

# THE SOMALI PIRACY CHALLENGE: OPERATIONAL PARTNERING, THE RULE OF LAW, AND CAPACITY BUILDING

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I. Introduction	45
II. Background: The Trajectory of Somali Piracy	47
A. Somalia	51
III. Legal Issues Associated with Piracy	55
A. Maritime Piracy	55
IV. Analysis: The Underlying Infrastructure Sustaining Piracy	63
A. The Development and Execution of an Attack	63
V. Proposal: An International Model for Cooperation	65
VI. Conclusion	68

## I. Introduction

With rocket-propelled grenades propped on their shoulders and AK-47s on their hips, pirates operating off the coast of Somalia on November 5, 2005, were poised to strike. A luxury cruise ship en route to Kenya on a quiet Saturday morning presented an opportune target. While the crew of the *Seabourn Spirit* successfully thwarted the attack, the attempted hijacking highlighted the vulnerability of ships in the Gulf of Aden and presaged a modern resurgence in piracy. Between 2006 and 2010, nearly 1,600 ships were attacked worldwide, illicitly securing hundreds of millions of dollars in both ransom payments and stolen cargo.<sup>1</sup>

Beyond the financial implications, dozens have been killed, including four Americans on the *S/V Quest* in 2011.<sup>2</sup> There are an estimated 70 camps where

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<sup>1</sup> See *Hostage-taking at Sea Rises to Record Levels, Says IMB*, ICC COMMERCIAL CRIME SERVICES (Jan. 17, 2011, 11:33 AM), <http://www.icc-ccs.org/news/429-hostage-taking-at-sea-rises-to-record-levels-says-imb>; see also *2009 Worldwide Piracy Figures Surpass 400*, ICC COMMERCIAL CRIME SERVICES (Jan. 14, 2011, 00:00 AM), <http://www.icc-ccs.org/news/385-2009-worldwide-piracy-figures-surpass-400>. IMB statistics, as well as data compiled by the International Maritime Organization (IMO), reflects piracy and armed robbery against ships as well as attempts. According to the IMO, there have been 5,716 incidents of piracy or armed robbery against ships from 1984 through 2010. The methods of pirates vary throughout the world: Somali pirates operate by holding a vessel until a ransom payment is made; pirates in other parts of the world also seek ransom as well as illicitly re-flag vessels, steal the vessel's cargo and/or money and property from passengers.

<sup>2</sup> *U.S. Forces Respond to Gunfire Aboard the S/V Quest*, NAVY LIVE (Feb. 22, 2011), <http://navylive.dodlive.mil/index.php/2011/02/22/u-s-forces-respond-to-gunfire-aboard-sv-quest/>. The International Maritime Bureau reported that worldwide from 2006-2010, 49 were killed in piratical attacks, 189 injured and 35 are missing. Seven were killed in the first six months of 2011. See ICC INTERNATIONAL MARITIME BUREAU, PIRACY AND ARMED ROBBERY AGAINST SHIPS REPORT FOR THE PERIOD OF 01 JANU-

## The Somali Piracy Challenge

Somali pirates recruit, plan, and organize their strikes, often displaying a sophisticated infrastructure.<sup>3</sup> Ships are drawn to the area, in part, because of the Bab El-Mandeb Strait, a critical chokepoint for global trade that connects the Mediterranean and Indian Ocean.<sup>4</sup> U.S. President Barack Obama declared that piracy off the Somali coast represents a threat to national security.<sup>5</sup>

Somali dependence on revenue that organized criminal networks secure through hijackings is increasing.<sup>6</sup> Piracy is not the only transnational maritime security threat that involves organized criminal networks.<sup>7</sup> Drug trafficking, human smuggling, oil poaching and the transport of weapons of mass destruction also occur in the maritime domain.<sup>8</sup> Confronting these threats involves navigating complex legal, jurisdictional, and operational obstacles, and requires international partnering and cooperation.

