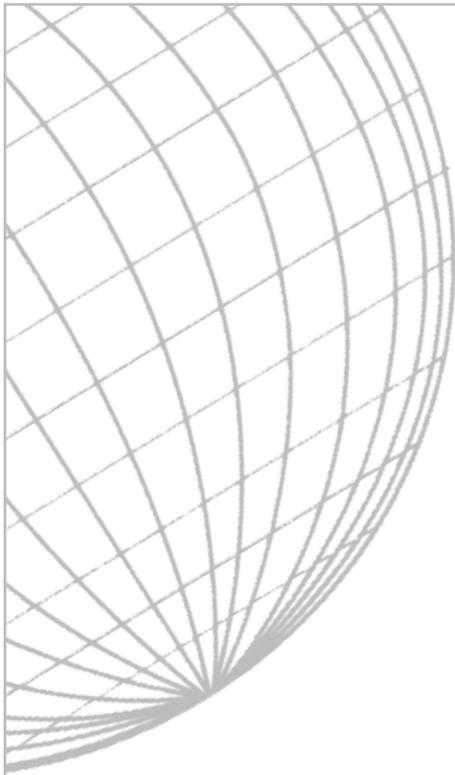




THE SYSTEMATIC PROSECUTION OF SOMALI PIRATE LEADERSHIP AND THE PRIMACY OF MULTI-LEVEL COOPERATION



Jonathan Bellish

oneearthfuture.org
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ABSTRACT

Since 2010, well over \$100 million has been spent on investigating, prosecuting, and imprisoning pirates operating off the Horn of Africa. These efforts have been subject to two related criticisms. First, compared to enhanced naval coordination, industry best management practices, and the use of private armed guards, threat of prosecution has been a relatively weak deterrent. Second, because of the marked decline in maritime piracy since 2012, improving the effectiveness of piracy prosecutions is no longer an urgent matter. This paper argues that shifting from a prosecutorial strategy that focuses on low-level pirates to one that targets the organizations' leadership ameliorates both of these concerns. Not only would the proposed strategic shift be more effective on its own terms, but it would also entail benefits not limited to combatting Somalia-based piracy. The paper then looks to the jurisprudence of several international criminal tribunals to identify characteristics that could be used to differentiate low-level pirates from pirate leadership, a necessary first step to any shift in strategy. From there, the paper describes the myriad options available to those actors interested in pursuing such a strategic shift, noting that piracy's status as the paradigmatic crime of universal jurisdiction under international law provides policymakers with an exceptional breadth of available options. Based on international law's permissiveness in this regard, the paper concludes that whatever the structure decided upon by the relevant stakeholders, it should be developed in the service of sustained multi-level cooperation, the lack of which is the true stumbling block to the targeted investigation and prosecution of pirate leadership.

ABOUT THE AUTHOR

Jonathan Bellish is Project Development Manager at the One Earth Future Foundation, Fellow at the Nanda Center for International and Comparative Law, and former Project Officer at Oceans Beyond Piracy. Thanks to Paige Coriden, William Kent, and Samantha Peaslee for their help researching, writing, and editing this paper.

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I. INTRODUCTION

Between 2010 and 2012, around \$50 million was spent prosecuting and imprisoning pirates operating off the coast of Somalia,¹ not including the \$55 million annual budget of the United Nations Office on Drugs and Crime's Counter Piracy Programme, which is also dedicated to piracy-related judicial deterrence and capacity-building.² Despite this significant expense, deterring piracy off the coast of Somalia through the threat of prosecution and imprisonment is seen as a relatively ineffective solution when compared to measures such as coordinated naval patrols, the use of industry best management practices, and the use of private armed security.³

Partially in response to this criticism, calls have been made for a strategic shift away from prosecuting lower-level pirates towards the systematic prosecution of the leaders of Somalia-based piracy operations.⁴ This paper makes the case that, even in an era of dramatically reduced pirate activity off the Horn of Africa, a strategic shift toward focusing judicial efforts and resources on Somali pirate leadership is warranted. It goes on to outline the various options for engaging in such a shift, and concludes that because international law is exceptionally permissive in the means afforded to those who would engage in such a shift, the primary focus should rest on facilitating sustained, multi-level cooperation, with the specific norms and institutions to be brought to bear playing a secondary role.

Perhaps the best point of entry into this issue is through the story of Mohamed Abdi Hassan, which simultaneously illustrates both the importance of prosecuting pirate leaders and the difficulty associated with doing so.

By most western accounts, the multi-million dollar "business model" of piracy for ransom off the coast of Somalia emerged around 2005.⁵ Yet as early as 2003, Mohamed Abdi Hassan, better known as "Afweyne," or "Big Mouth," had already begun building his enterprise.⁶ Prone to seasickness and without prior maritime experience, Afweyne started by recruiting the most prominent pirates from

1 Anna Bowden et al., *The Economic Cost of Piracy* (One Earth Future Working Paper) at 19 (2011), available at http://oceans-beyondpiracy.org/sites/default/files/attachments/View%20Full%20Report_4.pdf; Anna Bowden et al., *The Economic Cost of Piracy* (One Earth Future Working Paper) at 22 (2012), available at http://oceansbeyondpiracy.org/sites/default/files/economic_cost_of_piracy_2011.pdf; Jon Bellish et al., *The Economic Cost of Somali Piracy* (Oceans Beyond Piracy Working Paper) at 30 (Apr. 2013), available at http://oceansbeyondpiracy.org/sites/default/files/ecop2012final_2.pdf.

2 "Piracy is a complex challenge for East Africa's fragile economies," says UNODC Executive Director, UNITED NATIONS OFFICE OF DRUGS AND CRIME (Nov. 19, 2012), <http://www.unodc.org/unodc/en/press/releases/2012/November/piracy-is-a-complex-challenge-for-east-africas-fragile-economies-says-unodc-executive-director.html>.

3 E.g., Joshua Keating, *The Decline and Fall of Somali Piracy*, SLATE (Jan. 16, 2014, 12:34 PM), http://www.slate.com/blogs/the_world/2014/01/16/the_decline_and_fall_of_somali_piracy.html ("The IMB attributes the drop to a number of factors, including 'the key role of international navies, the hardening of vessels, the use of private armed security teams, and the stabilizing influence of Somalia's central government.'"); *What Happened to Somalia's Pirates?*, THE ECONOMIST (May 19, 2013, 11:50 PM), <http://www.economist.com/blogs/economist-explains/2013/05/economist-explains-11> ("[T]he main reason for the drop in maritime hijackings seems to be that ships are now far better defended against attacks."); see also Ved P. Nanda & Jonathan Bellish, *Moving from Crisis Management to a Sustainable Solution for Somali Piracy: Selected Initiatives and the Role of International Law*, CASE W. J. INT'L L. (forthcoming, Fall 2014).

4 Notes 55-58, *infra*.

5 E.g., JAMES KRASKA & RAUL PEDROZO, *INTERNATIONAL MARITIME SECURITY LAW* 728 (Martinus Nijhoff Publishers ed. 2013) ("European interest in the threat of Somali piracy emerged in 2005-06 out of concern over the vulnerability of [World Food Programme] shipments to Somali pirates.").

6 Jean-Marc Mojon, *Harardhere: The Cradle of Somali Piracy*, AGENCE FRANCE PRESSE (Oct. 29, 2009).

the breakaway region of Puntland—allegedly protecting Puntland’s waters from illegal fishing and dumping—and using their skills and experience toward more profitable ends.⁷

Although Afweyne adopted the stated motive of the Puntland pirates, telling the Associated Press in 2006 that his gang would release an Indonesian vessel once it “establishes that [the ship] was not illegally fishing in Somali waters,”⁸ the evidence unambiguously suggests that profit was Afweyne’s prime motive.⁹ First, in his earlier years Afweyne primarily hijacked World Food Programme transport ships,¹⁰ transitioning over time to large commercial vessels.¹¹ These types of vessels are known more for supplying aid to Somalis (and commanding large ransoms) than for engaging in illegal fishing or dumping. Second, Afweyne is generally credited for modernizing and professionalizing the piracy-for-ransom business model, acting “as if he were launching a Wall Street IPO,” and popularizing the use of mother ships, which allowed Somali pirates to dramatically expand their range beyond Somali territorial waters.¹² Finally, Afweyne ran, along with his son, a “pirate stock exchange” in Harardhere, Somalia.¹³ Open 24 hours a day, the exchange allowed investors to purchase shares in more than 70 pirate action groups.¹⁴ These are the actions of a profiteer, not a political activist.

Yet piracy was not Afweyne’s only foray into transnational crime. He was allegedly a member of the Somali terrorist organization al-Shabaab’s 10-man cabinet,¹⁵ was on a United Nations watch list for breaking the Somali arms embargo,¹⁶ and was a major investor in the Somali drug trade.¹⁷ In 2012, Afweyne allegedly paid al-Shabaab \$200,000 for two *Médecins Sans Frontières* workers, hoping to ransom them for a profit.¹⁸ It was therefore not at all surprising to find Afweyne in Tripoli in 2009 celebrating the 40th anniversary of Muammar Gaddafi’s rule in Libya alongside Zimbabwe’s President Robert Mugabe and Sudanese ruler Omar al-Bashir, who has been indicted for war crimes.¹⁹

By the time he handed the active management of his pirate operation over to his son Abdiqaadir sometime between 2010 and 2012, Afweyne was implicated in the hijackings of dozens of merchant

7 Mojon, *supra* note 6; James Bridger, *The Rise and Fall of Somalia’s Pirate King*, FOREIGN POLICY (Nov. 4, 2013).

8 Rodrique Ngowi, *Somali Pirates Hijack Ship, Sail into Lawless Country*, ASSOCIATED PRESS INTERNATIONAL (Apr. 28, 2006).

9 See Bridger, *supra* note 7.

10 Jonathan Clayton & Flora Bagenal, Ruthless Economics of the High Seas and the Somali Dream of a Life in the West, THE TIMES (LONDON) (Nov. 16, 2010); Notorious Somali Pirate ‘Big Mouth’ Retires, AGENCE FRANCE-PRESSE (Jan. 10, 2013), http://www.dailymotion.com/video/xwnp1g_notorious-somali-pirate-big-mouth-retires_news.

11 See Adjoa Anyimadu, *Notorious Somali Pirate Quits: Now is Shipping Safe?*, CNN.com (Jan. 11, 2013, 1:37 PM), <http://www.cnn.com/2013/01/11/opinion/somalia-pirate-retires/>.

12 Joshua Hammer, *Modern Marauders*, NYTimes (Aug. 7, 2011), <http://query.nytimes.com/gst/fullpage.html?res=9904EEDF1F3E-F934A3575BC0A9679D8B63> (last updated Aug. 7, 2013); Jay Bahadur, *Don’t Shed Any Tears for Somalia’s Pirates*, The Globe and Mail (Canada) (Sept. 16, 2011, 4:26 PM), <http://www.theglobeandmail.com/news/world/dont-shed-any-tears-for-somalias-pirates/article594660/> (last updated Sept. 17, 2011, 9:19 AM).

13 Farley Mesko, *Is there Life After Piracy in Somalia? The Headache of Al Shabaab, Policies*, The East African (May 11, 2013, 4:23 PM), <http://www.theeastafrican.co.ke/news/Is-there-life-after-piracy-in-Somalia/-/2558/1849532/-/nnpqqg/-/index.html>.

14 *Id.*; Abdi Moalim, *Somali Ex-Pirate Kingpin Now Leads Anti-Piracy Fight*, All Africa (Oct. 8, 2013), <http://allafrica.com/stories/201310090050.html>.

15 Mojon, *supra* note 6.

16 *Id.*

17 Bridger, *supra* note 7.

18 *Somali Pirates Buy Kidnapped Aid Workers for 200,000 Dollars*, BBC MONITORING AFRICA (Jan. 10, 2012); Bridger, *supra* note 7.

19 Daniel Howden, *Forty Years in Power Celebrated with a ‘Gallery of Grotesques’: War Crimes Suspect and Notorious Somali Pirate Turn out for Gaddafi’s Anniversary Party*, THE INDEPENDENT (London) (Sep. 2, 2009) <http://www.independent.co.uk/news/world/africa/gaddafis-forty-years-in-power-celebrated-with-a-gallery-of-grotesques-1780269.html>; Clayton & Bagenal, *supra* note 10.

vessels.²⁰ Among them were two from Belgium—the *MV Pompei* and the *MV Petra I*, hijacked in 2009 and 2010, respectively.²¹ Afweyne was tried for the former in Belgium *in absentia*²²; the latter would prove to be his ultimate downfall.²³

Afweyne had developed by 2012 a reputation as “one of the most dangerous of all the Somali pirates,”²⁴ and his home base of Harardhere became known as the “undisputed piracy capital of the world.”²⁵ That year, the Belgian and Seychellois authorities, who had been interested in Afweyne since as early as 2009, issued INTERPOL Red Notices for his arrest. Around that same time, Afweyne was apparently pursuing a clean break from piracy in Somalia. A leaked United Nations report stated that Afweyne had obtained a diplomatic passport as an inducement to quit piracy, a passport that kept him out of prison in Malaysia.²⁶ Similarly, when Somalia’s president Hassan Sheikh Mohamud issued an amnesty for low-level pirates but not senior pirate leaders, he explicitly stated that he did not consider Afweyne to be part of the pirate leadership.²⁷ Then, in January 2013, Afweyne officially announced his retirement from piracy at a press conference in the Adado region of Somalia, where he claimed that he would return to a normal life and try to persuade other pirates to do the same.²⁸

In the end, though, transnational justice carried the day when Afweyne was arrested, along with a Somali official in Brussels, in an operation worthy of Hollywood fame.²⁹ Through months of undercover work, Belgian authorities—in cooperation with Seychelles—lured Afweyne out of Somalia to sign a contract with a fake production company to produce a piracy documentary tracking Afweyne’s life.³⁰ Although many Somalis protested the arrest and advocates of foreign journalists denounced the plan for adding to the prevalent suspicion that many journalists are spies,³¹ a spokesperson for the High Representative of the European Union for Foreign Affairs and Security Policy was more optimistic, stating that Afweyne’s arrest “marks a significant step in the fight against piracy. It demonstrates that law enforcement authorities can now track not only the pirates themselves, but also the leaders of these criminal networks.”³²

20 Moalim, *supra* note 14; Bridger, *supra* note 7.

21 Caroline Baumann & James Fontanella-Khan, *Belgian Police Detain Two Suspected Somali Pirates*, FT.COM (Oct. 14, 2013, 6:49 PM), <http://www.ft.com/cms/s/0/2899b056-34e6-11e3-8148-00144feab7de.html>.

22 *Id.*

23 *Somalia: Belgian Bluff Lures in Alleged Somali Pirate Kingpin*, ALL AFRICA (Oct. 14, 2013), <http://allafrica.com/stories/201310150091.html>.

24 Clayton & Bagenal, *supra* note 10.

25 Mojon, *supra* note 6.

26 *UN Report Urges Sanctions Against Corrupt Somali Leaders*, AGENCE FRANCE PRESSE – English (Jul. 16, 2012), <http://www.capitalfm.co.ke/news/2012/07/un-report-urges-sanctions-against-corrupt-somali-leaders/>; Adam Taylor, *Somehow the Man Described as a ‘Founding Figure’ in Somali Piracy has got Himself a Diplomatic Passport*, BUSINESS INSIDER (Jul. 17, 2012, 4:55 PM), <http://www.businessinsider.com/the-president-of-somalia-reportedly-gave-a-top-pirate-kingpin-a-diplomatic-passport-2012-7>; *Somali Pirate Enjoys Diplomatic Immunity*, BUSINESS WORLD (Jul. 18, 2012, 8:31 AM), <http://www.businessworld.ie/livenews.htm?a=2963934;s=rollingnews.htm>.

27 Bridger, *supra* note 7.

28 *Somali Pirate Kingpin ‘Quits Piracy’*, BBC MONITORING AFRICA (Jan. 10, 2013); *Notorious Somali Pirate ‘Big Mouth’ Retires*, *supra* note 10.

29 *Wanted Somali Pirate Arrested in Brussels*, UPI (Oct. 14, 2013, 10:43 AM), http://www.upi.com/Top_News/World-News/2013/10/14/Wanted-Somali-pirate-arrested-in-Brussels/UPI-51671381761813/; Bridger, *supra* note 7.

30 Baumann & Fontanella-Khan, *supra* note 21; *Somalia: Belgian Bluff Lures in Alleged Somali Pirate Kingpin*, *supra* note 23.

31 *Somali Residents Protest Arrest of Ex-Pirate Kingpin in Belgium*, BBC MONITORING AFRICA (Oct. 17, 2013); Joshua Keating, *The Problem with Belgium’s Crazy Argo-like Somali Pirate Plot*, SLATE (Oct. 16, 2013, 4:30 PM), http://www.slate.com/blogs/the_world/2013/10/16/belgium_uses_fake_documentary_to_catch_somali_pirate_but_may_have_put_journalists.html; Jean-Paul Marthoz, *Duping Pirates and Endangering Journalists*, COMMITTEE TO PROTECT JOURNALISTS BLOG (Oct. 17, 2013), <https://cpj.org/blog/2013/10/duping-pirates-and-endangering-journalists.php>.

32 Baumann & Fontanella-Khan, *supra* note 21.

While the Afweyne case does indeed demonstrate a great deal about the importance, necessity, and difficulty of prosecuting piracy's senior leadership, it by no means demonstrates a present ability to track and apprehend those leaders as a matter of course. In fact, Afweyne's arrest is in many ways an exception that proves the rule; the plan used on Afweyne is neither replicable nor sustainable. As James Bridger wrote in *Foreign Policy*:

Somalia's remaining pirate kingpins, enjoying impunity at home, will surely be more cautious about foreign travel in the future, making *Argo*-like lures unlikely to work a second time. As funding pirate ventures becomes increasingly unprofitable, a quiet retirement becomes an attractive option -- at least until the warships and armed guards disappear.³³

Presently, the general consensus supports Bridger's hypothesis, as naval patrols, industry best management practices, and the use of private armed security—not judicial deterrence—are the oft-cited causes for piracy's recent decline.³⁴ Deterrence through the rule of law has not been a model for piracy suppression, and Afweyne's arrest is not a model for such deterrence in any broad sense. This paper calls for moving beyond isolated sting operations like Afweyne's and towards the systematic prosecution of pirate leadership.

Part II provides some background on piracy off the Horn of Africa. Part III makes the case for continuing to target the leaders of Somali pirate networks, notwithstanding the recent dramatic drop in Somali piracy. Part IV offers guidance for distinguishing pirate leaders from ordinary pirates in order to clarify the ideal targets of complex piracy prosecutions. Part V details the breadth of options available under international law for prosecuting pirate leadership. Part VI explores the common theme of cooperation running through each approach to prosecuting pirate leaders. Finally, Part VII concludes that unless relevant stakeholders agree that prosecuting pirate leadership should be a sustained priority and demonstrate a willingness to cooperate on multiple levels, the mechanism through which pirate leaders are investigated and prosecuted matters little.

