

10-1-2011

National Solutions To An International Scourge: Prosecuting Piracy Domestically As A Viable Alternative To International Tribunals

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Recommended Citation

Kevin H. Govern, *National Solutions To An International Scourge: Prosecuting Piracy Domestically As A Viable Alternative To International Tribunals*, 19 U. Miami Int'l & Comp. L. Rev. 1 (2011)
Available at: <https://repository.law.miami.edu/umiclr/vol19/iss1/3>

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NATIONAL SOLUTIONS TO AN INTERNATIONAL SCOURGE: PROSECUTING PIRACY DOMESTICALLY AS A VIABLE ALTERNATIVE TO INTERNATIONAL TRIBUNALS

*Kevin H. Govern**

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ABSTRACT

This article will assess both the problems and potential solutions to contemporary seaborne threats of piracy, robbery, and terrorism, and discuss challenges and opportunities for the domestic and international forums prosecuting the crimes that constitute piracy and

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maritime terrorism. In particular it will begin with a discussion of the (d)evolution of events in the late 20th Century, which has transformed the old problem of piracy into a modern scourge. Piratical tactics, techniques and procedures (TTP) gave rise to a distinctly different threat from that faced in the past. Accompanying this discussion is a survey of present-day piracy, followed by an analysis of why piratical activities are more susceptible now than ever before to the long arm of the law, especially, but not exclusively, domestic prosecution, as well as anti-piracy policies. The article will advance reasons for why domestic, rather than international, prosecution will be the prevailing remedy of choice when dealing with captured pirates. Concluding comments will note why it is likely that present and emergent anti-piracy activities will continue to expand across the spectrum of operations, and summarize the challenges and opportunities for the domestic and international forces preventing piracy, those capturing pirates, and the fora prosecuting the crimes that constitute piracy and maritime terrorism.

I. NEW TIMES, OLD PROBLEMS :
THE MODERN ERA OF MARITIME PIRACY

[Pirates] are peculiarly obnoxious because they maraud upon the open seas, the great highway of all maritime nations. So heinous is the offence considered, so difficult are such offenders to apprehend, and so universal is the interest in their prompt arrest and punishment, that they have long been regarded as outlaws and the enemies of all mankind.¹

Piracy is only one of many elements of what I call trans-national criminal activity because if [you are] using the seaways for piracy, [they are] probably being used for drug trafficking, human smuggling,

¹ Edwin D. Dickinson, *Is the Crime of Piracy Obsolete?*, 38 HARV. L. REV. 334, 338 (1925).

and arms smuggling. So, the way countries come together and solve this is important.²

For thousands of years, piracy, or “robbery of the high seas,” has caused conflict in international waters. Increasingly, piracy has become part of a multifaceted criminal or terrorist enterprise, especially in certain flashpoint locations around the globe. Contemporary “attacks appear to be escalating in *frequency, sophistication and severity*” in comparison to even the 20th Century’s blight of piratical activity.³ Piracy has thus become a highly organized business with “professional” pirates, threatening the stability of the seas and their surrounding nations. The increase in frequency of pirate attacks and maritime conflicts causes a need for reassessment of the countermeasures that have been implemented throughout history to combat this problem. Typically, many countries who remain involved in combating and preventing piracy tend to promote military solutions and amendment to international laws. However, placing emphasis on the domestication of criminalizing piracy will eliminate many of the problems that arise out of conflicting laws, sovereignty over criminals, and international boundaries.

The author Keith Johnson, in his 2010 work *Who’s a Pirate?*,⁴ mused on how it “may seem strange there should be doubt about an offense as old as this one.”⁴ “Piracy was the world’s first crime with universal jurisdiction, meaning that any country had the right to apprehend pirates on the high seas.”⁵ This jurisdiction was first exercised by the Romans, who, in Johnson’s estimation, took piracy “so seriously [that] they overrode a cautious Senate and gave near-dictatorial powers to an up-and-coming general named Pompey, who soon swept away piracy in the Mediterranean.”⁶ In the realm of one’s employment status bearing on legal status, history has been replete

² United States Navy Quotes About Maritime Strategy, NAVY.MIL, <http://www.navy.mil/navydata/leadership/quotes.asp?q=253&c=6> (last visited Mar. 3, 2012).

³ Frederick Chew, *Piracy, Maritime Terrorism and Regional Interests*, GEDDES PAPERS 73, 73 (Austl. Command and Staff Coll. 2005), http://www.defence.gov.au/adc/docs/publications2010/PublensGeddes2005_310310_PiracyMaritime.pdf.

⁴ Keith Johnson, *Who’s a Pirate? U.S. Court Sees Duel Over Definition*, WALL ST. J., Aug. 14, 2010, at A1.

⁵ *Id.*

⁶ *Id.*

with European countries such as Britain cracking “down on pirates—except when busy enlisting certain ones, dubbed ‘privateers,’ to help them fight their wars by raiding enemy ships.”⁷ Johnson even estimates that the creation of the modern U.S. Navy is attributable to “Thomas Jefferson erupt[ing] over the cost of paying tribute to the Barbary Corsairs for safe passage of U.S. merchant ships [when] [a]t the time, the U.S. was paying about one-tenth of the federal budget to the pirates.”⁸

There have traditionally been many relevant motivations that drive piracy including economic hardship, lifestyle choices, and in some cases social gain through organized crime. The ever-present threat of maritime piracy demonstrates the clear need for an effective international legal response to attacks on ships and developing the appropriate mechanisms to bring malefactors to justice. However, some piracy is also associated with political rebellion against their governments such as the Somali pirates who claim nationalist motives, or Nigerian pirates who claim to be rebelling against lost tribal rights. As Professor John Winn and this author have previously written, political motivation – or the lack thereof – appears to be a major contributing factor to the continuing crisis of contemporary piracy.⁹ Both scholars have assessed the following incident as the first major modern confluence of piracy and politics:

The modern era of maritime piracy, [hallmarked by complex, multifaceted operations], arguably began at 2320 hours (11:30 pm) on September 19, 1992. On that date, after a long period of relative inactivity, armed criminals grappled aboard the *Nagasaki Spirit*, a Liberian registered oil tanker, which was proceeding south in the Malacca Strait between Sumatra and Malaysia. After robbing the crew and looting the ship stores, the gang forced the captain and crew over the side before leaving the ship cruising at full speed on

⁷ *Id.*

⁸ *Id.*

⁹ John I. Winn & Kevin H. Govern, *Maritime Pirates, Sea Robbers, and Terrorists: New Approaches to Emerging Threats*, 2 THE HOMELAND SEC. REV. 131, 132 (2008).

autopilot in the most crowded shipping channel on Earth. At the same time, on an opposite heading, the container ship *Ocean Blessing* was also pilot-less with its crew locked below decks after a similar attack. The resulting collision and uncontrolled fires destroyed both ships and killed all but two of the crew. *Ocean Blessing* burned for six weeks spewing tons of heavy oil into nearby Malaysian fisheries. To complicate matters, the hulk of *Ocean Blessing* was towed by a Chinese flagged tug to a breakers yard in India. Upon arrival, however, suspicious customs investigators discovered dozens of containers filled with the charred remains of un-manifested Chinese-made small arms and explosives destined for the Middle East. Shortly afterwards, the owner of the breaker's yard disappeared without a trace.¹⁰

The *Ocean Blessing-Nagasaki Spirit* incident illuminates the complex nature of maritime piracy. "Since 1992, the threat to maritime commerce has increased dramatically."¹¹ Maritime piracy and sea robbery represent the most challenging current threat to international maritime security. What is possibly the most disturbing aspect of recent piracy "is the growing nexus between maritime crime, terror organizations, and failed or failing states."¹² Martin N. Murphy has opined that piracy may be a "marginal problem in itself, but the connections between organized piracy and wider criminal networks and corruption on land make it an element of a phenomenon that can have a weakening effect on states and a destabilizing one on the regions in which it is found."¹³ The emergent threat appears to come not so much from "traditional commercial

¹⁰ *Id.*; see also *Semco Salvage & Marine Pte. Ltd. v. Lancer Navigation Co.*, [1997] A.C. 455 (H.L.) (appeal taken from Eng.).

¹¹ Winn & Govern, *supra* note 9.

¹² *Id.*

¹³ David Osler, *Book Review: Contemporary Piracy and Maritime Terrorism*, MARITIME TERRORISM.COM, <http://www.maritimeterrorism.com/2007/08/19/book-review-contemporary-piracy-and-maritime-terrorism/> (last visited Mar. 3, 2012) (reviewing MARTIN N. MURPHY, *CONTEMPORARY PIRACY AND MARITIME TERRORISM* (2007)).

pirates, but from a new breed of maritime terrorist, whose skills evolve from a conventional piracy base[.]”¹⁴ The value of distinguishing modern piracy as maritime terrorism may result in government funds channeled into maritime security projects as a form of law-enforcement.¹⁵ In some instances, corrupt government officials work directly with naval units to steal cargoes or even entire ships or cargoes under the guise of “anti-smuggling” enforcement.¹⁶ Pirates and sea-robbers now range far out at sea in flotillas of small boats supported by sophisticated “mother-ships” to opportunistically attack vessels of almost any size.¹⁷ Maritime underwriters take the threats seriously that “sea sport scooters, scuba diving equipment, and mini-submarines” will be used in the near future to facilitate maritime attacks.¹⁸

II. TALLYING ACTORS AND THEIR TERRIBLE ACCOMPLISHMENTS

As Snodden has pointed out, there is a genuine dilemma of how to distinguish who the principal actors are in these activities, versus the accomplices and second or third-hand beneficiaries, where sponsorship and/or identity are not apparent and actors have overcome deterrence and evaded apprehension: “[H]ow would you know that pirates attacking a ship are those motivated by political ideals

¹⁴ *Aegis Maritime Terrorism Report – June 2004*, AEGIS DEFENSE SERVICES LTD., http://www.aegisdef-webservices.com/june_2004_maritime_terrorism_rep.htm (last visited Mar. 3, 2012).

¹⁵ Robert Snoddon, *Piracy and Maritime Terrorism: Naval Responses to Existing and Emerging Threats to the Global Seaborne Economy*, WAR AND GAME, (Jan. 18, 2008), <http://warandgame.wordpress.com/2008/01/18/piracy-and-maritime-terrorism-naval-responses-to-existing-and-emerging-threats-to-the-global-seaborne-economy/>.

¹⁶ See, e.g., U.S. Department of State, Bureau of International Narcotics and Law Enforcement Affairs, *2009 International Narcotics Control Strategy Report- Volume I Drug and Chemical Control* (Feb. 27, 2009), <http://www.state.gov/j/inl/rls/nrcrpt/2009/vol1/index.htm> (note especially country reports at pp. 106-627).

¹⁷ ‘Mother Ship’ Behind Pirate Raids, BBC NEWS, Nov. 11, 2005, <http://news.bbc.co.uk/2/hi/africa/4428808.stm> (reporting that “[p]irate attacks off Somalia’s coast are being organised from command vessels, or ‘mother ships,’” according to the International Maritime Bureau).

¹⁸ Graham Gerard Ong, *Pre-empting Maritime Terrorism in Southeast Asia*, VIEWPOINTS, 3, (Nov. 29, 2002), <http://community.middlebury.edu/~scs/docs/Ong-Preempting%20Terrorism%20and%20Piracy,%20ISEAS.pdf>.

and are part of a group of extremists intent on causing an economic downturn in the maritime markets?”¹⁹ In its breakdown of first and second order costs of maritime piracy, the One Earth Future Working Group estimated in 2010 that piracy created a global expense of \$7 to 12 billion per year:

Cost Factor	Value (Dollars)
Ransoms: excess costs	\$176 million
Insurance Premiums	\$460 million to \$3.2 billion
Re-Routing Ships	\$2.4 to \$3 billion
Security Equipment	\$363 million to \$2.5 billion
Naval Forces	\$2 billion
Prosecutions	\$31 million
Piracy Deterrent Organizations	\$19.5 million
Cost to Regional Economies	\$1.25 billion
TOTAL ESTIMATED COST	\$7 to \$12 billion per year

Table 1 – 2010 Estimate of Total Cost of Piracy²⁰

Regarding those losses, the “Joint War Committee” representing the marine committees of both Lloyd's Market Association, and representatives from London's insurance company underwriters classified the Strait of Malacca in 2005 as a “war zone” for purposes of indemnity coverage.²¹ Despite an increase in piracy, the “war zone” status was removed a year later—to the relief of shippers paying insurance premiums—as a “testimony to the increased security of the strait[.]”²² Nevertheless, other locations such as Benin

¹⁹ Snodden, *supra* note 15.

²⁰ Anna Bowden et al., *The Economic Cost of Maritime Piracy*, ONE EARTH FUTURE WORKING PAPER, 25 (Dec. 2010), http://oceansbeyondpiracy.org/sites/default/files/documents_old/The_Economic_Cost_of_Piracy_Full_Report.pdf.

²¹ David Pilla, *London Market Committee Sees Threat of Terror from Piracy in Key Shipping Lane*, BEST'S REVIEW, Sept. 2005, at 9.

²² K.C. Vijayan, *Malacca Strait Is Off War Risk List But Piracy Attacks Up Last Month*, THE STRAITS TIMES (Singapore) (Aug. 11, 2006), http://www.google.com/url?sa=t&rct=j&q=malacca%20strait%20is%20off%20war%20risk%20list%20but%20piracy%20attacks%20up%20last%20month&source=web&cd=1&ved=0CCQQFjAA&url=http%3A%2F%2Fwww.mindef.gov.sg%2Fscholarship%2FST%2520-%2520Reading.pdf&ei=opdST6_JIiKz0QHMsf22Bg&usq=AFQjCNGdYK

have been added as emergent “war zones.”²³ Elsewhere, particularly in Asia, piratical attacks have tended to result in thefts of ship’s cargo with or without fraudulent re-flagging.²⁴ In such instances, crews are often murdered to deter detection or prosecution.²⁵ Because of limited ports and market infrastructures, seizures in African waters typically involve demands for cash as a ransom, payment of which inadvertently encourages the persistence of piracy from the international community and causes the number of attacks to go up consistently despite best efforts to curb this trend.²⁶ Moreover, paying the ransom can cause a slippery slope, in that publicizing the capitulation to ransom demands will proliferate worldwide growth in piracy. The piracy threat is so severe that the International Maritime Board (IMB) of the International Chamber of Commerce (ICC) broadcasts “piracy alerts” from a twenty-four manned Piracy Reporting Center in Kuala Lumpur,²⁷ and at least one law firm informs its clients of daily vessel casualty and piracy risks.²⁸

qferMgdnABaun9hOA8lwnbTA&cad=rja; see also Newsbank Access World News, Rec. No. 1136F1464F5AD8E0.

²³ Jonathan Saul, *Ship Insurers Add Benin to Risk List After Attacks*, REUTERS (Aug. 8, 2011), <http://www.reuters.com/article/2011/08/08/idUSL6E7J51M420110808>.

²⁴ Catherine Zara Raymond, *Maritime Security: The Singaporean Experience Draft*, INST. OF DEF. AND STRATEGIC STUDIES SINGAPORE, 5-6 (Dec. 2005), <http://faculty.nps.edu/brutzman/InternationalMaritimeProtectionSymposium2005/speakers/RaymondCatherineZara/Hawaii%20paper-%20final.pdf>.

²⁵ See *id.* at 6.

²⁶ Eugene Kontorovich, *International Legal Responses to Piracy Off the Coast of Somalia*, ASIL INSIGHTS (Feb. 6, 2009), <http://www.asil.org/insights090206.cfm>.