The oceans are particularly susceptible to illicit transnational activity because of its vast expanse and anonymity. The ability of criminal networks to exploit gaps in authority, capability and capacity is directly linked to their success. Each threat is uniquely challenging, but Somali piracy has dominated recent focus because of a historical fascination with this crime, the notoriously open aspect of their attacks, and the large number of countries affected. This article examines

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ARY – 30 JUNE 2011 (July 2011), available at [http://www.icc-deutschland.de/fileadmin/icc/Meldungen/2011\\_Q2\\_IMB\\_Piracy\\_Report.pdf](http://www.icc-deutschland.de/fileadmin/icc/Meldungen/2011_Q2_IMB_Piracy_Report.pdf) [hereinafter IMB REPORT].

<sup>3</sup> U.N. Secretary-General, Report of the Secretary-General on Possible Options to Further the Aim of Prosecuting and Imprisoning Persons Responsible for Acts of Piracy and Armed Robbery at Sea off the Coast of Somalia, ¶ 7, U.N. Doc. S/2010/394 (July 26, 2010) [hereinafter *Possible Options*].

<sup>4</sup> The Bab El-Mandeb Strait is one of the most significant maritime chokepoints, or corridors, on earth. See *World Oil Transit Checkpoints*, U.S. ENERGY INFO. ADMIN. [EIA] (Feb. 2011), [http://www.eia.gov/cabs/World\\_Oil\\_Transit\\_Chokepoints/Full.html](http://www.eia.gov/cabs/World_Oil_Transit_Chokepoints/Full.html) (last visited October 24, 2011). The EIA defines chokepoints as, “narrow channels along widely used global sea routes, some so narrow that restrictions are placed on the size of vessel that can navigate through them. They are a critical part of global energy security due to the high volume of oil traded through their narrow straits.” The EIA also discussed the Bab El-Mandeb Strait as being “18 miles wide at its narrowest point.” *Id.*

<sup>5</sup> Exec. Order No. 13536, 75 Fed. Reg. 19,869 (April 12, 2010), available at <http://www.treasury.gov/resource-center/sanctions/Documents/13536.pdf> (“The deterioration of the security situation and the persistence of violence in Somalia, and acts of piracy and robbery at sea off the coast of Somalia. . . constitute an unusual and extraordinary threat to the national security and foreign policy of the United States. . .”). The national emergency declared in Exec. Order No. 13536 was continued for one year on April 7, 2011, by President Obama. See Notice of April 7, 2011, Continuation of the National Emergency With Respect to Somalia, 76 Fed. Reg. 19,897 (April 8, 2011).

<sup>6</sup> See *Possible Options*, *supra* note 3, ¶ 7; see also U.N. OFFICE ON DRUGS AND CRIME (UNDOC), THE GLOBALIZATION OF CRIME: A TRANSNATIONAL ORGANIZED THREAT ASSESSMENT, at 199, U.N. Sales No. E.10.IV.6, available at [http://www.unodc.org/documents/data-and-analysis/tocta/TOCTA\\_Report\\_2010\\_low\\_res.pdf](http://www.unodc.org/documents/data-and-analysis/tocta/TOCTA_Report_2010_low_res.pdf) (stating there are two main piracy networks in Somalia, “one in the semi-autonomous northern Puntland in the Eyl district and another group based in Harardheere in Central Somalia).

<sup>7</sup> United Nations Convention against Transnational Organized Crime, G.A. Res. 55/25, U.N. Doc. A/RES/55/25 (Nov. 15, 2000), available at <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>. Article 2(a) defines an organized criminal group as, “a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.” *Id.*

<sup>8</sup> See Jeremy Haken, *Transnational Crime in the Developing World*, GLOBAL FINANCIAL INTEGRITY (Feb. 2011), <http://transcrime.gfip.org/>, for an exceptional study of transnational illicit trade.

## The Somali Piracy Challenge

the trajectory of Somali piracy, the legal issues associated with countering piracy, and the international response.

### II. Background: The Trajectory of Somali Piracy

The dramatic increase in Somali piracy over the past five years has spawned a lucrative and organized criminal enterprise involving thousands of people, eroding navigational freedoms, and illicitly securing as much as \$400,000,000.<sup>9</sup> From 2008 through the first three months of 2011, approximately 2,000 people have been held hostage in 150 separate hijackings.<sup>10</sup> Though the success rate of piracy declined in the first six months of 2011 compared with previous years, ships remain vulnerable to attack.<sup>11</sup>

The 17,000 ships annually navigating the Suez Canal also pass through the narrow Bab El-Mandeb Strait in the Gulf of Aden,<sup>12</sup> and as many as 16,000 other ships navigate this high-risk area annually.<sup>13</sup> Thus, vessels carrying nearly ten percent of the world's daily oil supply<sup>14</sup> pass in close proximity to the crushing poverty, famine, ungoverned areas and rampant violence in Somalia.

