EXTRACTS FROM: 19 U. MIAMI INT'L & COMP. L. REV. 1

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

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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 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.

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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 and are part of a group of extremists intent on causing an

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economic downturn in the maritime markets?"[1] 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**[2]

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.[3] 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[.]"[4] Nevertheless, other locations such as Benin have been added as emergent "war zones."[5] Elsewhere, particularly in Asia, piratical attacks have tended to result in thefts of ship's cargo with or without fraudulent re-flagging.[6] In such instances, crews are often murdered to deter detection or prosecution.[7] 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.[8] Moreover, paying the

[1] Snodden, *supra* note 12.
[2] Anna Bowden et al., *The Economic Cost of Maritime Piracy* (One Earth Future Foundation Working Paper, Dec. 2010), at 25, http://oceansbeyondpiracy.org/sites/default/files/documents_old/The_Economic_Cost_of_Piracy_Full_Report.pdf.
[3] David Pilla, London Market Committee Sees Threat Of Terror from Piracy in Key Shipping Lane, BEST'S REVIEW, Sept. 2005, at 9, 9.
[4] 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&usg=AFQjCNGdYKqfcrMgdnABaun9hOA8IwnbTA&cad=rja *or see* Newsbank Access World News, Rec. No. 1136F1464F5AD8E0.
[5] Jonathan Saul, *Ship Insurers Add Benin to Risk List After Attacks*, REUTERS, Aug. 8, 2011, http://www.reuters.com/article/2011/08/08/idUSL6E7J51M420110808.
[6] Catherine Zara Raymond, *Maritime Security: The Singaporean Experience* 5-6 (Inst. of Def. & Strategic Stud., Draft Dec. 2005), http://faculty.nps.edu/brutzman/InternationalMaritimeProtectionSymposium2005/speakers/RaymondCatherineZara/Hawaii%20paper-%20final.pdf.
[7] *See id.* at 6.
[8] Eugene Kontorovich, *International Legal Responses to Piracy Off the Coast of Somalia*, ASIL INSIGHTS, Feb. 6, 2009, http://www.asil.org/insights090206.cfm.

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,[9] and at least one law firm informs its clients of daily vessel casualty and piracy risks.[10]

The IMB Piracy Reporting Centre (PRC) was established in October of 1992 following a series of violent pirate attacks, [11] 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.[12] 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.[13]

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[.]"**[14]** 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."[15] Meanwhile, the PRC encouragingly noted that "more Somali hijack attempts are being thwarted by strengthened anti-piracy measures."[16]

[9] *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 Piracy Reporting Centre's (PRC) 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."

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

[11] Cindy Vallar, *The Cost of Modern Piracy, Part 5*, PIRATES AND PRIVATEERS, http://www.cindyvallar.com/modern5.html (last visited Mar. 3, 2011).

[12] *See supra* note 9.

[13] Id.

[14] *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.

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

[16] Id.

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Global Maritime Pirate Attacks[17]

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**

This slight 1.3% decline from 2010 to 2011 contrasts with 2010's 10.9% leap over 2009's attack statistics, which in turne came after an 11.4% increase in piracy and armed robbery committed at sea worldwide between 2007 and 2008.[18] Just in the first two months of 2012 alone, there have been 62 pirate attacks and 6 hijackings worldwide, of which 26 of the attacks and 4 hijackings have been off Somali waters, bringing the total vessels held captive off Somalia at 12, and total hostages as 177!.[19] 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:

Comment [k1]: Please see below figures for piracy and armed robbery incidents as reported to the IMB Piracy Reporting Centre in 2012
Worldwide Incidents: updated on 27 Oct 2012
Total Attacks Worldwide: 252
Total Hijackings Worldwide: 26
Incidents Reported for Somalia:
Total Incidents: 71
Total Hijackings:13
Total Hostages: 212
Current vessels held by Somali pirates:
Vessels: 9 Hostages: 154.
http://www.icc-ccs.org/piracy-reporting-centre/piracynewsafigures

[17] 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* 14 (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).

[18] *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%20piarcy%20and%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%20piarcy%20and%20armed%20robbery%20report/133-Annual2008.pdf (asserting an 8.5% increase in piracy between 2007 and 2008).

[19] Int'l Maritime Org., *Reports on Acts of Piracy and Armed Robbery Against Ships: Issued Monthly 2012* (Feb. 29, 2012), http://www.icc-ccs.org/piracy-reporting-centre/piracynewsafigures. This included the incident, at the time of this article's writing, in which two hostages were killed and 16 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, USAToday, Feb 28., 2012, http://www.usatoday.com/news/world/story/2012-02-28/pirates-denmark-hostages-killed/53282318/1.

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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.[20] 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 clams for asylum under British law if their country of origin is known to use torture or allow execution as judicial punishment.[21] Charles Glass wrote of the sentiments of International Maritime Bureau Captain Pottengal Mukundun: "there are hardly any cases where these attackers are arrested and brought to trial. Piracy is a high-profit, low-risk activity."[22]

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Prescription Before Prosecution: Preventing Failing or Failed States From Becoming Fulfilled Piratocracies[23]

Donna Nincic's research has indicated, "being a failed state (at least as measured by the Failed State Index) is a necessary, though not sufficient condition for maritime piracy."[24] 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."[25] 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."[26]

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[20] *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.

[21] 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&sectionId=2&p=sto&bl=on&pf=all.

[22] 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.

[23] 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)).

[24] Nincic, *supra* note 17, 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 *The Fund for Peace*, use "indicators of risk and is based on thousands of articles and reports . . . from electronically available sources.").

[25] Nincic, *supra* note 17, at 30.

[26] Id.