²⁷ See *IMB Piracy Reporting Centre*, ICC COM. CRIME SERS., <http://www.icc-ccs.org/piracy-reporting-centre> (last visited Mar. 3, 2012) (Formed in 1992, the PRC’s role includes efforts to “raise awareness of piracy hotspots, detail specific attacks and their consequences, and investigate incidents of piracy and armed robbery at sea and in port.” The PRC also “work[s] with national governments on a range of initiatives to reduce and ultimately eradicate attacks against ships.”).

²⁸ Christoph M. Wahner, *Daily Vessel Casualty, Piracy & News Report*, COUNTRYMAN & MCDANIEL, http://www.cargolaw.com/presentations_casualties.php (last visited Mar. 3, 2012).

The IMB Piracy Reporting Centre (PRC) was established in October of 1992 following a series of violent pirate attacks,²⁹ namely but not exclusively the attack on the oil tanker *Valiant Carrier*. It has served as an active correspondent for the international community of the potential danger that piracy poses to the maritime industry. The PRC is an international nongovernmental organization financed by voluntary contributions from sixteen ship-owners associations and maritime insurance companies. The center records and reports incidents of maritime pirate attacks occurring globally.³⁰ The IMB's responsibilities and services range from being a primary point of contact when captains or shipmasters suspect piratical activity or attacks, to coordination with governmental law enforcement and regional organizations to report and combat piracy.³¹

By 2010, the IMB reported 445 acts of piracy and armed robbery at sea, the fourth successive year that the numbers of reported incidents have increased, with Somalia having "accounted for 92% of kidnappings" and 49 of 53 vessels seized, as the "highest [numbers the IMB's PRC has] ever seen[.]"³² By the Fall of 2011, piratical acts were on-track to hit a regrettable all-time high, as the PRC reported that "[p]iracy on the world's seas had risen to record levels, with Somali pirates behind 56% of the 352 attacks reported this year, the International Chamber of Commerce (ICC) International Maritime Bureau (IMB) revealed [on October 18, 2011] in its latest global piracy report."³³ Meanwhile, the PRC encouragingly noted "more Somali hijack attempts are being thwarted by strengthened anti-piracy measures."³⁴

²⁹ Cindy Vallar, *Combating Piracy, Modern Piracy, Part 5*, PIRATES AND PRIVATEERS, <http://www.cindyvallar.com/modern5.html> (last visited Mar. 3, 2012).

³⁰ See *IMB Piracy Reporting Centre*, *supra* note 27.

³¹ *Id.*

³² *Hostage-taking At Sea Rises To Record Levels, Says IMB*, ICC COM. CRIME SERVS. (Jan. 17, 2011), <http://www.icc-ccs.org/news/429-hostage-taking-at-sea-rises-to-record-levels-says-imb>.

³³ International Maritime Bureau, Press Release: Oct. 18, 2011, As World Piracy Hits a New High, More Ships Are Escaping Somali Pirates, <http://www.icc-ccs.org/news/969-as-world-piracy-hits-a-new-high-more-ships-are-escaping-somali-pirates-says-imb-r>.

³⁴ *Id.*

Year	Number of Attacks
1997	252
1998	210
1999	309
2000	471
2001	370
2002	383
2003	452
2004	330
2005	266
2006	239
2007	263
2008	293
2009	406
2010	445
2011	439
Total	5,128

Table 2 – Global Maritime Pirate Attacks³⁵

The slight 1.3% decline from 2010 to 2011 contrasts with 2010's 10.9% leap over 2009's attack statistics, which in turn came after an 11.4% increase in piracy and armed robbery committed at sea worldwide between 2007 and 2008.³⁶ In the first two months of 2012

³⁵ Donna Nincic, *State Failure And The Re-emergence Of Maritime Piracy* 2, Mar. 26-29, 2008, at 2 (49th Ann. Convention of the Int'l Stud. Ass'n, Presentation Paper, Mar. 26-29, 2008), http://citation.allacademic.com/meta/p_mla_apa_research_citation/2/5/4/3/2/pages254325/p254325-1.php; *Piracy Attacks in East and West Africa dominate world report*, ICC COM. CRIME SERVS. (Jan. 19, 2012), <http://www.icc-ccs.org/news/995-piracy-attacks-in-east-and-west-africa-dominate-world-report> (providing data for 2011); *Hostage-taking At Sea Rises To Record Levels, Says IMB*, *supra* note 32 (providing data for 2010); *2009 Worldwide Piracy Figures Surpass 400*, ICC COM. CRIME SERVS. (Jan. 14, 2010), http://www.icc-ccs.org/index.php?option=com_content&view=article&id=385:2009-worldwide-piracy-figures-surpass-400&catid=60:news&Itemid=51 (providing data for 2008 and 2009).

³⁶ *But cf. Reports on Acts of Piracy and Armed Robbery Against Ships 2010*, ANNUAL REPORT (Int'l Mar. Org., London) Apr. 1, 2011, at 2, <http://www.imo.org/OurWork/Security/PiracyArmedRobbery/Monthly%20and%20annual%20piracy%20>

alone, there have been sixty-two pirate attacks and six hijackings worldwide, of which twenty-six of the attacks and four hijackings have been off Somali waters, bring the total vessels held captive off Somalia to twelve, and total hostages to 177.³⁷ These statistics unfortunately invalidated the IMB's sanguine assessment of national and international antipiracy measures, such that it assessed a "relative decline in pirate attacks worldwide," despite an increase in Somali pirates' range and capabilities:

[a] total of 196 incidents around the world were recorded by the IMB's 24 hour Piracy Reporting Centre [for the first two quarters of 2010], compared to 240 incidents in 2009. This includes 31 vessels hijacked, 48 vessels fired upon and 70 vessels boarded.

During this period, one crew member was killed, 597 crew members were taken hostage and 16 were injured. The use of firearms including rocket propelled [sic] grenades was particularly marked in the waters off Somalia and in the Gulf of Aden. Attacks in this region and in the Red Sea represent more than half of the incidents reported over the past six months.

The coast of Somalia remains particularly vulnerable with 100 pirate attacks in 2010, including

0and%20armed%20robbery%20report/169_Annual2010.pdf [hereinafter *2010 IMO Report*] (asserting a 20.4% increase in piracy between 2009 and 2010); *Reports on Acts of Piracy and Armed Robbery Against Ships 2008*, ANNUAL REPORT (Int'l Mar. Org., London) Mar. 19, 2009, at 1, <http://www.imo.org/OurWork/Security/PiracyArmedRobbery/Monthly%20and%20annual%20piracy%20and%20armed%20robbery%20report/133-Annual2008.pdf> (asserting an 8.5% increase in piracy between 2007 and 2008).

³⁷ *Reports on Acts of Piracy and Armed Robbery Against Ships: Issued Monthly 2012*, INT'L MARL. ORG. (Feb. 29, 2012), <http://www.icc-ccs.org/piracy-reporting-centre/piracynewsfigures>. This included the incident in which two hostages were killed and sixteen others freed on Feb. 28, 2012, when a Danish warship intercepted a cargo vessel that had been hijacked by pirates off Somalia's coast. *Denmark: Pirates kill 2 hostages on hijacked vessel*, USA TODAY (Feb. 28, 2012) <http://www.usatoday.com/news/world/story/2012-02-28/pirates-denmark-hostages-killed/53282318/1>.

27 hijackings. The numbers of attacks [in 2010] have decreased compared to 2009 in the most dangerous maritime area of the world.³⁸

The predominance of these attacks has occurred in the Gulf of Aden and the remainder off of the Horn of Africa, with the Malacca Straights and South China Sea a distant third.³⁹ Ports have not been immune, with over 112 separate attacks on ships berthed or in anchor in port. Many of these attacks result in injury or death, with 11 crewmen killed, 32 crewmen injured, and 21 crewmembers missing. More disturbing is that during 2008 assailants took a total of 889 crewmembers hostage and hijacked 49 vessels.⁴⁰ The ICC Commercial Crime Service's 2010 analysis of the 2009 IMB figures is even more disturbing. During this time period, the IMB reported:

153 vessels were boarded, 49 vessels were hijacked, 84 attempted attacks and 120 vessels fired upon – compared to 46 ships fired upon in 2008. A total of 1052 crew were taken hostage. Sixty eight [sic] crew were injured in the various incidents and eight crew killed. The level of violence towards the crew has increased along with the number of crew injuries.⁴¹

³⁸ *Pirates Face New Resistance as Navies Strike Back, Says IMB*, ICC COM. CRIME SERVS. (July 15, 2010), http://www.icc-ccs.org/index.php?option=com_content&view=article&id=418:pirates-face-new-resistance-as-navies-strike-back-says-imb&catid=60:news&Itemid=51.

³⁹ *2010 IMO Report*, *supra* note 36, at annex 2 p.2.

⁴⁰ *Somalia Confirmed As Piracy Capital*, CNN (Jan. 16, 2009), http://articles.cnn.com/2009-01-16/world/pirates.year_1_piracy-reporting-center-crew-members-pirate-infested-waters?_s=PM:WORLD.

⁴¹ *2009 Worldwide Piracy Figures Surpass 400*, *supra* note 35. By Oct. 2011, worldwide piracy figures were on their way to setting a new record high: Worldwide Incidents: Total Attacks Worldwide – 369; Total Hijackings Worldwide – 36; Incidents Reported for Somalia: Total Incidents – 208; Total Hijackings – 24; Total Hostages: 400; Total Killed – 15; Current vessels held by Somali pirates: Vessels – 13; Hostages – 249. See *Piracy News & Figures*, ICC COM. CRIME SERVS., <http://www.icc-ccs.org/piracy-reporting-centre/piracynewsfigures> (last visited Mar. 3, 2012).

As was the case in 2009, most of the attacks occurred off of the Somali Coast.

In recent years, there has been a demographic shift associated with attack locales. In 2008, most of these attacks occurred off of the Gulf of Aden, adjacent to clan-led Puntland; the IMB assesses that "[p]irates from the Puntland region were believed responsible for 35 incidents of piracy in the first quarter of 2010, including nine hijackings."⁴² In 2009, there was a marked increase in attacks off of the east coast of Somalia near Haradhere; an area that since the Summer of 2010 has been controlled by the militant Islamist group *Hizbul Islam* that "wants to establish Sharia law and order and put an end to the pirate trade in the town[.]"⁴³ The attacks have become more sophisticated utilizing mother ships and occurring as far as 1,000 miles from the coast of Mogadishu, indicating that this type of piracy is becoming better funded and more refined. In August 2011, the IMB ranked piracy off the coast of West Africa to rival levels near Somalia, with Nigeria and Benin being second in the world, only to Somalia, for incidents of sea piracy in the world, dramatically increasing the cost of shipping to and from Nigeria in a region where the United States and other Western nations do not have substantial antipiracy patrols to augment national efforts.⁴⁴

Maritime piracy may even be an extension of armed insurgency extending its operations beyond land borders into the sea. Arabinda Acharya and Nadeeka P. Withana from Singapore have identified the Liberation Tigers of Tamil Eelam (LTTE) as the "pioneer in maritime terrorism with a state-of-the-art maritime terrorist organization" known as the "Sea Tigers."⁴⁵ Acharya and

⁴² Kerin Backhaus, *Piracy In The Puntland Region of Somalia*, OILPRICE (May 12, 2010), <http://oilprice.com/Geo-Politics/Africa/Piracy-In-The-Puntland-Region-of-Somalia.html>.

⁴³ *Somali Islamist Insurgents Seize Pirate Haven*, BBC NEWS, May 2, 2010, <http://news.bbc.co.uk/2/hi/africa/8657060.stm> (last visited Mar. 3, 2012).

⁴⁴ Yinkalbukun, *West Africa Piracy Threat Rising to Somali Level*, ASSOCIATED PRESS, Aug. 12, 2011, Westlaw, File No. 8/12/11 APWORLD 00:04:17.

⁴⁵ Hariharan Balakrishnan, *Experts Opinions*, SAVE RAM SETHU, (Mar. 22, 2008) <http://ramsethu.org/expert6.html>. Balakrishnan's discussion of Arabinda Acharya & Nadeeka Prashadani Withana's Presentation to the Centre for Security Analysis International Symposium on Dec. 13-14, 2006 in Chennai, India. The LTTE is a Tamil group of "8,000 to 10,000 armed combatants" and a core of 3,000 to 6,000

Withana report that the “Sea Tigers” are capable of “infiltrating harbours [sic] to lay mines, conducting reconnaissance operations and recovering material from vessels that have been sunk.”⁴⁶ Their tools of terrorism and piracy include mines improvised from “everyday household objects such as rice cookers[,]” to sophisticated free floating mines such as those found in Trincomalee harbor.⁴⁷ One unsuccessful mining operation led to the June 2006 arrests of Sea Tigers laying mines off the shore of Wennappuwa.⁴⁸ The British Broadcasting Service reported on March 22, 2008 that ten crew from a Sri Lankan patrol boat went missing off the coast of Nayarau after their vessel exploded upon striking a sea mine placed by the LTTE.⁴⁹ The “Sea Tigers” have also used a commercial fleet as a seemingly “legitimate commercial cover and a source of revenue” in order to clandestinely transport weapons and narcotics to support its own operations, along with other piratical and terrorist groups.⁵⁰ Piratical activity facilitates delivery of illegal weapons and explosives, allows undocumented movement of cadres, and provides banking-free anonymous cash from ransoms. Also, while maritime terror attacks may lack some of the desired public theatre of urban attacks, terror organizations clearly do appreciate the potential of using ships as both instruments and facilitators of terror. The U.S. Transportation Security Administration (TSA) has observed that while the

trained fighters that use “overt and illegal methods to raise funds, acquire weapons, and publicize its cause of establishing an independent Tamil state” in Sri Lanka. *See Liberation Tigers of Tamil Eelam (LTTE): Description*, FED’N OF AM. SCIENTISTS INTELLIGENCE RES. PROGRAM (May 21, 2004), <http://www.fas.org/irp/world/para/ltte.htm>.

⁴⁶ Balakrishnan, *supra* note 45.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Ten Missing After S[sic] Lanka Sinking*, BBC NEWS, Mar. 22, 2008, http://news.bbc.co.uk/2/hi/south_asia/7309200.stm.

⁵⁰ B. Raman, *Action Against LTTE's Maritime Terrorism, International Terrorism Monitor: Paper No.58*, INDIA DEF. CONSULTANTS (May 26, 2006) <http://www.indiadeffence.com/LTTEnavy.htm> (records that the Indian Navy confirmed at least one instance in 1995 when an LTTE ship had “clandestinely transported a consignment of arms and ammunition, dispatched by the Harkat-ul-Mujahideen (HUM) of Pakistan to the southern Philippines for use by the Abu Sayyaf. The HUM paid the LTTE for its services by donating to it some anti-aircraft weapons and ammunition. This was in addition to the cash paid for [the services].”)

September 11th attacks involved airplanes as bombs, “it would not take much of a leap to show that a ship could become the bomb, particularly a ship with volatile cargo.”⁵¹ Most disturbing is the potential for these groups to create catastrophic disruptions to regional or worldwide markets, especially for petroleum and liquefied natural gas (LNG) products.

Less than a year after the September 11th attacks, Greek authorities intercepted the *Baltic Sky*, a Comoros flagged ship carrying an unprecedented 750 tons of high explosives.⁵² This represents the amount of explosives the allies dropped on the German V-1 rocket assembly sites in World War II.⁵³ When intercepted, it was discovered that the *Baltic Sky* was destined for Sudan with a cargo consigned to a private company using a post-office box in Khartoum.⁵⁴ In October 2002, Abd al-Rahim al-Nashiri, a senior Al Qaeda operative in Yemen, was credited with the suicide attack of the French super-tanker *MV Limburg* in the Red Sea.⁵⁵ The next year, the Abu Sayef group took credit for an attack on a passenger ferry in Manila that killed over 100 passengers and crew.⁵⁶ More recent piracy attacks include the highly publicized April 8, 2009

⁵¹ Press Release, TV Worldwide.com, Port Debate Heightens Calls For More U.S. Crews On Ships As Security Measure (Sept. 14, 2004), http://www.tvworldwide.com/events/maritimetv/us_maritime_expo/player.cfm.