II. BACKGROUND: PIRACY OFF THE HORN OF AFRICA

Afweyne's early adoption notwithstanding, the piracy of large commercial ships for multi-million dollar ransoms began off the Horn of Africa in earnest around 2005, peaked in 2010, and has been in decline ever since. According to the International Maritime Bureau (IMB), between 1992 and 2005, there were 0–4 successful attacks per year off the Somali coast, generally taking the form of theft of personal property and ships' stores.³⁵ According to the IMB reports, the only two ransoms paid before

³³ Bridger, *supra* note 7.

³⁴ *Supra*, note 3.

³⁵ See ICC International Maritime Bureau, *Piracy and Armed Robbery Against Ships: Annual Report 1 January – 31 December 1992* at 7 (January 1993); ICC International Maritime Bureau, *Piracy and Armed Robbery Against Ships: Annual Report 1 January – 31 December 1993* at 2-3 (January 1994); ICC International Maritime Bureau, *Piracy and Armed Robbery Against Ships: Annual Report 1 January – 31 December 1994* at 3, 6 (January 1995); ICC International Maritime Bureau, *Piracy and Armed Robbery Against Ships: Annual Report 1 January – 31 December 1995* at 3 (January 1996); ICC International Maritime Bureau, *Piracy and Armed Robbery Against Ships: Annual Report 1 January f 31 December 1996* at 15-16 (January 1997); ICC International Maritime Bureau, *Piracy and Armed Robbery Against Ships: Annual Report 1 January – 31 December 1997* at 5, 28-30 (January 1998); ICC International Maritime Bureau, *Piracy and Armed Robbery Against Ships: Annual Report 1 January – 31 December 1998* at 4, 28-30 (January 1999); ICC International Maritime Bureau, *Piracy and Armed Robbery Against Ships: Annual Report 1 January – 31 December 1999* at 5, 14 (January 2000); ICC International Maritime Bureau, *Piracy and Armed*

2005 were for the fishing trawler *Bahari Hindi* and the cargo vessel *MV Princess Sarah*, though several additional ransom demands were mentioned.³⁶

In 2005, however, the number of successful hijackings jumped to 15 off the coast of Somalia alone,³⁷ and at least two ransoms—one \$315,000 and the other \$700,000—were paid for the *MV Feisty Gas*³⁸ and the *MV Panagia*,³⁹ respectively. From 2005 to 2010, the number of attempted attacks and successful hijackings off the African coast, as well as the value of ransom payments, increased steadily. By the time East African piracy reached its peak in 2010, attacks spread across the Indian Ocean to the west coast of the Indian subcontinent.⁴⁰ That year, there were 168 reported attempts and 49 successful hijackings;⁴¹ 44 ransoms were paid averaging \$5.4 million per ransom and totaling \$238 million.⁴² By 2010, maritime piracy off the coast of Somalia was truly a global menace, costing those involved in combatting piracy upwards of \$7 billion per year⁴³ and imposing an estimated \$18 billion in total cost to the global economy.⁴⁴

In response to the enormous human and economic costs that resulted from the surge in East African piracy between 2005 and 2010, a variety of stakeholders from industry, government, and civil society began working together in the hope of putting an end to the scourge. On the naval front, well over 25 separate navies have been escorting ships along the Internationally Recognized Transit Corridor, patrolling the Indian Ocean, responding to reported attacks, and otherwise disrupting pirate activity.⁴⁵ Additionally, the prosecution of low-level pirates also played a role. As of 2013, 22 nations as well as the United Nations have been involved in conducting prosecutions, imprisoning convicted pirates, and building regional capacity to prosecute and incarcerate.⁴⁶ In addition, there are many national prosecutors and transnational law enforcement efforts aimed at prosecuting and convicting pirate financiers and investors.⁴⁷

Robbery Against Ships: Annual Report 1 January – 31 December 2000 at 5, 16 (January 2001); ICC International Maritime Bureau, *Piracy and Armed Robbery Against Ships: Annual Report 1 January – 31 December 2001* at 7, 50-58 (January 2002); ICC International Maritime Bureau, *Piracy and Armed Robbery Against Ships: Annual Report 1 January – 31 December 2002* at 8, 18-19 (January 2003); ICC International Maritime Bureau, *Piracy and Armed Robbery Against Ships: Annual Report 1 January – 31 December 2003* at 7, 18, 23 (January 2004); ICC International Maritime Bureau, *Piracy and Armed Robbery Against Ships: Annual Report 1 January – 31 December 2004* at 7, 18, 23 (January 2005).

36 *Supra*, note 35.

37 ICC International Maritime Bureau, *Piracy and Armed Robbery Against Ships: Annual Report 1 January – 31 December 2005* at 7 (January 2006).

38 *Pirates of Somalia*, AEDI EXCLUSIVE, vol. 1, issue 1, at 4 (Mar. 2, 2009), available at http://priv.asiaeconomicinstitute.org/resources/uploads/africa/articles/1_1/1237478297Africa_Exclusives_Vol1_No1_2009-03-02_RO.pdf.

39 *Seized Ship Found in Northern Somalia*, HIIRAN (Nov. 3, 2005), available at http://www.hiiraan.com/2005/nov/somali_news03_1.html.

40 Bowden 2011, *supra* note 1, at 8.

41 ICC International Maritime Bureau, *Piracy and Armed Robbery Against Ships: Annual Report 1 January – 31 December 2010* at 8 (January 2011).

42 Bowden 2010, *supra* note 1, at 10.

43 *Id.*

44 The World Bank, *The Pirates of Somalia: Ending the Threat. Rebuilding a Nation* (Working Paper) at 25 (2013), available at <http://siteresources.worldbank.org/INTAFRICA/Resources/pirates-of-somalia-main-report-web.pdf>.

45 Bellish, *supra* note 1, at 13-15.

46 *Id.* at 28.

47 See, e.g., *Maritime Piracy*, INTERPOL (last visited on Jun. 10, 2012), available at <http://www.interpol.int/Crime-areas/Maritime-piracy/Maritime-piracy>; UKFCO, *Anti-piracy Centre Open for Business*, UK.gov (Feb. 25, 2013), available at <https://www.gov.uk/government/news/anti-piracy-centre-open-for-business>; Mark D. Clookie, *NCIS Uses New Techniques to Fight an Old Crime*, POLICE CHIEF (Sep. 2011), available at http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=2471&issue_id=92011.

As for the private sector, the shipping industry responded by developing and implementing a set of industry best management practices such as installing ship-hardening measures like razor wire and citadels, steaming at speeds that are faster than economically optimal, and re-routing to avoid vulnerability.⁴⁸ Finally, ship owners and operators began employing private armed guards. Before the rise of Somalia-based piracy, the use of private armed maritime security was quite rare.⁴⁹ By 2012, however, more than 140 private security firms were operating in the Indian Ocean, most of which were incorporated in 2011.⁵⁰ In 2012, ship owners and operators spent between \$1.15 and \$1.53 billion on private armed security alone.⁵¹

As a result of the efforts described above, the incidence of piracy off the Somali coast dropped markedly in the middle of 2011 and remained suppressed through 2012 and 2013.⁵² The number of ransoms, value of ransoms, and number of reported attacks fell by 74%, 80%, and 71%, respectively, between 2011 and 2012.⁵³ In 2013, there were only 2 hijackings and 13 reported attempted hijackings attributed to Somali pirates.⁵⁴

Despite the recent drop in activity, piracy for ransom is far from over as a global phenomenon. The conditions within Somalia are such that piracy still appears to be an exceedingly attractive career option.⁵⁵ In addition to continued vigilance, one way to ensure that piracy off the Horn of Africa does not return to peak levels is to focus on the enablers of Somali piracy: the so-called “kingpins.”

Calls to prosecute pirate leaders began as early as 2008, when United Nations Special Representative for Somalia Ahmedou Ould-Abdallah said, “[c]ountries that can do so should trace, track and freeze the assets of the backers of the pirates. . . . They deserve to be brought to justice and prevented from harming their country, its economy and reputation.”⁵⁶ Similar calls were made by Ronald K. Noble, Secretary General of INTERPOL,⁵⁷ as well as by several representatives of the United States Department of State’s Bureau of Political-Military Affairs.⁵⁸ Despite these repeated calls for action, a 2013 report by the Monitoring

48 Best Management Practices for Protection Against Somalia Based Piracy, WITHERBY PUBLISHING GROUP LTD. (August 2011), http://www.mschoa.org/docs/public-documents/bmp4-low-res_sept_5_2011.pdf?sfvtsn=0.

49 James Brown, *Pirates and Privateers: Managing the Indian Ocean’s Private Security Boom*, Lowy Institute Working Paper at 5 (Sep. 2012), available at http://www.lowyinstitute.org/files/brown_pirates_and_privateers_web.pdf.

50 *Id.*

51 Bellish, *supra* note 1, at 20.

52 See Bellish, *supra* note 1 at 7; Samihah Zaman and Nada AlTaher, *Successful Piracy Attempts Decline in Gulf of Aden and Arabian Sea*, GULF NEWS (Jun. 4, 2013), available at <http://gulfnews.com/news/gulf/uae/crime/successful-piracy-attempts-decline-in-gulf-of-aden-and-arabian-sea-1.1192614>.

53 Bellish, *supra* note 1, at 39.

54 ICC International Maritime Bureau, *Piracy and Armed Robbery Against Ships: Annual Report 1 January – 31 December 2013* at 8 (January 2014).

55 See, e.g., *Security Council Welcomes Recent Launch of United Nations Assistance Mission in Somalia*, SC/11025 (Jun. 6, 2013), available at <http://www.un.org/News/Press/docs/2013/sc11025.doc.htm>.

56 *Pirates Cashed in \$120 Million in 2008: UN*, AGENCE FRANCE-PRESSE (Dec. 11, 2008), available at http://www.hiiraan.com/news2/2008/dec/pirates_cashed_in_120 mln_in_2008_un.aspx.

57 Ronald K. Noble, INTERPOL Secretary General, *Welcome Address to Conference on Maritime Piracy Financial Investigations* (Jan. 19, 2010) (“[I]t is not time for the international community to integrate this fundamental financial component in its joint law enforcement strategy against maritime piracy, involving all relevant actors. . . : investigators, analysts and prosecutors – dealing with increasingly sophisticated piracy networks; policymakers and experts – facing the distorted impact of attacks and flows of proceeds on their constituencies; private shipping companies – from which profit is extorted by means of violence; [and] the financial industry – concerned by its products being turned into channels to funnel and launder proceeds.”).

58 Andrew Shapiro, Assistant Sec’y, Bureau of Political-Military Affairs, *Remarks to International Institute for Strategic Studies: U.S. Approaches to Counter-Piracy* (Mar. 30, 2011), available at <http://www.state.gov/t/pm/rls/rm/159419.htm> (“Furthermore, [the U.S. Department of State is] looking at additional ways to more aggressively target those who organize, lead, and profit from piracy opera-

Group on Somalia & Eritrea warned that, “[i]n the persisting absence of serious national and international efforts to investigate, prosecute or sanction those responsible for organizing Somali piracy, the leaders, financiers, negotiators and facilitators will continue to operate with impunity.”⁵⁹

These calls to prosecute pirate leadership ostensibly stem from the evidence that focusing prosecutions on low-level pirates has been a relatively ineffective deterrent. For example, at any given time, there are expected to be between 1,400 and 2,000 active Somali pirates.⁶⁰ By 2012, over 1,000 pirates had been prosecuted in national jurisdictions.⁶¹ If “Somali pirates” were a closed class, the prosecution rate of 50% to 67% should have been enough to decimate, or at least severely damage, the network’s operating capacities. The fact that such decimation did not occur suggests that there is a “seemingly inexhaustible supply of willing entrants to the [Somali] pirate labour market.”⁶² Moreover, “even capture, prosecution and imprisonment may leave a pirate little worse off materially than life in Somalia.”⁶³

As of early 2014, there have been only three prosecutions of pirates whose contribution to a hijacking went beyond boarding a commercial vessel and taking hostages.⁶⁴ The first such higher-up, Mohammad Saaili Shibin, was tried in the United States for his role in the hijackings of the *Marida Marguerite* and the *Quest*, a commercial vessel and a private yacht, respectively.⁶⁵ Shibin’s role in the 2010 hijacking of the *Marida Marguerite* was as a hostage negotiator, where he spent seven months on the ship negotiating a \$5 million ransom.⁶⁶ Similarly, Shibin was identified as the hostage negotiator in the 2011 hijacking of the *Quest*, which was crewed by four American nationals.⁶⁷ However, a confrontation between the *Quest*’s pirates and the United States Navy led to the pirates shooting and killing all four Americans before a ransom could be negotiated.⁶⁸

Following the *Quest* hijacking, the FBI worked with German law enforcement authorities and the Host Nation Defense Forces (HNDF) in Somalia to arrest Shibin in Bosasso, Somalia, on April 4, 2011.⁶⁹ Through custodial interrogation by the HNDF and a voluntary search conducted by the FBI, authorities found evidence sufficient to warrant his transfer from the HNDF to the Bosasso Police

tions, including disrupting the financial networks that support them.”); Thomas Kelly, Principal Deputy Assistant Sec’y, Bureau of Political-Military Affairs, Remarks to the Atlantic Council: Turning the Tide on Somali Piracy (Oct. 26, 2012), *available at* <http://www.state.gov/t/pm/rls/rm/199927.htm> (“As piracy has evolved into an organized transnational criminal enterprise, it is increasingly clear that the arrest and prosecution of rank and file pirates captured at sea is insufficient on its own to meet our longer term counter-piracy goals. Most pirates captured at sea are low-level operatives. The harsh reality of life in Somalia ensures there are willing replacements for pirates apprehended at sea. Prosecutions is one key to deterrence, but this must include the prosecution of the masterminds and funders along with the gunmen.”).

59 Report of the Monitoring Group on Somalia & Eritrea, S/2013/413 at 22, para. 65 (July 12, 2013).

60 James Kraska and Brian Wilson, Diplomatic Efforts Against the Gulf of Aden Pirates, *Harvard Int’l Review* (Feb. 19, 2009) *available at* <http://hir.harvard.edu/diplomatic-efforts-against-the-gulf-of-aden-pirates>; Douglas Guilfoyle, *Prosecuting Somali Pirates: A Critical Evaluation of the Options*, 10 J. INT’L CRIM. JUST. 767, 769 (2012).

61 Guilfoyle, *supra* note 60 at 769.

62 *Id.*

63 *Id.*

64 Ken Scott, *Prosecuting Pirate Leaders: Lessons Learned and Continuing Challenges*, (Oceans Beyond Piracy Working Paper) at 14 (May 2014).

65 United States v. Shibin, 722 F.3d 233, 235-36 (4th Cir. 2013).

66 *Id.* at 236.

67 *Id.*

68 *Id.*

69 *Id.* at 237.

Department and from the Bosasso Police Department to the FBI.⁷⁰ A jury convicted Shibin on all fifteen counts against him, sentencing him to twelve consecutive terms of life.⁷¹

The second higher-up, Ali Mohamed Ali, was also prosecuted by the United States for his role as a hostage negotiator.⁷² Ali's case stemmed from his role in the capture of the *CEC Future*, a Danish-owned merchant vessel, on November 7, 2008, where he spent over a year negotiating a \$1.7 million ransom.⁷³ Ali, the Director General of the Ministry of Education for the Republic of Somaliland, was lured to the United States on the premise of attending an education conference in Raleigh, North Carolina, but it was all an "elaborate ruse" put on by the United States government.⁷⁴ When Ali's plane touched down at Dulles International Airport on April 20, 2011, Ali was arrested.⁷⁵

Yet Ali fared much better than Shibin in court. After more than two years of pre-trial motions and appeals, Ali was acquitted of the piracy-related charges by a jury on November 26, 2013, because the jury found that Ali lacked the proper *mens rea*.⁷⁶ The not guilty verdict for Ali's piracy-related charges was accompanied by a hung jury for the hostage-taking charges against him.⁷⁷ Ultimately, however, the Department of Justice determined that it was obligated to drop the case on double jeopardy grounds, citing the Supreme Court's opinion in *Yeager v. United States*.⁷⁸

Finally, as discussed at length in Part I, Mohamed Abdi Hassan ("Afweyne"), the father of large-scale piracy for ransom off the Horn of Africa, was arrested by Belgian authorities in late 2013 after ten years, dozens of hijackings, and millions of dollars.⁷⁹ His case is currently pending before Belgian courts.

In addition to these three confirmed prosecutions, another pirate leader, Mohamed Abdi Garaad, was captured by the Iranian navy in April 2012.⁸⁰ Garaad had been connected to the capture of about a dozen fishing vessels and an "untold number" of commercial vessels,⁸¹ including the 2009 hijacking of the *Maersk Alabama* that famously resulted in a standoff between the pirates and United States Navy SEALs.⁸² Garaad was ultimately captured by the Iranian navy after it conducted a rescue operation for the Chinese-owned and Panamanian-flagged ship the *Xianghuamen*.⁸³ Garaad's identity was revealed during the course of interrogations by Iranian authorities.⁸⁴ At the time of this writing, Garaad's status is unknown.

70 *Id.*

71 *Id.* at 239.

72 *United States v. Ali*, 718 F.3d 929 (D.C. Cir. 2012).

73 *Id.* at 933.

74 *Id.*

75 *Id.*

76 Frederic. J. Frommer, *Not Guilty Verdict in Piracy Case*, ASSOCIATED PRESS (Nov. 26, 2013).

77 Frederic. J. Frommer, *Govt Plans to Retry Alleged Pirate*, ASSOCIATED PRESS (Dec. 18, 2013).

78 *Yeager v. United States*, 129 S.Ct. 2360 (2009).

79 *See Part I, supra*.

80 Daniel Nyassy, Most Wanted 'Carlos the Jackal' Somali Pirate Seized, DAILY NATION (Apr. 10, 2012, 10:16 AM), available at <http://www.africareview.com/News/Most+wanted+Somali+pirate+seized/-/979180/1383504/-/14bpryj/-/>.

81 Office of Foreign Assets Control, Somalia Sanctions: Information on Persons Listed in the Annex to E.O. 13536 of April 12, 2010 (last updated Sep. 22, 2010), available at http://www.treasury.gov/resource-center/sanctions/Programs/Documents/eo13536_pr.pdf.

82 Report of the Monitoring Group on Somalia Pursuant to Security Council Resolution 1853 (2008), S/2010/91 (Mar. 10, 2010), available at http://www.un.org/ga/search/view_doc.asp?symbol=S/2010/91.

83 Nyassy, *supra* note 80.

84 S. Isayev and T. Jafarov, *Iranian Navy Hits Jackpot, Captures Pirate Leader*, TREND DAILY ECONOMIC NEWS (Apr. 13, 2012, 9:59 AM), available at <http://en.trend.az/regions/iran/2013958.html>.

