Gulf of Aden, southeast of the Suez Canal, and the larger Somali Basin are strategically located where East meets West, with more than 22,000 vessels transiting the area each year, carrying 8% of the world’s trade and 12% of the total oil transported by sea. *Global Menace*, at 178.
- 13 Jeffrey Gettleman, “The Pirates Are Winning!,” *New York Review of Books* (September 14, 2010).
- 14 *IMO Assembly Resolution A. 922(22)* (November 2001). The IMO’s activities related to piracy date to at least 1983, when the IMO Assembly adopted a resolution on measures to prevent acts of piracy and armed robbery against ships.

- IMO Assembly Resolution A.545 (November 17, 1983).
- 15 *International Maritime Organization Assembly Resolution A.922(22)* (November 29, 2001) (emphasis added).
- 16 *International Maritime Organization Assembly Resolution A.922(22)* (November 29, 2001).
- 17 *International Maritime Organization Assembly Resolution A.1002(25)* (November 29, 2007) (emphasis added).
- 18 *UN Security Council Resolution 1816*, S/RES/1816 (June 2, 2008). Participants at the June 2013 Tokyo International Conference on African Development “agreed that resolving cross-border issues such as piracy [is] essential to achieving a stable African continent.” *Report of the Secretary General on the Situation with Respect to Piracy and Armed Robbery at Sea Off the Coast of Somalia*, S/2013/623 (October 21, 2013) (“*Secretary-General’s 2013 Somali Piracy Report*”), para. 33.
- 19 While a formal Chapter VII finding that a particular situation poses a “threat to international peace and security” is one of the most important and potentially empowering actions that the UN Security Council can take, the Security Council’s Chapter VII resolutions concerning Somalia have not been as strong or empowering as they might first appear. They expressly affirm Somalia’s sovereignty (despite the absence of a functioning government), require permission from Somalia’s Transitional Federal Government in order for States to take actions on Somalia’s territory or in its territorial waters, and make it clear that the Chapter VII authorizations apply only to Somalia and should not be interpreted as customary law. With these conditions and limitations, the Chapter VII authorization did not in fact create any new legal rights or abilities for international actors concerning Somali piracy. *See Burden-Sharing*, at 17; *Maritime Piracy*, at 73.
- 20 *Pirate Trails: Tracking the Illicit Financial Flows from Pirate Activities Off the Horn of Africa* (World Bank [together with the UN Office on Drugs and Crime and INTERPOL’s Maritime Piracy Task Force], 2013) (“*Pirate Trails*”), at 39 (emphasis added).
- 21 *Burden-Sharing*, at 8-9.
- 22 *Secretary-General’s 2013 Somali Piracy Report*, para. 6.
- 23 *Burden-Sharing*, at 8-9.
- 24 *Pirate Trails*, at 1.
- 25 *Burden-Sharing*, at 8-9. *See also The Economic Cost of Somali Piracy 2010* (One Earth Future Foundation, 2011) (“*2010 Cost*”); *The Economic Cost of Piracy 2011* (One Earth Future Foundation, 2012) (“*2011 Cost*”); *The Economic Cost of Piracy 2012* (One Earth Future Foundation, 2013) (“*2012 Cost*”).
- 26 *Pirate Trails*, at 33. *See also Secretary-General’s 2013 Somali Piracy Report*, para. 6 (reporting, *inter alia*, that \$63.5 million was spent in 2012 alone on the costs of “ransom delivery, vessel damage from time in captivity and the fees of negotiators, consultants and attorneys, as well as the ransoms”).
- 27 *Secretary-General’s 2013 Somali Piracy Report*, para. 29.
- 28 *Secretary-General’s 2013 Somali Piracy Report*, para. 9.
- 29 *Burden-Sharing*, at 9.
- 30 Two important matters must be considered in dealing with insider evidence. First, proper care must always be taken and diligence exercised in dealing with insiders, including the exercise of a healthy degree of skepticism in judging the credibility of the person and his evidence, which may include assessing his motives in providing such evidence, looking for corroborating evidence, etc. Dealing with such elements as rewards and other possible inducements “in exchange” for a person’s evidence must also be handled with care. To urge and exercise caution, however, is not to say that it should not be done, and in fact such evidence is developed and used in most criminal justice systems on virtually a daily basis. Second, developing insider evidence, especially in connection with violent crime or in an overall violent or potentially violent environment, may often require or raise the issue of witness protection. A potentially valuable insider witness will often be reluctant to cooperate with authorities if he fears retaliation against himself or his family if or when his cooperation becomes known. In some instances, nothing short of a full-scale witness protection program may be sufficient, including the relocation of the witness and his family. That such a program may involve additional costs is no serious strike against it, in comparison to the millions of dollars in ransom paid, lives affected and profits and property lost. Further, the number of witnesses requiring protection in any given case will likely be small, as even the testimony of two or three well-placed insiders may be sufficient, in combination with and corroborated by other evidence, to convict the crime leader.
- 31 Again, in the context of the Yugoslavia war crimes investigations, it was ultimately found that there were various military intercept programs being employed by all sides and also other ways in which important meetings and conversations were