⁵² *Greeks Stop Explosives-Laden Ship*, CBS NEWS, Feb. 11, 2009, <http://www.cbsnews.com/stories/2003/06/23/world/main559855.shtml>

⁵³ Adam L. Gruen, THE UNITED STATES ARMY AIR FORCES IN WORLD WAR II PREEMPTIVE DEFENSE ALLIED AIR POWER VERSUS HITLER’S V-WEAPONS, 1943–1945 32 (1998) (The U.S. Fifteenth Air Force based in Italy attacked the V-weapon manufacturing plant at Ober Raderach in southern Germany with more than 750 tons of bombs.).

⁵⁴ Patrick Quinn, *Greeks Probe Possible Terror Links To Seized Ship Loaded With Explosives*, ASSOCIATED PRESS, June 24, 2003, Westlaw, File No. 6/24/03 APWORLD 00:00:00.

⁵⁵ OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, *Biographies of High Value Terrorist Detainees Transferred to the US Naval Base at Guantanamo Bay 7* (Sept. 6, 2006), <http://www.dni.gov/announcements/content/DetaineeBiographies.pdf>.

⁵⁶ Carlos H. Conde, *4 Suspects Arrested in Philippine Attacks*, N.Y. TIMES, Aug. 12, 2005, <http://www.nytimes.com/2005/08/11/world/asia/11iht-phil.html>.

hijacking of the *Maersk Alabama* off the coast of Somalia,⁵⁷ and the attack on the U.S.-flagged *Liberty Sun* on April 14, 2009,⁵⁸ showing that this international threat of piracy is continuous and must be addressed. How the world community is responding to this menace is predicated on the interpretation and enforcement of the assortment of international treaties, international and common law attributes, and adjacent State regulation, code and law. According to Honorable William D. Delahunt, speaking before the House Subcommittee on International Organizations, Human Rights and Oversight in April 2009, “[p]iracy will present a particularly difficult task because it is not only an American problem—but an international problem that will need a coordinated response from the world community.”⁵⁹

A BBC report in 2008 estimated that the total payout to pirates that year exceeded \$150 million, making piracy quite a lucrative enterprise.⁶⁰ Even more disturbing is the inability of powerful nations to control the occurrences of piracy. By August 2010, “at least 22 foreign vessels plus one barge [were] kept in Somali hands against the will of their owners, while at least 401 seafarers—including an elderly British yachting couple—plus the lorry drivers from Somaliland” were being detained.⁶¹ In January 2011, the 320

⁵⁷ Mark Mazzetti & Sharon Otterman, *U.S. Captain Is Hostage of Pirates; Navy Ship Arrives*, N.Y. TIMES, Apr. 8, 2009, <http://www.nytimes.com/2009/04/09/world/africa/09pirates.html>.

⁵⁸ Martha Raddatz, Kirit Radia & Lee Ferran, *American Ship Survives Somali Pirates Hijack Attempt*, ABC NEWS, Apr. 14, 2009, <http://abcnews.go.com/US/International/story?id=7331134&page=1>.

⁵⁹ *International Efforts to Combat Maritime Piracy: Hearing Before the Subcomm. on Int'l Orgs., Human Rights and Oversight of the Comm. on Foreign Affairs*, 111th Cong. 4 (2009) (statement of Hon. William D. Delahunt, Chairman, Subcomm. on Int'l Orgs., Human Rights and Oversight).

⁶⁰ Robyn Hunter, *How Do You Pay a Pirate's Ransom?*, BBC NEWS, Dec. 3, 2008, <http://news.bbc.co.uk/1/hi/7752813.stm>. The BBC report further stated that “Roger Middleton, a Horn of Africa specialist at the Chatham House, says the ship-owners hire professionals, from specialist negotiators to private security firms, to transfer the ransoms.” *Id.*

⁶¹ *Status of Seized Vessels and Crews in Somalia, The Gulf of Aden and the Indian Ocean*, THE INT'L NEWS MAG., (Aug. 13, 2010), http://www.international.to/index.php?option=com_content&view=article&id=548:-status-of-seized-vessels-and-crews-in-somalia-the-gulf-of-aden-and-the-indian-ocean-ecoterra-12-august-2010-&catid=36:news&Itemid=74. Notably, a British couple hijacked while sailing

elderly passengers aboard the *Spirit of Adventure* had the unexpected adventure of coming under attack by Somali pirates, while at the same time some forty other ships came into pirates' hands and more than 800 crew were being held captive in the seas south of the Gulf of Aden.⁶² The STRATFOR Global Intelligence organization assessed in January 2011, that "[a]s long as these pirates have safe-havens along Somalia's coast, they will be able to replace men, weapons and vessels lost at sea to foreign naval forces—and will continue collecting ransom payments ranging as high as \$10 million."⁶³

A "perfect storm" of increasing maritime vulnerability and pirate capability threatens maritime underpinnings of international trade, peace, and security. Failed, corrupt, or indifferent states ignore obligations to cooperate with other states to repress piratical activity.⁶⁴ Access to weapons and technologies, including global positioning systems (GPS) and marine satellite (MARSAT) communications, can allow pirates to venture forth with impunity. Weak maritime registration regimes also allow stolen vessels to be re-registered at sea, and crews carrying false passports, forged competency certificates, and fraudulent bills of lading are able to man stolen ships. Maritime documents were discovered to be fraudulent or questionable in some locations, according to the IMO as well as press sources.⁶⁵ The IMO report notes that issuers of fraudulent documents are "'well-organised [sic], with effective links to maritime administrations, employers, manning agents and training establishments.'"⁶⁶ Port officials and customs agents may also collude with

a private yacht to Tanzania in October 2009 were still being held hostage by Somali pirates in the coastal town of Hobyo for a demanded \$7 million ransom for their release.

⁶² Michael Nicholson, *Spirit of Adventure: Behind the Rise of the Somali Pirates*, THE TELEGRAPH, Feb. 2, 2011, <http://www.telegraph.co.uk/travel/travelnews/8298095/Spirit-of-Adventure-Behind-the-rise-of-the-Somali-pirates.html>.

⁶³ *The Somali Pirates Are Getting Smarter and More Aggressive*, BUSINESS INSIDER (Jan. 31, 2011), <http://www.businessinsider.com/the-somali-pirates-are-getting-smarter-and-more-aggressive-2011-1>.

⁶⁴ United Nations Convention on the High Seas art. 14-15, Apr. 29, 1958, 450 U.N.T.S. 90; United Nations Convention on the Law of the Sea (UNCLOS) art.100-101, Dec. 10, 1982, 1833 U.N.T.S. 436 [hereinafter UNCLOS].

⁶⁵ Eric Watkins, *Shipping Fraud Heightens Terror Threat*, BBC NEWS, Feb. 6, 2002, <http://news.bbc.co.uk/2/hi/asia-pacific/1804146.stm>.

⁶⁶ *Id.*

organized criminal groups to identify and track potential target ships; they work together to prevent recovery of ships and cargoes or the prosecution of offenders.⁶⁷ Billions of dollars are lost to piracy and maritime predation each year, yet most incidents go unreported.⁶⁸ Owners clearly wish to avoid protracted, futile, or corrupt investigations, negative publicity, or increased underwriting costs that may exceed the amount of the loss itself.⁶⁹

Prior to the late 20th Century, threats to maritime security “were either political or military in nature” and normally resolved through diplomacy or conflict.⁷⁰ In that century, pirates escaped detection by navigating at high speed, ignoring international boundaries, and taking advantage of safe havens in their own or foreign coastal waters. Areas most affected by piracy and maritime criminality also typically lack bilateral or multilateral understandings with neighbors.⁷¹ National self-interest (and corruption) fosters a lack of commitment to address maritime theft and violence. Economically challenged maritime states with limited littoral (“brown water”) and deep water (“blue water”) naval capabilities are often reluctant to spend their limited fiscal resources to benefit primarily foreign

⁶⁷ *Examining The Links Between Organised Crime And Corruption*, CENTER FOR THE STUDY OF DEMOCRACY (Apr. 2010), http://kms1.isn.ethz.ch/serviceengine/Files/ISN/132594/ipublicationdocument_singledocument/5d40e029-9b44-4b00-bf40-92690cef3714/en/OrganizedCrime%26Corruption.pdf (example of Greece at pp. 238-241 where several members or whole departments of state administrative bodies, to include police and port customs officials, members of the judiciary, and politicians have colluded with organized crime groups by engaging in what is termed “systemic” or “organised corruption.”).

⁶⁸ Bowden et al., *supra* note 20, at 25.

⁶⁹ See Anna Hopper, *Squashing the Skull and Bones: Reforming the International Anti-Piracy Regime*, HARV. INT'L REV., Winter 2008, at 28, 30 (asserting that barriers to reporting contribute to less-than-complete data on piracy).

⁷⁰ Vijay Sakhuja, *Maritime Order & Piracy*, 24 STRATEGIC ANALYSIS 923, 923 (2000). For a fascinating examination of 19th Century Anglo-U.S. policy and treaties that equated the slave trade to piracy; see Jenny S. Martinez, *Antislavery Courts and the Dawn of International Human Rights Law*, 117 YALE L. J. 550, 604, 607, 625 (2008) (discussing the role and establishment of antislavery courts).

⁷¹ Lauren Ploch et al., *Piracy Off the Horn of Africa*, CRS REPORT FOR CONGRESS R40528 (Apr. 27, 2011), <http://www.fas.org/sgp/crs/row/R40528.pdf> (As noted on page 3 of the report, “[p]irates tend to operate in regions with large coastal areas, high levels of commercial activity, small national naval forces, and weak regional security cooperation mechanisms.”).

commercial interests. When regional and sub-regional diplomatic meetings do occur, they typically yield no more than pledges of cooperation or information sharing, often because of the inability of some nations to support an anti-piracy initiative. Regional states, particularly in Asia, remain especially sensitive to issues of sovereignty, but are increasingly willing to discuss and pursue serious counter-piracy regimes, including ones involving cooperation with the U.S.⁷²

Maritime pirates, sea-robbers, and sea-terrorists present a daunting set of legal, political, and practical challenges, including the task of patrolling 2.5 million square miles of sea to prevent such attacks in the pirate plagued country of Somalia alone.⁷³ Nevertheless, in an age of diminishing resources and burgeoning demand for manufactured products and raw materials, mitigating the maritime piracy threat is critical. The threat posed by pirates and

⁷² Ralph A. Cossa et. al., *The United States and the Asia-Pacific Region: Security Strategy for the Obama Administration*, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES (CSIS) REPORT (Feb. 2009), http://csis.org/files/media/csis/pubs/issuesinsights_v09n01.pdf (As noted on page 69 of the CSIS report, “[m]ore concretely, the littoral states of Southeast Asia should step up efforts to secure sea lines of communication and prevent piracy.”). The Djibouti Code of Conduct is also noteworthy regarding antipiracy measures in this region. See *Djibouti Code of Conduct*, INT’L MAR. ORG. (2011), <http://www.imo.org/OurWork/Security/PIU/Pages/DCoC.aspx>. Signatories promote cooperation to fight against piracy in the Western Indian Ocean and the Gulf of Aden. *Id.* In conformity with local and international laws, nations under this initiative will set up inquiries, arrests and prosecution of persons suspected to have committed piracy acts and armed attacks against ships, as well as the interdiction and seizure of suspected vessels and their cargo, the medical treatment and repatriation of sailors, fishermen and onboard personnel and other passengers. *Id.* Representatives of Djibouti, Ethiopia, Kenya, Madagascar, Maldives, Seychelles, Somalia, the United Republic of Tanzania and Yemen signed on Jan. 29, 2009, and Comoros, Egypt, Eritrea, Jordan, Mauritius, Oman, Saudi Arabia, Sudan and the United Arab Emirates have since signed making the current total eighteen countries from the twenty-one eligible to sign the Djibouti Code of Conduct. *Id.* It remains open for signature at IMO Headquarters by other countries in the region. *Id.*

⁷³ *International Efforts to Combat Maritime Piracy*, *supra* note 59, at 20 (statement of Rear Admiral William Baumgartner on behalf of the U.S. Coast Guard); see also U.S. NAT’L SEC. COUNCIL, COUNTERING PIRACY OFF THE HORN OF AFRICA: PARTNERSHIP & ACTION PLAN, (2008), at 5, http://www.marad.dot.gov/documents/Countering_Piracy_Off_The_Horn_of_Africa_-_Partnership_Action_Plan.pdf.

sea robbers will increase dramatically in scope and violence into the foreseeable future without global commitment, cooperation, and engagement. Piracy undermines global international market systems and is symptomatic of failed, weak, and corrupt states. In turn, weak and failed states are most associated with other maritime crime, including illegal fishing, drug and arms smuggling, illegal migration, pollution, and terrorism.

III. LOOKING FROM DISTANT SHORES CLOSER TO HOME: LAW AND POLICY TO COMBAT PIRACY

Under customary international law, piracy included every unauthorized act of violence committed by a private vessel on the open sea against another vessel with intent to plunder.⁷⁴ Prior to the 19th century, captured pirates were *hostes humanae generis* (enemies of mankind) and subject to summary justice (including capital punishment) “without any [s]olemnity of [c]ondemnation, by the [m]arine [l]aw.”⁷⁵ By the mid 20th Century, several important international conventions had already been developed, including the International Convention for the Safety of Life at Sea of 1948 (SOLAS),⁷⁶ the International Convention for the Prevention of Pollution of the Sea by Oil of 1954 (MARPOL),⁷⁷ and treaties dealing with the prevention of collisions at sea.⁷⁸ The United Nations International Maritime Organization (IMO) came into existence in 1958.⁷⁹ Responsibilities of the IMO include adopting, implementing, and amending conventions that facilitate international maritime

⁷⁴ See L. OPPENHEIM, INTERNATIONAL LAW 608-609 (Lauterpacht 8th ed. 1955).

⁷⁵ Jonathan M. Guttoff, *The Law of Piracy in Popular Culture*, 31J. OF MAR. LAW & COM. 643, 646-47 (2000) (quoting G. JACOB, A NEW LAW DICTIONARY, at “Pirates” (8th ed. 1762)).

⁷⁶ See International Convention for the Safety of Life at Sea (SOLAS), 1974, 32 U.S.T. 47, 1184 U.N.T.S. 278 [hereinafter SOLAS]. This treaty was motivated in large part by the Titanic disaster of 1912.

⁷⁷ See International Convention for the Prevention of Pollution of the Sea by Oil (MARPOL), May 12, 1954, 327 U.N.T.S. 3.

⁷⁸ See International Convention on Load Lines, Apr. 5, 1966, 640 U.N.T.S. 133; see also Convention on the International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 1050 U.N.T.S. 16.