Overall, investigations and prosecutions of high-level pirates have been much less successful than other suppression efforts made by piracy-affected stakeholders, such as naval patrols, industry best practices, and the use of private armed guards. The sheer number of prosecutions and convictions over the last decade, three and two respectively, leaves much to be desired. Moreover, because of the dramatic reduction in Somali piracy in 2012 and 2013—with zero hijackings of commercial vessels occurring in 2013—it is unclear whether the political will that has been brought to bear on piracy off the coast of Somalia since 2009 will continue.⁸⁵ The section that follows argues that irrespective of current levels of East African piracy, targeting the leaders behind Somali piracy is a strategy worth pursuing.

III. THE CASE FOR TARGETING LEADERS OF SOMALI PIRACY WITH PROSECUTION

In 2012 and 2013 combined, there were only 43 confirmed pirate attacks attributed to Somalia-based pirates, while there had been 176 in 2011 alone.⁸⁶ Indeed, not a single commercial vessel was successfully hijacked off the Horn of Africa in 2013.⁸⁷ Nonetheless, it is not too late to undertake a strategic shift towards the systematic prosecution of the leaders of Somali piracy. This is the case for four reasons.

First, there is broad consensus that the progress made in suppressing Somali piracy has focused on short-term repression and not on long-term solutions. Because those with the capital, knowledge, and skills necessary to become pirate leaders are less fungible than low-level pirates, focusing on leadership is a promising avenue toward a more lasting solution. Second, focusing on the leadership structure of organized criminal syndicates has been a successful law enforcement method, and Somali piracy-for-ransom organizations fit the broader mold of organized crime in a way that such a strategy would likely be successful. Third, even though piracy for ransom may be waning in East Africa, it remains a persistent threat in other geographic regions. Lessons learned through an effort to reach Somali pirate leadership could be applicable in those regions. Finally, because of piracy's status as a crime of universal jurisdiction, and because those involved at the highest levels of Somali piracy for ransom are likely involved in other criminal activity, piracy prosecutions could be to transnational organized crime what the Racketeer Influenced and Corrupt Organizations Act (RICO Act) was to domestic organized crime in the United States: a means to reach leaders of organized criminal syndicates, in part for acts that would be difficult or impossible to prove directly.

A. Prosecuting Pirate Leaders is a Long-Term Solution

Although recent efforts among national governments, international organizations, and the shipping and private security industries to combat piracy have been both impressive and commendable, most of these efforts have focused on short-term suppression at sea as opposed to sustainable solutions on shore.⁸⁸ In fact, 99.5% and 99.4% of all direct costs were spent on short-term mitigation in 2011 and

85 See *Somali pirates hijack first ship since 2012*, THE TELEGRAPH (Jan. 19, 2014), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/somalia/10582360/Somali-pirates-hijack-first-ship-since-2012.html>.

86 *Id.*

87 *Id.*

88 Bellish, *supra* note 1, at 40.

2012, respectively.⁸⁹ A consensus has emerged among experts that unless pirate groups are disbanded on land, the problem of piracy will remain, however latently.⁹⁰

Prosecution and imprisonment, as applied to low-level pirates, qualifies as a shorter term solution. Although any individual low-level pirate who is prosecuted and detained will be unable to commit an act of piracy for between four and sixty years,⁹¹ evidence suggests that there is no shortage of men willing to take his place.⁹² Due to lack of economic opportunity in Somalia and the potentially lucrative nature of piracy for ransom, low-level pirates are fungible in a way that renders their prosecution and imprisonment little more than temporary relief.

Prosecuting the leaders of large piracy-for-ransom operations, on the other hand, qualifies as a longer-term solution because leaders are much less easily replaced than low-level foot soldiers are. Pirate leaders are less fungible both because they are less numerous than low-level pirates and because the skills and disposition required to take a leadership role are much less common than those required to be a low-level pirate. According to the United Nation Office on Drugs and Crime's (UNODC) dataset on pirate financiers, there are only about 59 such financiers with operations in Somalia.⁹³ While there are 1,400 to 2,000 low-level pirates operating at any given time, to be a financier of Somali piracy is to be a member of a relatively small group.⁹⁴ Additionally, pirate financiers have skill sets that are not easily replicable, such as the ability to get large sums of cash in and out of Somalia and the ability to launder money once it is outside Somalia.⁹⁵ Perhaps most obviously, they must have access to thousands or tens of thousands of dollars in capital to invest in the operation, a rarity in a country whose annual per capita income is well under \$200.⁹⁶ Thus, because pirate leaders are both rarer and less fungible than their low-level counterparts, prosecuting and imprisoning the former qualifies as part of an enduring solution while prosecuting and imprisoning the latter does not.

B. Prosecuting Leaders Has Been Effective in Other Criminal Contexts

Prosecuting those at or near the top of an organized criminal enterprise is a commonly used law enforcement and legislative tactic. For example, a United States statute, 21 U.S.C. § 848, provides for imprisonment of twenty years to life for participating in a continuing criminal enterprise, but imposes a mandatory life sentence for those who act as a "principal administrator, organizer, or leader" of a criminal enterprise.⁹⁷ Additionally, strategy documents of the governments of the United States and the United Kingdom call for focusing on the leaders of organized criminal enterprises.⁹⁸ In its 2011 *Digest of United States Practice in International Law*, the United States Department of State

⁸⁹ *Id.*

⁹⁰ *Somali pirates hijack first ship since 2012*, *supra* note 85.

⁹¹ Eugene Kontorovich, *The Penalties for Piracy: An Empirical Study of National Prosecution of International Crime*, Northwestern UNIVERSITY FACULTY WORKING PAPER no. 211 (2012), <http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/211/>.

⁹² Guilfoyle, *supra* note 60 at 769.

⁹³ The World Bank et. al., *Pirate Trails: Tracking the Illicit Financial Flows from Pirate Activities off the Horn of Africa* (Working Paper) at 59 (2013), available at <https://openknowledge.worldbank.org/handle/10986/16196> [hereinafter *Pirate Trails*].

⁹⁴ Guilfoyle, *supra* note 60 at 769.

⁹⁵ *Pirate Trails*, *supra* note 93, at 48-55.

⁹⁶ Somalia, U.N. DATA (last visited Apr. 24, 2014), <http://data.un.org/CountryProfile.aspx?crName=Somalia>.

⁹⁷ 21 U.S.C. § 848.

⁹⁸ FBI's Law Enforcement Strategy to Combat International Organized Crime at 1, 11 (<http://www.justice.gov/criminal/icitap/pr/2008/04-23-08combat-intl-crime-overview.pdf>); UK's Serious and Organised Crime Strategy (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/248645/Serious_and_Organised_Crime_Strategy.pdf) at 34.

makes the connection between Somali piracy and other forms of organized crime—and the strategic decision that flows from that connection—explicit:

Somali piracy is an organized criminal enterprise, like a mafia or racketeering criminal organization. A key element of our overall counter-piracy approach is the disruption of piracy-related financial flows. We need to hit pirate supply lines—cutting them off at the source. A significant effort must be made to track where pirates get their fuel, supplies, ladders and outboard motors in Somalia and in other nearby countries and to explore means to disrupt this supply. Most importantly, we must focus on pirate leaders and financiers to deny them the means to benefit from ransom proceeds. They must be tracked and hunted by following the money that fuels their operations using all available information. This should include by tracing the money that fuels their operations with the same level of rigor and discipline we currently employ to combat other transnational organized crime.⁹⁹

On the international level, the UNODC’s Model Legislative Provisions against organized crime, as well as the Legislative Guide for implementing the United Nations Convention against Transnational Organized Crime, contain aiding and abetting provisions to “ensure...the liability of leaders of criminal organizations who give the orders but do not engage in the commission of the actual crimes themselves.”¹⁰⁰ Carla Del Ponte, former Chief Prosecutor of the International Criminal Tribunal for the former Yugoslavia, describes a way in which a strategy of pursuing senior organizational leadership could affect overall prosecutorial strategy in the international context:

Building a case against the most senior persons responsible may involve a series of cases which ‘work up the ladder’, prosecuting lower-level perpetrators in the collection of evidence against the higher-level perpetrators, or in obtaining the substantive cooperation of ‘insiders’. The use of such witnesses, both lower-level and higher-level insiders, is a valuable tool in international prosecutions.¹⁰¹

Openly employing such a strategy creates an incentive for lower-level perpetrators to cooperate in exchange for reduced sentences.¹⁰² This incentive structure would almost certainly be relevant in the case of Somali piracy, but the degree of information that the lowest-level pirates have about the highest levels of organizational leadership remains unclear.¹⁰³

Nevertheless, the hierarchical structure of the Somali piracy-for-ransom business model closely resembles that of other organized criminal groups. The organized Somali pirate enterprise consists of instigators who gather funds to launch the operation, the actual financiers of an operation, informants who provide intelligence, pirate commanders, boarding pirates, ransom negotiators, ground security, post-hijacking provision suppliers, and even an accountant to divide ransom proceeds.¹⁰⁴ Outside the immediate structure of the criminal enterprise, there are numerous local politicians and clan

99 2011 Digest of United States Practice in International Law at 78, <http://www.state.gov/documents/organization/194113.pdf>.

100 UNODC’s Model Legislative Provisions against Organized Crime (https://www.unodc.org/documents/organized-crime/Publications/Model_Legislative_Provisions_UNTOC_Ebook.pdf); Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto, p. 25.

101 Carla Del Ponte, *Investigation and Prosecution of Large-scale Crimes at the International Level*, 4 J. INT’L CRIM. JUST. (2006) 539, 543.

102 Del Ponte, *supra* note 101, at 543.

103 See Scott, *supra* note 64, at 9.

104 *Clan Structure in Somalia*, CIVIL MILITARY FUSION CENTRE, (Aug. 2011), https://www.cimicweb.org/cmo/Piracy/Documents/CFC%20Anti-Piracy%20Thematic%20Reports/CFC_Anti-Piracy_Report_Clans%20in%20Somalia_Aug_2011.pdf.

leaders who take bribes in exchange for non-interference or even help in directing the operation of the enterprise.¹⁰⁵

In sum, because of the relative effectiveness of focusing on the leaders of other types of organized criminal networks, and because of the similarities between Somali piracy-for-ransom organizations and other criminal syndicates, there is reason to believe that a strategy of systematically targeting pirate leadership would be a successful one.

C. Prosecuting Pirate Leaders in Somalia Would Generate Applicable Lessons

The third reason that a strategic shift toward the systematic prosecution of those most responsible for Somalia-based organized piracy groups—despite the fact that Somalia-based piracy itself appears to be on the wane—is that maritime piracy is a global phenomenon, one that appears to be becoming increasingly organized.

For example, piracy in the Gulf of Guinea resulted in 11, 22, and 21 hijacked vessels in 2000, 2005, and 2010, respectively.¹⁰⁶ Yet during those years, attacks resulted in the theft of personal property; seafarers were neither taken hostage nor held for ransom.¹⁰⁷ However, in 2012, 206 seafarers were taken hostage and 5 were held for ransom by pirates operating in the Gulf of Guinea,¹⁰⁸ and in 2013, 279 were taken hostage and 73 were held for ransom.¹⁰⁹ The drastic increase in the number of individuals taken hostage for ransom by pirates operating in the Gulf of Guinea not only reflects the fact that West African piracy is increasing in scale, but also that it is increasing in organization. Negotiating and executing a ransom over the course of a month requires a great deal more organization and sophistication than stealing cash or even siphoning oil. To the extent that West African piracy resembles its East African counterpart in organization, lessons learned in dismantling Somali pirate networks from the top down would be useful on the west coast. There have also been similar concerns that Southeast Asian piracy is becoming increasingly organized, providing yet another potential avenue in which to apply lessons from the Somali context.¹¹⁰

D. Prosecuting Pirate Leaders Could Deter Other Forms of Organized Crime

Finally, because those individuals at the highest levels of organized piracy enterprises are engaged in other forms of transnational organized crime, prosecuting these individuals for their involvement

¹⁰⁵ *Id.*

¹⁰⁶ *Piracy and Armed Robbery Against Ships: Annual Report 1 January – 31 December 2000*, *supra* note 35, at 5; *Piracy and Armed Robbery Against Ships: Annual Report 1 January – 31 December 2005*, *supra* note 35, at 7; *Piracy and Armed Robbery Against Ships: Annual Report 1 January – 31 December 2010*, *supra* note 35, at 7.

¹⁰⁷ *Id.*

¹⁰⁸ Kaija Hurlburt & D. Conor Seyle, *The Human Cost of Maritime Piracy 2012* (Oceans Beyond Piracy Working Paper) at 13 (Jun. 2013), available at <http://oceansbeyondpiracy.org/sites/default/files/attachments/View%20Full%20Report.pdf>.

¹⁰⁹ D. Conor Seyle et. al., *The State of Maritime Piracy 2013* (Oceans Beyond Piracy working paper) at 4 (May, 2014).

¹¹⁰ *E.g. Piracy in Southeast Asia: Organised Criminal Syndicates or Small Scale Opportunists* (Gray Page working Paper) at 3 (Apr., 2013), available at <http://www.graypage.com/assets/Piracy-in-Southeast-Asia-Organised-Criminal-Syndicates-or-small-scale-opportunists.pdf> (“However, two recent hijacks (ARROWANA UNITED and ZAFIRAH) have demonstrated a marginally more pre-determined business model which might lead some to believe that criminal syndicates are once again targeting shipping in the region”).

in piracy could be analogous to prosecuting Al Capone for tax evasion¹¹¹ or the Gambino crime family for a RICO Act violation.¹¹² In the case of domestic organized crime in the United States, law enforcement officials were able to reach individuals particularly skilled at shielding themselves from criminal liability without running afoul of the prohibition against *ex post facto laws* by pursuing these sophisticated criminals through easier to prove though less directly applicable statutes.¹¹³ The crime of piracy under the law of nations could serve a similar function in the context of transnational organized crime.

It is widely understood that leaders of Somali pirate enterprises are engaged in other sorts of transnational criminal activities including money laundering, smuggling, the drug trade, human trafficking, and investing in insurgent groups and militias.¹¹⁴ For example, as mentioned above, the notorious pirate leader Afweyne was a known khat trader, a leader of al-Shabaab, and associated with indicted war criminals.¹¹⁵

Apart from maritime piracy, which is the quintessential international crime, the other illicit activities in which members of the Somali pirate leadership are actively engaged are more properly considered transnational organized crime.¹¹⁶ Despite the existence of over 200 treaties aimed at suppressing transnational organized crime, such crime has proven extremely difficult to combat and continues to proliferate.¹¹⁷ Among the particular difficulties associated with combatting transnational organized crime are a lack of standardization among governments, a lack of well-established norms related to transnational organized crime, a lack of doctrinal coherency among the many treaties dealing with transnational organized crime, jurisdictional limitations, and differing law enforcement capacities among affected jurisdictions.¹¹⁸

Where applicable, prosecuting individuals involved in many forms of transnational organized crime for piracy reduces some of the obstacles associated with prosecuting cases of transnational organized crime more generally. Although national piracy laws are not perfectly standardized,¹¹⁹ the definition of piracy under the law of nations is settled as a matter of customary international law, and there

111 *Famous Cases & Criminals: Al Capone*, FEDERAL BUREAU OF INVESTIGATIONS (last visited Apr. 25, 2014), <http://www.fbi.gov/about-us/history/famous-cases/al-capone>.

112 *Four Gambino Crime Family Members and Associates Plead Guilty in Manhattan Federal Court*, FEDERAL BUREAU OF INVESTIGATIONS (Feb. 17, 2012), <http://www.fbi.gov/newyork/press-releases/2012/four-gambino-crime-family-members-and-associates-plead-guilty-in-manhattan-federal-court>.

113 See A. Laxmidas Sawkar, *From the Mafia to Milking Cows: State RICO Act Expansion*, 41 ARIZ. L. REV. 1133, 1136 (1999) (“In short, [the RICO Act] had to be careful to focus not on who the person was, but on what the person did.” due to constitutional stigma attached to status-based legislation.”).

114 Pirate Trails, *supra* note 93, at 48-55, 62-66.

115 Mojon, *supra* note 6; Howden, *supra* note 19.

116 For a comprehensive discussion of the differences between transnational and international crime, see Neil Boister, ‘*Transnational Criminal Law*’?, 14 Eur. J. Int’l L. 953 (2003).

117 *Id.* at 956; James O. Finckenauer, *Effectively Combating Transnational Organized Crime*, NATIONAL INSTITUTE OF JUSTICE (last visited Apr. 25, 2014), <http://www.nij.gov/topics/crime/organized-crime/pages/effective-practices.aspx> (“Crime that is ‘transnational’ or ‘organized’ presents special challenges for law enforcement. But when these two factors are combined, as in transnational organized crime, the challenges are especially formidable.”).

118 *Id.* at 954-64; see also Ethan Nadelmann, *Global Prohibition Regimes: The Evolution of Norms in International Society*, 44 INT’L ORG. 479, 481 (1990); *Transnational Organized Crime*, NATIONAL INSTITUTE OF JUSTICE (last visited Apr. 25, 2014), <http://www.nij.gov/topics/crime/organized-crime/pages/welcome.aspx>.

119 Elizabeth Andersen et. al., *Suppressing Maritime Piracy: Exploring the Options in International Law* (One Earth Future, American Society of International Law, and ACUNS conference report) at 15 (2010), available at <http://acuns.org/wp-content/uploads/2012/06/SuppressingMaritimePiracyExploringOptionsIntlLaw.pdf> (“[D]omestic prosecutions raise the question of how the implementation of international law can be standardized across domestic contexts to promote efficiency and fairness.”).

remains substantial uniformity across jurisdictions.¹²⁰ Similarly, because of its historical and universal importance in international law, norms and doctrines dealing with the suppression of piracy are much more well-established than those dealing with other forms of transnational crime.¹²¹ Finally, piracy's uncontested status as a crime of universal jurisdiction ameliorates problems that result from deficiencies in a given country's positive law or law enforcement capabilities.¹²²

This approach would be quite similar to the one employed by the FBI in convicting Al Capone of tax evasion charges, as opposed to the more violent offenses for which he was most famous.¹²³ It would also be analogous to the policy rationale for passing the RICO Act in 1970, based on Congress's finding that "the sanctions and remedies available" to prosecute organized crime pre-1970 were "unnecessarily limited in scope and impact."¹²⁴ Just as the United States Congress concluded that combatting domestic organized crime required an attack that "[took] place on all available fronts,"¹²⁵ the international community could use the prosecution of transnational criminals for their involvement in maritime piracy as an important tool to end impunity.

With these manifold benefits in mind, it is no surprise that calls have been made to target pirate leaders.¹²⁶ Yet despite these calls, there is no agreement over what specifically constitutes a "leader" in the context of organized piracy for ransom.