- recorded, and many such intercepts and recordings became important ICTY evidence. It turned out, for instance, that the Republic of Croatia's then-President, Franjo Tudjman, had a recording system in his presidential offices and the transcripts of important meetings and conversation were important evidence in the case against Jadranko Prlić and other senior Bosnian Croat political and military leaders, including, as an example, a conversation discussing intentional efforts by top Croatian government officials to conceal Croatia's deep involvement in carving up Bosnia, as "providing proof that we are giving the orders there." *Prosecutor v. Prlić, et al.*, No. IT-04-74-T, International Criminal Tribunal for the Former Yugoslavia, Prosecution Exh. P06831.
- 32 While initially and frequently difficult to obtain, the ICTY Office of the Prosecutor ultimately found and assembled, piece by piece, a document collection involving millions of pages, much of which became critical evidence in the prosecution of now-convicted Balkan war criminals. Again, in the ICTY case against Prlić and others, the personal diary of top Bosnian Serb commander Ratko Mladić documented meetings with Prlić, the Croatian general Slobodan Praljak and others, where Praljak made the nationalist Croats' territorial goals abundantly clear and informed all of those at the meeting that "we're on a good path to compel [Bosnia's President] Alija [Izetbegović] to divide Bosnia." *Prosecutor v. Prlić, et al.*, No. IT-04-74-T, International Criminal Tribunal for the Former Yugoslavia, Prosecution Exh. P11376.
- 33 *Landelijk Parket*, The National Prosecutor's Office, lpwb_bw_eng_3447.pdf; see also "About the Public Prosecution Service," http://www.om.nlvast-menu_blok/english/about_the_public/; "What Does the International Crimes Team Do?" <http://www.om.nl/onderwerpen/international-crimes/what-does-the/>.
- 34 Secretary of State Condoleezza Rice, "Combating the Scourge of Piracy," New York, New York, December 18, 2008; <http://2001-2009.state.gov/secretary/rm/2008/12/113269.htm> (emphasis added).
- 35 See generally the Contact Group website, at www.thecgpcs.org.
- 36 Contact Group website, *About CGPCS; Burden-Sharing*, at 19.
- 37 *Burden-Sharing*, at 11-12.
- 38 *Burden-Sharing*, at 28.
- 39 At the Contact Group's request, the UN Secretary-General established an international piracy trust fund in January 2010. Established as a voluntary mechanism open to contributions from governments, industry, and others, the fund seeks to "help defray expenses associated with the prosecution of suspected pirates and other activities related to implementing contact group objectives." *Burden-Sharing*, at 27. "By June 2010, the trust fund had approved seven projects, six of which concerned strengthening prosecution in Seychelles, Kenya, Somaliland, and Puntland. The seventh concerned strategic communications dissemination with local partners . . . By the end of 2012, the fund had received \$16.5 million [about the size of three pirate ransoms in 2011], and \$12.12 million had been dispersed for a total of 27 approved projects, all or virtually all of which relate to regional capacity-building and not to prosecuting pirate leaders." *Burden-Sharing*, at 27.
- 40 See generally *Burden-Sharing*, at 15, 29-30.
- 41 Scott Barrett, *Why Cooperate? The Incentive to Supply Global Public Goods* (Oxford: Oxford University Press, 2007).
- 42 *Burden-Sharing*, at 33.
- 43 *Burden-Sharing*, at 33.
- 44 *Report of the Secretary-General on Possible Options to Further the Aim of Prosecuting and Imprisoning Persons Responsible for Acts of Piracy and Armed Robbery at Sea off the Coast of Somalia*, S/2010/394 (July 26, 2010), para. 1.
- 45 *Annex II, S/2010/394 (July 26, 2010)*, paras. 9-10.
- 46 *Annex II, S/2010/394 (July 26, 2010)*, paras. 8-9; *Burden-Sharing*, at 23.
- 47 *Maritime Piracy*, at 100. See also *Global Menace*, at 206-07.
- 48 *Burden Sharing*, at 23.
- 49 *Lang Report, S/2011/30 (January 25, 2011)*.
- 50 *Lang Report, S/2011/30 (January 25, 2011)*, para. 118 (footnote omitted).