⁷⁹ *Brief History of IMO*, U.N. INT'L MAR. ORG., <http://www.imo.org/About/HistoryOfIMO/Pages/Default.aspx> (last visited Mar. 3, 2012).

safety, efficiency in navigation and prevention of marine pollution from ships.⁸⁰

One important agency that emerged was the Maritime Law Association of the United States (USMLA), which formed the Committee on the International Law of the Sea to review and study the existing international laws that dealt with maritime piracy. In November of 1997, the USMLA made recommendations to the Comité Maritime International (CMI) that it should, in concert with the United Nations and IMB, form a working group that would be charged with developing a model national law concerning maritime piracy.⁸¹ This same group lobbied Congress to review U.S. piracy law, but there was little interest shown by Capitol Hill until after the 9/11 tragedy.⁸²

In 1998, the CMI formulated a Joint International Working Group on Uniformity of Law Concerning Acts of Piracy and Maritime Violence (JIWG), comprised of maritime transportation representatives, trade councils, international law enforcement agencies, and the ICC-IMB.⁸³ The JIWG identified that the fundamental difficulty in obtaining effective measures of suppression was a lack of uniformity in national laws concerning piracy and acts of maritime violence as well as the reporting and investigation of

⁸⁰ *Id.*

⁸¹ See generally George D. Gabel, Jr., *Smoother Seas Ahead: The Draft Guidelines as an International Solution to Modern-Day Piracy*, 81 TUL. L. REV. 1433, 1446-47 (2006).

⁸² *Id.* at 1447, 1450-51.

⁸³ Letter from Frank L. Wiswall, Jr., Chairman of the JIWG 1-3 (May 2005), http://www.comitemaritime.org/Uploads/pdf/Acts_PiracyWP.pdf. (At its May 2005 meeting, the Executive Council approved the establishment of the Joint International Working Group, including representatives of the following participants in addition to the CMI: the Baltic and International Maritime Council (BIMCO); the International Chamber of Shipping (ICS); the International Criminal Police Organization (INTERPOL); the International Group of P & I Clubs (IGP & I); the ICC International Maritime Bureau (ICC-IMB); the International Maritime Organization (IMO); the International Transport Workers' Federation (ITF); and the International Union of Marine Insurance (IUMI). Those in attendance gave preliminary consideration to amendment and re-formulation of the Model National Law. Contact was also made with the Director of the Legal Bureau of the International Civil Aviation Organization (ICAO), and the Director of the Legal Department of the International Air Transport Association (IATA).).

incidents.⁸⁴ The group set out to formulate a Model National Law Code dealing with piracy, especially with regards to jurisdiction and prosecution of piracy and maritime violence.⁸⁵ The JIWG previously produced a Model National Law that the Assembly of the CMI adopted in Singapore in February 2001.⁸⁶ The increasing frequency of hostage taking in connection with acts of piracy and maritime caused the CMI to consider whether the Model National Law should be “amended or re-formulated to attract wider implementation and to resolve issues of jurisdiction and prosecution of a broader range of criminal offences committed on board foreign-flag ships, some of which offences may have implications for maritime security.”⁸⁷

Any successfully implemented and universally adopted Model National Law ought to harmonize with the 1982 UNCLOS and the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA) articles, and any “coalition of the willing”⁸⁸ that combats piracy must have common diplomatic and political philosophies that include proactive cooperation, not condonation or tolerance of piracy,⁸⁹ and a “common vocabulary” with respect to defining, preventing, and prosecuting maritime piracy, terrorism, and other related acts of violence.

The United Nations Convention on the Law of the Sea (UNCLOS) codifies piracy to constitute the following:

⁸⁴ *Id.* at 5.

⁸⁵ *Id.*

⁸⁶ Letter from Jean Serge Rohart, President of the CMI 1 (May 19, 2005), http://www.comitemaritime.org/Uploads/pdf/Acts_PiracyWP.pdf.

⁸⁷ Wiswall, *supra* note 83, at 2.

⁸⁸ See Interview with Sam Donaldson of ABC News, 1 PUB. PAPERS 1035, 1035 (June 5, 1994); Exchange with Reporters in Crawford, Texas, 2 PUB. PAPERS 2215, 2217 (Dec. 31 2002). Note: The origin of the term “coalition of the willing” is uncertain, but as a post-1990 political phrase, President Bill Clinton used it in June 1994, in relation to possible operations against North Korea, and President George W. Bush in the intervention of Iraq in 2003.

⁸⁹ See, e.g., David Osler, *ICS Demands Unified Anti-piracy Effort*, in *Current Awareness Bulletin*, MAR. KNOWLEDGE CTR. (Int’l Mar. Organ., London), Jan., 2010, at 14, <http://www.imo.org/KnowledgeCentre/CurrentAwarenessBulletin/Documents/CAB%20159%20January%202010.pdf>

Article 101
Definition of piracy

Piracy consists of any of the following acts:

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

Article 102
Piracy by a warship, government ship or government aircraft whose crew has mutinied

The acts of piracy, as defined in article 101, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship or aircraft.

Article 103
Definition of a pirate ship or aircraft

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts

referred to in article 101. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.⁹⁰

Armed robbery against ships is defined in the draft Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships (resolution A.922 (22), Annex, paragraph 2.2) as follows:

[a]rmed robbery against ships means any unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of "piracy", directed against a ship or against persons or property on board such ship, within a State's jurisdiction over such offences.⁹¹

For statistical purposes, the IMB defines piracy and armed robbery as:

*[a]n act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in the furtherance of that act. This definition thus covers actual or attempted attacks whether the ship is berthed, at anchor or at sea. Petty thefts are excluded, unless the thieves are armed.*⁹²

⁹⁰ UNCLOS, *supra* note 64, at art. 101-103.

⁹¹ See *Reports on Acts of Piracy and Armed Robbery Against Ships*, THIRD QUARTERLY REPORT (Int'l Mar. Org., London) Dec. 7, 2007, at 1, http://www.imo.org/includes/blastDataOnly.asp/data_id=20879/110.pdf.

⁹² *Piracy and Armed Robbery Against Ships*, ANNUAL REPORT (ICC Int'l Mar. Bureau, London) Jan. 2011, at 1, [http://www.simsi.com/Downloads/Piracy/IMB PiracyReport2010.pdf](http://www.simsi.com/Downloads/Piracy/IMB%20PiracyReport2010.pdf). For a superb compilation of law and policy on piracy and armed robbery at sea, see *Information Resources on Piracy and Armed Robbery at Sea*, Information sheet No. 28, INT'L MAR. ORG. (May 12, 2008), [http://www.imo.org/KnowledgeCentre/InformationResourcesOnCurrentTopics/InformationResourcesOnCurrentTopicsArchives/Documents/PIRACY%20AND%20ARMED%20ROBBERY%20AT%20SEA%20\(13%20December%202007\).pdf](http://www.imo.org/KnowledgeCentre/InformationResourcesOnCurrentTopics/InformationResourcesOnCurrentTopicsArchives/Documents/PIRACY%20AND%20ARMED%20ROBBERY%20AT%20SEA%20(13%20December%202007).pdf).

Any state may invoke extraordinary jurisdiction to arrest or detain persons or vessels on the high seas involved in piracy.⁹³ Violence or other criminal acts committed for political ends (i.e. terrorism) under UNCLOS is not piracy.⁹⁴ Also un-encompassed by UNCLOS are planned crimes committed by stowaways, even on the high seas, and “outside of mutiny any unlawful acts of violence by a government vessel against another craft are a matter of State responsibility, not the law of piracy.”⁹⁵ Debate continues as to whether UNCLOS addresses what amounts to a large amount of all maritime attacks against ships and crew; that is, those vessels attacked or stolen when moored in ports, harbors, or other territorial waters.⁹⁶ Continued discussion also covers whether the definitions of piracy adequately encompass the needs of the modern era and exactly which acts are considered to be illegal. Acts falling outside of UNCLOS’s narrow definition are usually referred to as “sea robbery,” “piratical acts,” or occasionally as “modern piracy.”⁹⁷

⁹³ See, e.g., Kontorovich, *supra* note 26.

⁹⁴ Letter from Int’l Mar. Org., to All IMO Member States, United Nations and specialized agencies, Intergovernmental orgs., Non-governmental org. in consultative status, and Liberation movements, 3 (May 17, 2011), http://www.un.org/depts/los/piracy/circular_letter_3180.pdf (“Pursuant to article 101 of UNCLOS, an act of piracy requires that it be committed for private ends, such as extracting a ransom. Acts that are politically motivated, i.e. done with the objective of intimidating a population or of compelling a Government or an international organization to do, or to abstain from doing any act, will not be acts of piracy.”).

⁹⁵ *Africa Programme and International Law Conference Report – Piracy and Legal Issues: Reconciling Public and Private Interests*, CHATHAM HOUSE CONFERENCE REPORT, 28 (OCT. 1, 2009), http://www.chathamhouse.org/sites/default/files/public/Research/Africa/011009piracy_law.pdf.

⁹⁶ See Tamara R. Shie, *Ports in a Storm? The Nexus Between Counterterrorism, Counterproliferation, and Maritime Security in Southeast Asia*, PACIFIC FORUM CSIS, Jul. 2004, at 17, http://csis.org/files/media/csis/pubs/issuesinsights_v04n04.pdf. Shie notes that the debate concerns whether “attacks are those which only occur on the high seas, as in the traditional definition imposed by UNCLOS (though in 2001 the IMO expanded the definition to include attacks in territorial waters), or if attacks to vessels in port are also included, as they are in the definition employed by the International Maritime Bureau.”

⁹⁷ See generally Silvia C. Galleti, *Old and New Threats: Piracy and Maritime Terrorism*, THE SOUTH CHINA SEA, (2006).

Within the meaning and effect of UNCLOS international piracy, or *piracy jure gentium*,⁹⁸ remains *sui generis*, or of a class of its own, because of the truly unique jurisdictional complexities associated with international maritime crime. Courts often have difficulty determining whether the criminal law in question applies to the place where the alleged offense occurred and whether the court in question has jurisdiction to try the case.

Following the 1985 terror-hijacking of the Italian cruise ship *Achille Lauro*, and recognizing the severe shortcomings within UNCLOS,⁹⁹ the U.S. was instrumental in advancing and promulgating the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA) under the auspices of the United Nations IMB.¹⁰⁰ The SUA, which formally entered into effect in 1998, partially fills a jurisdictional gap in UNCLOS. Article 3(1) invokes a universal obligation of states to either punish or to extradite any person that commits an offense (yet not using the words “piracy”) if that person unlawfully and intentionally:

- (a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation;
or

⁹⁸ See GERHARD VON GLAHN, LAW AMONG NATIONS 258 (7th ed. 1996) (*piracy jure gentium* means “piracy under international law.”).

⁹⁹ *Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation (SUA Convention)*, CENTER FOR NONPROLIFERATION STUDIES 1, (May 15, 2010) <http://cns.miis.edu/inventory/pdfs/maritime.pdf>. The IMO’s official commentary noted that “[c]oncern about unlawful acts that threaten the safety of ships and the security of their passengers and crews grew during the 1980s motivated states to negotiate and subsequently adopt this convention . . . [After] the 1985 hijacking of the *Achille Lauro*, the U.N. General Assembly adopted Resolution 40/61 in 1985, urging States to cooperate in contributing to the elimination of causes underlying terrorism and invited the IMO to study the problem of terrorism aboard or against ships with a view to making recommendations on appropriate measures.”

¹⁰⁰ *SUA Treaties*, U.N. INT’L MAR. ORG., <http://www.imo.org/About/Conventions/ListOfConventions/Pages/SUA-Treaties.aspx> (last visited Mar. 2, 2012) (The official commentary by the IMO notes that “[i]n November 1985 the problem was considered by IMO’s 14th Assembly and a proposal by the United States that measures to prevent such unlawful acts should be developed by IMO was supported.”).

- (b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or
- (c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or
- (d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or
- (e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or
- (f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or
- (g) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).¹⁰¹

Unlike UNCLOS, SUA encompasses criminal actions committed in ports, coastal zones, or territorial waters.¹⁰² SUA makes no distinction between commercial or political motives.¹⁰³ Although the SUA definition of piracy is a substantial improvement over that found in UNCLOS, critics note that it does not encompass extortion or conspiracies by port officials, even if part of a piratical enter-

¹⁰¹ The SUA also covers inchoate (incomplete) acts, including attempts, abetting, acting as an accomplice, and threatening with or without a condition. Convention for the Suppression of Unlawful [sic] Acts Against the Safety of Maritime Navigation art.3, Mar. 10, 1988, 1678 U.N.T.S. 201.

¹⁰² *Piracy and Armed Robbery Against Ships*, ANNUAL REPORT (ICC Int'l Mar. Bureau, London) Jan. 2011, at 1, available at <http://www.simsi.com/Downloads/Piracy/IMBPiracyReport2010.pdf>

¹⁰³ See Dana Dillon, *Maritime Piracy: Defining the Problem*, 25 SAIS REV. 155, 156-57 (2005).

prise.¹⁰⁴ SUA also suffers from jurisdictional limitations. Once a lawful boarding has taken place (with the permission of the flag state), Article 6 of the SUA does not provide for any independent or prescriptive jurisdiction.¹⁰⁵ SUA likewise denies the capturing state the right to prosecute offenders without permission of the flag state.¹⁰⁶

However, the 2005 Protocols to SUA did include, by reference to other treaties, as unlawful acts: 1) actions aimed to intimidate a population, government or international agency to take action or abstain from taking action; 2) actions against or on ships by utilizing or discharging biological or chemical weapons (BCN) or weapons of mass destruction (WMD) or transporting the same; 3) using or discharging oil, LNG, or other hazardous substances in such quantity to cause injury or death; 4) using a ship as a weapon; and/or 5) transporting or utilizing software or technology that contributes to the design, manufacturer or delivery of a BCN weapon.¹⁰⁷ However, there is significant confusion over Article 3 of the 2005 Protocol with regard to what constitutes persons “acting unlawfully and intentionally” with respect to “seizure of ships by force[,] acts of violence against persons on board ships[,] and the placing of devices on board a ship which are likely to destroy or damage it.”¹⁰⁸

Does this Protocol refer to unlawful acts under international or national law, or both? Also, like SUA, the 2005 Protocols only bind contracting states that are a party to it. Thus far, the U.S. and 157 other nations are contracting states with respect to the 1988

¹⁰⁴ *Africa Programme*, *supra* note 95.

¹⁰⁵ See Summary of Discussion, International Law Discussion Group at Chatham House, *Ship-Boarding: An Effective Measure Against Terrorism and WMD Proliferation?* 3 (Nov. 24, 2005), <http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/ilp241105.doc> [hereinafter Chatham House].

¹⁰⁶ *Id.* at 2.

¹⁰⁷ Protocol of 2005 To the Convention For the Suppression of Unlawful Acts Against the Safety of Maritime Navigation art 3bis, Nov. 1, 2005, *available at* https://www.unodc.org/tldb/pdf/Protocol_2005_Convention_Maritime_navigation.pdf.

¹⁰⁸ *SUA Treaties*, *supra* note 100 (“The 2005 Protocol to the SUA Convention also adds a new Article 3bis which states that a person commits an offence within the meaning of the Convention if that person unlawfully and intentionally” committed certain enumerated acts relating to “explosive, radioactive material or BCN (biological, chemical, nuclear) weapons.”).

Convention.¹⁰⁹ The U.S and 145 other nations have ratified the 1988 Protocol.¹¹⁰ Only seventeen nations, however, have ratified the 2005 Protocols.¹¹¹ Most distressing, some of the maritime states most affected by, or involved with, piracy are non-signatories to SUA, its protocols or none of the related instruments at the time of this writing.¹¹²

Furthermore, jurisdictional gaps in UNCLOS or SUA could be filled by invocation of Article 7 of the Rome Statute rendering jurisdiction to the International Criminal Court (ICC) to prosecute persons who engage in terroristic attacks at sea.¹¹³ Unfortunately, in addition to the delay and controversy apparently intrinsic to invocation of ICC jurisdiction, none of the littoral states, those closest to the seas and most affected by—or associated with—piratical activity, are contracting states to the Rome Statute.¹¹⁴ Even if these

¹⁰⁹ *Summary of Status of Conventions*, INT'L MAR. ORG., LONDON (Jan. 31, 2012), <http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Summary%20of%20Status.xls>.