IV. DEFINING A PIRATE LEADER

The first step in the formulation of any strategy to target pirate leaders with prosecution would be to identify the criteria that distinguish a pirate leader from an ordinary pirate. To help illuminate possible criteria to differentiate high- and low-level pirates, this section considers leadership criteria from three international and hybrid tribunals: The Extraordinary Chambers in the Courts of Cambodia (ECCC), the International Criminal Court (ICC), and the International Criminal Tribunal for the former Yugoslavia (ICTY).

The ECCC considered leadership characteristics in the context of determining whether the court was limited by its own terms to prosecuting "senior leaders of Democratic Kampuchea and those who were most responsible for the [relevant] crimes."¹²⁷ Although the Supreme Court Chamber ultimately found that being a "senior leader" and "most responsible" for the relevant crimes were not jurisdictional requirements,¹²⁸ opinions of the Trial Chamber shed some light on the nature of

120 *E.g.* United States v. Hasan, 747 F.Supp.2d 599, 619 (E.D. Va. 2010) ("[T]he United States has accepted as customary international law the treaty provisions dealing with "traditional uses" of the sea [including the definition of piracy].").

121 *See* S.S. Lotus case (France v. Turkey), 1927 PCIJ (Ser. A) No. 10, at 70.

122 United Nations Convention on the Law of the Sea art. 105, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

123 *Famous Cases & Criminals: Al Capone*, *supra* note 111.

124 G. Robert Blakely & John Robert Blakely, **Civil and Criminal RICO: An Overview of the Statute and its Operation**, 64 DEF. COUNS. J. 36 (1997); Russello v. United States, 464 U.S. 16, 26 (1983) (finding that the legislative history of RICO "clearly demonstrates that ... [it] was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots").

125 S. REP. NO. 91-617 at 79.

126 *E.g. supra* notes 56-59.

127 *Clan Structure in Somalia*, CIVIL MILITARY FUSION CENTRE, (Aug. 2011), https://www.cimicweb.org/cmo/Piracy/Documents/CFC%20Anti-Piracy%20Thematic%20Reports/CFC_Anti-Piracy_Report_Clans%20in%20Somalia_Aug_2011.pdf.

128 Supreme Court Chamber Judgment, No. 001/18-07-2007-ECCC/SC ¶ 79 (Feb. 3, 2012).

the inquiry. First, the court noted that, although hierarchical position is a relevant criterion, it is not dispositive.¹²⁹ Second, the *de jure* and *de facto* roles of the individual should both be considered.¹³⁰ In other words, the nominal role the individual held, as well as the actual power the individual wielded, should both be relevant considerations.

The context in which the ICC considered leadership criteria is similar to that of the ECCC in that both were determining whether an individual's leadership role was a jurisdictional requirement. At the ICC, the issue was whether a defendant must be among "the most senior leaders suspected of being the most responsible for the crimes within the jurisdiction of the Court" to satisfy the gravity threshold in art. 17(1)(d) of the Rome Statute.¹³¹ In deciding that a defendant's role was relevant to the gravity threshold, the Trial Chamber reasoned that considering an individual's role maximizes the ICC's deterrent effect because senior leaders are "the ones who can most effectively prevent or stop the commission of those crimes."¹³²

Like the ECCC, the ICC considered the *de jure* and *de facto* roles of the individual, but the ICC added a third criterion regarding the role that the organization of which the individual in question was a leader played in the overall commission of the relevant crimes.¹³³ In considering the *de jure* and *de facto* roles, the ICC paid special attention to the individual's "authority to negotiate, sign, or implement ceasefires or peace agreements," because it was those with the greatest authority to put an end to the crimes in question whose effective deterrence would bring the greatest benefit to the international community.¹³⁴ Although the Appeals Chamber reversed the Trial Chamber's holding on procedural and substantive grounds,¹³⁵ the ICC Trial Chamber's policy rationale remains relevant to defining leaders of maritime piracy.

Of all the international tribunals to consider leadership criteria, the one whose experience most closely relates to maritime piracy is the ICTY. Initially, the ICTY prosecuted individuals at all levels of criminal responsibility.¹³⁶ However, as part of the tribunal's completion strategy, the United Nations Security Council called on the ICTY to determine which cases should be tried at the ICTY and which should be transferred to a local jurisdiction, calling on the ICTY to "concentrate on the most senior leaders suspected of being most responsible for crimes."¹³⁷ In response, the ICTY amended Rule 11**bis**(C) of the Rules of Procedure and Evidence to require the Referral Bench to "consider[] the level of responsibility of the accused when determining whether to transfer to a national jurisdiction."¹³⁸

Former ICTY Chief Prosecutor Carla Del Ponte describes the criteria that she and her team used when considering referral to national jurisdictions:

(1) the seriousness of the crime including its severity, magnitude, nature and impact decided after comprehensive investigation and analysis including reviewing open source material, NGO

129 Trial Chamber Judgment No. 001/18-07-2007/ECCC/TC ¶24 (Jul. 26, 2010).

130 Case File No.: 003/07-09-2009-ECCC-OCIJ ¶14 (May 2, 2012).

131 Situation in the Democratic Republic of the Congo, Case No. ICC-01/04-01/07 ¶51 (Feb. 10, 2006).

132 *Id.* para. 54.

133 *Id.* paras. 52-53.

134 *Id.* para. 69.

135 Situation in the Democratic Republic of the Congo, Case No. ICC-01/04, Appeals Chamber ¶¶54, 60 (Jul. 13, 2006).

136 Situation in the Democratic Republic of the Congo, *supra* note 131 para. 56.

137 UNSCR 1534 (2004), ¶¶ 4-5.

138 International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure 11 bis (C).

reports, identifying and conducting interviews of victims throughout the former Yugoslavia and in countries where victims have sought refugee status, forensic evidence, demographic evidence, expert evidence and exhumation and autopsy reports; (2) the leadership level and position in the military and political hierarchical structures as well as information about the military formations, the political organizations, the de facto as well as the de jure command structures, the relationship between political, military, paramilitary and police organizations at the time of the conflict; (3) the responsibility quotient among the senior leaders assessing their involvement, manner of participation, contribution to the crime and importance of their role.¹³⁹

In applying these criteria to the case of *Prosecutor v. Dragomir Milosevic*, the Referral Bench of the ICTY further elaborated on what is necessarily a line-drawing exercise.¹⁴⁰ Milosevic was the permanent commander of the Sarajevo-Romanija Corps, a unit composed of approximately 18,000 soldiers.¹⁴¹ This position placed him on the second-highest tier of military authority, “answering ‘solely to the Commander of the VRS [Bosnian Serb Army] Main Staff and the Supreme Commander of [the] Army.’”¹⁴²

In determining that Dragomir Milosevic had achieved a level of responsibility sufficient to warrant prosecution at the ICTY, the Referral Bench rejected the argument that the Security Council intended the phrase “most senior leaders” to be restricted to the “architects of an overall policy which forms the basis of the alleged crimes.”¹⁴³ Instead, the Referral Bench concluded that Rule 11bis(C) covers “individuals... who, by virtue of their position and function in the relevant hierarchy, both *de jure* and *de facto*, are alleged to have exercised such a degree of authority that it is appropriate to describe them as among the ‘most senior’, rather than ‘intermediate.’”¹⁴⁴ The Referral Bench considered the fact that Milosevic negotiated and signed anti-sniping and local cease-fire agreements as a factor weighing in favor of ICTY prosecution and re-iterated that Milosevic’s lack of involvement in initially creating the military situation and planning the campaign was not enough to have his case referred to a national jurisdiction.¹⁴⁵

Taken together, the experiences of international tribunals in differentiating between low-level perpetrators and leaders sheds light on that which should be considered—and that which should not be considered—in differentiating between pirate leadership and ordinary pirates. Possible considerations include: 1) the individual’s leadership level in terms of *de jure* and *de facto* authority; 2) the role of the organization in question in the wider context of the relevant crimes; 3) the severity, magnitude, nature and impact of the specific crimes for which the individual is allegedly responsible; and 4) whether the individual has the power to stop further criminal activity. The experiences of the tribunals further suggest that the role the individual had in creating the broader situation that resulted in the commission of crimes is not relevant, and those whose authority is “intermediate” should not be considered part of the organization’s leadership.

139 Del Ponte, *supra* note 101, at 543.

140 *Prosecutor v. Dragomir Milosevic*, Case No. IT-02-54, Decision on Referral of Case Pursuant to Rule 11 Bis (Int’l Crim. Trib. For the Former Yugoslavia Jul. 8, 2005).

141 *Id.* para 21.

142 *Id.* para. 14.

143 *Id.* para. 22 (internal quotations omitted).

144 *Id.*

145 *Id.* para. 23.

A final consideration, purely as a matter of strategy, is the relative value of the individual in question as a defendant and as a source of information that could be used to move further up the chain of conspiracy. For example, a non-cooperative accused in the second or third tier of leadership may be worth prosecuting, where an informed and cooperative accused with the same level of authority might be more useful as an insider witness than as a defendant, though it should be noted that the roles of defendant and informant are not mutually exclusive.

Applying these criteria to organized piracy operations, it is clear that at least two classes of individuals—instigators and large-scale financiers—should be targeted for prosecution. Those with the connections to assemble large sums of money and those with the capital to finance large-scale criminal activity are at the top of the criminal hierarchy, both from a *de jure* and a *de facto* standpoint. Moreover, because these large-scale financiers tend to be responsible for many separate pirate action groups, they are responsible for a large amount of pirate activity relative to that of an individual boarding pirate. Finally, because a single pirate expedition requires approximately \$80,000 in start-up capital,¹⁴⁶ it is reasonable to conclude that instigators and high-level financiers are most able to put an end to pirate activity through a lack of funding.

In a similar way, clan elders and local politicians who take bribes in exchange for non-interference would almost certainly be worthy targets of a large-scale prosecutorial effort. These individuals, like the instigators and large-scale financiers, enable the work of many separate pirate action groups and are arguably at the top of the organizational hierarchy.

The experiences of international tribunals further suggest classes of pirates that are likely of better use as a means for reaching high-level targets than as defendants. These include the pirates who physically board vessels and take hostages (with the exception of the “pirate commander”), the post-hijacking security team (with the exception of the “ground commander”), and those individuals involved in supplying the ground security team and hostages with provisions while the negotiating process is underway. These individuals are at or near the bottom of the hierarchical structure, are responsible for decidedly less criminal activity than financiers, instigators, and enablers are, and have almost no power to stop piracy, due to the low-skill nature of their roles and the ease with which they can be replaced.¹⁴⁷ There are of course exceptions that should be made depending on the severity of the individual acts committed by a given low-level operative, but for the most part these individuals should be used primarily for information-gathering purposes if prosecutorial focus is to systematically shift toward pirate leadership.

This leaves the remainder—small-scale investors, informants, pirate commanders, ground commanders, hostage negotiators, and accountants—to be dealt with on a case-by-case basis. When deciding whether an individual is more valuable as a source of information or as a final target, policymakers and prosecutors should consider the prominence of the pirate action group or groups of which the individual in question is a part, as well as the quantity and severity of individual crimes for which the individual in question could be held responsible. A key consideration in this context is the willingness of the individual to provide actionable information and evidence about those further up the organizational hierarchy. Those who are able and willing to provide actionable information

146 World Bank, *Pirates of Somalia*, *supra* note 44, at 113.

147 Guilfoyle, *supra* note 60, at 769.

and evidence on instigators, large-scale financiers, corrupt clan elders, and local politicians should be allowed to do so in exchange for reduced sentences.

Identifying the criteria distinguishing pirate leaders from ordinary pirates is a necessary part of any strategy to systematically target pirate leadership, but it is far from sufficient. There must be some sort of mechanism to investigate, build evidence against, and ultimately prosecute these individuals in the most efficient and effective way possible. Fortunately, piracy's status as the paradigmatic crime of universal jurisdiction under international law generates an exceptionally wide range of possibilities for developing such a mechanism. The next section considers several already-tried mechanisms, with the following section covering options that have been proposed but not yet tried.

V. THE MYRIAD OPTIONS FOR PROSECUTING PIRATE LEADERS

Due to piracy's paradigmatic status as a crime of universal jurisdiction and its universal regard as a crime of international concern,¹⁴⁸ international law is exceptionally permissive in the breadth of norms and institutions available to those interested in systematically prosecuting pirate leadership. This section reviews those options, which range from purely national efforts to fundamentally international ones.

A. Coordinated National Efforts

The first possibility for systematically investigating and prosecuting pirate leadership is through national-level prosecutions coordinated through any number of international institutions. These types of efforts are already ongoing. For example, several states with greater naval power, such as the United States, take an active part in multinational counter-piracy operations.¹⁴⁹ These states are active in rescuing ships, capturing pirates, and conducting general police work.¹⁵⁰ The United States Navy also has its own branch that specializes in investigating piracy, the Naval Criminal Investigative Service (NCIS),¹⁵¹ which conducts post-hijacking crime scene investigations.¹⁵² However, when NCIS is unable to conduct an investigation, a team is "cobbled together" from whatever resources are available, with mixed results.¹⁵³ Moreover, there is a sense that national law enforcement agencies are less willing to share information across borders than their international counterparts are.¹⁵⁴

Other states, such as Kenya, Seychelles, and Mauritius, have signed agreements with the policing nations regarding prosecution and imprisonment, allowing for more economically efficient

148 UNCLOS, *supra* note 122, art. 105; S.S. Lotus case, *supra* note 121, at 70.

149 *Continued U.S. Efforts to Combat Somali Piracy*, 105 Am. J. Int'l L. 131, 131-32 (2011), ORIGINALLY IN CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW (John R. Crook, ed. 2011).

150 Tom Syring, *A Pirate and a Refugee: Reservations and Responses in the Fight Against Piracy*, 17 ILSA J. INT'L & COMP. L. 437, 437 (2011).

151 NAVAL CRIMINAL INVESTIGATIVE SERVICE (NCIS), <http://www.ncis.navy.mil/Pages/publicdefault.aspx> (last visited Mar. 18, 2014).

152 Scott, *supra* note 64, at 16.

153 *Id.*

154 *Id.*

prosecutions than those conducted by the capturing state.¹⁵⁵ Although the bulk of prosecutions have taken place in states within the regions, non-regional nations such as the Netherlands, Germany, and the United States have also engaged in prosecuting suspected pirates, but these prosecutions tend to proceed only when national interests are involved.¹⁵⁶

If properly coordinated, national-level efforts could serve as the basis for systematically investigating and prosecuting pirate leadership. In fact, a certain amount of coordination is already underway. For example, INTERPOL has aided efforts to prosecute pirates through its investigative strategies as well as coordination and organization efforts.¹⁵⁷ INTERPOL contributes to counter-piracy prosecutions by improving evidence collection, facilitating data exchange, and helping build regional capabilities for investigation.¹⁵⁸ Working closely with NCIS, INTERPOL deploys teams to retrieve evidence from hijacked ships.¹⁵⁹ INTERPOL also runs a global maritime piracy database that allows states to share information with INTERPOL and then retrieve information given by other states,¹⁶⁰ though some have suggested that the database has been under-resourced and under-utilized.¹⁶¹

Additionally, Working Groups 2 and 5 of the Contact Group on Piracy off the Coast of Somalia have been working to coordinate national-level efforts with an eye towards prosecuting pirate leadership. Working Group 2 provides specific, practical, and legally sound guidance to the Contact Group on all legal aspects of counter-piracy.¹⁶² Participants exchange information on ongoing judicial activities, including specific court cases, as well as on relevant capacity-building activities in the region.¹⁶³ Through this exchange of information, Working Group 2 contributes to a common approach to and understanding of legal issues related to maritime piracy. Working Group 5, however, focuses on how to advance information-sharing internationally and between industry and government authorities to disrupt the pirate enterprise on shore, working with partners such as INTERPOL, national law enforcement/prosecution agencies, and Working Group 2 to create new opportunities for prosecutors and investigators to de-conflict and exchange information about their ongoing investigations and proactively target the top organizers, financiers, and negotiators of Somali piracy for arrest and prosecution.¹⁶⁴

Third, EUROPOL and EUROJUST have worked to inhibit the free flow of laundered money, while “targeting financiers and coordinating databases to increase the understanding of the pirate business model.”¹⁶⁵ These entities accomplish their respective missions by operating a piracy database similar

155 Sandra L. Hodgkinson, *International Law in Crisis: Seeking the Best Prosecution Model for Somali Pirates*, 44 CASE W. RES. J. INT’L L. 303, 305-07 (2011); James Thuo Gathii, *Kenya’s Piracy Prosecutions*, 104 AM. J. INT’L L. 416, 416-17 (2010).

156 *Continued U.S. Efforts to Combat Somali Piracy*, 105 AM. J. INT’L L. 131, 133 (2011), originally in CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW (John R. Crook, ed. 2011).

157 Maritime Piracy, INTERPOL, <http://www.interpol.int/Crime-areas/Maritime-piracy/Maritime-piracy> (last visited Mar. 18, 2014).

158 *Id.*

159 *2011: A ground-breaking year for INTERPOL’s future*, INTERPOL, Dec. 31, 2011, <http://interpolnoticeremoval.com/tag/interpol-global-maritime-piracy-database/>.

160 *Id.*

161 Scott, *supra* note 64, at 28-29

162 *Working Group 2*, Contact Group of Piracy off the Coast of Somalia, <http://www.thecgps.org/work.do?action=workSub2> (last visited April 20, 2014).

163 *Id.*

164 *Working Group 5*, Contact Group of Piracy off the Coast of Somalia, <http://www.thecgps.org/work.do?action=workSub25> (last visited April 20, 2014).

165 *Maritime Piracy: Strengthening the EU Response*, OCEANUSLIVE.ORG, <http://www.oceanuslive.org/main/viewnews.aspx?uid=00000627> (last visited April 21, 2014).

to the one operated by INTERPOL and by bringing prosecutors together to exchange information on best practices in conducting investigations and dealing with legal obstacles, as well as to facilitate the exchange of information.¹⁶⁶

Fourth, the UNODC's Counter Piracy Programme, whose efforts were primarily focused on lower-level pirates, has recently shifted its focus toward pirate leadership. On November 22, 2013, UNODC launched its "Programme to Support Maritime Security" (MASE). MASE "will address maritime crime in the Indian Ocean including piracy, drugs and arms smuggling, human trafficking, illegal fishing and maritime pollution."¹⁶⁷ Included among MASE's goals is the strengthening of "regional capacity to disrupt the financial networks of pirate leaders and their financiers."¹⁶⁸

Finally, the Seychelles-based Regional Fusion Law Enforcement Centre for Safety and Security at Sea (REFLECS³) has the three-part mission of combatting transnational organized crime; improving maritime shipping information-sharing; and coordinating local and regional capacity-building programs in the Indian Ocean.¹⁶⁹ Part of this mandate includes coordination with respect to piracy in the Indian Ocean.