- 51 *Lang Report, S/2011/30 (January 25, 2011)*, para. 78.
- 52 *Lang Report, S/2011/30 (January 25, 2011)*, Summary at 2; Report, paras. 122-23.
- 53 *Lang Report, S/2011/30 (January 25, 2011)*, Summary at 3; Report, para. 135.
- 54 *Lang Report, S/2011/30 (January 25, 2011)*, para. 123.
- 55 *SG Report, S/2011/360 (June 15, 2011)*.
- 56 *SG Report, S/2011/360 (June 15, 2011)*, para. 10 (emphasis added, footnote omitted).
- 57 *SG Report, S/2011/360 (June 15, 2011)*, para. 96 (emphasis added).
- 58 *SG Report, S/2011/360 (June 15, 2011)*, paras. 9, 52-59; *SG Report, S/2012/50 (January 20, 2012)*, paras. 18, 23, 45. Opposition to a specialized piracy court in Puntland was apparently based in part on concerns regarding alleged connections between the local Puntland authorities and pirate bosses. *Burden-Sharing*, at 23.
- 59 In a strictly legal sense, a significant number of these cases are not, or were not, piracy cases under international law, in that many of them were, or may have been, charged as various domestic crimes in territorial waters. *See Penalties for Piracy*, at 8. They are nonetheless generally considered part of the escalated war against East Africa piracy in the last five or six years and are included here (and elsewhere) as piracy cases.
- 60 *See, e.g., Report of the Monitoring Group on Somalia & Eritrea pursuant to Security Council resolution 2060 (2012): Somalia (June 19, 2013)*, Annexes 3.1.c and 3.1.d; *Report of the Monitoring Group on Somalia pursuant to Security Council resolution 1853 (2010)*, at 35-43; “UK-Seychelles Partnership Sprouts RAPPICC,” <http://www.neptunemarinetimesecurity.com/uk-seychelles-partnership-sprouts-rappicc> (March 1, 2013) (naming alleged pirate organizers and financiers, “including Abdullahin Hassan Afrayne and Mohamed Garfanje Ali Dulai and their financiers.”
- 61 *See, e.g., “UK, US Pledge Added Support to RAPPICC,”* <http://maryvonnepoolseychelles.blogspot.com/2013/05/uk-us-pledge-added-support-rappicc.html> (May 3, 2013) (“We have already issued four international warrants for the arrests of several people”).
- 62 Some observers have raised questions whether these transfers-for-prosecution are legal. The UN Convention on the Law of the Sea “only speaks of prosecution by the courts of the captor nations. Arguments have been made that UNCLOS does not authorize such transfers, and the practice has raised some controversy. . . . Art. 105 of UNCLOS does not establish a general universal jurisdiction, but rather one limited to the ‘jurisdiction of the state that carried out the seizure.’” *Penalties for Piracy*, at 4 (footnotes omitted). The above practice has nonetheless been widely accepted and is considered standard practice.
- 63 *Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia*, Security Council document S/2011/30, January 25, 2011, at 13.
- 64 “For many years the persistent challenge facing international efforts against Somali piracy has been finding a nation willing to prosecute and imprison those captured by the multinational forces.” *Penalties for Piracy*, at 2.
- 65 In terms of the number or volume of prosecutions, “African states have taken the primary responsibility . . . , followed by Asian and Middle Eastern states, European states, and North America.” *Burden-Sharing*, at 30. One national law enforcement system in Europe reported receiving approximately 150 pirate incident reports in recent years. For a variety of reasons, including non-identification of the pirate perpetrators and other lack of evidence, only five investigations and two prosecutions emerged from these reports.
- 66 “[The principle of] [*n*]on-*refoulement* [that is, not returning asylum seekers or refugees to places where their life or liberty would be at risk] has made many Europeans hesitant about bringing pirates to their shores because they are afraid that once their jail terms are over it will not be possible to send pirates home. There is no basis for this fear[,] as *non-refoulement* does not apply to violent criminals -- there is no prohibition to return individuals convicted of serious crimes to their home countries. In Europe, individuals convicted of piracy are neither subject to the rules of *non-refoulement* nor are they eligible for asylum. This is not the case for those suspects found not guilty, however, and while there is no legal restriction, popular sentiment will often not allow deportations regardless of the suspect’s innocence or guilt.” *Maritime Piracy*, at 67.
- 67 UN Secretary-General Ban Ki-moon recently stated that “concerned flag States and ship owners should ensure that appropriate attention is paid to the well-being of seafarers in captivity and their families . . .” *Secretary-General’s 2013 Somali Piracy Report*, para. 73 “In November 2012, the Board [of the Trust Fund to Support Initiatives of States Countering Piracy off the Coast of Somalia] approved, on an exceptional basis, the Hostage Support Programme, to provide humanitarian assistance to hostages.” *Id.*, para. 29. “Security Council Resolution 1950 (2010) provides that seafarers must have an opportunity to

- give evidence in criminal proceedings. Their security must be guaranteed during the trial in order to remove any fear of reprisals.” *Lang Report*, para. 62. “Seafarers’ contracts could include clauses providing compensation for giving evidence and enshrining the right to do so, which could be enforceable against the employer.” *Id.*
- 68 See Jon Huggins & Liza Kane-Hartnett, *Somali Piracy - Are We at the End Game?* (Oceans Beyond Piracy, 2013) (“*End Game*”), at 12.
- 69 Communique from the Contact Group’s First Plenary Session, January 14, 2009, available at the Contact Group’s website, at <http://www.thecgps.org/plenary.do?action=plenarySub&seq=3>.
- 70 *Burden-Sharing*, at 11-12.
- 71 *International Maritime Organization Assembly Resolution A.922(22)* (November 29, 2001) (emphasis added).
- 72 *Burden-Sharing*, at 20.
- 73 The Secretary-General reported these efforts in his October 21, 2013 report: “Also in April, the Chairs of Working Group 2 and Working Group 5 hosted, with INTERPOL, a special meeting of piracy prosecutors and investigators intended to facilitate information-sharing among law enforcement agencies to target key piracy organizers and financiers.” *Secretary-General’s 2013 Somali Piracy Report*, para. 27.
- 74 As an example, INTERPOL fought hard, and successfully, to have language emphasizing the need to prosecute pirate leaders, land-based financiers and facilitators in UN Security Council resolutions like No. 1950 and No. 2077. Unfortunately, the resolution was not followed by any significant additional commitment or funding.
- 75 As of early 2012, ‘no one ha[d] [yet been able to track the money . . .]’ *Maritime Piracy*, at 87. “Low-level pirates typically receive a standard fee of between US\$30,000 and US\$75,000 (which would amount to about 0.01-0.25 percent of an average ransom payment). . . . The pirate financiers who invested in the piracy operations receive the bulk of the ransom, an estimated 30-75% of the total ransom payment depending on the Somali piracy business model.” *Pirate Trails*, at 3.
- 76 As of late 2011, “[t]wo main networks were initially active, one to the north of Puntland and one to the south. Those networks have apparently broken up, after the reinvestment by certain pirates of a proportion of the ransoms. About 10 instigators may be active currently, mostly in Puntland.” *Lang Report, S/2011/30 (January 25, 2011)*, para. 95.
- 77 See footnote 86, *infra*.
- 78 See *DefenceWeb*, “German Dutch investigation team to combat piracy in Somali waters” (November 25, 2011), http://www.defenceweb.co.za/index.php?option=com_content&view=article&id=21504:german-dutch-investigation-team-to-combat-piracy-in-somali-waters.
- 79 “Best management practices,” in connection with counter-piracy, include increased vigilance, “vessel hardening” techniques (such as secured stairs and passageways, the use of perimeter razor wire and water cannon or hoses, a ship “citadel” or safe room (where a ship’s crew can take refuge pending naval or law enforcement intervention) and enhanced bridge protection), re-routing (to avoid or minimize exposure to higher risk areas) and steaming at higher speeds.
- 80 *Report of the Monitoring Group on Somalia & Eritrea (July 12, 2013)*, para. 65.
- 81 In the earlier part of East Africa’s counter-piracy efforts, the more basic types of information that most detained or convicted low-level pirates could provide was more valuable in increasing law enforcement’s understanding of pirate operations. However, as knowledge of piracy operations has increased, much of the more basic information is now less valuable. In fact, many of the lowest-level or foot soldier pirates “talk” -- in the sense of being debriefed by law enforcement, providing information, etc., but they often have little or no information about higher-level pirate leaders or financiers.
- 82 In the law enforcement industry and body of law concerning communication interception, such interceptions are considered “consensual” because at least one party to the conversation (here the ship owner or insurance company) is aware of and has consented to the surveillance and recording. In many systems, including the U.S., no court order or approval is needed for law enforcement-related consensual surveillance and recording.
- 83 Of course, various communication surveillance or interception activities may raise legal issues, and should be considered and implemented with full attention to relevant legal requirements, ethical rules and rules of evidence.
- 84 See generally Douglas Guilfoyle, *Treaty Jurisdiction over Pirates: A Compilation of Legal Texts with Introductory*