¹¹⁰ *Id.*

¹¹¹ *Id.* On Sept. 25, 2008 the U.S. Senate resolved, with 2/3 of the Senators present concurring therein, to advise and consented to the ratification of the 2005 SUA Protocol (in a reservation, it declared “that it does not consider itself bound by Article 16(2) of the Convention with respect to disputes concerning the interpretation or application of the 2005 SUA Protocol.” A lengthy list of “understandings” also accompanied the Senate ratification of the 2005 SUA Protocol.). See S. Exec. Rep. 110-25, 110th Cong., 1st Sess. (2008), https://docs.google.com/viewer?a=v&q=cache:XR7D6pArasoJ:www.foreign.senate.gov/download/?id%3D906EAF6F-7CDD-4124-99E6-FBB6FD3AE2D1+&hl=en&gl=us&pid=bl&srcid=ADGEESjnjwMm4-8cnHGg9aEd5tz3l70fzZvTq9l1e3eG109mWAYJBca923Z0o4exRfHSEgox8MC8VFX8xoGJrbVHKj_QFsKWKi8D3qhKxK5pKyYySGM97onlbuWc39POzdMRh8Hk7F&sig=AHIEtbR1ZmtNaMjmiEMhAbbPGudAg-WZ3Q&pli=1

¹¹² U.N. OFFICE ON DRUGS AND CRIME, *Short Ratification Status* (Sept. 15, 2011), https://www.unodc.org/tldb/pdf/ratification_status_no_access.rtf. Bangladesh, China, India, and the Philippines have ratified the SUA 1988 and SUA 1988 Protocol, but not the SUA 2005 Protocols. Sri Lanka and Nigeria have ratified only the SUA 1988; Indonesia, Malaysia, Somalia and Thailand have ratified none of the SUA treaties or protocols.

¹¹³ Rome Statute of the International Criminal Court art. 7, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90, 93-94 [hereinafter Rome Statute].

¹¹⁴ Considering the same states as identified in Endnote 112, Nigeria has, in fairness, both signed and ratified the Rome Statute. Bangladesh, the Philippines, and Thailand have signed but not ratified the Rome Statute. China, India, Indonesia, Malaysia, Sri

states were to ratify the Rome Statute, the U.S. remains a significant (and disappointing) non-party state to the Rome Statute.¹¹⁵

This is because the Rome Statute remains far from ideal. Jurisdiction under the ICC is entirely discretionary and sanctions are not available against states that ignore treaty obligations. Also, Rome does not create universal jurisdiction under customary international law norms (*jus cogens*).¹¹⁶ Jurisdiction is limited to instances in which perpetrators or victims are nationals of a state party to the Statute.¹¹⁷ Even then, jurisdiction attaches only if the criminal act in question takes place in a state party's territorial waters or aboard a vessel flagged by that state.¹¹⁸ This leaves out the ability to prosecute arrested pirates whose crimes occurred in international waters and whose nationality is other than those involved because of the lack of international criminal jurisdiction based on the national laws of that maritime territory. Other problems arise when arrested pirates are extradited into third countries to be prosecuted. This is because the establishment of universal jurisdiction in cases of extradition would

Lanka and Somalia have neither signed or ratified the Rome Statute. *See* U.N. Secretary-General, Multilateral Treaties Deposited with the Secretary General, (April 2011), http://treaties.un.org/doc/source/events/2011/Treaties/list_english.pdf.

¹¹⁵ The U.S. gave notice of same to the Secretary General on May 6, 2002, stating: "This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on Dec. 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty." *See United States (U.S.): Letter to the Secretary-General of the United Nations Regarding the Rome Statute of the International Criminal Court (April 27, 2002)*, in *International Law in Brief*, AM. SOC'Y OF INT'L L. (May 9, 2002), <http://www.asil.org/ilib0506.cfm#r3>.

¹¹⁶ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW: SOURCES OF INT'L LAW §102 (1987).

¹¹⁷ *See* Rome Statute, *supra* note 113, at art. 12. *But see The Tribunal*, INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA, <http://www.itlos.org/index.php?id=15> (last visited Mar. 3, 2012) (The International Tribunal for the Law of the Sea (The Tribunal) is an independent judicial body established by the United Nations Convention on the Law of the Sea (UNCLOS) and the Tribunal has jurisdiction over any dispute concerning the interpretation or application of the Convention, and over all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal).

¹¹⁸ Rome Statute, *supra* note 113, at art. 12.

be against the terms of the UNCLOS treaty, which states that punishment must be carried out by “the courts of the state which carried out the seizure. . . .”¹¹⁹

As a result of the vast area that is plagued by piracy, international maritime laws struggle to amend these issues because of uncertainties over jurisdictions and legal definitions, among many other factors. By default, or out of a lack of extant, let alone effective forum for international prosecution of piracy, nation-states are often left to trying insurgents, rogue military units, organized crime syndicates, terrorist and terrorist-sponsored groups (a/k/a “pirates”) domestically.¹²⁰

During the first half of 2011, piracy attacks in the Indian Ocean increased by 36%,¹²¹ yet as immigration law expert Jason Dzubow notes that prosecution of captured pirates remains relatively rare: “in fact, four-fifths of captured pirates are released without further ado.”¹²²

The One Earth Future Working Paper estimated that the cost of piracy prosecutions in 2010 alone was around \$31 million, obtained by estimating “the cost of piracy prosecutions each year by multiplying the average cost of criminal prosecutions in ‘regional’ nations (i.e. Kenya, the Seychelles, and Yemen), North America, and Europe, by the number of prosecutions occurring in each of those respective regions[.]”¹²³ Surveying the nations involved in Somali pirate prosecutions over the past two years, Jurist Legal News and Research notes that Germany, Kenya, the Seychelles, South Korea,

¹¹⁹ UNCLOS, *supra* note 64, at art. 105.

¹²⁰ This article does not discuss aircraft piracy (a/k/a “skyjacking”) committed by various state and non-state actors, nor does it address cyber-piracy, such as that experienced by the U.S. during the late 1980s onward from actors within China. Professor Peter K. Yu has written about U.S.-China intellectual property disputes and the eventual, yet partial, resolution via intellectual property agreements in 1992, 1995, and 1996. Despite these agreements, Yu concluded in 2000 that intellectual property piracy remains rampant in China. See Peter K. Yu, *From Pirates To Partners: Protecting Intellectual Property In China In The Twenty-First Century*, 50 AM. U. L. REV. 131, 133 (2000).

¹²¹ Jason Dzubow, *Pirates Taken to USA for Prosecution Might Seek Asylum*, MARITIME SECURITY.ASIA (July 19, 2011), <http://maritimesecurity.asia/free-2/piracy-update/pirates-taken-to-the-usa-for-prosecution-might-seek-asylum/>.

¹²² *Id.*

¹²³ Bowden et al., *supra* note 20, at 19.

Somaliland, Spain, Malaysia, Mauritius, the Netherlands, and, Yemen have all attempted to prosecute suspected pirates, with varying degrees of success in conviction.¹²⁴ Yet the *de-facto* Somali government reaction (given the lack of a *de jure* government) has been critical of the U.S. in particular for exercising jurisdiction over suspected Somali pirates and has called for piracy cases to be handled by an international tribunal.¹²⁵

At the time of this article's writing, four piracy prosecutions in the U.S. had become the first successful prosecutions of piracy in a U.S. court since the 1820s. On November 24, 2010 five Somali men were convicted of attacking the U.S. Navy ship *USS Nichols* off the eastern coast of Africa.¹²⁶ In January 2011, the attorneys for the convicted pirates made a request for the sentencing judge to reconsider their conviction on charges of piracy, attacking to plunder a maritime vessel and assault with a dangerous weapon.¹²⁷ On November 29, 2010 a judge for the U.S. District Court for the Eastern District of Virginia sentenced Somali citizen Jama Idle Ibrahim to 30 years pursuant to his guilty plea to conspiracy to commit piracy under the law of nations and conspiracy to use a firearm during and in relation to a violent act of piracy in the Gulf of Aden against a

¹²⁴ Dan Taglioli, *Somali Man Indicted In U.S. As Alleged Pirate Leader*, JURIST (April 14, 2011), http://jurist.org/paperchase/2011/04/index_2011_04_14.php. For a survey of these prosecutions, see, e.g., *pirates*, search the JURIST archive, http://jurist.org/jurist_search.php?q=pirates (search "pirates" within the query box in the upper-right corner). On Feb. 1, 2012, a group of suspected pirates caught by a Royal Navy operation in the Indian Ocean were brought to justice in the Seychelles. *RFA Fort Victoria disembarks pirates for prosecution in the Seychelles*, MARITIME SECURITY ASIA (Feb. 1, 2012), <http://maritimesecurity.asia/free-2/piracy-2/rfa-fort-victoria-disembarks-pirates-for-prosecution-in-the-seychelles/>. A Royal Fleet Auxiliary (RFA) vessel Fort Victoria – part of NATO's counter-piracy task force Operation OCEAN SHIELD –handed over the suspected pirates to the Seychelles authorities for prosecution.

¹²⁵ *Somalia Criticizes US for putting pirate on trial*, BBC NEWS, May 19, 2010, <http://www.bbc.co.uk/news/10126248>.

¹²⁶ *5 Somalis Guilty of Attack on U.S. Ship*, N.Y. TIMES, Nov. 24, 2010, <http://www.nytimes.com/2010/11/25/world/africa/25pirates.html>.

¹²⁷ Steve Szkotak, *Attorneys Want Somalis' Piracy Convictions Tossed*, SEATTLE TIMES, Jan. 1, 2011, http://seattletimes.nwsources.com/html/nationworld/2013821397_apusprosecutingpirates.html.

merchant vessel, the MV/CEC Future, in November 2008.¹²⁸ Abduwali Abdukhadir Muse, a 21 year old Somali, plead guilty in May 2010 to hostage-taking and conspiracy in the hijacking of the *Maersk Alabama* in the Indian Ocean in April 2009; on Wednesday, February 16, 2011, he was sentenced to 33 years, 9 months imprisonment in U.S. Federal District Court in Manhattan, NY.¹²⁹ On May 23, 2011, two Somali men plead guilty to charges of piracy for their role in hijacking a yacht, which resulted in the deaths of four Americans. The guilty pleas by Jilani Abdiali and Burhan Abdirahman Yusuf join those entered by Mohamud Hirs Issa Ali, Mohamud Salad Ali and Ali Abdi Mohamed in the U.S. District Court for the Eastern District of Virginia.¹³⁰

As announced by the U.S. Attorney in the Muse (*Maersk Alabama*) case noted above, the U.S. Department of State's official position on such prosecutions has become that "the United States believes that the first option for prosecution of a piracy incident should be by the affected state(s)—the flag state or the state of nationality of the vessel's owner or crew."¹³¹ This is part of a

¹²⁸ Megan McKee, *Federal Judge Sentences Somali Pirate To 30 Years*, JURIST (November 28, 2010), <http://jurist.org/paperchase/2010/11/federal-judge-sentences-somali-pirate-to-30-years.php>. On the related matter of the guilty plea, see Press Release, FBI Washington Field Office, Somali Pleads Guilty to Conspiracy to Commit Piracy in Takeover of Merchant Ship (Sept. 8, 2010), <http://www.fbi.gov/washingtondc/press-releases/2010/wfo090810.htm>. By way of contrast, A Malaysian court on Feb. 11, 2011 charged seven suspected Somali pirates for firing at Malaysian forces during a Gulf of Aden raid to free a hijacked tanker, under laws that carry the death penalty. *Somalia "Pirates" Charged In Malaysia*, BBC NEWS, Feb. 11, 2011, <http://www.bbc.co.uk/news/world-asia-pacific-12430671>.

¹²⁹ Chad Bray, *Somali Man Sentenced to More Than 33 Years in Hijacking of Ships*, WALL ST. J., Feb. 16, 2011, <http://online.wsj.com/article/SB10001424052748703373404576148393224867726.html>.

¹³⁰ See Press Release, U.S. Attorney's Office Eastern District of Virginia, Two More Somalis Plead Guilty to Charges Relating to Piracy of Quest (May 23, 2011), <http://www.justice.gov/usao/vae/news/2011/05/20110523abdialinr.html>. The U.S. Attorney's Office reports that sentencing is scheduled for August 22, 2011 for Yusuf and September 6, 2011 for Abdiali. Both are expected to receive sentences of life in prison. Under the plea agreement, however, they could serve less time and eventually be deported to Somalia. There were 14 suspects indicted in connection with the attack, and others are expected to plead guilty in the near future. *Id.*

¹³¹ *United States Actions To Counter Piracy Off the Horn of Africa*, U.S. DEP'T OF STATE (Sept. 1, 2009), <http://www.state.gov/t/pm/rls/fs/128540.htm>.

coordinated strategy by which the U.S. “continues to urge states to ensure that they have the proper domestic legal framework to prosecute suspected pirates in their national courts.”¹³² For example, in the instance of Kenya, an affected state which may continue to be unable to prosecute suspected offenders captured by the United States, the United States has a Memorandum of Understanding “to facilitate the transfer of the suspected pirates to Kenya for prosecution in [the Kenyan] courts” and the U.S. States is “exploring similar arrangements with other states to handle cases when affected states are unable to prosecute pirates.”¹³³

The increasing intensity of patrolling pirate infested waters around the globe, including but not limited to Somalia, will likely lead to continued successful capturing of pirates or sea-robbers to be brought to formal trial.¹³⁴ The challenge then arises as to where these pirates should be prosecuted. Alternatives include either domestic prosecution under the laws criminalizing acts of piracy (or other available U.S. criminal statutes) in U.S. Federal District Court (or other competent U.S. court then extant or yet-to-be created), or rendition back to the state of citizenship or regional partner states, or rendition to the ICC. Professor Milena Sterio has noted that rendition of pirates to the ICC would be viewed, at a minimum, as executive recognition of the ICC by the U.S. — a politically undesirable result — in the event it ever transfers captured pirates to so-called regional

¹³² *Id.*

¹³³ *Id.*

¹³⁴ See, e.g., Press Release, U.S. Navy 5th Fleet Public Affairs, USS Ashland Captures Pirates (Apr. 10, 2010), http://www.navy.mil/search/display.asp?story_id=52519. This is in contrast to other acts of piracy which have been brought before U.S. courts. See, e.g., *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008). Born in Houston and a resident of Northern Virginia, Ali was charged with conspiracy to assassinate the president, providing material support to al Qaeda, conspiracy to commit aircraft piracy, and other associated crimes. The jury trial took place in November 2005. On November 22, 2005, after deliberating for two and a half days, the jury returned a unanimous guilty verdict on all counts. On March 29, 2006, Ali was sentenced to 30 years in prison for his crime. On appeal, the United States Court of Appeals for the Fourth Circuit upheld the conviction but overturned the sentence on the grounds that the prior Court had deviated from federal sentencing guidelines, which call for life in prison. Judge Lee resented Ali to life in prison. *Id.*

partner states, emulating what the U.K. does, for instance, with transfer to Kenya for prosecution.¹³⁵ Under UNCLOS, Sterio notes,

[T]he legality of this type of transfer is dubious, as only the capturing state has jurisdiction over caught pirates, and receiving states, like Kenya, do not. Moreover, domestic statutes implementing UNCLOS do not always allow for universal jurisdiction. The U.S. statute that implemented UNCLOS allows the U.S. to prosecute pirates, although the U.S. is the capturing nation and has jurisdiction to prosecute under UNCLOS, only if pirates somehow acted against American interests.¹³⁶

This dilemma has arisen as a result of provisions stated by the UNCLOS, which has posed enough problems on securing jurisdiction over suspected pirates that the U.N. Security Council attempted to address them through further new provisions in 2009. These provisions adopted resolutions that would confer maritime powers not granted in UNCLOS to member states in order to allow them to conduct antipiracy operations in Somali waters and to facilitate the prosecution of suspected pirates.¹³⁷ Herein the resolutions bypass current UNCLOS provisions because of the higher power conferred upon the United Nations Security Council when it “acts in the interest of international peace and security.”¹³⁸ Although this expands jurisdictional power over pirates and fills some of the gaps left by the SUA, it does not solve all state sovereignty issues, but rather it imposes limited, if any, obligations on states to delegate

¹³⁵ Milena Sterio, *Fighting Piracy in Somalia (and Elsewhere): Why More Is Needed*, BERKELEY ELEC. PRESS 14 (2009), http://works.bepress.com/milena_sterio/4; see also Kontorovich, *supra* note 26.