Operating on simple fishing boats, dhows, or from hijacked vessel known as "mother ships", the pirates generally lack sophisticated equipment and most often do not have large or varied weapons.<sup>15</sup> As such, piracy in the Horn of Africa<sup>16</sup>

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<sup>9</sup> Estimates vary regarding the total amount of ransom payments secured by pirates. See Stephen L. Caldwell & John H. Pendleton, Director of Homeland Security and Justice Issues & Director of Defense Capabilities and Management, respectively, Testimony before the Subcommittee on Coast Guard and Maritime Transportation, Committee on Transportation and Infrastructure, House of Representatives (Mar. 15, 2011), in U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 11-449T, MARITIME SECURITY: UPDATING U.S. COUNTERPIRACY Action plan Gains Urgency as Piracy Escalates off the Horn of Africa 1 (2011), available at <http://www.gao.gov/new.items/d11449t.pdf> (stating, "since 2007, 640 ships have reported pirate attacks in this area, and Somali pirates have taken more than 3,150 hostages and, according to the Department of Defense (DOD), received over \$180 million in ransom payments"); see also Anna Bowden, et. al, *The Economic Cost of Maritime Piracy* (One Earth Future Working Paper, Dec. 2010), [http://www.oneearthfuture.org/index.php?id=120&pid=37&page=Cost\\_of\\_Piracy](http://www.oneearthfuture.org/index.php?id=120&pid=37&page=Cost_of_Piracy) (asserting that \$238 million was paid to Somali pirates in ransom payments in just 2010).

<sup>10</sup> Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia, transmitted by letter dated Jan. 24, 2010 from the Secretary General, addressed to the President of the Security Council, ¶16, U.N. Doc. S/2011/30 (Jan. 25, 2011) available at [http://reliefweb.int/sites/reliefweb.int/files/resources/C3368F7BFEF0D4E98525783\\_800796871-Full\\_Report.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/C3368F7BFEF0D4E98525783_800796871-Full_Report.pdf) [hereinafter Lang Rep.].

<sup>11</sup> In the first six months of 2011, there were 92 reported attempts or firings upon vessels by Somali pirates, of which 20 were hijacked. See IMB REPORT, *supra* note 2.

<sup>12</sup> 2010 Annual Report, SUEZ CANAL AUTHORITY, <http://www.suezcanal.gov.eg/Files/Publications/58.pdf> (last visited Sept. 23, 2011).

<sup>13</sup> Andrew J. Shapiro, Assistant Sec'y of State, Remarks to the Global Maritime Information Sharing Symposium, National Defense University, Washington, DC: Taking Diplomatic Action Against Piracy (Sep. 16, 2009), available at <http://www.state.gov/t/pm/rls/rm/129258.htm> (stating that the total number of commercial ship transits in the Gulf of Aden is estimated to be 33,000, "making it one of the world's busiest shipping lanes.").

<sup>14</sup> See THE GLOBALIZATION OF CRIME, *supra* note 6, at 198 ("The U.S. Department of Energy estimated that, as of 2006, as many as 3.3 million barrels of oil per day were transiting the Bab El-Mandeb strait between the Gulf of Aden and the Red Sea.").

<sup>15</sup> The NATO Shipping Centre defines a mothership as "a vessel captured by pirates by on the high seas or within Somali TTW (territorial waters) which will be used predominantly for the purpose of committing acts of piracy (IRT Art 103 UNCLOS). Pirates remain on board and are in full control of the

## The Somali Piracy Challenge

has become an international concern not because of the weapons or the gear used in attacks, but rather, as a result of the sanctuary Somalia provides to pirates, coupled with a seemingly unlimited supply of potential recruits.<sup>17</sup> Even though thousands of pirates have been captured since 2008,<sup>18</sup> the illicit business model continues.<sup>19</sup> If other organized criminal networks sought to replicate the success of Somali pirates, they would similarly need the capacity to conduct illicit operations, an abundant supply of recruits, and a base of operations that is either un-governed, or not effectively controlled.