Prosecuting pirate leadership through coordinated national efforts is not without difficulty, as different nations have varying interest in and capacity for engaging in such an effort. Moreover, there is a multitude of international institutions vying to act as the coordinating mechanism for these efforts, illustrating the difficulty in efficiently coordinating national-level efforts. Nonetheless, piracy's unambiguous status as a crime of universal jurisdiction removes jurisdictional barriers that would otherwise be present in a way that makes coordinated national efforts a viable option for tackling this fundamentally international problem.

B. Mutual Legal Assistance Regime

Should relevant stakeholders desire a more formalized approach to conducting complex investigations and prosecutions related to maritime piracy, they could turn to a mutual legal assistance (MLA) regime. MLA regimes are designed to facilitate transnational law enforcement by setting enforceable standards related to investigating and prosecuting complex crimes that span national borders.¹⁷⁰

MLA regimes come in two basic forms: as stand-alone, bilateral mutual legal assistance treaties (MLATs) covering a wide range of crimes, or as part of a multilateral treaty focusing on a single crime or class of crimes.¹⁷¹ Both varieties are fairly common. For example, the United States has entered into

166 *Factsheet: The EU fight against piracy in the Horn of Africa* EUROPEAN UNION EXTERNAL ACTION (131223/03) (Dec. 23, 2013) http://eeas.europa.eu/statements/docs/2013/131223_03_en.pdf; *The Role of EUROJUST in the Fight Against Terrorism* EUROJUST, http://www.coe.int/t/dlapil/codexter/8_Conferences/Istanbul2013/Presentations/Session3-Eurojust-Hermans-web.pdf.

167 STATE DEP'T PRESS RELEASES AND DOCUMENTS, CONTACT GROUP ON PIRACY OFF THE COAST OF SOMALIA: QUARTERLY UPDATE, (Dec. 24, 2013), <http://www.state.gov/t/pm/rls/fs/2013/212140.htm>.

168 *Annex*, EUROPEAID, http://ec.europa.eu/europeaid/documents/aap/2013/af_aap-spe_2013_intra-acp_p3.pdf.

169 *Id.*

170 *E.g.* Marian Nash (Leich), *Contemporary Practice of the United States Relating to International Law: Mutual Legal Assistance Treaties*, 91 AM. J. INT'L L. 699, 699-700 (1997).

171 Telephone interview by Jon Bellish with Cliff Johnson, Assistant Legal Adviser for Oceans, International Environmental, and Scientific Affairs, United States Department of State (Nov. 8, 2013) (*hereinafter* Johnson Interview).

bilateral MLATs with 56 countries, as well as 27 MLA-related instruments, agreements, and protocols with the European Union.¹⁷² In addition, many multilateral treaties contain MLA provisions, including the Inter-American Convention on Mutual Legal Assistance of the Organization of American States, the European Convention on Mutual Assistance in Criminal Matters, the United Nations Convention against Corruption, the International Convention for the Suppression of the Financing of Terrorism, and the 1988 UN Drug Convention.

In a 2013 interview, one government official involved in the legal aspects of countering piracy suggested that a universal MLAT might be an appropriate tool to combat maritime piracy.¹⁷³ Pursuing complex piracy prosecutions and investigations through an MLA regime could be done in a number of ways: using the MLA provisions contained in an applicable multilateral treaty, utilizing existing bilateral MLATs, negotiating a piracy-specific MLAT, or negotiating a new multilateral treaty related to maritime piracy including provisions for MLA. Each of these variations will be briefly discussed and analyzed in turn.

1. MLA Provisions in Existing Multilateral Treaties

Although there are a number of multilateral treaties potentially applicable to maritime piracy,¹⁷⁴ this section will focus on the 1979 International Convention against the Taking of Hostages (Hostage-Taking Convention),¹⁷⁵ the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention),¹⁷⁶ and the 2000 United Nations Convention on Transnational Organized Crime (UNTOC).¹⁷⁷ This is because, of all the possible multilateral conventions that could be used, these three are the most widely-ratified and most obviously applicable to maritime piracy.

Each of these multilateral treaties is fairly widely ratified. The Hostage-Taking Convention came into force on June 3, 1983, and currently has 173 States Parties,¹⁷⁸ the SUA Convention has been ratified

172 Antigua & Barbuda, Argentina, Australia, Austria, the Bahamas, Barbados, Belgium, Belize, Brazil, Canada, Cyprus, Czech Republic, Dominica, Egypt, Estonia, France, Germany, Greece, Grenada, Hong Kong, Hungary, India, Ireland, Israel, Italy, Jamaica, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malaysia, Mexico, Morocco, the Kingdom of the Netherlands (including Aruba, Bonaire, Curacao, Saba, St. Eustatius and St. Maarten), Nigeria, Panama, Philippines, Poland, Romania, Russia, St. Lucia, St. Kitts & Nevis, St. Vincent & the Grenadines, South Africa, South Korea, Spain, Sweden, Switzerland, Thailand, Trinidad & Tobago, Turkey, Ukraine, United Kingdom (including the Isle of Man, Cayman Islands, Anguilla, British Virgin Islands, Montserrat and Turks and Caicos), Uruguay, and Venezuela; <http://www.state.gov/j/inl/rls/nrcrpt/2012/vol2/184110.htm>.

173 Scott, *supra* note 64, at 44.

174 See Cheah Wui Ling, *Maritime crimes and the problem of cross-border enforcement: Making the most of existing multilateral instruments*, working paper (on file with author) (2012) (considering the 2004 Treaty on Mutual Legal Assistance in Criminal Matters (2004 MLAT), the 1979 International Convention against the Taking of Hostages, the 1999 International Convention for the Suppression of the Financing of Terrorism, the 2007 ASEAN Convention on Counter Terrorism, the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, the 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the 2000 United Nations Convention on Transnational Organized Crime).

175 International Convention against the Taking of Hostages, 17 December 1979, 1316 U.N.T.S. 206, 18 I.L.M. 1456 (entered into force 3 June 1983), *available at* <http://treaties.un.org/doc/db/Terrorism/english-18-5.pdf> [*hereinafter* Hostage-Taking Convention].

176 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 10 March 1988, 1678 U.N.T.S. 222, 27 I.L.M. 668 (entered into force 1 March 1992), *available at* <http://treaties.un.org/doc/db/Terrorism/Conv8-english.pdf> [*hereinafter* SUA Convention].

177 2000 United Nations Convention against Transnational Organized Crime, 15 November 2000, 2225 U.N.T.S. 209, 40 I.L.M. 335 (entered into force 29 September 2003) [*hereinafter* UNTOC].

178 Status of the International Convention Against the Taking of Hostages, UNITED NATIONS TREATY COLLECTION (last visited Feb. 21, 2014), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-5&chapter=18&lang=en.

by 162 states,¹⁷⁹ and UNTOC has been ratified by 179 nations.¹⁸⁰ However, Somalia has not ratified the Hostage-Taking Convention, the SUA Convention, or the UNTOC, which of course will have important ramifications for the practical utility of this approach.¹⁸¹

Nonetheless, each of these conventions, by their own terms, could be interpreted as covering acts of piracy. The Hostage-Taking Convention could be used to cover piracy for ransom because it criminalizes “[s]eiz[ing], detain[ing] and threaten[ing] to kill, to injure or to continue to detain another person in order to compel a third party...to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage.”¹⁸² Because the Convention criminalizes acting as an accomplice in a hostage-taking, it could be used to reach pirate senior leadership.¹⁸³ Nonetheless, the Hostage-Taking Convention has limited applicability to piracy in that it only covers piracy for ransom, as opposed to all acts of piracy.

Similarly, the SUA Convention covers piratical acts by criminalizing the unlawful and intentional “seiz[ure] or exercise[of] control over a ship by force or threat thereof or any other form of intimidation,” and provides for accomplice liability, allowing authorities to reach senior leaders.¹⁸⁴ The Convention was drafted in response to maritime terrorism, and although the sponsoring nations disclaimed the treaty’s relevance to piracy,¹⁸⁵ the acts covered in the SUA Convention clearly describe acts committed by contemporary pirates. Finally, the UNTOC criminalizes “[a]greeing with one or more other persons to commit a serious crime [punishment for which is more than 4 years] for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit [and an act in furtherance where required in domestic law],” as well as “[o]rganizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group.”¹⁸⁶

Each of these conventions provides for wide jurisdictional latitude, including provisions related to maritime jurisdictions as well as MLA provisions regarding international cooperation.¹⁸⁷ However, they also contain exceptions that are numerous and potentially quite broad. For example, the Hostage-Taking Convention states that cooperation can be refused if the capturing state believes that the extradition request is discriminatory in nature or if the capturing state believes that the requesting party will not treat the suspect fairly.¹⁸⁸ The SUA Convention’s exception is even broader, stating that refusal to cooperate is valid as long as it is accompanied by a statement explaining why a state

179 Status of Conventions, INTERNATIONAL MARITIME ORGANIZATION (last visited Feb. 20, 2014), <http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx>.

180 Status of United Nations Convention against Transnational Organized Crime, Nov. 15, 2000, Doc. A/55/383, 2225 U.N.T.S. 209, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=en (last visited Apr. 4, 2014).

181 See notes 178-180, *supra*.

182 Hostage-Taking Convention, *supra* note 175, art. 1(1).

183 *Id.* art. 1(2).

184 Status of Conventions, INTERNATIONAL MARITIME ORGANIZATION (last visited Feb. 20, 2014), <http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx>; SUA Convention, *supra* note 176 art. 3.

185 Helmut Tuerk, *Combatting Terrorism at Sea – The Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 15 U. Miami Int’l & Comp. L. Rev. 337, 345 2007-2008.

186 UNTOC, *supra* note 177, art. 5.1, 6.1, 10.4;

187 Hostage-Taking Convention, *supra* note 175, art. 5.1, 6.1, 10.4; SUA Convention, *supra* note 176, art. 6.1, 6.2, 7.5, 10.1, 12.1, & 13-15; UNTOC, *supra* note 177, art. 15.1-15.3, 15.5, 16.8, & 18.

188 Hostage-Taking Convention, *supra* note 175, 9.1.

believes that the treaty is not applicable to a given situation.¹⁸⁹ The UNTOC also provides a number of grounds for refusal, including questions about essential state interests, dual criminality, fair treatment, discrimination, and the incompatibility of legal systems.¹⁹⁰

Pursuing complex piracy prosecutions and investigations through existing MLA regimes contained in multilateral treaties would be beneficial because such treaties are widely ratified and contain mandatory legal obligations with regard to asserting jurisdiction, sharing information and evidence, and transferring suspects. However, this approach will not likely be a panacea when it comes to maritime piracy. First, Somalia is not a State Party to any of the relevant treaties, so any relevant obligations would not be binding on Somalia by way of the treaties at issue. Second, there are a number of valid and sometimes applicable grounds for refusing to cooperate, so the process would be far from automatic. Finally and perhaps most importantly, the MLA regimes created by these treaties assume that relevant persons, information, and/or evidence are already in the hands of authorities. They do very little in and of themselves to enhance law enforcement capacity or streamline the process for collecting information in the first place.

2. Existing Bilateral MLATs

A second option, and one related to utilizing existing MLA provisions contained in widely-ratified multilateral treaties, would be to use the existing bilateral MLAT regime to facilitate complex piracy prosecutions and investigations. Worldwide, there are too many bilateral MLATs to count. By way of example, the United States has entered into 62 MLATs since 1977,¹⁹¹ the United Kingdom is party to 40,¹⁹² and most other states have entered into at least one bilateral MLAT, although some states, such as Japan, use them less often than others.¹⁹³

Due to the wide variety of MLATs and the massive number of states potentially affected by maritime piracy, it would be impossible to analyze each potentially applicable bilateral treaty. Nonetheless, there are characteristics common among bilateral MLATs that can be considered with their utility in the context of complex piracy prosecutions and investigations in mind. The UN Office on Drugs and Crime has identified seven common features of MLATs and MLA clauses: (1) scope of the treaty; (2) obligations of the parties; (3) relation of the treaty to other MLATs or MLA agreements; (4) the assistance available to parties; (5) safeguards; (6) grounds for refusal; and (7) restraint, confiscation, and asset recovery.¹⁹⁴

189 SUA Convention, *supra* note 176, art. 8.3.

190 UNTOC, *supra* note 177, arts. 16.13, 16.14, & 18.21.

191 Brian Kindle, *MLATs are powerful weapons in financial crime combat, even for private sector*, ASSOCIATION OF CERTIFIED FINANCIAL CRIME SPECIALISTS (Feb. 14, 2012), <http://www.acfcs.org/mlats-are-powerful-weapons-in-counter-financial-crime-combat-even-for-private-sector/>; 2012 INCSR: Treaties and Agreements, Bureau of International Narcotics and Law Enforcement Affairs (Mar. 7, 2012), <http://www.state.gov/j/inl/rls/nrcrpt/2012/vol2/184110.htm>.

192 BILATERAL AGREEMENTS ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS, <http://webarchive.nationalarchives.gov.uk/20121212135632/http://www.fco.gov.uk/resources/en/pdf/3706546/10773698/FCO-Tr-MLA> (last visited Apr. 10, 2014).

193 Julian M. Joshua, Peter D. Camesasca, & Youngjin Jung, *Extradition and Mutual Legal Assistance Treaties: Cartel Enforcement's Global Reach*, 75 ANTITRUST L.J. 353, 383 (stating that Japan has only concluded two bilateral extradition treaties, one with the U.S. and the other with the Republic of Korea).

194 Rajka Vlahovic, Senior Legal Adviser for Division of Treaty Affairs, Workshop on Strengthening International Legal Cooperation amongst Member States of the Organisation for Security and Cooperation in Europe to Combat Transnational Organised Crime (Apr. 7 2008).

The scope of the treaty refers to the specific crimes covered by the MLAT. Some treaties contain an annex with an exhaustive list of covered crimes,¹⁹⁵ while others state that all crimes are included unless specifically excluded.¹⁹⁶ Of fourteen randomly selected bilateral MLATs entered into by the United States, piracy was explicitly listed in two,¹⁹⁷ implicitly listed in two,¹⁹⁸ and not excluded in any of the remaining ten.¹⁹⁹ This suggests that piracy would fall within the scope of the vast majority of MLATs currently in force.

The second common characteristic of MLATs, the obligations of the parties, focuses on describing the nature of assistance required, designating the central national authority for receiving and responding to MLA requests, and specifying the form in which MLA requests should be submitted.²⁰⁰ The central authority and the MLA form requirements, while they vary from treaty to treaty, are spelled out explicitly and have little bearing on the applicability of bilateral MLATs to piracy.²⁰¹ As for the nature of assistance required, some treaties require the “widest possible measure of mutual assistance,”²⁰² others specify the types of assistance required,²⁰³ and still others say nothing about how much mutual assistance is available.²⁰⁴ Third, the vast majority of bilateral MLATs include a provision stating that the MLAT has no effect on other treaties, obligations, or arrangements.²⁰⁵

195 *E.g.* Mutual Assistance in Criminal Matters, U.S.-Switz., Dec. 23, 1975, 27 U.S.T. 2019, T.I.A.S. 8302, *available at* <http://www.rhf.admin.ch/etc/medialib/data/rhf/recht.Par.0010.File.tmp/sr0-351-933-6-e.pdf> [hereinafter U.S.-Switz.].

196 *E.g.* Mutual Legal Assistance Treaty Between the United States of America and Sweden, U.S.-Swed., Dec. 17, 2001, T.I.A.S. 09-601, *available at* <http://www.state.gov/documents/organization/190056.pdf> [hereinafter U.S.-Swed.].

197 Extradition and Mutual Assistance in Criminal Matters, U.S.-Turk., June 7, 1979, 32 U.S.T. 3111, T.I.A.S. 9891, *available at* <http://internationalextraditionblog.files.wordpress.com/2011/03/turkey.pdf> [hereinafter U.S.-Turk.]; U.S.-Switz., *supra* note 195.

198 Treaty between the United States of America and the Republic of Panama on Mutual Assistance in Criminal Matters, U.S.-Pan., Apr. 11, 1991, Treaty Doc. 102-15, http://www.oas.org/juridico/mla/en/traites/en_traites-mla-usa-pan.pdf; Treaty between the United States of America and the Commonwealth of the Bahamas on Mutual Assistance in Criminal Matters, U.S.-Bah., June 12, 1987, Treaty Doc. 100-17, *available at* http://www.oas.org/juridico/mla/en/traites/en_traites-mla-usa-bhs.pdf.

199 Mutual Legal Assistance Treaty Between the United States of America and Malta, U.S.-Malta, May 18, 2006, T.I.A.S. 10-201.40, *available at* <http://www.state.gov/documents/organization/189591.pdf>; Mutual Legal Assistance Treaty Between the United States of America and Finland, U.S.-Fin., Dec. 16, 2004, T.I.A.S. 10-201.31, *available at* <http://www.state.gov/documents/organization/188261.pdf>; U.S.-Swed., *supra* note 196; Mutual Legal Assistance Treaty between the United States of America and Ireland, U.S.-Ire., Jan. 18, 2001, T.I.A.S. 13137, *available at* <http://www.state.gov/documents/organization/129536.pdf>; Mutual Legal Assistance Treaty between the United States of America and South Africa, U.S.-S. Afr., Sept. 16, 1999, T.I.A.S. 13061, *available at* <http://www.state.gov/documents/organization/124466.pdf>; Mutual Legal Assistance Treaty between the United States of America and Greece, U.S.-Greece, May 26, 1999, T.I.A.S. 13036, *available at* <http://www.state.gov/documents/organization/122864.pdf>; Mutual Legal Assistance Treaty between the United States of America and the Czech Republic, U.S.-Czech, Feb. 4, 1998, T.I.A.S. 12928, *available at* <http://www.state.gov/documents/organization/107829.pdf>; Treaty between the Government of the United States of America and the Government of the Federative Republic of Brazil on Mutual Legal Assistance in Criminal Matters, U.S.-Braz., Oct. 14, 1997, Treaty Doc. 105-42, *available at* http://www.oas.org/juridico/MLA/pt/bra/br_mlat_br_us_en.pdf; Mutual Legal Assistance Treaty Between the United States of America and Venezuela, U.S.-Venez., Oct. 12, 1997, T.I.A.S. 12941, *available at* <http://www.state.gov/documents/organization/111634.pdf>; Treaty Between the United States of America and the Republic of Latvia on Mutual legal Assistance in Criminal Matters, U.S.-Lat., June 13, 1997, T.I.A.S. 12867, *available at* <http://russian.riga.usembassy.gov/judicialjune.pdf>.

200 *E.g.* Treaty between the Government of the United States of America and the Government of Canada on Mutual Legal Assistance in Criminal Matters art. II, U.S., Can., Mar. 18, 1985, Treaty Doc. 100-14, *available at* http://www.oas.org/juridico/mla/en/traites/en_traites-mla-usa-can.pdf [hereinafter U.S.-Can.].