¹³⁶ *Id.*

¹³⁷ Donald R. Rothwell, *Maritime Piracy and International Law*, CRIMES OF WAR PROJECT, <http://www.crimesofwar.org/commentary/maritime-piracy-and-international-law/> (last visited Mar. 3, 2012).

¹³⁸ Joseph M. Isanga, *Countering Persistent Contemporary Sea Piracy: Expanding Jurisdictional Regimes*, 59 AM. U. L. REV. 1267, 1294 (quoting U.N. Charter art. 2, para. 7).

authority over pirates, and should be further revised to enhance prosecutorial powers.

Towards that end, the U.N. Security Council decided to urgently consider the establishment of specialized Somali courts to try suspected pirates both in Somalia and in the region, including an “extraterritorial Somali specialized anti-piracy court” by adopting resolution 1976 (2011) on April 11, 2011.¹³⁹ Reports indicate that the unrecognized independent region of Somaliland has opened a maximum security prison for pirates in August 2011,¹⁴⁰ yet piracy trials cannot be held in Somalia because the country has lacked a functioning legal system since the ouster of Mohamed Siad Barre in 1991.¹⁴¹ The prison, refurbished by a USD \$1.5 million grant from the UN Office on Drugs and Crime (UNODC),¹⁴² is currently only housing prisoners tried in Somalia,¹⁴³ a currently seeming impossibility. The UNODC has also announced in May 2010 that Seychelles was to create a UN-supported center to accept and try pirates captured by the European Union Naval Force Somalia (EU NAVFOR) off the coast of Somalia and surrounding areas.¹⁴⁴ “The UNODC also indicated that future prisons may be opened in Puntland as well as several more in Somaliland.”¹⁴⁵

¹³⁹ S.C. Res. 1976, ¶ 26, U.N. Doc. S/RES/1976 (Apr. 11, 2011).

¹⁴⁰ Sarah McGregor, *Somaliland Opens Pirate Prison*, SOMALILAND PRESS (Mar. 29, 2011), <http://somalilandpress.com/somaliland-opens-pirate-prison-2-21314>.

¹⁴¹ *Id.*

¹⁴² Press Release, U.N. Office on Drugs and Crime (UNODC), UNODC Open Somaliland’s First Prison in 50 Years to Further Tackle Piracy Scourge, (Mar. 29, 2011) <http://www.unodc.org/unodc/en/press/releases/2011/March/unodc-open-somalilands-first-prison-in-50-years-to-further-tackle-piracy-scurge.html>.

¹⁴³ McGregor, *supra* note 140.

¹⁴⁴ Press Release, U.N. Office on Drugs and Crime (UNODC), Seychelles To Establish Centre For Piracy Trials, (May 11, 2010), <http://www.unodc.org/southerncone/en/frontpage/2010/05/11-ilhas-seychelles-estudam-criar-uma-corte-especifica-para-atos-de-pirataria.html>. Towards that end, the EU NAVFOR has sought out some unique “bona fide occupational qualifications” in its recent advertisement for, amongst other professionals, a “Pirate Cultural Advisor.” See *Somalia: Career Vacancy - Pirate Cultural Advisor*, ALLAFRICA.COM (Aug. 11, 2011), <http://allafrica.com/stories/201108120118.html>.

¹⁴⁵ Julia Zebley, *Somaliland Opens Maximum Security Prison for Pirates*, JURIST (Mar. 30, 2011), <http://jurist.org/paperchase/2011/03/somaliland-opens-maximum-security-prison-for-pirates.php>.

In Sunil Agarwal's estimate, these territorial and extra-territorial tribunals are at best a "practical and concrete, albeit half-step, towards developing the effective prosecution mechanisms to combat Somali piracy."¹⁴⁶ The resolution Agarwal discusses, sponsored by Russia, calls for the creation of piracy courts outside of Somalia and cooperation among countries in combating the piracy problem.¹⁴⁷ Russian Ambassador to the U.N., Vitaly Churkin, stated that the resolution was the "first practical step in the direction of creating an effective judicial mechanism, one capable of a credible, reliable solution to the problem of bringing pirates to justice."¹⁴⁸ Ambassador Churkin further asserted:

The worsening situation with piracy off the coast of Somalia requires the international community to adopt qualitatively new measures to combat it. Today we've taken a big step ahead in fighting piracy. The resolution adopted upon our initiative contains a wide array of qualitatively new measures aimed at establishing the necessary conditions for more effectively counteracting the pirates.¹⁴⁹

So, given the ambiguity and the lack of cohesion of international standards, what is possible through existent, as well as "qualitatively new" measures under domestic (U.S.) criminal law, and the laws of other nations that are capable (and willing) to prosecute pirates? One answer is prosecution under laws sanctioning terrorism. For instance, the U.S. Code contains a definition of terrorism—to include maritime activities—embedded in its requirement that Annual Country reports on Terrorism be submitted

¹⁴⁶ Sunil Kumar Agarwal, *Resolution 1976(2011) on Somali Piracy: Towards Developing Prosecution Mechanisms to Combat Piracy* 3 (Nat'l Mar. Found., Working Paper Series, May 25, 2011), <http://ssrn.com/abstract=1873866>.

¹⁴⁷ Michael Haggerson, *UN Security Council to Consider Special Maritime Piracy Courts*, JURIST (Apr. 11, 2011), http://jurist.org/paperchase/2011/04/index_2011_04_11.php#35350.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

by the Secretary of State to Congress every year. According to Title 22, Chapter 38, Section 2656f(d):

(d) Definitions

As used in this section—

- (1) the term “international terrorism” means terrorism involving citizens or the territory of more than 1 country;
- (2) the term “terrorism” means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents;
- (3) the term “terrorist group” means any group, or which has significant subgroups which practice, international terrorism;
- (4) the terms “territory” and “territory of the country” mean the land, waters, and airspace of the country; and
- (5) the terms “terrorist sanctuary” and “sanctuary” mean an area in the territory of the country —
 - (A) that is used by a terrorist or terrorist organization —
 - (i) to carry out terrorist activities, including training, fundraising, financing, and recruitment; or
 - (ii) as a transit point; and
 - (B) the government of which expressly consents to, or with knowledge, allows, tolerates, or disregards such use of its territory and is not subject to a determination under —
 - (i) section 2405(j)(1)(A) of the Appendix to title 50;
 - (ii) section 2371(a) of this title; or
 - (iii) section 2780(d) of this title.¹⁵⁰

¹⁵⁰ 22 U.S.C. § 2656f(d) (2010).

As for domestic prosecution, Title 18 of the U.S. Code, Chapter 113B, Section 2332b(g)(5) sets forth the “Federal crime of terrorism” as an offense that:

- (A) is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct; and
- (B) is a violation of [any one of several dozen sections of Titles 18, 42, or 49].¹⁵¹

IV. FROM PIRATE TO PROSECUTED CRIMINAL:

POLITICAL CAPITAL AND RESOURCES BROUGHT TO BEAR

Practical challenges attendant to bringing captured pirates to trial prove most daunting. In addition to basic issues of criminal jurisdiction, any criminal prosecution of pirates also involves significant political and resource commitments. These commitments include witness travel costs, visas, evidence preservation, and any attendant diplomatic questions involving rendition or extradition. Costs associated with even a simple criminal prosecution could easily exceed millions of dollars. Obviously because of these limitations, when U.S. or other coalition maritime forces actually intervene to stop observed armed attacks on private vessels, they immediately cease fire and passively standoff once pirate vessels break contact with their intended targets.¹⁵² As recently as 2008, the British Foreign Office advised the Royal Navy to avoid detaining pirates of certain nationalities in view of the possibility that pirates may actually invoke claims for asylum under British law if their country of origin is known to use torture or allow execution as judicial punishment.¹⁵³ Charles Glass wrote of the sentiments of International Maritime Bureau Captain Pottengal Mukundun: “there are hardly any cases

¹⁵¹ 18 U.S.C. § 2332b(g)(5) (2010).

¹⁵² See, e.g., *Coalition Maritime Forces Deter Pirate Attack off Yemen*, NAVY NEWSSTAND (Dec. 15, 2004), <http://www.globalsecurity.org/military/library/news/2004/12/mil-041215-nns03.htm>.

¹⁵³ Marie Woolf, *Pirates can Claim UK Asylum*, THE SUNDAY TIMES, Apr. 13, 2008, at 1, <http://www.thesundaytimes.co.uk/sto/public/sitesearch.do?querystring=Pirates+can+Claim+UK+Asylum§ionId=2&p=sto&bl=on&pf=all>.

where these attackers are arrested and brought to trial. Piracy is a high-profit, low-risk activity.”¹⁵⁴

Illustrative of this high-profit, low-risk paradigm is the 1999 incident involving the Indian Navy's recapture of the merchant vessel *Alondra Rainbow*. Upon re-capture, it was determined that the vessel was owned by a Japanese corporation, flagged in Panama, and crewed largely by Filipinos.¹⁵⁵ While the initial pirate attack and seizure occurred off Indonesia, the ship also traversed the Sri Lankan coastline before being disabled by gunfire in Indian waters. Because of the multiple legal interests, nationalities, and obligations under domestic and international law, the first piracy prosecution in India's history¹⁵⁶ required the cooperation of the IMB, Sri Lanka, Indian Justice and Marine Ministries, the Indian Navy, Indian Coast Guard, the private insurers, and Japanese government. After several years of delay, the pirate gang was finally brought to trial and prosecuted in 2003 under questionable provisions of India's pre-independence Penal Code.¹⁵⁷ Although the pirates were in fact found guilty, despite the use of deadly force, casting adrift of crew, and attempted scuttling, the trial court imposed sentences no greater than seven years imprisonment.¹⁵⁸ Subsequently, despite the best efforts of the Indian prosecutors, the prisoners were freed and deported to Indonesia only two years after dismissal of the case by the Mumbai High Court of Appeals.¹⁵⁹ As a result of this very complex litigation,

¹⁵⁴ Charles Glass, *New Piracy: Charles Glass on the High Seas*, LONDON REV. OF BOOKS, Dec.18, 2003, at 5, <http://www.lrb.co.uk/v25/n24/charles-glass/the-new-piracy>.

¹⁵⁵ See Michael Richardson, *Challenging Marauders' Spread, Navy Recovers A Hijacked Ship: India and China Set Sights On Piracy*, N.Y. TIMES, Nov. 23, 1999, <http://www.nytimes.com/1999/11/23/news/23iht-pirates.2.t.html>.

¹⁵⁶ *14 Indonesians Convicted For Hijacking Japanese Ship*, ASIAN TRIBUNE (Feb. 26, 2003), <http://www.asiantribune.com/news/2003/02/26/14-indonesians-convicted-hijacking-japanese-ship>.

¹⁵⁷ See *id.*

¹⁵⁸ *Id.*

¹⁵⁹ RS Vasan, *Alondra Rainbow Revisited: A Study of Related Issues in the Light of the Recent Judgment of Mumbai High Court*, Paper No. 1379, S. ASIA ANALYSIS GRP. (May 13, 2005), <http://www.southasiananalysis.org/%5Cpapers14%5Cpaper1379.html>. With regards to future Indian prosecutions, the U.S. welcomed India's decision to chair a plenary of the Contact Group on Piracy off the Coast of Somalia in 2012. See India, U.S. ask Pakistan to expedite prosecution of 26/11 conspirators,

and the growing reality of piracy threats to Indian maritime interests, the Indian Ministry of Foreign Affairs continues to work with Parliament at the time of this article's writing to draft a new "bill [that] seeks to define piracy, the people who can be termed as pirates, the courts of law which would be trying these pirates and the quantum of punishment to be given to the apprehended sea brigands."¹⁶⁰ Until laws and courts exist to expedite piracy prosecutions, India's official stance towards piracy prosecutions is "inclined to support the establishment of a special chamber within the national jurisdiction of a State or States in the region, with UN participation [since this] option is considered suitable besides being cost effective, as it would strengthen the existing jurisdiction with the established procedures[.]"¹⁶¹

In an earlier piracy incident, complicated by third-party nation interference bordering on complicity, we can study the 1998 case of the *Petro Ranger*, an oil tanker registered in Singapore that was hijacked off the coast of Malaysia.¹⁶² The pirates re-painted and renamed the ship the *Wilby* and flew Honduran colors.¹⁶³ Following an IMB Piracy Alert, the ship was identified, detained, and escorted to the port of Hankou by the Chinese Coast Guard.¹⁶⁴ Although Chinese authorities did release the ship to its original owners, they retained about half the total fuel on board as "evidence."¹⁶⁵ Also, perhaps to avoid questions about collusion by port authorities, the pirates themselves were arrested, confined for a year but released without prosecution, and returned to Indonesia despite a formal request for extradition by Singapore.¹⁶⁶

NET INDIAN NEWS NETWORK (July 19, 2011), <http://netindian.in/news/2011/07/19/00014320/india-us-ask-pakistan-expedite-prosecution-2611-conspirators>.

¹⁶⁰ *New Law To Deal With Piracy At Advanced Stage*, IBN LIVE (July 29, 2011), <http://ibnlive.in.com/generalnewsfeed/news/new-law-to-deal-with-piracy-at-advanced-stage/769426.html>.

¹⁶¹ *Id.*

¹⁶² Jonathan Howland, *Hazardous Seas*, GLOBALSECURITY.ORG (Apr 1, 2004), <http://www.globalsecurity.org/org/news/2004/040401-hazardous-seas.htm>.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Glass, *supra* note 154, at 4.

Coastal states also understandably resist the deployment of foreign warships in or even near territorial waters. Indonesia in particular has a long history of sensitivity to the transit of foreign military vessels through seas that they consider to be an "imagined bridge" between nations,¹⁶⁷ such as the Malacca strait and other important navigable waters. Littoral states are also quite sensitive to interdictions or inspections by warships of another state, even if to rescue hostages or recover stolen property.¹⁶⁸

Under UNCLOS and long-standing customary international law, the high seas are not subject to the sovereignty of any state. In this respect, all actions on the high seas must be exercised with scrupulous regard to the rights of other states in the exercise of their sovereign vessels and citizens thereon. Except by special convention, or in time of war, interference by a military vessel with a commercial vessel engaged in lawful transit on the high seas is unlawful and violates the sovereignty of the flag state of the vessel in question.¹⁶⁹ Even when pirates are engaged by military or coastal vessels in international waters, under 11(3) of UNCLOS, there is no right of hot pursuit when pirates enter the territorial waters of another state allowing an easy escape.¹⁷⁰ UNCLOS does preserve the right of states to suppress piracy and prosecute piracy in international waters¹⁷¹ but, unlike previous customary law, Article 107 of UNCLOS strictly limits anti-piracy activities to "warships or military aircraft."¹⁷² Conversely, whenever a foreign warship is lawfully within the internal waters of another state (i.e. by invitation or innocent passage), the ship retains sovereign immunity from local jurisdiction within the reserved exclusive jurisdiction of the flag state.¹⁷³

¹⁶⁷ Dedi Supriadi Adhuri, *Does the Sea Divide or Unite Indonesians? Ethnicity and Regionalism from a Maritime Perspective* 4 (Res. Mgmt. in Asia-Pacific Program, Working Paper No. 48, 2003), https://digitalcollections.anu.edu.au/bitstream/1885/40995/3/rmap_wp48.pdf.