Forward deployed naval vessels, private armed security teams, and the significantly increased use of preventative measures by merchant ships have favorably altered the situation. The success rate of Somali pirates has plummeted from greater than 60 percent in 2007, to below 20 percent in 2011,<sup>20</sup> with hundreds of attacks being thwarted between 2008-2010.<sup>21</sup> While these trends are positive, pirates were nevertheless able to board, hijack, and secure increasingly higher ransoms (some were approximately \$10 million) from dozens of ships.<sup>22</sup> In

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vessel and the crew.” *Terminology*, NATO SHIPPING CTR., <http://www.shipping.nato.int/operations/OS/Pages/Definitions.aspx> (last visited October 24, 2011). Furthermore, weapons used by pirates have included, “pistols, Kalashnikov-pattern assault rifles, PKM light machine guns or equivalent, and rocket propelled grenade(s) (RPG). . . In March 2010, the European Union Naval Force (EU NAVFOR) seized 18 Chinese-manufactured 40 mm type-69 rockets . . . in four separate counter-piracy operations in the Indian Ocean.” Rep. of the Monitoring Group on Somalia and Eritrea pursuant to S.C. Res. 1916 (2010), ¶¶ 101-03, U.N. Doc. S/2011/433 (July 18, 2011) [hereinafter Rep. of the Monitoring Group on Somalia and Eritrea].

<sup>16</sup> The European Union describes the *Horn of Africa* as the geographic area of East Africa encompassing Djibouti, Ethiopia, Eritrea, Kenya, Somalia, Sudan and Uganda. *A regional policy partnership for the Horn of Africa*, EUROPA, [http://europa.eu/legislation\\_summaries/development/african\\_caribbean\\_pacific\\_states/r13004\\_en.htm](http://europa.eu/legislation_summaries/development/african_caribbean_pacific_states/r13004_en.htm) (last visited October 24, 2011). The Horn of Africa is “one of the poorest and most conflict prone regions in the world. . . An uncontrolled, politically neglected, economically marginalised and environmentally damaged Horn has the potential to undermine the region and the EU broad stability and security.” *Id.*

<sup>17</sup> The use of hijacked ships, known as mother ships as a staging platform to launch additional attacks has increased. See Rep. of the Monitoring Group on Somalia pursuant to S.C. Res. 1853 (2008), at 36, U.N. Doc. S/2010/91 (Mar. 10, 2010) [hereinafter Rep. of the Monitoring Group on Somalia] (stating that the use of mother ships enables pirates to remain underway for longer periods along with a greatly expanded operational reach); see also Caldwell & Pendleton, *supra* note 9, at 3 (“Officials also have cited reports of pirates using seafarers on the hijacked mother ships as ‘human shields’ to fend off attacks from naval vessels.”).

<sup>18</sup> See Lang Rep., *supra* note 10, ¶ 43 (asserting that more than 2,000 pirates have been captured between 2008 and 2011).

<sup>19</sup> 2010 Annual Report, *supra* note 12.

<sup>20</sup> See Lang Rep., *supra* note 10, ¶ 39. The success rate refers to the number of ships that are boarded/and hijacked versus the overall number of ships attacked. Thus, a success rate of twenty-five percent means that one in four ships that pirates sought to board, either, for example, through the firing or display of weapons, verbal communications or the movement of the vessels under their control resulted in a boarding/hijacking; see also Agence France-Presses, *World Piracy up, but more Somali attacks thwarted: report*, DEFENSE TALK, Oct. 19, 2011, <http://www.defencetalk.com/world-piracy-up-but-more-somali-attacks-thwarted-report-37752/>.

<sup>21</sup> See Lang Rep., *supra* note 10, ¶ 39 (stating, “[n]aval forces. . . proved effective: they thwarted 126 attacks in 2008, 176 in 2009 and 127 in 2010.”).