201 *E.g.* Treaty Between the United States of America and Japan on Mutual Legal assistance in Criminal Matters art. 2(1), U.S.-Jap., Aug. 5, 2003, Treaty Doc. 108-12, *available at* <http://www.gpo.gov/fdsys/pkg/CDOC-108tdoc12/pdf/CDOC-108tdoc12.pdf>; U.S.-Switz., *supra* note 195, art. 28(1).

202 Treaty Between the Republic of the Philippines and the Republic of Korea on Mutual Legal Assistance in Criminal Matters art. 1(1), Phil.-S. Kor., June 3, 2003, *available at* <https://www.dfa.gov.ph/treaty/scanneddocs/187.pdf> [hereinafter Phil.-S. Kor.]; Model Treaty on Mutual Assistance in Criminal Matters art. 1(1), Dec. 14, 1990, A/RES/45/117, *available at* http://www.unodc.org/pdf/model_treaty_mutual_assistance_criminal_matters.pdf [hereinafter Model Treaty].

203 Treaty on Mutual Legal Assistance in criminal matters, with attachments, U.S.-Spain, Nov. 20, 1990, 1730 U.N.T.S. 113, *available at* http://photos.state.gov/libraries/spain/164311/tratados_bilaterales_2013/Judicial_Assistance_TIAS_1730.pdf.

204 U.S.-Switz., *supra* note 195.

205 Model Treaty, *supra* note 202, art. 2.

The fourth characteristic of MLATs covers the types of assistance available to the parties. These provisions vary, but the Model Treaty on Mutual Assistance in Criminal Matters developed by the United Nations lists several forms of assistance, including:

- (a) Taking evidence or statements from persons;
- (b) Assisting in the availability of detained persons or others to give evidence or assist in investigations;
- (c) Effecting service of judicial documents;
- (d) Executing searches and seizures;
- (e) Examining objects and sites;
- (f) Providing information and evidentiary items; and
- (g) Providing originals or certified copies of relevant documents and records, including bank, financial, corporate or business records.²⁰⁶

Each of these particular measures of assistance could be used to facilitate complex piracy prosecutions and investigations.

Fifth, MLATs tend to contain safeguards, such as individual grounds to refuse cooperation, the requirement that that all material must be returned to the requested state after the proceedings,²⁰⁷ use of the evidence or documents gathered is limited to the use for which the state requested it,²⁰⁸ confidentiality²⁰⁹ (sometimes only upon request),²¹⁰ the provision of counsel or legal representatives,²¹¹ safe conduct for witnesses,²¹² and limitations on the extent of search and seizure.²¹³ These safeguards apply generally to all crimes, including maritime piracy.

The sixth common characteristic of bilateral MLATs is a list of grounds for refusal to cooperate. Common among the grounds for refusal are dual criminality,²¹⁴ prejudice to the requested state's sovereignty, security, public order, or other essential public interests,²¹⁵ double jeopardy,²¹⁶ political

²⁰⁶ *Id.* art. 1(2).

²⁰⁷ *Id.* art. 7; Agreement between the Government of the Hong Kong special Administrative Region of the People's Republic of China and the Government of the Republic of Korea Concerning Mutual Legal Assistance in Criminal Matters art. 11(1), H.K.-S. Kor., Nov. 17, 1998, available at <http://www.oecd.org/site/adboecdanti-corruptioninitiative/39836999.pdf> [hereinafter H.K.-S. Kor.]; U.S.-Switz., *supra* note 195, art. 32.

²⁰⁸ Phil.-S. Kor., *supra* note 202, art. 8(4); Model Treaty, *supra* note 202, art. 8; H.K.-S. Kor., *supra* note 207, art. 7(1); U.S.-Can., *supra* note 200, art. 9; U.S.-Switz., *supra* note 195, art. 5.

²⁰⁹ Phil.-S. Kor., *supra* note 202, art. 8(1); Model Treaty, *supra* note 202, art. 9; H.K.-S. Kor., *supra* note 207, art. 8; U.S.-Switz., *supra* note 195, art. 8(1).

²¹⁰ Model Treaty, *supra* note 202, art. 9.

²¹¹ *Id.* art. 11(2); U.S.-Switz., *supra* note 195, art. 20(2).

²¹² Phil.-S. Kor., *supra* note 202, art. 14; Model Treaty, *supra* note 202, art. 15; H.K.-S. Kor., *supra* note 207, art. 15; U.S.-Switz., *supra* note 195, art. 27.

²¹³ Phil.-S. Kor., *supra* note 202, art. 16; Model Treaty, *supra* note 202, art. 17; H.K.-S. Kor., *supra* note 207, art. 16; U.S.-Can., *supra* note 200, art. 16.

²¹⁴ Joshua, Camesasca, & Young, *supra* note 193, at 391.

²¹⁵ Phil.-S. Kor., *supra* note 202, art. 5(1)(d); Model Treaty, *supra* note 202, art. 4(1)(a); H.K.-S. Kor., *supra* note 207, art. 4(1)(a); U.S.-Can., *supra* note 200, art. 5(1); U.S.-Switz., *supra* note 195, art. 3(1)(a).

²¹⁶ Model Treaty, *supra* note 202, art. 4(1)(d); U.S.-Switz., *supra* note 195 art. 3(1)(b).

offenses,²¹⁷ or inconsistency with law and practice in that jurisdiction.²¹⁸ Piracy's status as a crime of universal jurisdiction minimizes the risk that cooperation would violate the principles of dual criminality and prejudice to the requested state's sovereignty, while piracy's "private ends" requirement all but forecloses the possibility of refusal based on the political offenses exception. Double jeopardy and consistency with law and practice between parties would need to be considered on a case-by-case basis.

Finally, bilateral MLATs tend to contain provisions concerning the restraint, confiscation, and recovery of crime proceeds.²¹⁹ These provisions are important in all transnational criminal contexts, and maritime piracy is no exception.

The benefits and drawbacks of utilizing the existing bilateral MLAT regime to facilitate complex piracy prosecutions and investigations are similar to those associated with using an existing MLA provision from a multilateral convention. Bilateral MLATs create binding obligations and the predictability and consistency that accompany such obligations. Additionally, piracy's status as a crime of universal jurisdiction helps resolve some problems associated with dual criminality, political offenses, and sovereign equality common in MLA relationships.

Conversely, bilateral MLATs, like their multilateral counterparts, focus on handling—as opposed to gathering and capturing—information and suspects, the latter issue being the primary roadblock to more effective transnational piracy investigations and prosecutions.²²⁰ Additionally, a bilateral MLAT approach would not include Somalia, which has not deposited a single MLAT with the United Nations Treaty Collection.²²¹ Finally, the same predictability and consistency that comes along with a binding MLAT regime also contains significant complexity, especially regarding the formality of MLA requests and necessity of working through the designated central national authority. Thus an MLAT regime, while providing discrete benefits, would also limit the flexibility that characterizes ongoing efforts.

3. A Piracy-Specific MLA Regime

Three of the main drawbacks to using an existing MLA regime—the lack of focus on collecting information as opposed to using it, the present inability to include Somalia in such a regime, and the limitations associated with working with a generic national authority—could all be ameliorated by creating a piracy-specific MLA regime. However, the two avenues to creating such a regime, a multilateral MLAT limited to maritime piracy and a new multilateral treaty covering maritime piracy and containing MLA provisions, while both conceptually sound, appear unlikely from a practical standpoint.

217 Model Treaty, *supra* note 202, art. 4(1)(b).

218 *Id.* art. 4(1)(e).

219 Vlahovic, *supra* note 194.

220 See Scott, *supra* note 64, at 17-20.

221 *Depositary Notifications (CNs) by the Secretary-General*, U.N. TREATY COLLECTION, <https://treaties.un.org/Pages/CNs.aspx> (last visited Apr. 14, 2014).

The first option available to those interested in creating a piracy-specific MLA regime would be to negotiate a multilateral MLAT limited by its own terms to piracy on the high seas, as defined under the United Nations Convention on the Law of the Sea (UNCLOS).²²² The treaty would be similar in form to bilateral MLATs, containing provisions related to the scope of the crime covered, obligations of the parties to provide assistance, the nature of assistance available to parties, as well as procedural safeguards and grounds for refusal.²²³ Additionally, the treaty could diverge from traditional MLAT drafting practice by allowing for flexibility in terms of national central authorities, expressly limiting the scope of the treaty to so-called “kingpins,” or even creating a central international repository to act as a clearinghouse for intelligence, information, and evidence concerning pirates.

This idea, proposed by an individual in the counter-piracy community, would contain all of the benefits of more traditional bilateral MLATs while accounting for many of the drawbacks. Like bilateral MLATs, a piracy-specific multilateral MLAT would create binding legal obligations to cooperate in the pursuit of high-level pirates. Additionally, because of piracy’s status as a crime of universal jurisdiction,²²⁴ as well as the existing international obligation to cooperate in the repression of piracy,²²⁵ restrictions based on dual criminality and infringement of state sovereignty or fundamental national interests could be curtailed. Thus, limiting the scope of the proposed multilateral MLAT to maritime piracy greatly enhances the possibility of achieving universal consensus—including that of Somalia—which would represent a significant structural improvement to the international community’s ability to conduct complex piracy investigations and prosecutions.

However, negotiating MLATs takes many years and a great deal of resources.²²⁶ For that reason, states tend to either negotiate bilateral MLATs that cover a large variety of crimes or multilateral treaties covering a great deal of ground on a limited issue and containing MLA provisions.²²⁷ With that practical consideration in mind, the second approach to using a piracy-specific MLA regime would be to negotiate a multilateral treaty covering all issues related to maritime piracy, and to include MLA provisions in such a treaty.

The possibility of a new treaty dealing with maritime piracy has been raised a number of times,²²⁸ including by the Council of Europe.²²⁹ There are several purported features of such a treaty. First, a

222 UNCLOS, *supra* note 122, art. 101.

223 Vlahovic, *supra* note 194.

224 UNCLOS, *supra* note 122, art. 105.

225 *Id.* art. 100.

226 International Chamber of Commerce, *Using Mutual Legal Assistance Treaties (MLATs) To Improve Cross-Border Lawful Intercept Procedures*, ICC Doc. No. 373/512 at 4 (Sep. 12, 2012), available at <http://www.iccindiaonline.org/policy-statement/3.pdf> (“[B]ecause new MLATs take time to negotiate; existing MLATs will continue to form the backbone of global law enforcement cooperation for many years to come.”).

227 Interview with Cliff Johnson, *supra* note 171.

228 E.g., Lucas Bento, *Toward an International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish*, 29 *Berkley J. INT’L L.* 399 (2011); Janin Viviane Ahnefeld, *The International Fight against Modern-Day Piracy – Are the Legal Regulations enough?*, UNIV. OF TROMSØ MASTER’S THESIS (2011), available at <http://munin.uit.no/bitstream/handle/10037/3891/thesis.pdf?sequence=2>; Joseph M. Isanga, *Troubled Waters: Combating Maritime Piracy with the Rule of Law Articles*, 59 *AM. U. L. REV.* 1267 (2010).

229 Council of Eur., *The necessity to take additional international legal steps to deal with sea piracy*, Report of the Committee on Legal Affairs and Human Rights Doc. 12194 (Apr. 6, 2010), available at <http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=12392&Language=EN> (“The international law framework also needs to be modified if it is to serve modern needs effectively. However, there is no practical possibility of revising the UNCLOS in the foreseeable future. Adoption of a new treaty on policing at sea, based on agreed mechanisms for obtaining any necessary flag or coastal state consent, is a possibility. A mul-

modern treaty concerning all aspects of maritime piracy could clarify some uncertainty surrounding the state of international law.²³⁰ For example, questions have arisen regarding the uniformity of national definitions of piracy,²³¹ whether universal jurisdiction applies to states other than the capturing state,²³² the precise nature of the “private ends” requirement,²³³ and the scope of universal jurisdiction for facilitative acts that occur entirely from within the territory of a single state.²³⁴ Additionally, because private armed security now appears firmly rooted in the modern counter-piracy regime, a new multilateral treaty could address that emerging issue as well. Second, the creation of a modern multilateral piracy treaty would signal the continuing importance of the issue, articulate the global norms surrounding it, and provide a benchmark for measurements of progress.²³⁵ Third, such a treaty could provide practical reforms concerning regional cooperation, Somali support, and shipping industry best practices.²³⁶

In addition to the benefits inherent in a modern multilateral piracy treaty, this approach would alleviate the concern surrounding a multilateral piracy MLAT that the time and resources associated with negotiating the treaty would not be worth the limited benefit of an MLA regime alone.²³⁷ However this approach, like all others, comes with several drawbacks, summarized here by Lucas Bento:

It would most certainly engender initial disagreements over the proper balance between more latitude for apprehending pirates and notions of state sovereignty, as well as preferences for flexibility in local policy. Additionally, the fact that piracy is a crime complicates the standardization of domestic laws in this area, as criminal law tends to reflect the social, religious, institutional, and political norms of a state. States may have been reluctant to negotiate a new agreement because they do not yet perceive current piracy incidents as sufficiently serious to create momentum for a new international convention. Finally, negotiating a new international treaty is time-consuming.²³⁸

There are several ways that an MLA regime could aid in creating a cooperative international system to conduct complex piracy investigations and prosecutions: the use of existing multilateral MLA provisions, the use of existing bilateral MLATs, and the creation of a new multilateral MLAT or more broadly-applicable piracy treaty. Although an MLA regime would create binding legal obligations and

tilateral declaration to which states may adhere, setting out a more liberal understanding of the manner in which the current rules should be interpreted and applied, is another possibility.”).

230 Bento, *supra* note 228, at 439.

231 *Id.* at 139-40; Ahnefeld, *supra* note 228, at 39.

232 Ahnefeld, *supra* note 228, at 41; UNCLOS, *supra* note 122, art. 105 (“On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. *The courts of the State which carried out the seizure* may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.”) (*emphasis added*)).

233 See *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc’y*, 708 F.3d 1099, 1101-1102 (9th Cir. 2013).

234 *U.S. v. Ali*, 718 F.3d 929 (D.C. Cir. 2012); Jonathan Bellish, *A High Seas Requirement for Inciters and Intentional Facilitators of Piracy and its (lack of) Implications for Impunity*, 15 SAN DIEGO INT’L L.J. 115 (2013); Selina MacLaren, *Entrepreneurship, Hardship, and Gamesmanship: Modern Piracy as a Dry Endeavor*, 14 Chi. J. Int’l L. 347, 363 (2013); Roger L. Phillips, *Pirate Accessory Liability: Developing a Modern Legal Regime Governing Incitement and Intentional Facilitation of Maritime Piracy*, 25 FLA. J. INT’L L. 271 (2013).

235 Bento, *supra* note 228, at 439-40.

236 *Id.*

237 Interview with Cliff Johnson, *supra* note 171.

238 Bento, *supra* note 228, at 440.

there would likely be fewer obstacles to cooperation in the context of piracy than in other transnational crime, utilizing an MLA regime would be politically and financially costly, and would be unlikely to result in additional cooperation from the Somali government.

C. Ad Hoc International Tribunal

The third proposed approach to conducting the complex investigations and prosecutions necessary to reach pirate leadership, the creation of an ad hoc tribunal through the United Nations Security Council's Chapter VII powers, has been considered and rejected by the United Nations and other relevant stakeholders in the context of prosecuting pirates at all levels. Yet limiting the jurisdiction of an ad hoc tribunal to pirate leadership could ameliorate the concerns already levied against an ad hoc tribunal sufficiently to warrant reconsideration.

The idea for an ad hoc tribunal emerged in response to Security Council Resolution 1918, adopted in April 2010, calling for the Secretary-General to present a report with "options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal" to combat Somali piracy.²³⁹ In July 2010, the Secretary-General produced such a report, written by Jack Lang and outlining seven options for prosecuting pirates, the last of which called for the establishment of a Chapter VII ad hoc tribunal.²⁴⁰

In his section on the proposed ad hoc tribunal, Lang noted that the Security Council would need to decide whether jurisdiction extends to all acts of piracy, or "whether it should be restricted to a category of the 'most responsible', e.g., those who finance or plan acts of piracy."²⁴¹ Yet by the time Lang produced his second report on behalf of the Secretary-General's office a year later, an ad hoc tribunal was seen as a dead idea regardless of whether or not it focused on pirate leadership. Lang concluded that "most States believe that [an ad hoc tribunal] would not be well suited to the ordinary crime of piracy."²⁴² Instead, Lang proposed "establish[ing] specialized courts in Puntland, Somaliland and outside Somalia," with the extraterritorial court eventually being transferred to Mogadishu,²⁴³ thus creating a Somali court with international support, but no international participation.²⁴⁴ In the

239 S.C. Res. 1918, U.N. Doc. S/RES/1918 (Apr. 27, 2010), available at <http://www.refworld.org/docid/4bea70cc2.html>; Pavel Bureš, *To Have or Not to Have a Special Tribunal for Somali Pirates? (An International Response to National Failure)*, 2 CZECH Y.B. OF INT'L L. 289 (2011), available at http://files.cyil.eu/200000053-c4abfc5a56/%C4%8CSMP_2011_14_bures.pdf.

240 U.N. Secretary-General, *Rep. of the Secretary-General on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia, including, in particular, options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements...*, 2, UN Doc S/2010/394 (July 26, 2010), available at <http://www.securitycouncil-report.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Somalia%20S2010%20394.pdf>.

241 *Id.* ¶ 100.

242 Jack Lang, Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia, ¶ 78, S/2011/30 (Jan. 25, 2011), available at http://cil.nus.edu.sg/wp/wp-content/uploads/2010/10/Lang_report_S-2011-301.pdf [hereinafter Lang Report]. See also Further written evidence from Dr. Douglas Guilfoyle: International cooperation in the prosecution of Somali pirates, Testimony before the UK House of Commons (Jul. 21, 2011), <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmfaff/writev/1318/m09.htm> [hereinafter Guilfoyle Testimony] ("This idea [of an *ad hoc* tribunal] is no longer on the agenda, having failed to attract consensus in the Security Council or more widely."); Chairman's Conclusions, 4th Meeting of Working Group 2 on Legal Issues, Contact group on Piracy off the Coast of Somalia 3 (Nov. 26-27, 2009), http://www.marad.dot.gov/documents/WG2-4th_Meeting_chair-conclusions-November_26-27-2009-mtg.pdf. But see 2011 Digest on International Law, *supra* note 99, at 78 (expressing a willingness to consider an international tribunal in light of a lack of political will among states).

243 *Id.* ¶ 119.