¹⁶⁸ *See id.*

¹⁶⁹ *Owners of the Jessie, the Thomas F. Bayard and the Pescawha (Gr. Brit.) v. United States*, 6 R.I.A.A. 57, 58 (Perm. Ct. Arb. 1921).

¹⁷⁰ UNCLOS, *supra* note 64, at art. 111.

¹⁷¹ *Id.* at art. 105.

¹⁷² *Id.* at art. 107.

¹⁷³ *Id.* at art. 32; *see also* GILBERT CHARLES GIDEL, *LE DROIT INTERNATIONAL PUBLIC DE LA MER* 236 (Topos Verlag ed., 1932).

Warships may not be boarded, detained, or searched.¹⁷⁴ The only lawful non-belligerent sanctions available to a coastal state regarding the conduct of a foreign warship are diplomatic protest or expulsion from territorial waters.¹⁷⁵ Although commercial interests (and France) have repeatedly proposed the creation of multinational maritime forces under UN control to deal with pirates, these proposals are usually rejected immediately by both Malaysia and Indonesia.¹⁷⁶ Professor John Mo has identified that a strong complicating factor in this cooperation happens to be the unsettled territorial claims among China, Taiwan, Vietnam, the Philippines, Malaysia, Indonesia, and Brunei, and naval patrols in the South China Sea, involving the Spratly Islands (Nasha Islands), the Pratas archipelago (Dongsha Islands), the Macclesfield Bank (Zhongsha Islands), and Paracel Islands (Xisha Islands).¹⁷⁷ At the same time, Mo claims that the countries of the Association of Southeast Asian Nations (ASEAN) countries and China fear Japan's enforcement activities in deterring piracy as "re-emerging Japanese militarism."¹⁷⁸

V. PRESCRIPTION BEFORE PROSECUTION: PREVENTING FAILING OR FAILED STATES FROM BECOMING FULFILLED PIRATOCRACIES¹⁷⁹

Donna Nincic's research has indicated, "being a failed state (at least as measured by the Failed State Index) is a necessary, though

¹⁷⁴ See UNCLOS, *supra* note 64, at art. 32.

¹⁷⁵ *Id.* at art. 30.

¹⁷⁶ See generally John Mo, *Options to Combat Maritime Piracy in Southeast Asia*, 33 OCEAN DEV. & INT'L L. 343, 350-52 (2002).

¹⁷⁷ *Id.* at 350.

¹⁷⁸ *Id.* at 351. For commentary on the Association of Southeast Asian Nations cooperative efforts, see ASEAN.ORG, <http://www.asean.org/> (last visited Mar. 3, 2012). Five original Member Countries (Indonesia, Malaysia, Philippines, Singapore, and Thailand) formed the ASEAN on Aug. 8, 1967 in Bangkok; the Brunei Darussalam joined on Jan. 8, 1984, Vietnam on July 28, 1995, Lao PDR and Myanmar on July 23, 1997, and Cambodia on April 30 1999. *Id.*

¹⁷⁹ For a discussion of "piratocracy," see, e.g., Edward Countryman, *Stability and Class, Theory and History: The South in the Eighteenth Century*, 17 J. AM. STUD. 243, 243-50 (1983) (reviewing RHYS ISAAC, *THE TRANSFORMATION OF VIRGINIA* (1982); JEROME J. NADELHAFT, *THE DISORDERS OF WAR: THE REVOLUTION IN SOUTH CAROLINA* (1981); and A. ROGER EKIRCH, "POOR CAROLINA": POLITICS AND SOCIETY IN COLONIAL NORTH CAROLINA (1981)).

not sufficient condition for maritime piracy.”¹⁸⁰ Nincic also found precursor conditions to piracy which include presence “in an area where merchant shipping concentrates; either in the vicinity of a major sea-lane of communication, or important hub ports.”¹⁸¹ Finally, she found that maritime piracy is “more likely to occur when the state has lost some control over the legitimate means of violence in society; i.e., where armed militias, para-military gangs and the like are able to operate with near impunity.”¹⁸²

The latter assertion is especially logical, since diminished, pre-occupied, or corrupt naval and coastal forces are incapable of stemming criminal acts at sea. Even the IMB acknowledged that only the U.S. and other Western nations with modern navies seem capable of controlling pirates in hotspots such as Indonesia, Somalia and West Africa.¹⁸³ In a remarkable case of strange bedfellows, in November 2007, the U.S. Navy actually came to the direct assistance of a North Korean cargo vessel *MV Dai Hong Dan*, which had been attacked and subsequently boarded by pirates of Somalia.¹⁸⁴ In another intervention in April 2008, French special-operations forces recaptured the luxury sailing yacht *LePonant* taken in the Red Sea.¹⁸⁵ The hijackers, apparently acting with complete impunity sailed the vessel into the Somali port of Eyl from which they demanded a large ransom to free the crew.¹⁸⁶ In an ensuing rescue following delivery of the ransom by the ships owners, six pirates were captured and taken

¹⁸⁰ Nincic, *supra* note 35, at 30; see also *The Failed States Index 2010*, FOREIGN POLICY (November 7, 2011), http://www.foreignpolicy.com/articles/2010/06/21/2010_failed_states_index_interactive_map_and_rankings (The so-called “Failed States Index,” drawn up by the *Foreign Policy* and *TheFund for Peace*, use “indicators of risk and is based on thousands of articles and reports . . . from electronically available sources.”).

¹⁸¹ Nincic, *supra* note 35, at 30.

¹⁸² *Id.*

¹⁸³ Lauren Ploch et al., *supra* note 71, at 30.

¹⁸⁴ *US ship helps North Korea vessel crew overpower Somali pirates*, AGENCE FRANCE PRESS (Oct. 30, 2007), <http://afp.google.com/article/ALeqM5hQLMlkR4kES5yt9Zfyy7YA8V1B8Q>.

¹⁸⁵ *France: Pirates Captured, Hostages Freed*, CBS NEWS (February 11, 2009), <http://www.cbsnews.com/stories/2008/04/11/world/main4009248.shtml>; Spiegel Staff, *Blackwater vs. Blackbeard Off the Coast of Africa*, SALON (Nov. 25, 2008), http://www.salon.com/2008/11/25/pirates_2/.

¹⁸⁶ *France: Pirates Captured, Hostages Freed*, *supra* note 185.

to France for prosecution.¹⁸⁷ Eight other pirates were pursued and killed on shore by attack helicopters as they attempted to escape.¹⁸⁸

Yet even when authorities in one region increase pressure on maritime criminals, piratical activity simply moves closer to shore, towards areas with less enforcement activity, or increases in violence. For example, when piratical activity decreased in Malaysia and Bangladesh in 2007, attacks off Nigeria and Somalia tripled.¹⁸⁹ In June 2007, the International Maritime Bureau (IMB) requested "urgent help" from Western navies to protect shipping off the Somali coast.¹⁹⁰ After the U.S. called for a "Regional Maritime Security Initiative" in 2004, multilateral maritime security initiatives were introduced in the Malacca Strait between 2004 and 2007.¹⁹¹ Since that time, in general, the number of piracy incidents has been falling in the Malacca Strait since 2005, "largely as a result of a number of countermeasures introduced by the three littoral states of Malaysia, Singapore, and Indonesia."¹⁹²

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ See *Reported Piracy Rise Sharply in 2007*, INT'L MAR. BUREAU (January 8, 2008), <http://www.icc-ccs.org/news/148-reported-piracy-incidents-rise-sharply-in-2007->.

¹⁹⁰ *UN Relief At French Help Against Somali Pirates*, AGENCE FRANCE PRESS (September 26, 2007), <http://afp.google.com/article/ALEqM5g8aw97BGHluPtBQhnq1d3drKCIMQ>.

¹⁹¹ Catherine Zara Raymond, *Piracy And Armed Robbery In The Malacca Strait – A Problem Solved?* 62 NAVAL WAR COLL. REV., 31, 35 (Summer 2009), available at <http://www.usnwc.edu/getattachment/7835607e-388c-4e70-baf1-b00e9fb443f1/Piracy-and-Armed-Robbery-in-the-Malacca-Strait--A->. The IMO has lauded regional anti-piracy operation in the Straits of Malacca and Singapore. *Piracy and armed robbery against ships*, INTERNATIONAL MARITIME ORGANIZATION, <http://www.imo.org/ourwork/security/piracyarmedrobbery/Pages/Default.aspx> (last visited Mar. 3, 2012). The Regional Cooperation Agreement on Combating Piracy and Armed Robbery against ships in Asia (RECAAP), which concluded in November 2004 by 16 countries in Asia, and includes the RECAAP Information Sharing Centre (ISC) for facilitating the sharing of piracy-related information, is a good example of successful regional cooperation which IMO seeks to replicate elsewhere."

¹⁹² Raymond, *supra* note 191, at 32.

Emerging states, not just failed states, lag far behind the West in port security and vessel identification systems.¹⁹³ Illustrative is the recent saga of the *An Yue Jiang*, a Chinese merchant ship allegedly carrying ammunition and small arms destined for landlocked Zimbabwe. Upon discovering the nature of the cargo, a group of southern African nations coordinated efforts to monitor that ship's movements and prevent unloading of the cargo.¹⁹⁴ After air and sea patrols lost track of the vessel, the South African government acknowledged their capacity to track and monitor vessels at sea was essentially "non-existent."¹⁹⁵ The *An Yue Jiang* incident also highlights a failure of compliance by non-Western coastal states with amendments to the 1974 International Convention for the Safety of Life at Sea (SOLAS) relating to implementation of a unified long-range identification and tracking system (LRIT) capable of identifying merchant vessels over 300 tons displacement up to 1500km at sea.¹⁹⁶

Another potential factor in increased predation is the general prohibition on the use of small arms or weapons capable of deadly force on commercial vessels for self-defense. Sea-going vessels virtually never carry arms for self-defense.¹⁹⁷ This situation is primarily attributable to severe penal and customs laws against weapons possession in almost all maritime states. Insurers and ships owners also view the liability risk associated with armed defense as exceeding the risk of loss of the vessel itself. Even were armed force a viable option, increased technologies have resulted in much smaller ships crews often out-numbered by potential borders. Merchant sailors are not trained to use firearms and coordinating a ship's defense with crews speaking three different languages also might

¹⁹³ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-1155T, MARITIME SECURITY: PROGRESS MADE IN IMPLEMENTING MARITIME TRANSPORTATION SECURITY ACT, BUT CONCERNS REMAIN (2003), <http://www.gao.gov/new.items/d031155t.pdf>.

¹⁹⁴ *South Africa Lacks Maritime Security Skills, Systems says Official*, AFRICAN PRESS INT'L (API) (May 18, 2008), <http://africanpress.wordpress.com/2008/05/18/south-africa-lacks-maritime-security-skills-systems-says-official/>.

¹⁹⁵ *Id.*

¹⁹⁶ SOLAS, *supra* note 76.

¹⁹⁷ *Guns on-board: A "Real World" Look At the Issue of Carrying Firearms On Your Vessel*, MARITIME SECURITY, <http://maritimesecurity.com/gunsonboard.htm> (last visited Mar. 3, 2012).

present obstacles to effective self-defense, even were it lawfully authorized. Licensed, armed guards are available in some instances but costs are high and logistics complicated. Furthermore, there may be as much risk from un-vetted local security as from actual pirates.

To prevent attacks or boarding, ships captains rely upon increased speed, maneuvering, water hoses, sound cannons or newer passive systems such as electrified boarding nets, alarm systems, or lubricant foams.¹⁹⁸ Most often, in order to protect the lives and safety of their crews, shipping companies usually request naval forces to stand-off while they negotiate for weeks or even months with pirate hostage-takers. In November 2007, the U.S. Navy actually served as intermediary between a group of particularly violent Somali pirates and owners of the *Ching Fong Hwa 168*, a Taiwanese fishing vessel. "We continue to talk with the pirates regularly, encouraging them to leave ships," noted a Navy spokesperson from 5th Fleet Headquarters in Bahrain.¹⁹⁹

So-called Private Security Companies (PSCs), also known as Private Military Firms (PMFs), usually headquartered in Europe or the U.S. also offer anti-piracy consulting and other services. There are however significant gaps between what PSCs may claim in marketing materials as opposed to the actual end services they are capable of providing. Most legitimate PSCs limit services to deterrence or vigilance training, background checks, hostage negotiations, recovery investigations, or general risk assessment.²⁰⁰ Employment of armed guards on merchant ships, or the use of private armed escort vessels is exceedingly rare. Privately employed and armed security personnel face substantial risks of arrest and detention as mercenaries or even terrorists, especially in Asian waters, and face opposition by the U.N. over concerns of accountability and effi-

¹⁹⁸ See, e.g., gCaptain Staff, *Anti-Piracy Weapons – Top 10 For Future Use In Somalia*, GCAPTAIN (September 29, 2008), <http://gcaptain.com/anti-pirate-weapons-piracy-somalia?2873>.

¹⁹⁹ *Survivors of Somali Pirate Attack Tell of Months Of Horror At Sea*, BOSTON HERALD, November 15, 2007, <http://www.bostonherald.com/news/regional/view.bg?articleid=1044962&format=text>.

²⁰⁰ Carlyn Liss, *Private Security Companies in the Fight Against Piracy in Asia* 1-3 (Asia Research Ctr., Working Paper No. 120, June 2005), <http://www.humansecuritygateway.com/showRecord.php?RecordId=12808>.

cacy.²⁰¹ Desperate ships owners have proposed the creation of small multinational military forces under license from the United Nations. Meanwhile, a robust multinational task force for military counter-piracy operations under the auspices of two Combined Task Forces (CTFs), CTF-150 and 151, conduct Maritime Security Operations (MSO) in the Gulf of Aden, Gulf of Oman, the Arabian Sea, Red Sea and the Indian Ocean, with regular rotation of command over these CTFs among partner navies, and augmentation with Special Operations Forces as required.²⁰²

²⁰¹ *Id.* at 6-7. In the Spring of 2011, the northern Somali region of Puntland has suspended a deal with the South African mercenary firm Saracen International “after close consultation with the U.N.,” and the de-facto Somali government canceled a similar contract with Saracen in January. See *Somalia: Puntland Drops Deal With Mercenary Firm*, N.Y. TIMES, March 17, 2011, http://www.nytimes.com/2011/03/18/world/africa/18briefs-ART-Somalia.html?_r=1&ref=privatemilitarycompanies. By way of contrast and at nearly the same time, Bancroft Global Development is an American private security company that the U.S. State Department has indirectly financed to train African troops fighting “a pitched urban battle . . . against the Shabab, the Somali militant group allied with Al Qaeda.” Jeffrey Gettleman, Mark Mazzetti & Eric Schmitt, *U.S. Relies on Contractors in Somali Conflict*, N.Y. TIMES, Aug. 10, 2010, <http://www.nytimes.com/2011/08/11/world/africa/11somalia.html?ref=privatemilitarycompanies>. For an analysis of the roles, relationships, and real problems of Private Military Firm /Private Military Company employment and deployment; see also Kevin Govern & Eric Bales, *Taking Shots at Private Military Firms: International Law Misses Its Mark (Again)*, 32 *FORDHAM INT'L L. J.* 55 (2008).