Notes, prepared for the 3rd meeting of [Contact Group] Working Group 2 on legal Issues, Copenhagen, 26-27 August 2009.

- 85 The UN's Lang Report, discussed *infra*, S/2011/30 (January 25, 2011), states at para. 48: "There is no lack of legal bases allowing States to exercise universal jurisdiction. General international law provides for multiple forms of jurisdiction without establishing priority rules. . . . Those bases enable a large number of States to fulfil their duty to cooperate in the repression of piracy to the fullest possible extent . . ."
- 86 An international registry operating through the UN or a UN body "could assume the responsibility for implementation and enforcement of maritime standards and criminal investigation and prosecution" and the "funding for such a registry could be obtained through [registration fees] . . ." *Maritime Piracy*, at 113. Such an authority could either prosecute cases in national courts, applying international law, or in any international tribunal with jurisdiction, as might even be set up as part of an overall scheme for regulation and law enforcement jurisdiction over maritime activity.
- 87 *Secretary-General's 2013 Somali Piracy Report*, para. 74.
- 88 *See generally* Eugene Kontorovich, *The Penalties of Piracy* (Oceans Beyond Piracy, 2012) ("*Penalties for Piracy*"). The Secretary-General reported in October 2013 that globally, pirate sentences range from two to 24 years [apparently not including life sentences] and that the average sentence is twelve years' imprisonment. *Secretary-General's 2013 Somali Piracy Report*, para. 47. The problem with the average is the large overall range, and the average is skewed by heavy sentences in a few jurisdictions. The average pirate sentence in Europe and Africa remains closer to five years.
- 89 *See generally Penalties for Piracy, at 12-14, particularly at 12-13 (footnote omitted):*
The [financial] reward to the lowliest pirate assisting in a single [pirate] operation could exceed his total future non-piratical earnings. Spending. . . several years in a Western prison would not be a significant deterrent, particularly with the prospect of being released while still young. On the contrary, the differences in quality of life between Somalia and the West mean that a prison in the latter is like a palace in the former. Interviews with pirates facing trial in the Netherlands find them saying 'life is good.' . . . Similarly, a pirate on trial in Hamburg said he would 'not go back to Somalia for a million dollars . . .'
- 90 *See also* Douglas Guilfoyle, "Prosecuting Pirates: The Contact Group on Piracy off the Coast of Somalia, Governance and International Law," *Global Policy*, Vol. 4, No. 1 (February 2013), at 74 (footnote omitted): "Despite contrary reports, [piracy] trials are not vexed by questions of jurisdiction. There are no significant jurisdictional obstacles in international law in prosecuting pirates. . . . The problems involved arise largely from a lack of national implementation and the ordinary difficulties of cooperation between national legal systems.
- 91 Both nationally and internationally, there has been "a patchwork of military and civilian institutions interfacing with shipping, leading to issues of overlap and duplication." *Burden-Sharing*, at 15. "The glaring institutional gaps pertaining to information sharing, leadership, and coordination among relevant actors at the international level imposed serious constraints on mounting an effective response. These gaps were compounded by existing gaps in enforcing compliance." *Id.* at 15.
- 92 Several community members said that a maritime element that existed in the UN Political Office for Somalia (UNPOS) and provided valuable service in acting as a sort of "ringmaster" has not been replicated in the newer UN Assistance Mission in Somalia (UNSOM) which replaced UNPOS.
- 93 Communique from the Contact Group's First Plenary Session, January 14, 2009, available at the Contact Group's website, at <http://www.thecgps.org/plenary.do?action=plenarySub&seq=3>.
- 94 *End Game*, at 8.
- 95 *End Game*, at 8.
- 96 *Lang Report, S/2011/30 (January 25, 2011), para. 145.*
- 97 *Lang Report, S/2011/30 (January 25, 2011), para. 147 (emphasis added).*
- 98 *End Game*, at 6 (describing the patrolling naval forces' heavy reliance "on expensive intelligence and surveillance assets"); at 7 (discussing military cooperation "to ensure optimal deployment of surveillance platforms").
- 99 *Burden-Sharing, at 28.* Shipping companies have also voiced concern about information provided to or learned by law enforcement authorities being used to their legal or commercial disadvantage. For example, an investigation might show that an attacked vessel failed to follow best management practices or to deploy reasonable available countermeasures, which might cause an insurance carrier to deny coverage.