244 *Id.* ¶ 124.

end, though, even that approach was abandoned for a more de-centralized one, with the international community supporting national jurisdictions, both inside Somalia and within the region, in prosecuting pirates through traditional judicial mechanisms.²⁴⁵

Policymakers and commentators have identified several benefits of an ad hoc tribunal, including the simplicity and uniformity of a unitary approach, the ease with which piracy can be defined under international law, and the limited regional capacity-building that could occur if judges from the region sat on the tribunal,²⁴⁶ but focus remains on the drawbacks of such a mechanism. Included among the criticisms raised were the large volume of cases the tribunal would be required to handle,²⁴⁷ the high cost of developing and running a tribunal,²⁴⁸ the lack of political consensus around a tribunal,²⁴⁹ the amount of time it would take to establish a tribunal,²⁵⁰ and the neutral or even negative effects that an international tribunal might have on regional judicial capacity-building.²⁵¹

Although Lang called for the consideration of whether an ad hoc tribunal’s jurisdiction should encompass all pirates or merely those “most responsible,” it appears that the international community only truly considered such a mechanism in the broader context.²⁵² Yet considering an ad hoc tribunal with the relatively narrow jurisdictional mandate of those most responsible for piracy ameliorates some of the concerns that have been raised. A tribunal whose jurisdiction was restricted to pirate leadership would not hear a large volume of cases, nor would an international tribunal focused on leadership functioning alongside domestic courts prosecuting lower-level pirates foreclose the opportunity for continued regional judicial capacity-building. For these reasons, the political consensus around a tribunal focused on pirate leadership might be stronger than previously expressed.

Moreover, a situation similar to the one employed as part of the ICTY’s completion strategy—where an international tribunal decides which cases are serious enough to merit the tribunal’s resources and sends less severe cases to a national jurisdiction—appears particularly well-suited to the complex task of prosecuting piracy at all levels. Initial investigations could be conducted by tribunal staff creating a single institution responsible for housing and synthesizing information and intelligence with an eye to using its findings as evidence. The resources and expertise that come along with a UN-funded and administered tribunal could then be brought to bear on pirate leadership, with the vast majority of simpler cases against low-level pirates being handled within the region, enhancing cost efficiency and potential for capacity-building. A Chapter VII ad hoc tribunal would have the legal character sufficient to enter into the required agreements with regional member states, as demonstrated at the ICTY.

245 See Part IV, *supra*.

246 Guilfoyle, *supra* note 60, at 780; Guilfoyle Testimony, *supra* note 242; U.N. Secretary-General, *supra* note 240, ¶¶ 98-99.

247 Guilfoyle, *supra* note 60, at 780; Guilfoyle Testimony, *supra* note 242; U.N. Secretary-General, *supra* note 240, ¶ 100.

248 Guilfoyle, *supra* note 60, at 782; Hodgkinson, *supra* note 155, at 311; Guilfoyle Testimony, *supra* note 242; U.N. Secretary-General, *supra* note 240, ¶ 101.

249 Guilfoyle, *supra* note 60, at 782; Hodgkinson, *supra* note 155, at 311.

250 Guilfoyle, *supra* note 242.

251 Guilfoyle, *supra* note 60, at 781; Hodgkinson, *supra* note 155, at 331; Guilfoyle Testimony, *supra* note 196; U.N. Secretary-General, *supra* note 240, ¶ 98.

252 See U.N. Secretary-General, *supra* note 240, ¶ 49 (describing crimes of piracy as “not complex” and encompassing “a high number of suspects,” descriptors that apply to large scale prosecution of low-level pirates, but not complex prosecutions of sophisticated pirate leaders).

Nevertheless, the high cost of an ad hoc tribunal and the time it would take to set up such an institution remain relevant downsides, leaving the creation of an ad hoc tribunal but one of many options available to the international community.

D. “International Lite” Mechanism

An approach closely related to the creation of an ad hoc international tribunal has been proposed by Ken Scott, a former senior prosecutor at the ICTY.²⁵³ Dubbed an “international lite” mechanism, this approach calls for a judicial mechanism short of an ad hoc international tribunal to be established by the United Nations Security Council under Chapter VII of the United Nations Charter.

The idea for an “international lite” mechanism arrives from the premise that the Security Council has broad powers under Chapter VII to deal with “threat[s] to the peace.”²⁵⁴ For example, the ICTY and the International Criminal Tribunal for Rwanda (ICTR) are subsidiary organs of the Security Council and apply only international law.²⁵⁵ The Special Court for Sierra Leone, the Special Tribunal for Lebanon, and the Extraordinary Chambers in the Courts of Cambodia were all set up pursuant to an agreement between the United Nations and the relevant national governments, each applying different combinations of national and international law, some existing as an independent tribunal and others existing entirely within a national court system.²⁵⁶

The proposed “international lite” mechanism would take advantage of such flexibility and tailor the structure and competency of the mechanism to meet the needs presented by maritime piracy.²⁵⁷ According to Scott, the starting point for such a mechanism would be the Security Council using its Chapter VII powers to enact a piracy statute using applicable international law and prior experience setting up Chapter VII judicial mechanisms.²⁵⁸

An essential feature of the “international lite” mechanism is that it would not call for the construction and operation of a physical tribunal.²⁵⁹ Once a pre-trial judge confirmed an indictment prepared by the prosecutors, a courtroom (and related facilities) would be made available within a national system, and a trial would take place there.²⁶⁰ Appeals could either proceed through that same national system or be transferred to a panel of international judges, the latter option producing a consistent body of substantive and procedural law.²⁶¹ As is the case with all existing international tribunals, sentences would be served within a national system.²⁶²

The staffing choices for an “international lite” mechanism would seek to match the nimbleness of the mechanism’s structure. Scott asserts that such a mechanism could be staffed by one lead prosecutor,

253 Scott, *supra* note 64, at 44.

254 *Id.*; U.N. Charter art. 39.

255 U.N. Secretary-General, *supra* note 240, at 39.

256 *Id.* at 39-43.

257 See Scott, *supra* note 64, at 50.

258 *Id.*

259 *Id.* at 51.

260 *Id.*

261 *Id.*

262 *Id.*

15 prosecutors acting in support, 25 to 30 investigators and analysts (also working for the prosecution team), three judges, defense counsel appointed by the mechanism on an as-needed basis, and a small support staff.²⁶³ Although the staff would be relatively small, it would also be relatively powerful. The lead prosecutor would be given the maximum investigative powers allowed under international law, “including the power to subpoena or summon witnesses, to issue subpoenas or seek court orders for the production of documents and other evidence, the ability to obtain and execute search warrants, to prepare indictments and to seek and obtain arrests warrants.”²⁶⁴ The judicial staff would have powers similar to those enjoyed on the national level and in already-established international tribunals.²⁶⁵ Funding for the “international lite” mechanism would be provided primarily by the United Nations, but collecting contributions from flag states and the shipping industry could also be considered.²⁶⁶

There are several advantages associated with an “international lite” mechanism. First, the mechanism’s creation under Chapter VII of the United Nations Charter would give prosecutors “the ability to summon witnesses, to conduct non-consensual searches, and to require the production of evidence.”²⁶⁷ Second, an “international lite” mechanism would result in more consistent sentencing for pirate leaders than has been afforded to lower-level pirates in national courts.²⁶⁸ Third, centralizing all prosecutions of pirate leaders in one location would create economies of scale and a lasting knowledge base that the ongoing approaches fail to provide.²⁶⁹ Fourth, the sheer existence of such a mechanism would have positive knock-on effects such as bringing direction and focus to counter-piracy prosecution efforts, bringing increased pressure on the Somali government to cooperate, and serving as a model for other transnational efforts.²⁷⁰

Additionally, provided that the “international lite” mechanism was limited to investigating and prosecuting only the financiers and enablers of piracy, it would make up for some of the shortcomings attributed to an international piracy tribunal. Particularly, the charges that piracy is not a serious enough crime to warrant an international mechanism²⁷¹ and that the volume of cases would be too large are not applicable to an international mechanism focusing only on so-called pirate “kingpins.”²⁷²

The key disadvantage to the “international lite” approach has less to do with the theoretical appropriateness of such a mechanism and more to do with the practicability of developing it. Essentially, the main disadvantage of an “international lite” mechanism to prosecute pirate leadership is that such an effort would be seen as contributing to “tribunal fatigue,” which came on the heels of the ICTY and ICTR and resulted in the international community favoring centralized approaches

263 *Id.* at 50-52.

264 *Id.* at 50; *See, e.g.*, ICTY Statute arts. 16, 18, 19 & 29 (respectively titled The Prosecutor, Investigation and preparation of indictment, Review of the indictment, and Co-operation and judicial assistance).

265 Scott, *supra* note 64, at 51.

266 *Id.* at 52; U.N. Secretary-General, *supra* note 240, ¶ 113(e) (“The Security Council would encourage further donations to the Trust Fund to Support Initiatives of States Countering Piracy off the Coast of Somalia, including from the shipping industry and flag States . . .”).

267 Scott, *supra* note 64, at 54.

268 *Id.*; Eugene Kontorovich, *The Penalties for Piracy*, OCEANS BEYOND PIRACY WORKING PAPER (2012), available at http://oceansbeyondpiracy.org/sites/default/files/obp_penalties_for_piracy_final.pdf.

269 Scott, *supra* note 64, at 54.

270 *Id.* at 54-55.

271 *Id.* at 44; Annex II, S/2010/394 (July 26, 2010), ¶ 8. *See also* Lang Report, *supra* note 242, ¶ 78 (“Most States believe that [an international tribunal] would not be well suited to the ordinary crime of piracy.”).

272 Scott, *supra* note 64, at 45; *see* U.N. Secretary-General, *supra* note 240, ¶ 100.

such as the ICC over issue-specific tribunals.²⁷³ That fatigue, combined with the substantial cost of developing and running the mechanism,²⁷⁴ makes the establishment of such a mechanism particularly difficult from a political standpoint.

E. The International Criminal Court

A final proposal for conducting the complex pirate investigations and prosecutions required to end impunity for those most responsible for maritime piracy is to utilize the International Criminal Court.²⁷⁵ The ICC is a creation of the Rome Statute, a multilateral treaty adopted by 120 nations on July 17, 1998, and entered into force on July 1, 2002, after ratification by 60 states.²⁷⁶ As of February 2014, 139 states have signed the Rome Statute and 122 states have ratified it, becoming States Parties to the ICC.²⁷⁷

The ICC was established to “exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute.”²⁷⁸ As it stands, the four crimes within the jurisdiction of the ICC are genocide, crimes against humanity, war crimes, and the crime of aggression, with the latter crime coming into effect upon the adoption of a separate provision.²⁷⁹ Notably absent from this list is the crime of piracy under international law. Moreover, piracy cannot be construed as a war crime (which can only occur during an armed conflict),²⁸⁰ a crime against humanity (which can only occur as part of a “widespread and systematic” attack against a civilian population),²⁸¹ genocide (which requires “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”),²⁸² or aggression (which can only be committed by someone “in a position effectively to exercise control over or to direct the political or military action of a State”).²⁸³

Thus placing the crime of piracy *jure gentium* within the auspices of the ICC would require a renegotiation of the Rome Statute.²⁸⁴ A prime benefit of such a negotiation would be that the ICC, like the “international lite” mechanism and the international tribunal described above, would have true

273 David J. Scheffer, *Challenges Confronting International Justice Issues*, Address by David J. Scheffer (1998), available at <http://www.nesl.edu/userfiles/file/nejicl/vol4/scheffer.pdf>.

274 Scott, *supra* note 64, at 49 (“Among all of the concerns, [the high cost of an “international lite mechanism”] is perhaps the most valid one...”).

275 See Marco Silva, *Somalia: State Failure, Piracy, and the Challenge to International Law*, 50 VA. J. INT’L L. 553, 577 (2010) (“One solution would be to place pirates under the jurisdiction of the International Criminal Court.”); Max Boot, *Pirates, Then and Now*, FOREIGN AFFAIRS (2009) (“One option would be to negotiate an international agreement that would allow the processing and detention of pirates and terrorists through legal venues such as the International Criminal Court or a specially created UN tribunal.”).

276 *About the Court*, INT’L CRIMINAL COURT, http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx (last visited Feb. 11, 2014).

277 *Status of the Rome Statute of the International Criminal Court*, U.N. TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en (last visited Feb. 11, 2014).

278 The Rome Statute of the International Criminal Court art. 1, UN Doc. A/CONF. 183/9; 37 ILM 1002, 2187 U.N.T.S. 90 (1998) [hereinafter Rome Statute].

279 *Id.* art. 9.

280 *Id.* art. 8; Douglas Guilfoyle, *The Laws of War and the Fight against Somali Piracy: Combatants or Criminals?*, 11 MELB. J. INT’L L. 141, 142 (2010).

281 Rome Statute, *supra* note 278, art. 7.

282 *Id.* art. 6.

283 *Id.* art. 8.

284 See n. 275, *supra*.

prosecutorial and investigative power.²⁸⁵ Second, because the ICC is already operational, repurposing the ICC to try piracy cases may be more cost-effective and pose less of a “tribunal fatigue” problem than the “international lite” and ad hoc tribunal approaches. Third, the crime of piracy *jure gentium* is widely regarded as being analogous to genocide, crimes against humanity, war crimes, and the crime of aggression, as all are considered “serious crimes of international concern.”²⁸⁶ Finally, the Rome Statute already contains a mechanism for adding new substantive crimes.²⁸⁷ Any State Party can submit a proposed Amendment to the Secretary-General of the United Nations, a majority of States Parties decide whether or not to take up the proposal, and two-thirds of States Parties can vote to adopt the amendment.²⁸⁸ The amendment would only be binding on the States Parties that accept it, unless seven-eighths of all States Parties accept the amendment, in which case the amendment becomes binding on all States Parties that choose to remain party to the Rome Statute.²⁸⁹ Thus from a conceptual and procedural standpoint, maritime piracy could conceivably fit within the ICC’s mandate, and such an approach would have discrete benefits.

Yet there are also a number of downsides to prosecuting pirate leaders in the ICC, the most obvious of which is the practical difficulty of amending the Rome Statute to allow for the prosecution of the crime of piracy. Initial negotiation of the treaty required dozens of weeks’ worth of formal negotiations over the course of almost three years to work through the 1,700 brackets of disagreed language.²⁹⁰ Once the treaty was agreed upon and adopted, further “extraordinarily complex” negotiations were required to develop the elements of each crime.²⁹¹ A coalition of 2,500 civil society organizations in 150 countries continues to work to promote wider adoption of the Rome Statute in its current form.²⁹² Despite the theoretical fit between piracy and the crimes covered in the Rome Statute and the avenue for amending the Statute, adding an entirely new substantive crime to the Rome Statute would likely be extremely costly both politically and financially. It is entirely unclear whether current States Parties would be open to such an expansion.

Even if the crime of piracy were successfully added to the Rome Statute, the jurisdictional provisions of the Statute may well make prosecuting pirate leadership more complicated than doing so through national courts. First, adding piracy to the Rome Statute would not limit the prosecutions of pirate leaders to the ICC. On the contrary; the principle of complementarity states that the ICC cannot accept a case where a national court with jurisdiction is investigating or prosecuting the matter, or has done so in the past.²⁹³ This principle could be particularly problematic for maritime piracy—a crime for which every jurisdiction in the world could potentially exercise jurisdiction. Second, the various

285 Rome Statute, *supra* note 278, arts. 53-61..

286 See, e.g., Louis Sohn, *Introduction to BENJAMIN B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE* (1980) (“The first breakthrough [for punishing ‘international crime’] occurred when international law accepted the concepts that pirates are ‘enemies of mankind’ and once this concept of an international crime was developed in one area, it was soon applied by analogy in other fields.”); *Crossfire*, CNN (Feb. 27, 1991) (transcript No. 156) (“From an international law standpoint, any court has jurisdiction over Saddam Hussein because what he’s done, war crimes, there’s a theory of universal jurisdiction It goes back to piracy. Anyone who could catch a pirate could try him.”).

287 Rome Statute, *supra* note. 278, art. 121.

288 *Id.* arts. 121(1)-121(3).

289 *Id.* arts. 121(4)-121(6).

290 John Washburn, *The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century*, 11 *Pace Int’l L. Rev.* 361, 362-363 (1999), available at <http://digitalcommons.pace.edu/pilr/vol11/iss2/4>.

291 Michael A. Newton, *The International Criminal Court Preparatory Commission: The Way it is & the Way Ahead*, 41 *Va. J. Int’l L.* 204, 205 (2000).

292 See About the Coalition, Coalition for the International Criminal Court, <http://www.iccnw.org/?mod=coalition> (last visited Feb. 12, 2014).

293 Rome Statute, *supra* note. 278, art. 17; *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07 (Mar. 7, 2014).

methods of bringing a case before the ICC are more restrictive than simply exercising universal jurisdiction.²⁹⁴ The ICC only has jurisdiction over a crime if that crime was committed on the territory of a State Party or by a national of a State Party, or if a case is referred by the Security Council.²⁹⁵ Further complicating matters is the fact that Somalia is not a State Party to the Rome Statute, so a senior Somali pirate leader operating from Somalia can only be brought before the ICC if s/he is connected to a hijacking that took place aboard a ship whose flag state is a State Party or if his/her case is referred to the ICC by the Security Council.²⁹⁶

VI. THE PRIMACY OF MULTI-LEVEL COOPERATION

As the two preceding sections have shown, it is virtually impossible to overstate the breadth of options available under international law to investigate and prosecute pirate leaders. Potential investigative mechanisms range from ad hoc national efforts to a single, UN-funded team. Possible venues for trial include a domestic courtroom, the International Criminal Court, or any number of arrangements made by the Security Council under its Chapter VII powers. The exceptional flexibility afforded to judicially combatting maritime piracy under international law is due to its status as the paradigmatic crime of universal jurisdiction,²⁹⁷ as well as the fact that the international duty to cooperate in the suppression of maritime piracy is so well-established.²⁹⁸ Maritime piracy is “an offense against the law of nations” in the truest sense of the term, and the breadth of possible international institutions and legal frameworks potentially equipped to combat piracy is testament to that fact.²⁹⁹

Indeed, a survey of dozens of individuals closely involved with ongoing efforts to prosecute pirate leaders identified several shortcomings of the international efforts to prosecute pirate leadership, but a restrictive legal regime was not among them.³⁰⁰ Survey participants reported that the principal obstacles to the systematic prosecution of pirate leadership are: 1) the fact that prosecuting pirate leadership has not been a sustained political priority³⁰¹; 2) the extremely difficult situation on the ground in Somalia, particularly as it relates to corruption and a lack of traditional financial institutions;³⁰² and 3) a general lack of organization among relevant stakeholders, manifested by the duplication of efforts, the absence of set procedures for conducting investigations, and uncertainty about which institutions to turn to under which circumstances.³⁰³ Taken together, the status quo has resulted in “process uncertainty, substantial inefficiency, higher costs and less effectiveness,”³⁰⁴ but this uncertainty and inefficiency have not resulted from legal limitations.

294 This assumes that all pirate leaders, regardless of their presence on the high seas, are subject to universal jurisdiction. See Ali, 718 F.3d, at 939 (“Because international law permits prosecuting acts of aiding and abetting piracy committed while not on the high seas, the Charming Betsy canon is no constraint...”).