<sup>22</sup> Jeffrey Gettleman, *Money in Piracy Attracts More Somalis*, N.Y. TIMES, Nov. 9, 2010, <http://www.nytimes.com/2010/11/10/world/africa/10somalia.html> (stating, “[A] band of pirates received what is widely believed to be a record ransom — around \$10 million — for a hijacked South Korean super-tanker, the *Samho Dream*. The ship had been commandeered in April and anchored for months off the

## The Somali Piracy Challenge

March 2011, Somali pirates held approximately 30 ships with 600 hostages for ransom.<sup>23</sup>

The international response to Somali piracy in diplomatic venues and on the water over the past four years is unprecedented: passage of ten Somali-piracy focused United Nations Security Council resolutions,<sup>24</sup> completion of several United Nations-directed studies<sup>25</sup> deployments of warships from more than two dozen countries,<sup>26</sup> updates to the Best Management Practices for commercial vessels,<sup>27</sup> and an expansion of bilateral and regional partnering.<sup>28</sup> Such impressive action has contributed to a significant decline in the success rate of attacks in 2011, but land-based issues in Somalia, along with pirate camps, remain. As Somali pirates expanded their operating area more than 1,200 miles east and

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city of Hobyo, in central Somalia, in plain sight of the beach. The ransom was promptly divided among dozens of young gunmen, each allotted a \$150,000 share. But many of the pirates never saw close to that much money because they had taken advances from their bosses and had to pay back expenses, said a pirate in the Hobyo area. During the six months the ship was here, they spent a lot on qat, a local stimulant, women and drink. . . Many just came home with \$20,000.”)

<sup>23</sup> *Somalia Needs Governance to Defeat Piracy: U.S.*, NAVY TIMES, June 1, 2011, <http://www.navytimes.com/news/2011/06/ap-somalia-needs-governance-defeat-piracy-060111/>.

<sup>24</sup> S.C. Res. 2020, U.N. Doc. S/RES/2020 (Nov. 22, 2011); S.C. Res. 2015, U.N. Doc. S/RES/2015 (Octo. 14, 2011); S.C. Res. 1976, U.N. Doc. S/RES/1976 (Apr. 11, 2011); S.C. Res. 1950, U.N. Doc. S/RES/1950 (Nov. 23, 2010); S.C. Res. 1918, U.N. Doc. S/RES/1918 (Apr. 27, 2010); S.C. Res. 1897, U.N. Doc. S/RES/1897 (Nov. 30, 2009); S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008); S.C. Res. 1846, U.N. Doc. S/RES/1846 (Dec. 2, 2008); S.C. Res. 1838, U.N. Doc. S/RES/1838 (Oct. 7, 2008); S.C. Res. 1816, U.N. Doc. S/RES/1816 (June 2, 2008).

<sup>25</sup> See Lang Rep., *supra* note 10; see also *Possible Options*, *supra* note 3; Rep. of the Monitoring Group on Somalia, *supra* note 17; U.N. Secretary-General, Rep. of the Secretary-General pursuant to S.C. Res. 1846, U.N. Doc S/2009/146 (Mar. 16, 2009); Piracy off the Somali Coast: Final Report, INT’L EXPERT GROUP ON PIRACY OFF THE SOMALI COAST (Nov. 21, 2008), [http://www.imcsnet.org/imcs/docs/somalia\\_piracy\\_intl\\_experts\\_report\\_consolidated.pdf](http://www.imcsnet.org/imcs/docs/somalia_piracy_intl_experts_report_consolidated.pdf) (the report was commissioned by the Special Representative of the Secretary General of the UN to Somalia Ambassador Ahmedou Ould-Abdallah) [hereinafter Piracy off the Somali coast: Final Report]; Rep. of the Monitoring Group on Somalia and Eritrea, *supra* note 15.

<sup>26</sup> See *About Us: European Union Naval Force (EU NAVFOR) Somalia – Operation ATALANTA*, EU NAVFOR SOMALIA, <http://www.eunavfor.eu/about-us/> (last visited Oct. 8, 2011) [hereinafter *Operation ATALANTA*]; see also *Combined Task Force (CTF) 151*, COMBINED MARITIME FORCES, <http://www.cusnc.navy.mil/cmef/151/index.html> (last visited Oct. 8, 2011); *Counter-piracy operations*, NATO, [http://www.nato.int/cps/en/natolive/topics\\_48815.htm](http://www.nato.int/cps/en/natolive/topics_48815.htm) (last visited Oct. 8, 2011).