- 100 Kenya officially terminated its transfer agreement with the European Union, the United Kingdom, United States and other countries (by which it agreed to accept suspected Somali pirates for prosecution) in October 2010 on the grounds that it was bearing an excessive part of the counter-piracy burden and not receiving sufficient international assistance, but has continued to accept pirates for prosecution on an *ad hoc* basis. *CNN*, “Kenya Ends Agreement with EU to Prosecute Suspected Somali Pirates” (October 4, 2010). “It is problematic to ask some States to keep up their efforts when the burden is not shared.” *Lang Report*, para. 72.
- 101 “[T]he kingpins of piracy are well-connected elites within Somalia and abroad . . .” *Burden-Sharing*, at 10. “Somalia’s prospects for stabilization and effective governance have fallen prey to political and commercial ‘elites’ who appropriate, privatize and criminalize the core functions of the Somali state, enriching themselves while perpetuating a political economy of state collapse.” Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2002 (2011), para. 34. “Pirate leaders and financiers gain power and access to economic resources thanks to the ransoms they receive, which influences the balance and organization of the concerned communities, further undermining efforts to establish a legitimate government.” *Pirate Trails*, at 28. “In Somalia, [the network of pirate financiers and investors] has gained considerable economic and political capacities.” *Id.* at 50.
- 102 Illustrating the possible differences in priorities, several community members voiced the view that should some of the same persons who have been involved in maritime piracy move into other criminal enterprises perceived to have a greater negative impact on a particular country’s economy, such as kidnapping tourists for ransom as opposed to hijacking commercial vessels 50 miles at sea, some governments might be more motivated to investigate and prosecute these persons. In other areas, for example, counter-terrorism will be a higher priority than fighting piracy.
- 103 Institute for Security Studies, *Preliminary Observations on Responses to Organized Crime* (2010), available at <http://www.issafrica.org/uploads/21Apr2010OCML.pdf>.
- 104 *Global Menace*, at 202.
- 105 *BBC News Africa*, “Q&A: What do you do with a captured pirate?” (January 25, 2011).
- 106 *Jurist*, “UN Announces Opening of New Kenya Courtroom for Piracy Trials” (June 25, 2010); *Jurist*, “UN Announces \$9.3 Million in Donations to Fund Piracy Courts” (June 15, 2010); *CNN*, “Kenya Ends Agreement with EU to Prosecute Suspected Somali Pirates” (October 4, 2010).
- 107 *Christian Science Monitor*, “Landmark Kenya Ruling Could See Dozens of Somali Pirates Set Free” (Nov. 10, 2010).
- 108 UNODC, *Counter Piracy Programme, Support to the Trial and Related Treatment of Piracy Suspects*, Issue 10 (December 2012), at 9-10.
- 109 President George W. Bush signed the U.S. policy on maritime piracy in 2007 and in December 2008, the U.S. National Security Council issued a document titled *Countering Piracy off the Horn of Africa: Partnership & Action Plan*. See *Global Menace*, at 197.
- 110 The use of what the shipping industry and counter-piracy community have come to call “Privately Contracted Armed Security Personnel” (PCASP) has been controversial. While the use of private armed security on commercial vessels initially encountered fairly extensive opposition, it has come to be more broadly accepted (or at least tolerated) as, essentially, a matter of necessity, although it is still not officially considered an approved best management practice. There are estimates that up to 60% of the ships transiting the East Africa/Indian Ocean region in the past few years employ private armed security teams. The use of private armed security raises a number of issues concerning the use of force, “professional” standards, accountability and legal liability, with the regulation of these matters, to date, left primarily to flag or registry states or to industry self-regulation. Private armed security, or PCASP, should not be confused with uniformed military security teams which have been placed on some vessels, which are known as Vessel Protection Detachments, or VPDs. Both practices, however, raise at least some similar issues concerning the use of force. In February 2012, Italian Navy marines on the privately-owned Italian-flagged tanker *MT Enrica Lexie* fired on a fishing trawler which was suspected of being engaged in pirate activity but in fact was not, killing two Indian fishermen. Two of the Italian marines were arrested by Indian authorities and charged with murder under the Indian Penal Code and the case is still pending. More recently, in October 2013, Indian authorities arrested the crew of a privately-owned, U.S.-flagged “counter-piracy escort ship” used in connection with private security operations, after the crew failed to produce documentation authorizing them to carry or transport weapons and ammunition in Indian waters, with the resolution of this incident also still pending.
- 111 *Burden-Sharing*, at 38.
- 112 *Burden-Sharing*, at 34.