²⁰² *Combined Task Force (CTF) 150*, COMBINED MARITIME FORCES, <http://www.cusnc.navy.mil/cmf/150/index.html> (last visited Mar. 3, 2012). Countries presently contributing to CTF-150 include Republic of Korea, Canada, Denmark, France, Germany, Pakistan, Thailand, the United Kingdom and the United States. Other nations who have participated include Australia, Italy, Netherlands, New Zealand, Portugal, Singapore, Spain, and Turkey. CTF 151 is a multinational task force established in January 2009 to conduct counter-piracy operations under a mission-based mandate throughout the Combined Maritime Forces (CMF) area of responsibility to actively deter, disrupt and suppress piracy in order to protect global maritime security and secure freedom of navigation for the benefit of all nations. CTF 151 has been commanded by the U.S. Navy, the Korean Navy and the Turkish Navy. See *Combined Task Force (CTF) 151*, COMBINED MARITIME FORCES, <http://www.cusnc.navy.mil/cmf/151/index.html> (last visited Mar. 3, 2012). For one of the most successful uses of Special Operations Forces in counter-terrorism/counterpiracy operations, contemporaneous with the writing of this article, see e.g. Ariel Zirulnick, *SEAL Team 6: Somalia rescue illustrates new US military strategy*, CHRISTIAN SCIENCE MONITOR (Jan. 26, 2012), <http://www.csmonitor.com>.

VI. POTENTIAL WAYS AHEAD IN PREVENTING AND CHALLENGING PIRATICAL THREATS

In view of the complex nature of the maritime piracy, as well as its demonstrated threat to national, regional, and international security, effective confrontation requires global engagement; a willingness to reach consensus-based integrated deterrence strategies, and an active prosecution regime. Amendments to SUA should focus on more robust inspections of ships and crews, the recognition of a limited right of "hot pursuit," and broadened definitions of both piracy and maritime terrorism.²⁰³ Although recently the SUA amended the definition of piracy, it did not extend the scope of international jurisdiction. Accordingly, the United States has repeatedly sought to amend SUA to allow warships automatic permission to board foreign flagged vessels where the flag state fails to respond to the requesting state's request within a certain number of hours.²⁰⁴ An international ship's registration process must be implemented in order to eliminate non-transparent convenience flagging. Biometric credentials and passports could address the current blight of fraudulent documentation. A United Nations 'Maritime Ombudsman' agency under IMO control or the United Nations International Labor Office (ILO) could intervene when requested to address concerns about detained crews or the lack of due-process or transparency for those charged with maritime criminal offenses.

Towards these important ends, the United States must move forward and accept its responsibilities as (although not aspiring to be) the world's only remaining super-power and leading maritime state. This includes, *inter alia*, the ratification of UNCLOS and, with reservations if necessary, the Rome Statute.²⁰⁵ UNCLOS and Rome Statute ratification will also facilitate a leadership role for the United States in negotiating multilateral instruments and more effective

com/World/terrorism-security/2012/0126/SEAL-Team-6-Somalia-rescue-illustrates-new-US-military-strategy.

²⁰³ GRAHAM GERARD ONG-WEBB, "SHIPS CAN BE DANGEROUS TOO": COUPLING PIRACY AND MARITIME TERRORISM IN SOUTHEAST ASIA'S MARITIME SECURITY FRAMEWORK (2004), <http://www.iseas.edu.sg/ipsi12004.pdf>.

²⁰⁴ See Chatham House, *supra* note 105, at 1-2.

²⁰⁵ See generally, Rome Statute, *supra* note 113.

international regimes that can address maritime terrorism, in addition to the U.S.'s own efforts to apprehend pirates and prosecute them under domestic U.S. laws. In the forefront there must be clear and consistent domestic criminalization and extradition agreements in accordance with the 2005 Protocols and SUA Convention. Taking the diplomatic lead in this area would also facilitate the formation of an effective multinational U.N. maritime force capable of clearing sea-lanes of pirates, sea robbers, and terrorists. The United States' vast intelligence capabilities and unique technologies, such as unmanned reconnaissance aircraft (armed or un-armed), could provide much needed leverage for a multinational force and greatly reducing associated costs, especially in Africa where technical resources (and political will) to effectuate needed changes are limited.

As noted, prosecution of extra-territorial piratical acts against U.S.-flagged ships or involving U.S. citizens is possible under various U.S. federal piracy or expansive anti-terrorism legislation.²⁰⁶ Also, there are successful models of inter-agency and international maritime cooperation. Specifically, Joint Interagency Task Forces (JIATFs) involved in counter-drug interdiction operations have worked directly with Central and South American states in the Gulf of Mexico, South Atlantic, and Pacific since 1989.²⁰⁷ Based upon these

²⁰⁶ U.S. Const., art. I, § 8; 18 U.S.C. § 7(1) (2010) (Special Maritime and Territorial Jurisdiction of the United States); 18 U.S.C. § 111 (2010) (Assault on Federal Officials); 18 U.S.C. § 113 (2010) (Assault on the high seas); 18 U.S.C. § 371 (2010) (Conspiracy); 18 U.S.C. § 844(i) (2010) (Use of explosive against property used in foreign commerce of the United States or against any property used in an activity affecting foreign commerce of the United States); 18 U.S.C. § 1651 (2010) (Piracy on the high seas); 18 U.S.C. § 1659 (plundering a ship); 18 U.S.C. § 2111 (2010) (Robbery on high seas); 18 U.S.C. § 2280(a)(1)(A),(B), and/or (H) (2010) (Maritime violence/hijacking of a ship); 18 U.S.C. § 2232 (2010) (Assaults on U.S. nationals overseas); 18 U.S.C. § 2232a (2010) (Use of WMD against U.S. nationals outside of the U.S.).

²⁰⁷ See, e.g., Evan Munsing & Christopher J. Lamb, *Joint Interagency Task Force—South: The Best Known, Least Understood Interagency Success*, INST. FOR NAT'L STRATEGIC STUDIES (June 2011), http://www.ndu.edu/inss/docuploaded/Strat%20Perspectives%205%20_%20Lamb-Munsing.pdf ("Joint Interagency Task Force—South (JIATF—South) is well known within the U.S. Government as the "gold standard" for interagency cooperation and intelligence fusion, despite its preference for keeping a low profile and giving other agencies the credit for its successes. It is often cited as a model for whole-of-government problem-solving in the literature on

success models, similar counter-piracy arrangements with partners in Asia and Africa could yield immediate and positive results, especially if criminal jurisdiction issues can also be resolved.

Perhaps of equal importance, dealing with the piracy problem in turn lessens the opportunities for pirates and terror groups to leverage maritime crime and violence towards political ends, especially with regards to the hijacking of weapons and items which may be employed as weapons of mass destruction (WMD). Any progress in this area also reduces the possibility for regional and worldwide devastation. A 2006 RAND Center for Terrorism Risk Management Policy report notes a so-called “dirty-bomb” explosion from within an uninspected cargo container presents “the greatest combination of likelihood and expected economic harm.”²⁰⁸ Ships filled with explosives could also destroy densely populated urban areas, critical infrastructures, or be scuttled in maritime choke points such as the Malacca or Hormuz straits. Additionally, in regards to WMD control, failed or weak states will face increasing economic and diplomatic pressure to deal with their own criminal elements and general lack of maritime transparency.

In May of 2003, the United States, along with ten coalition partners, founded the Proliferation Security Initiative (PSI).²⁰⁹ That number has now grown to eighteen with sixty others agreeing to cooperate in interdiction strategies.²¹⁰ The PSI has no unique legal authority; its interdiction principles state that all activities are to be “consistent with national legal authorities and relevant international

interagency collaboration, and other national security organizations have tried to copy its approach and successes.”).

²⁰⁸ Michael D. Greenberg, Peter Chalk, Henry H. Willis, Ivan Khilko & David S. Ortiz, *Maritime Terrorism: Risk and Liability*, RAND CENTER FOR TERRORISM RISK MANAGEMENT 19 (2006), http://rand.org/pubs/monographs/2006/RAND_MG520.sum.pdf.

²⁰⁹ *Proliferation Security Initiative: Statement of Interdiction Principles*, U.S. DEP’T OF STATE (Sept. 4, 2003), <http://www.state.gov/t/isn/c27726.htm> [hereinafter PSI Statement].

²¹⁰ *Id.* Those other original member states include Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, and the United Kingdom. *See* Shie, *supra* note 96, at 23 (noting the addition of Canada, Singapore, Norway, Denmark, and Turkey in Dec. 2003, and the Czech Republic and Russia in 2004).

law and frameworks."²¹¹ The PSI seeks to "involve in some capacity all states that have a stake in nonproliferation and the ability and willingness to take steps to stop the flow of such items at sea, in the air, or on land."²¹² The PSI also "seeks cooperation from any state whose vessels, flags, ports, territorial waters, airspace, or land might be used for proliferation purposes by states and non-state actors of proliferation concern."²¹³

The PSI's principal goals are:

1. Undertake effective measures, either alone or in concert with other states, for interdicting the transfer or transport of WMD, their delivery systems, and related materials to and from states and non-state actors of proliferation concern[;] . . .
2. Adopt streamlined procedures for rapid exchange of relevant information concerning suspected proliferation activity, protecting the confidential character of classified information provided by other states as part of this initiative, dedicate appropriate resources and efforts to interdiction operations and capabilities, and maximize coordination among participants in interdiction efforts[;]
3. Review and work to strengthen their relevant national legal authorities where necessary to accomplish these objectives, and work to strengthen when necessary relevant international laws and frameworks in appropriate ways to support these commitments[;]
4. Take specific actions in support of interdiction efforts regarding cargoes of WMD, their delivery systems, or related materials, to the extent their national legal authorities permit and consistent with their obligations under international law and frameworks[.]²¹⁴

²¹¹ Eben Kaplan, *The Proliferation Security Initiative*, COUNCIL ON FOREIGN RELATIONS (Oct. 19, 2006), <http://www.cfr.org/publication/11057/>.

²¹² PSI Statement, *supra* note 209.

²¹³ PSI Statement, *supra* note 209.

²¹⁴ *Id.*

Successful PSI cooperation has included not only plenary sessions and maritime training exercises,²¹⁵ but also at least one mission conducted by PSI nations in October 2003.²¹⁶ Eben Kaplan of the Council on Foreign Relations credited the PSI (along with other groups investigating proliferation) for intercepting the German-owned *BBC China*, because it diverted the ship to the port of Taranto, Italy from its voyage from Dubai to Libya.²¹⁷ The *BBC China* was found to be carrying nuclear centrifuge parts for Libya's nascent nuclear program.²¹⁸ Kaplan noted that "[t]he seizure helped unravel the Khan network and was a major factor in negotiating the forfeiture of Libya's WMD programs."²¹⁹

Robert G. Joseph, U.S. Under Secretary of State for Arms Control and International Security, exhorted the assembled PSI nations at a June 2006 PSI meeting to:

First: Think innovatively. Undertake a review of your laws and how they can be strengthened to deny the proliferation of WMD and missile-related shipments and services that support proliferation from or through your states;

Second: Enforce aggressively. Develop a regularized interagency mechanism in your government to review enforcement data and share information on possible interdictions of shipments, personnel, funds, and other services that aid in proliferation; and

²¹⁵ Shie, *supra* note 96, at 17.

²¹⁶ Kaplan, *supra* note 211.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.* (Note that the "Khan Network" is not to be confused with the "Aga Khan Development Network" (AKDN) that was and is a group of development agencies with mandates ranging from health and education to architecture, culture, and other endeavors. This quote refers to Abdul Qadeer Khan, the "father" of Pakistan's nuclear weapons and deterrence program, who then established an administrative proliferation network weapons allegedly to North Korea, Iran, Iraq and Libya.).

Third: Engage regularly. Commit to active outreach and to host and participate in PSI exercises in your region and beyond.²²⁰

Not by might alone, but also by the “power of the purse,” Joseph described how PSI members and all those nations pursuing counter proliferation might develop “tools to interdict payments between proliferators and their suppliers.”²²¹ For instance, U.S. Executive Order 13382²²² aims to “freez[e] the assets of proliferators of weapons of mass destruction and their supporters, and isolat[e] them financially[.]” so that “[d]esignations under E.O. 13382 prohibit all transactions between the designees and any U.S. person, and freeze any assets the designees may have under U.S. jurisdiction.”²²³

VII. CONCLUSION

As piracy has evolved, modern threats have required modern approaches. There still exists an abiding calculus of right and might used since time immemorial to combat piracy. Future approaches to preventing and combating piracy will, as always, require the sword—competent military forces to protect both maritime boundaries and prevent smuggling and piracy—in addition to the power of the pen—laws and policies concluded and enforced by competent governments.²²⁴ The maritime community has increased its

²²⁰ Robert G. Joseph, Under Sec’y for Arms Control and Int’l Sec., Dep’t of State, Address at PSI’s Third Anniversary Meeting in Krakow, Poland (June 23, 2006), <http://2001-2009.state.gov/t/us/rm/68269.htm>.

²²¹ *Id.* (Joseph noted how the U.S. had put in place a “new Executive Order, which prohibits U.S. persons from doing business with entities designated because of their proliferation activities.”).

²²² Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters, Exec. Order No. 13,382, 3 C.F.R. 13382 (June 28, 2005).

²²³ *Executive Order 13382*, DEP’T OF STATE, <http://www.state.gov/t/isn/c22080.htm> (last visited Mar. 3, 2012).

²²⁴ *See, e.g., Navy is India's Sword and Shield at Sea*, INDO-ASIAN NEWS SERVICE (Aug. 17, 2004), http://www.ipcs.org/pdf_file/news_archive/aug_04_militarynavy.pdf. The authors also assert that competent air and land forces can and will be required to operate in joint (multiple branches of military service), combined (multinational) and interagency (multiple departments of the executive branch) operations. *Id.*

awareness of this situation, but the international legal community, as a whole, is in disarray with respect to effective and contemporary sets of laws and rules. Maritime incidents have changed the complexion of the situation and gaps in efforts to restrain maritime acts of violence have been exposed.

A solution to the continuing challenge of applying international laws to both international and national problems of piracy and maritime terrorism must also address the disparities in capabilities which remain between the nations with established and competent navies and littoral nations. Significant gaps that remain both in maritime law and international jurisdiction will have to be amended by new legislation, improvement in the provisions of maritime conventions, and in the future, domestication of criminalizing piracy to more effectively combat this age old problem.

Because nations with modern navies have capabilities of controlling piracy, while emerging nations and failed states struggle to contain violence, the U.S. can employ a full range of sophisticated technologies, multidisciplinary capabilities, as well as overwhelming force to “overmatch” piratical threats. The U.S. judicial system has proven experience in effectively and swiftly applying domestic (if not international) laws to try cases of terrorism and piracy in all forms. Wherever possible, looking beyond national shores and maritime zones, the U.S. and other nations afflicted by maritime piracy, criminality, and terrorist activities must also act in bilateral/multilateral capacities to prevent future conflicts and piracy challenges. Towards those ends, there is much merit to extending current international agreements, and implementing effective powers to prosecute maritime criminals under present and future international conventions. This focus on expanding the responsibilities and the rights of maritime nations to freedom of navigation will decrease rogue power and momentum, if not eliminating this international scourge of piracy entirely.