<sup>27</sup> See *Best Management Practices Version 4 – “BMP 4” a significant change for the better*, MARITIME SECURITY CTR. HORN OF AFRICA, <http://www.mschoa.org/bmp3/Pages/BestManagementPractices.aspx> (last visited Sept. 14, 2011) (stating, “[t]he presence of Naval/military forces in the Gulf of Aden, concentrated on the Internationally Recommended Transit Corridor (IRTC), has significantly reduced the incidence of piracy attack in this area.”); see also Lang, *supra* note 10, ¶ 35 (stating “the best management practices are not binding. Some 20 percent of ships are reportedly not in compliance.”). The IRTC spans 464 miles. Rear Admiral Terry McKnight, *Gulf of Aden Counter Piracy Operations: UNSI Brief*, U.S. NAVAL INSTITUTE, <http://www.usni.org/userfiles/file/ADM%20McKnight%20GOA%20Piracy%20-%20USNI.pdf> (last visited October 24, 2011).

<sup>28</sup> In addition to bilateral agreements on the transfer and prosecution of pirates with regional states and those in the United States and in Europe. See *The Djibouti Code of Conduct*, INT’L MARITIME ORG, <http://www.imo.org/OurWork/Security/PIU/Pages/DCoC.aspx> (last visited Nov. 9, 2011); *The Contact Group on Piracy off the Coast of Somalia: Fact Sheet*, U.S. DEP’T OF STATE (May 18, 2009), <http://www.state.gov/r/pa/prs/ps/2009/05/123584.htm>; Media Note, *United States Signs New York Declaration*, U.S. DEP’T OF STATE (Sept. 9, 2009), <http://www.state.gov/r/pa/prs/ps/2009/sept/128767.htm>; see also Robert W. Maggi, *Countering Piracy: International Partnership Achieves Steady Progress*, DIPNOTE U.S. DEP’T OF STATE OFFICIAL BLOG (August 24, 2010), [http://blogs.state.gov/index.php/site/entry/piracy\\_international\\_partnership\\_progress](http://blogs.state.gov/index.php/site/entry/piracy_international_partnership_progress).

## The Somali Piracy Challenge

1,000 miles south,<sup>29</sup> more ships are exposed. In a three-year window (2007-2010), Somali pirates held six times more hostages despite a reduced success rate because the number of attempts jumped from a few dozen to more than 200.<sup>30</sup> Somali pirates have also increased their violent and aggressive treatment of hostages.

Even though less than one percent of the ships using these waters are attacked,<sup>31</sup> every vessel in the region is affected as insurance rates have increased from \$500 per transit to more than \$300,000 per transit.<sup>32</sup> Additionally, a leading shipping firm, CMA CGM, among others, imposes a piracy surcharge between \$130-\$260 dollars per container for ships transiting the Gulf of Aden.<sup>33</sup> For ships that may hold 10,000 containers, the surcharge could add hundreds of thousands of dollars for every transit. The use of private security teams, which can be armed or unarmed, adds potentially another \$100,000 for a single transit, with private security contractors earning \$1,000 a day.<sup>34</sup> Area avoidance is an option, but a costly one. The route around Africa and the Cape of Good Hope (versus going through the Suez Canal) adds as many as 2,700 miles and between 6 to 20 days of transit to the journey.<sup>35</sup>

Despite operating in the vicinity of superior military forces on the water, Somali pirates remain capable of hijacking ships because they have adjusted their tactics. Naval forces and the shipping industry have likewise adjusted their tactics to address this evolving threat.

Effectively confronting Somali pirates and maintaining public order in the maritime domain is particularly challenging because the operating space exceeds

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<sup>29</sup> *Operation ATALANTA*, *supra* note 26.

<sup>30</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 11-449T, MARITIME SECURITY: UPDATING U.S. COUNTERPIRACY *Action plan* Gains Urgency as Piracy Escalates off the Horn of Africa 7 (2011), *available at* <http://www.gao.gov/new.items/d11449t.pdf> [hereinafter GAO Report] (The number of attacks includes both those that are unsuccessful *and* successful).

<sup>31</sup> *Id.* Based on 219 attacks reported in 2010 compared with the overall annual number of transits in the Gulf of Aden (33,000); *see also* Assistant Secretary of State Shapiro's remarks, *supra* note 13 (regarding 33,000 vessels annually transiting the Gulf of Aden).