- 113 *Evaluation of UNODC's Counter Piracy Programme combating maritime piracy in the Horn of Africa and the Indian Ocean*, Independent Evaluation Unit, June 2013 (XAMT72, XEAX20, XSSX11, SOMX54, MUSX55, XEAX67), at 6.
- 114 *Burden-Sharing*, at 32.
- 115 INTERPOL website, <http://www.interpol.int/Crime-areas/Maritime-piracy/Operational-support>.
- 116 *Secretary-General's 2013 Somali Piracy Report*, para. 11.
- 117 *Memorandum of Understanding between the UK and Seychelles* (February 2012), RAPPICC Partnership Arrangement, Annex A, RAPPICC Operating Model, at 1.
- 118 As stated in *Secretary-General's 2013 Somali Piracy Report*, para. 54: "The Centre will develop regional expertise to track financial flows linked to piracy and support the collection of evidence and intelligence that could be used in prosecutions. UNODC is providing logistical and training support to the Centre. With the support of Norway, INTERPOL seconded an officer to the Centre to support efforts to build cases against the organizers of piracy networks."
- 119 *Maritime Piracy*, at 99-100. "Unlike the situation in Somalia, a government exists in Nigeria, but massive corruption at all levels of government allows piracy to flourish. Nigeria is not a poor country, although most of its people are very poor. . . . Piracy and kidnapping . . . [are] rampant." *Maritime Piracy*, at 99.
- 120 Alan C. Cole [Regional Coordinator, Counter-Piracy Program, United Nations Office on Drugs and Crime], "Large Scale Prosecution of Somali Piracy Suspects: What Have we Learned?", Briefing Paper, 3rd UAE Counter Piracy Conference (September 2013).
- 121 *Maritime Piracy*, at 107.
- 122 *Maritime Piracy*, at 122.
- 123 *Maritime Piracy*, at 67-68.
- 124 *Maritime Piracy*, at 110.
- 125 *Annex III, SG Report, S/2011/360 (June 15, 2011)*, para. 4; *SG Report, S/2012/50 (January 20, 2012)*, paras. 4, 17-21.
- 126 *Annex III, SG Report, S/2011/360 (June 15, 2011)*, para. 4
- 127 *SG Report, S/2012/50 (January 20, 2012)*, para. 20.
- 128 *SG Report, S/2012/50 (January 20, 2012)*, para. 16.
- 129 *SG Report, S/2011/360 (June 15, 2011)*, paras. 30, 87.
- 130 *SG Report, S/2011/360 (June 15, 2011)*, paras. 42, 94. A detailed review of the proposed multi-year development program shows how sorely deficient the Puntland and Somaliland justice systems were, requiring the most basic training, construction and equipment, requiring basic legislation, the construction of police stations and courtrooms, the recruitment of an additional twelve prosecutors, etc., all of which required the extensive use of international experts and personnel. *SG Report, S/2012/50 (January 20, 2012)*, paras. 116-17.
- 131 *SG Report, S/2012/50 (January 20, 2012)*, para. 13 (emphasis added).
- 132 *SG Report, S/2011/360 (June 15, 2011)*, *Annex IV*, para. 5 (emphasis added).
- 133 In his January 2012 report, the Secretary-General emphasized again the need for substantially greater "participation and/or assistance by international judges, prosecutors and other legal professionals . . ." *SG Report, S/2012/50 (January 20, 2012)*, para. 126. *See also Lang Report, S/2011/30 (January 25, 2011)*, para. 117 ("Significant international support is crucial to raise legal practices to the level of international standards"); *para. 120* ("International support will be crucial . . . [A]n internationally supported extraterritorial Somali court would be the vehicle for legal capacity-building by the international community in Somalia"); *para. 134* ("International support should help provide such new courts with all the available expertise to enhance the expertise of judges, prosecutors and defence counsel") (footnote omitted).
- 134 *SG Report, S/2012/50 (January 20, 2012)*, paras. 43-47.
- 135 *SG Report, S/2012/50 (January 20, 2012)*, para. 66.
- 136 *Maritime Piracy*, at 95.
- 137 *Maritime Piracy*, at 108.
- 138 *Report of the Monitoring Group on Somalia & Eritrea (July 12, 2013)*, at 22, para. 67 (emphasis added). Other observers

have noted: “With the number of successful attacks declining, the willingness of governments to improve coordination is decreasing. It’s good that the number of crew taken is decreasing but it is reducing the pressure on governments to get together. . . . The military has the same concern; they are concerned that the financial support to their operations will decrease. *Burden-Sharing*, at 38.

139 *Maritime Piracy*, at 106-07.

140 The international community has a responsibility to intervene where “serious harm” is being done to a state’s population and “the state in question is unwilling or unable to halt or avert it.” International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001) [ICISS], <http://responsibilitytoprotect.org/ICISS%20Report.pdf>, at XI.

141 *Implementing the Responsibility to Protect*, Report of the Secretary-General, A/63/677 (January 12, 2009), at 9 (the international community has a responsibility to take “decisive” action “when a State is manifestly failing to” protect its population). In a real sense, the shipping and insurance industries have already applied a complementarity concept to piracy. In response to their perception that the relevant coastal and flag states have generally been unable and/or unwilling to take effective action against piracy, the industries have turned, in significant part, to privatization and self-help, in employing private armed security and other measures on ships passing through pirate areas.

142 While some major maritime states could perhaps do more to investigate and prosecute piracy, there is no reason to believe that an even more diffuse, multiplicitous and fragmented counter-piracy effort would be productive.

143 *Secretary-General’s 2013 Somali Piracy Report*, para 36.

144 As part of the prosecutions in the United States concerning the *S/V Quest* incident, the guilty pleas of eleven pirate co-conspirators preceded the trial and conviction of the final three pirate perpetrators and their sentencing to life imprisonment. *Secretary-General’s 2013 Somali Piracy Report*, para. 46.

145 If piracy is considered too small a mandate for a more full-fledged international tribunal, consideration might be given to expanding its jurisdiction to maritime crimes generally, including human trafficking, the arms trade, ocean dumping, smuggling, etc.

146 *See generally Report of the Secretary-General on Possible Options to Further the Aim of Prosecuting and Imprisoning Persons Responsible for Acts of Piracy and Armed Robbery at Sea off the Coast of Somalia*, S/2010/394 (July 26, 2010), Annex I, *Existing Practice of the United Nations in Establishing and Participating in United Nations and United Nations Assisted Tribunals, and the Experience of Other Relevant Judicial Mechanisms*.