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.[27] 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.[28] In another intervention in April 2008, French special-operations forces recaptured the luxury sailing yacht *LePonant* taken in the Red Sea.[29] 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.[30] In an ensuing rescue following delivery of the ransom by the ships owners, six pirates were captured and taken to France for prosecution.[31] Eight other pirates were pursued and killed on shore by attack helicopters as they attempted to escape.[32]

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.[33] In June 2007, the International Maritime Bureau (IMB) requested "urgent help" from Western navies to protect shipping off the Somali coast.[34] 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.[35] 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.".[36]

Emerging states, not just failed states, lag far behind the West in port security and vessel identification systems.[37] Illustrative is the recent saga of the *An Yue Jiang*, a Chinese merchant

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[27] Lauren Ploch, *supra* note 71, 30.
[28] *US ship helps North Korea vessel crew overpower Somali pirates***,** AGENCE FRANCE PRESS (AFP) (Oct. 30, 2007), http://afp.google.com/article/ALeqM5hQLMlkR4kES5yt9Zfyy7YA8V1B8Q.
[29] *France: Pirates Captured, Hostages Freed*, CBSNEWS (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/.
[30] France: Pirates Captured, Hostages Freed, supra note 29.
[31] Id.
[32] *Id.*
[33] *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-.
[34] *UN Relief At French Help Against Somali Pirates***,** AGENCE FRANCE PRESS (AFP) (September 26, 2007), http://afp.google.com/article/ALeqM5g8aw97BGHluPtBQhnq1d3drKCIMQ.
[35] Catherine Zara Raymond, *Piracy And Armed Robbery In The Malacca Strait – A Problem Solved?* 35 NAVAL WAR COLL. REV., Summer 2009, Vol. 62, No. 3 31, 35, 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, specifically, the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against ships in Asia (RECAAP), as being a "good example of successful regional cooperation which IMO seeks to replicate elsewhere." RECAAP was 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. http://www.imo.org/ourwork/security/piracyarmedrobbery/Pages/Default.aspx
[36] Id., 32
[37] 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.

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.[38] 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."[39] 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.[40]

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.[41] 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 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.[42] 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.[43]

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.[44] Employment of armed guards on merchant

Comment [k2]: *See also* Piracy and private security Laws and guns Armed guards on ships deter pirates. But who says they are legal?, The Economist, Apr. 14, 2012, http://www.economist.com/node/21552553

[38] *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/.
[39] Id.
[40] SOLAS, *supra* note __
[41] *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).
[42] *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.
[43] *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.
[44] *Carlyn Liss,* Private Security Companies in the Fight Against Piracy in Asia 1-3 *(Asia Research Ctr., Working*

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 efficacy.[45] 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 (SOF) as required.[46]

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.[47] 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

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Paper No. 120, June 2005), http://www.humansecuritygateway.com/showRecord.php?RecordId=12808.

[45] Id., 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).

[46] *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 SOF in counterterrorism/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/World/terrorism-security/2012/0126/SEAL-Team-6-Somalia-rescue-illustrates-new-US-military-strategy.

[47] 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.

where the flag state fails to respond to the requesting state's request within a certain number of hours.[48] 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.[49] UNCLOS and Rome Statute ratification will also facilitate a leadership role for the United States in negotiating multilateral instruments and more effective 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 un-manned 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.[50] 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.[51] Based upon these 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.

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[48] *See* Chatham House, *supra* note __ at 1-2.

[49] *See generally*, Rome Statute, *supra* note **Error! Bookmark not defined.**.

[50] 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.).

[51] *See, e.g.*, Evan Munsing and Christopher J. Lamb, *Joint Interagency Task Force–South: The Best Known, Least Understood Interagency Success*, INSTITUTE FOR NATIONAL 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 interagency collaboration, and other national security organizations have tried to copy its approach and successes.").

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."[52] 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).[53] That number has now grown to eighteen with sixty others agreeing to cooperate in interdiction strategies.[54] 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 law and frameworks."[55] 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."[56] 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."[57]
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

[52] 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.
[53] *Proliferation Security Initiative: Statement of Interdiction Principles*, U.S. DEP'T OF STATE (Sept. 4, 2003), http://www.state.gov/t/isn/c27726.htm.
[54] *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 **Error! Bookmark not defined.**, at 23 (noting the addition of Canada, Singapore, Norway, Denmark, and Turkey in Dec. 2003, and the Czech Republic and Russia in 2004).
[55] Eben Kaplan, *The Proliferation Security Initiative*, COUNCIL ON FOREIGN RELATIONS (Oct. 19, 2006), http://www.cfr.org/publication/11057/.
[56] PSI Statement, *supra* note 53.
[57] PSI Statement, *supra* note 53.

> 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[.][58]

Successful PSI cooperation has included not only plenary sessions and maritime training exercises,[59] but also at least one mission conducted by PSI nations in October 2003.[60] 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.[61] The *BBC China* was found to be carrying nuclear centrifuge parts for Libya's nascent nuclear program.[62] 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."[63]

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
> Third: Engage regularly. Commit to active outreach and to host and participate in PSI exercises in your region and beyond.[64]

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."[65] For instance, U.S. Executive Order

[58] Id.
[59] Shie, *supra* note __, at 17.
[60] Kaplan, *supra* note 55.
[61] Id.
[62] Id.
[63] *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.
[64] 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.
[65] *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." *Id.*

13382[66] 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."[67]

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.[68] The maritime community has increased its 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 the international and national problems of piracy and maritime terrorism will also have to 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 in order 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.

[66] Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters, Exec. Order No. 13,382, 3 C.F.R. 13382 (June 28, 2005).
[67] *Executive Order 13382*, DEP'T OF STATE, http://www.state.gov/t/isn/c22080.htm (last visited Mar. 3, 2012).
[68] *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.*