295 Rome Statute, *supra* note 278, arts. 12-13.

296 *Status of the Rome Statute*, *supra* note 277.

297 UNCLOS, *supra* note 122, art. 105; S.S. Lotus case, *supra* note 121, at 70.

298 UNCLOS, *supra* note 122, art. 100.

299 S.S. Lotus case, *supra* note 121, at 70.

300 See Scott, *supra* note 64, at 26-38.

301 *Id.* at 26, 28.

302 *Id.* at 28.

303 *Id.* at 28, 35-36.

304 *Id.* at 35.

One survey respondent summarized the state of affairs succinctly: “Unless there is better organization and focus, we will not get to the pirate organizers, except by chance.”³⁰⁵ What is lacking is not available legal norms or institutions but rather sustained, multi-level cooperation. To systematically investigate and prosecute pirate leadership, cooperation will be required among counter-piracy actors at the national and inter-governmental levels, between the military and law enforcement, between law enforcement and the judiciary, between industry and investigators, and between the Somali government and the international community. The legal norms and institutions to be utilized—as well as the identity of the actor performing within a given scope—should be chosen in service of the goal of sustained multi-level cooperation. There are a number of specific steps that could be taken to facilitate such cooperation.

A. Decide on the Fundamental Legal Character of the System

The first thing that could be done to facilitate the multi-level cooperation required to systematically investigate and prosecute pirate leadership would be to decide—at the broadest level—whether the framework will be fundamentally national or international in character. A national framework could be facilitated through various combinations of bilateral and multilateral agreements and/or supported by any number of international institutions.³⁰⁶ Similarly, an international mechanism could take the form of an ad hoc tribunal set up under Chapter VII of the United Nations Charter,³⁰⁷ an amendment to the Rome Statute of the International Criminal Court,³⁰⁸ an “international lite” mechanism along the lines provided by Ken Scott,³⁰⁹ or an entirely new international piracy regime agreed to by at least a substantial majority of all nations.³¹⁰

This decision should be reached at the earliest possible stage, because regardless of the outcome, this high-level dichotomy will drive future priorities and decisions. If the system is to be fundamentally national in character, focus should be placed on issues such as harmonizing national norms regarding extraterritorial information-sharing,³¹¹ as well as the development of informal but consistent systems for information-sharing.³¹² Conversely, if the mechanism is to be fundamentally international in character, focus should be on developing the support necessary to commence the proceedings needed to formally develop such a mechanism, whether they involve States Parties to the Rome Statute, the United Nations Security Council, or the world’s foreign ministries.

B. Agree Upon a Central Repository for Information

Irrespective of whether the investigating and prosecuting mechanism is national or international in character, relevant stakeholders should agree upon a central repository to store and analyze information and intelligence regarding pirate activity. This feature is necessary for several reasons. First, a single, centralized repository would allow for the most efficient use of resources, avoiding duplications of

305 *Id.* at 34.

306 *See* Parts IV and V(A), *supra*.

307 *See* Part V(B), *supra*.

308 *See* Part V(D), *supra*.

309 *See* Part V(C), *supra*.

310 *See* Part V(A)(3), *supra*.

311 Scott, *supra* note 64 at 45.

312 *See id.* at 45.

effort.³¹³ Second, a centralized repository for information and intelligence would allow for a unified investigative strategy specifically targeted at pirate leaders; a strategy that values insider evidence over crime scene evidence and uses information on lower-level pirates principally to reach pirate leadership.³¹⁴ Third, a centralized repository allows for greater emphasis on information synthesis and analysis over information collection.³¹⁵ Fourth, developing a centralized repository would result in a standardized set of processes and procedures, which would be beneficial to investigators, military intelligence units, and the private sector alike.³¹⁶

C. Agree Upon a Single Venue for Prosecution

Like a single, centralized mechanism for gathering and analyzing information and intelligence, there is a need for a single, agreed-upon venue for the prosecution of pirate leadership. Because of piracy's status as a crime of universal jurisdiction, this venue could be a domestic criminal court, an international tribunal, or some creative combination of the two.

The difference between information and intelligence on the one hand, and evidence on the other, is at the heart of the need for an agreed-upon venue for prosecutions of pirate leadership.³¹⁷ "Evidence" is a legal term of art referring to that which tends to prove the existence of a fact and may be legally introduced before a tribunal under relevant legal rules.³¹⁸ It is developed with reference to the specific rules under which it is to be judged and is principally concerned with false positives that result in wrongful convictions.³¹⁹ By contrast, intelligence is collected to inform relevant officials,³²⁰ tends to be full of uncertainty,³²¹ and is concerned primarily with false negatives that could result in security breaches.³²² Information, while potentially relevant to a specific crime, was not collected in accordance with, and may not satisfy, the standards necessary for admissibility in a trial.

These distinctions result in two related problems for any repository collecting information on pirate networks. First, a substantial portion of the information in a given repository likely will not meet a judicial admissibility standard without at least some analysis and synthesis. Second, due to the wide variety of evidentiary regimes, only once the ultimate venue for prosecution is known can information reliably be converted to evidence in a way that ensures admissibility. Therefore, agreeing upon a single venue for the prosecution of pirate leaders—whether domestic or international—will be necessary to ensure that information and intelligence can be efficiently and reliably converted to legally admissible evidence.

313 *Id.* at 42.

314 *See* Part III, *supra*; Scott, *supra* note 64, at 42-43.

315 Scott, *supra* note 64, at 45.

316 *See id.* at 46.

317 *See* Kent Roach, *Chapter 8 Secret Evidence and Its Alternatives*, 14 *IUS GENTIUM* 179, 181 (2011) ("As ideal types, the differences between intelligence and evidence are great.")

318 Black's Law Dictionary (9th ed. 2009), available at Westlaw BLACKS.

319 Kent Roach, *The Eroding Distinction Between Intelligence and Evidence in Terrorism Investigations*, in NICOLA MCGARRITY, ANDREW LYNCH AND GEORGE WILLIAMS EDS., *COUNTER-TERRORISM AND BEYOND* 48, 53, 56 (ABINGTON: ROUTLEDGE, 2010).

320 Bruce Berkowitz, *The Big Difference Between Intelligence and Evidence*, WASHINGTON POST (Feb. 2, 2003), available at <http://www.rand.org/blog/2003/02/the-big-difference-between-intelligence-and-evidence.html>.

321 *Id.*

322 Roach, *supra* note 319, at 56.

D. Ensure the Cooperation of the Military, the Private Sector, and Somali Authorities

While creating a mechanism to systematically prosecute will require sustained multi-level cooperation among foreign ministries, justice departments, and inter-governmental organizations, successfully operating such a mechanism will require the cooperation of the military, the private sector, and Somali authorities. These three groups are particularly important, as they are the ones that interact directly with pirate groups at sea or have the ability to arrest their members on shore.

The military often interdicts pirates at sea and decides whether to detain or release them,³²³ while the NCIS, a military investigative unit, has taken the lead in crime scene investigations, although such investigations are also performed by domestic law enforcement.³²⁴ Although securing their cooperation will be extremely helpful in systematically prosecuting pirate leadership, evidence suggests that securing such cooperation will be difficult.

Historically, the military intelligence gathering and law enforcement investigation spheres have been deliberately kept separate to avoid concerns about domestic “secret police” forces.³²⁵ More recently, however, the concern has shifted in the other direction, with concerns about military over-classification being voiced widely in the United States³²⁶ as well as by surveyed members of the counter-piracy community.³²⁷ Sharing intercepted communications and surveillance footage of organized pirate operations would be extremely useful evidence in the effort to reach pirate leadership. Nonetheless, concerns about terrorism, heightened when working in Somalia, home of the notorious al-Qaeda affiliate al-Shabaab, make the decision about whether to classify information especially difficult.

Similarly, the victims of pirate attacks, shipping companies, their insurance brokers, and hostage support teams often have access to valuable information about the ransom negotiation process.³²⁸ Access to this insider information would be invaluable in moving up the chain of conspiracy to reach pirate leaders. Nonetheless, Ken Scott’s survey of the piracy law enforcement community reveals a somewhat contested relationship between law enforcement and the private sector.

Scott’s survey reported “widespread concern” in the law enforcement community that the private sector is “often uncooperative and even obstructive” where sharing piracy-related information is concerned.³²⁹ Although there is recognition that some companies are more cooperative than others, there is a perception among law enforcement that the private sector is using unjustified claims of “proprietary information” to further their own commercial agendas.³³⁰ In response, the shipping industry

323 John Knott, Piracy off Somalia: An overview of catch-and-release, counter-measures, trends, ransoms, hostages, rescues; recent developments appraised, and proposals for the future, Holman Fenwick Willan (last visited Mar. 25, 2014), available at <http://www.hfw.com/Piracy-off-Somalia>.

324 UKFCO, *supra* note 47.

325 Thomas Rossler, *A New Mission and New Challenges: Law Enforcement and Intelligence After the USA PATRIOT Act*, 2003 J. INST. JUST. INT’L STUD. 70, 71 (2003).

326 See, e.g., *DoD Evaluation of Over-Classification of National Security Information (Redacted)*, Inspector General Report DODIG-2013-142 (Sept. 30, 2013), available at http://www.dodig.mil/pubs/report_summary.cfm?id=535.

327 Scott, *supra* note 64, at 44.

328 See, e.g., Leslie Edwards, *Talk the talk: negotiation with Somali pirates*, THE TELEGRAPH (Oct. 16, 2013), available at <http://www.telegraph.co.uk/sponsored/culture/captain-phillips-film/10380729/somali-pirate-negotiation.html>.

329 Scott, *supra* note 64, at 30.

330 *Id.*

representatives argue that these criticisms are unjustified.³³¹ These industry representatives claim that they began with an “open door” policy regarding information-sharing, but quickly found national law enforcement agencies to be uninterested, lacking standardized policies and procedures, and unable to produce sufficiently tangible results.³³² The private sector claims to remain willing to cooperate with a single entity if it appeared capable of achieving judicial deterrence through the information provided. Just as the legal authority remains with law enforcement to request or compel compliance, so should the burden be on law enforcement to produce results when compliance is requested or compelled. Pursuing a strategy that uses information from the private sector to systematically reach pirate leadership could help provide the private sector with the assurances necessary to enhance compliance.

Finally, now that European and American law enforcement agencies have each successfully conducted ruses luring higher-level Somali pirates out of Somalia for prosecution, pirate leaders within Somalia will be extremely unlikely to travel outside Somalia in the future.³³³ Moreover, reaching pirate leadership will likely require information from mid-level pirates, the vast majority of whom live within Somalia. Although the United States Supreme Court and the European Court of Human Rights have both held that arrests initiated extraterritorially do not necessarily protect a defendant from domestic prosecution by the arresting country,³³⁴ systematically interrogating and prosecuting individuals located within Somalia will require the active cooperation of Somali authorities. At minimum, Somali authorities should execute international arrest warrants for pirate leadership,³³⁵ but cooperation could extend so far as to entail active cooperation by Somali authorities in ongoing investigations of Somali pirate networks.

E. Maintain Political Will

Achieving the sustained, multi-level cooperation described above is much more easily described than accomplished. This is especially true in an era of declining levels of pirate activity off the coast of Somalia, with the International Maritime Bureau reporting only 2 hijackings and 13 reported hijacking attempts attributed to Somali pirates in 2013.³³⁶ Nevertheless, the gains made by the counter-piracy community are often described as both fragile and reversible.³³⁷ Maintaining the political will to permanently end the Somali piracy-for-ransom business model is in the long-term interests of almost all of the parties involved, and engaging in a prosecutorial strategy that systematically targets pirate leaders over low-level pirates may help provide the political will needed to justify a sustained counter-piracy effort off the Somali coast. If successful, such an effort could cause lasting harm to pirate networks, as opposed to the superficial harm caused by the apprehension of low-level pirates alone, and could ultimately prove to be the most cost-effective way of ending the scourge of piracy off the Horn of Africa.³³⁸

331 *Id.*

332 *Id.* at 30-31.

333 Bridger, *supra* note 7.

334 App. No. 28780/95, *Illich Sanchez Ramirez v. France*, ECommHr, decision of 24 June 1996, DR 86, at 155-162; *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

335 Scott, *supra* note 64, at 46.

336 ICC International Maritime Bureau, *Piracy and Armed Robbery Against Ships: Annual Report 1 January – 31 December 2013*, *supra* note 54 at 8.

337 E.g. Mark Szakonyi, *US Diplomat: Piracy Falling But Progress ‘Fragile and Reversible’*, JOC.COM (May 22, 2013), http://www.joc.com/maritime-news/maritime-piracy/indian-ocean/us-diplomat-piracy-falling-progress-fragile-and-reversible_20130522.html; Huggins: *Positive Trends in Combating Piracy “Fragile and Reversible”*, IPIINST.ORG (Dec. 10, 2012), <http://www.ipinst.org/events/panel-discussions/details/417-huggins-positive-trends-in-combating-piracy-fragile-and-reversible.html>.

338 See Scott, *supra* note 64, at 45.

VII. CONCLUDING REMARKS

When compared to improved naval patrols, the use of shipping industry best practices, and the use of private armed guards, deterring Somali pirates through prosecution and imprisonment has been relatively ineffective.³³⁹ Moreover, success in combatting piracy between 2010 and 2014 has been achieved almost entirely through short-term suppression tactics, as opposed to systemic changes resulting in lasting solutions.³⁴⁰

One way to address these two related problems would be to shift the overall prosecutorial strategy away from low-level pirates toward the systematic investigation and prosecution of pirate leadership. Under this strategy, low-level pirates would be used primarily as tools to acquire information about pirate leadership, allowing investigators and prosecutors to move up the chain of conspiracy rather than directly target these low-level operatives for prosecution.

There are several discrete benefits associated with this strategy. First, the vast majority of successful counter-piracy efforts are aimed at suppressing piracy in the short term as opposed to forming part of a lasting solution.³⁴¹ Because those who have the skills needed to be successful pirate leaders are rare relative to those who have the skills needed to be low-level pirates, and because leaders are both fewer in number and less easily replaceable, a strategy targeting those leaders is inherently longer term in nature.³⁴² Second, focusing on the leaders of an organized criminal network in order to dismantle it is a strategy that has been used to combat many forms of organized crime,³⁴³ and Somali piracy-for-ransom networks appear to fit the model for organized criminal networks such that this strategic shift would be likely to bear fruit.³⁴⁴ Third, even if piracy off the Horn of Africa remains suppressed, a strategy targeting pirate leaders would generate important lessons for other areas of the world, such as the Gulf of Guinea in West Africa and the Straits of Malacca in Southeast Asia, where piracy appears to be becoming more organized.³⁴⁵ Finally, the proposed strategy could deter other forms of organized crime. There is evidence suggesting that those at the top of the Somali pirate hierarchy are also engaged in other forms of transnational organized crime, and piracy convictions may be easier to secure than convictions for other sorts of transnational organized crime due to increased uniformity, better-established norms, and practical benefits associated with universal jurisdiction.³⁴⁶

Executing this type of a strategy will require a typology distinguishing pirate leaders from low-level pirates in order to determine which individuals are to be the ultimate targets of prosecution and which are to be treated as instruments for reaching the ultimate targets. The work of international tribunals, particularly the ICTY, provides guidance on the relevant characteristics of organizational leaders. In determining which individuals were “most responsible” for the crimes under their jurisdictions, international tribunals have considered: 1) the individual’s *de jure* and *de facto* authority; 2) the role of the relevant organization in the wider context of the crimes at issue; 3) the severity, magnitude, nature

339 *Supra*, notes 60-63.

340 Bellish, *supra* note 1, at 40.

341 Bellish, *supra* note 1, at 40.

342 *Supra*, notes 88-96.

343 *Supra*, notes 97-98.

344 2011, Digest of United States Practice in International Law, *supra* note 99, at 78.

345 *Supra*, notes 106-110.

346 *Supra*, notes 111-125.

and impact of the specific crimes for which the individual is allegedly responsible; and 4) whether the individual has the power to stop further criminal activity.³⁴⁷ Applying these criteria to organized pirate groups suggests that instigators, large-scale investors, and corrupt clan leaders and local politicians almost certainly qualify as leadership. Conversely, boarding pirates, the post-hijacking security team, and post-hijacking suppliers should be categorically excluded from the leadership classification. The remaining roles—small-scale investors, informants, pirate commanders, ground commanders, hostage negotiators, and accountants—should be treated on a case-by-case basis, with primary consideration placed upon the individual’s relative value as a source of information that could be used to move further up the chain of conspiracy.

Because of maritime piracy’s status as the paradigmatic crime of universal jurisdiction, international law is extremely permissive regarding the means through which systematic high-level piracy prosecutions could be accomplished. The proposed strategic shift could be accomplished through coordinated national efforts,³⁴⁸ any one of several mutual legal assistance regimes,³⁴⁹ an ad hoc tribunal under Chapter VII of the United Nations Charter,³⁵⁰ an international secretariat also set up pursuant to Chapter VII,³⁵¹ or the International Criminal Court.³⁵² Each of these options has its respective merits and demerits both politically and logistically, but each would be permissible under international law and contemporary prevailing norms.

With such a breadth of options available under international law, it is not surprising that the counter-piracy law enforcement community and other relevant stakeholders reported that the main obstacles to the systematic prosecution of pirate leadership are a lack of political will, instability within Somalia, and a general lack of effective cooperation among stakeholders, as opposed to a lack of structural flexibility.³⁵³ Thus, regardless of the form that the systematic prosecution of pirate leadership takes, relevant stakeholders must decide whether the fundamental legal character of the system will be national or international, agree upon a single repository for information-gathering, analysis, and synthesis, and agree upon a single venue for prosecution so that collected information can be most efficiently turned into admissible evidence. This will require enhanced multi-level cooperation among counter-piracy stakeholders. These stakeholders will also have to secure the cooperation of the military, shipping companies, insurance brokers, hostage support teams, and Somali national authorities, as each of these groups has special access to the information and individuals necessary to implement the proposed strategy.

All of this will require sustained political will, and presently the degree to which such political will can be maintained in an era of dramatically reduced piracy off the Horn of Africa is unclear. Yet if the story of Afweyne is to be more than the exception that proves the rule that even the most notorious pirate leaders operate with impunity, any structure that is developed to systematically investigate and prosecute pirate leadership must be founded on sustained, multi-level cooperation.

347 *Supra*, notes 127-145.

348 *Supra*, notes 149-169.

349 *Supra*, notes 170-238.

350 *Supra*, notes 239-252.

351 *Supra*, notes 253-274.

352 *Supra*, notes 275-296.

353 Scott, *supra* note 64, at 26-36.

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The Ved Nanda Center for
International & Comparative Law

**Sturm College of Law
University of Denver
2255 E. Evans Avenue
Denver, CO 80208
(303) 871-6000**