147 “Tribunal fatigue” is sometimes used as a shorthand reference to international community concerns that the various international criminal courts and tribunals since 1993 have, in some assessments, been cumbersome, slow and expensive.

148 *Annex II, S/2010/394 (July 26, 2010), para. 8. See also Lang Report, S/2011/30 (January 25, 2011), para. 78* (“Most States believe that [an international tribunal] would not be well suited to the ordinary crime of piracy”).

149 *2010 Cost*, at 16; *2011 Cost*, at 2; *2012 Cost*, at 3.

150 In fact, if criminal sentences are any measure of the significance of a crime, the average global sentence for a convicted pirate -- sixteen years’ imprisonment -- is exactly on par with the average sentences for crimes against humanity and war crimes at the ICTY, East Timor and Kosovo tribunals, although less than the average sentence at the ICTR. *Penalties for Piracy*, at 10.

151 *SG Report, S/2010/394 (July 26, 2010), para. 110.*

152 *SG Report, S/2010/394 (July 26, 2010), para. 100.*

153 *Annex I, S/2010/394 (July 26, 2010), para. 7* (footnote omitted).

154 *Annex I, S/2010/394 (July 26, 2010), para. 7.*

155 *Annex I, S/2010/394 (July 26, 2010), para. 8.*

156 While it has potential ancillary jurisdiction over other, related attacks, the principal jurisdiction of the Special Tribunal for Lebanon is limited to the investigation and prosecution of persons responsible for the February 14, 2005 bombing that killed former Lebanese Prime Minister Rafiq Hariri and killed or injured 22 others. *Annex I, S/2010/394 (July 26, 2010), para. 11.*

- 157 *Annex I, S/2010/394 (July 26, 2010)*, para. 11; *see also* the Special Tribunal for Lebanon website, <http://www.stl-tsl.org>.
- 158 *Annex I, S/2010/394 (July 26, 2010)*, para. 13.
- 159 *See* the ICTY Statute, Article 9; ICTR Statute, Article 8.
- 160 *Annex I, S/2010/394 (July 26, 2010)*, para. 7 (footnote omitted). An international mechanism would likely defer to a national prosecution where there was clear capacity in the national system to prosecute the particular case, but assert its primacy concerning the prosecution of a pirate leader that might be initiated in a jurisdiction with doubtful capacity to handle the case.
- 161 Indeed, while an international mechanism could handle some of the smaller- or medium-sized cases itself, such prosecutions could also be coordinated with and conducted in national courts, where both appropriate and effective.
- 162 *Annex I, S/2010/394 (July 26, 2010)*, para. 23.
- 163 *Maritime Piracy*, at 101.
- 164 *Annex I, S/2010/394 (July 26, 2010)*, para. 28.
- 165 *Annex I, S/2010/394 (July 26, 2010)*, para. 28. On the establishment of a Chapter VII mechanism, *see generally SG Report, S/2010/394 (July 26, 2010)*, Summary at 4; para. 97.
- 166 *Annex I, S/2010/394 (July 26, 2010)*, para. 28.
- 167 *SG Report, S/2011/360 (June 15, 2011)*, para. 10 (footnote omitted); paras. 94-96.
- 168 *Annex I, S/2010/394 (July 26, 2010)*, para. 30; *SG Report, S/2010/394 (July 26, 2010)*, para. 99.
- 169 *SG Report, S/2010/394 (July 26, 2010)*, para. 99.
- 170 *SG Report, S/2010/394 (July 26, 2010)*, para. 99.
- 171 *Lang Report, S/2011/30 (January 25, 2011)*, para. 60.
- 172 *See, e.g., ICTY Rules of Procedure & Evidence*, Part Three, Section 6 (The Prosecutor), Part Four, Section 1 (Investigations), Part Five, Section 1 (Indictments), Section 2 (Orders and Warrants), Section 3 (Preliminary Proceedings), etc.
- 173 *SG Report, S/2010/394 (July 26, 2010)*, Summary at 4 (disadvantages may include higher costs) and para. 101 (an international tribunal “not likely to be among the most cost-effective”); *Burden-Sharing*, at 23.
- 174 *Report of the Monitoring Group on Somalia & Eritrea, S/2013/413 (July 12, 2013)*, at 22, para. 65.
- 175 *Report of the Monitoring Group on Somalia & Eritrea (July 12, 2013)*, at 8.
- 176 *Report of the Monitoring Group on Somalia & Eritrea (July 12, 2013)*, para. 66.
- 177 *Report of the Monitoring Group on Somalia & Eritrea (July 12, 2013)*, para. 67.
- 178 *Maritime Piracy*, at 108-09.
- 179 *See, e.g.,* the ICTY Statute, Article 16 (The Prosecutor), Article 18 (Investigation and preparation of indictment); Article 19 (Review of the indictment); and Article 29 (Co-operation and judicial assistance).
- 180 *See, e.g.,* the ICTY Statute, Article 27 (Enforcement of Sentences) and Article 28.
- 181 *SG Report, S/2012/50 (January 20, 2012)*, para. 113 (h) (“UNDP and UNODC would assist with recruitment of the necessary judges, prosecutors, police and other legal professionals, and recruit the necessary international experts, as set out in the present report”).
- 182 *SG Report, S/2012/50 (January 20, 2012)*, para. 113 (e) (“The Security Council would encourage further donations to the Trust Fund . . . including from the shipping industry and flag States . . .”).
- 183 *Lang Report, S/2011/30 (January 25, 2011)*, para. 140.
- 184 *2011 Economic Cost*, at 1. Note that out of this approximate \$6.6 billion, only \$16 million was spent world-wide on prosecutions and imprisonment. *Id.* at 2.
- 185 *SG Report, S/2010/394 (July 26, 2010)*, para. 98.
- 186 Another objection that has sometime been expressed concerning an international tribunal is that it would lose the benefit

of the experience gained in the regional state courts in trying pirate cases. First, interviews with community members who have been closely involved with piracy trials in the region indicate that such trials are generally straightforward and not particularly difficult. Second, the lessons learned and experience gained could certainly be transferred to those involved at an international mechanism, and indeed, nothing would foreclose a regional prosecutor becoming part of the international mechanism's prosecution team. And third, and perhaps most important, the trials of higher-level pirate leaders at an international court would probably look considerably different than the trials of skiff pirates.

187 *Annex I, S/2010/394 (July 26, 2010)*, para. 27.

188 *SG Report, S/2010/394 (July 26, 2010), Summary at 4; Annex I, S/2010/394 (July 26, 2010)*, para. 27 (“All States have a legal obligation under Chapter VII of the Charter of the United Nations to cooperate with [the] ICTY and ICTR”).

189 The ICTY and ICTR require state cooperation and production of evidence not through mutual legal assistance treaties, but pursuant to their respective statutes and rules. *See* ICTY Statute, Articles 1, 16, 18 and 29 (1. “States shall cooperate . . . 2. States shall comply without undue delay . . .”); ICTR Statute, Articles 1, 15, 17 and 28.

190 *See* the ICTY Statute, Articles 19, 20, 27-29; ICTR Statute, 18, 19, 26-28. As stated in the Secretary-General’s July 2010 report, “[i]t would remain to be determined whether the international tribunal [would] enter into transfer agreements . . . , or whether the Security Council would wish to determine [the matter of transfers] in its resolution under Chapter VII.” *SG Report, S/2010/394 (July 26, 2010)*, para. 103.

191 *Annex I, S/2010/394 (July 26, 2010)*, para. 38; *also SG Report, S/2010/394 (July 26, 2010)*, para. 104.

192 This is not to argue that the various international criminal courts since 1993 (such as the ICTY, ICTR, etc.) are models of international justice, or that they are not in need of significant improvements. A number of steps can and should be taken to improve the efficiency of international criminal justice and shorten the length and reduce the costs of international proceedings, while remaining faithful to the core values and international standards of due process and fair trial, but are topics for another paper.

193 *Lang Report, S/2011/30 (January 25, 2011)*, para. 147 (“The Secretary-General . . . should contemplate the establishment of an institutional structure to facilitate the implementation of the Security Council resolution under the aegis of a high-level eminent personality with vast United Nations experience”).

194 *Penalties for Piracy*, at 1.

195 *See United States v. Said*, 757 F. Supp. 554, 565 (E.D. Va. 2010) (“no single court can bring order to various interpretations of [the UN Convention on the Law of the Sea] . . . Rather, enforcement actions against pirates and criminal prosecutions . . . are left to individual countries, many of which have different penalties for the crime of piracy ranging from three years to life in prison”), *vacated and remanded*, 680 F.3d 374 (4th Cir. 2012). “[O]ne previously unappreciated advantage of a dedicated international piracy tribunal or chamber would be the elimination of sentencing disparities.” *Penalties for Piracy*, at 15. “The disparity in sentencing raises the issue of equity among defendants, particularly because the defendants are all engaged in similar conduct but their punishments depend on where they happen to be tried.” *Id.* at 1.

196 *World Bank, Pirate Trails*, at 33.

197 Speech by U.S. Principal Deputy Assistant Secretary of State, Bureau of Political-Military Affairs, Thomas Kelly, October 25, 2012. In its report released on November 1, 2013, the World Bank states: “While the focus has been on naval operations to combat pirates, this study proposes that interventions focused to stop the financial flows from proceeds of piracy are just as important in dealing with the problem.” *Pirate Trails*, at 34.

198 Secretary of State Condoleezza Rice, “Combating the Scourge of Piracy,” New York, New York, December 18, 2008; <http://2001-2009.state.gov/secretary/rm/2008/12/113269.htm>.

199 *Lang Report, S/2011/30 (January 25, 2011)*, para. 145.

200 *Secretary-General’s 2013 Somali Piracy Report*, para. 70.

201 *End Game*, at 2-3.

202 *Burden-Sharing*, at 8-9. The recent World Bank study, *Pirate Trails*, estimates considerably higher piracy economic costs, of approximately \$18 billion a year. *Pirates Trails*, at 33.

203 “[A]t least four pirate financiers are reportedly engaged in various smuggling activities. Of these, at least two are engaged in human trafficking and/or migrant smuggling.” *Pirate Trails*, at 66. The piracy-related financial networks

which are “investing the most in militias are reported located in Puntland, where individual cases of operational cooperation between pirate financiers and [the al-Qaeda-related terrorist organization] Al-Shabaab” are reported to have occurred. *Id.* at 64. There are reports that “several pirate financiers are engaging in other criminal activities . . . and that they have built significant paramilitary capacities on land . . .” Secretary-General’s 2013 Somali Piracy Report, para. 8.

204 No. 1:11-cr-00106-1 (June 11, 2013).

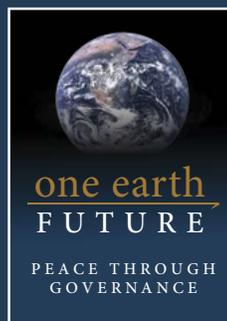
205 *Secretary-General’s 2013 Somali Piracy Report*, para. 74.

206 Security Council Resolution 2077, S/Res/2077 (November 21, 2012).



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