<sup>32</sup> Anna Bowden, et.al, *supra* note 9, at 10.

<sup>33</sup> *See CMA-CGM Customer Advisory #107-2010, Piracy Risk Surcharge – East Africa & Indian Ocean Islands, Effective August 2010*, CMA CGM, (July 2, 2010), <http://www.cma-cgm.com/Images/ContentManagement/en-US/WorldwideNetwork/Local/USA/Documentation/2010-CA-107-Piracy-Surcharge-East-Africa-and-Indian-Ocean-Islands-Aug-2010.pdf> (stating, “[a]s the situation continues to worsen, CMA CGM is increasing the Piracy Risk Surcharge (PRS) as of August 1, 2010 for all shipments ex USA and destined for East African and Indian Ocean destinations, as follows: USD \$130 per 20’ container (all types) [and] USD \$260 per 40’ Container (all types)”); *see also* Press Release, CMA CGM, Aden Gulf Surcharge (December 17, 2008), *available at* [http://www.cma-cgm.com/AboutUs/PressRoom/PressRelease\\_Aden-Gulf-Surcharge\\_7426.aspx](http://www.cma-cgm.com/AboutUs/PressRoom/PressRelease_Aden-Gulf-Surcharge_7426.aspx) (last visited October 24, 2011) (stating, “[t]he transit of Container Ships through the Gulf of Aden in both directions is now subject to additional high costs due to increased insurance premiums and other costs, caused by the prevailing risks of piracy in the area.”).

<sup>34</sup> Anna Bowden, et.al, *supra* note 9, at 15; *see also* Anastasia Mistedaki, *Greek Commandos Protect Vessels Against Somalian Pirates*, GREEK WORLD REP. (April 22, 2011), <http://world.greekreporter.com/2011/04/22/greek-commandos-protect-vessels-against-somalian-pirates/>.

<sup>35</sup> Anna Bowden, et.al, *supra* note 9, at 13-14. The operating costs of ships vary; a 300,000 dead weight tonnage (DWT) Very Large Crude Carrier (VLCC) fuel vessel costs approximately \$50,000 a day.

## The Somali Piracy Challenge

two million square miles, extensive land-based hurdles, and complex legal and judicial issues that require cooperation by a variety of countries.<sup>36</sup>

There is agreement that piracy is a universal crime, though no consensus exists regarding whether piracy is primarily a civilian or military concern, whether piracy represents a criminal or national security threat, or whether the long-term solution involves more economic development or kinetic action.<sup>37</sup>

### A. Somalia

With a population near 10 million, Somalia occupies an area the size of Texas with a 2,300-mile coastline.<sup>38</sup> Somalia faces a variety of challenges including an adult literacy rate that is below 40 percent, massive unemployment and no viable economic infrastructure or development opportunities.

Nearly two decades ago, a senior adviser to the United Nations, Mohamed Sahnoun, noted that Somalia is “a country without central, regional or local administration, and without services. No electricity, no communication, no transport, no school, no health services.”<sup>39</sup> Things have not changed much in the past two decades. Since 1991, no functioning government has existed in Somalia. While the Transitional Federal Government (TFG) may represent Somalia in international venues, the TFG faces tremendous resource, organization, and capacity problems.<sup>40</sup>

Since 2008, the United Nations has commissioned several reports on Somalia and Somali piracy.<sup>41</sup> The Report of the Monitoring Group on Somalia and Eritrea (2011), a comprehensive 417-page examination of Somali and Eritrea, recommended, among other things, that known pirates should be designated for targeted measures and that counter-piracy operations in the Gulf of Aden and

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<sup>36</sup> One U.S. Navy analysis estimated that “1,000 ships equipped with helicopters would be required to provide the same level of coverage in the Indian Ocean that is currently provided in the Gulf of Aden – an approach that is clearly infeasible.” GAO Report, *supra* note 30, at 6.

<sup>37</sup> Defining *kinetic action* has sparked considerable discussion. A New York Times examination noted that, “in common usage, ‘kinetic’ is an adjective used to describe motion, but the Washington meaning derives from its secondary definition, ‘active, as opposed to latent.’ Dropping bombs and shooting bullets – you know, killing people – is kinetic. But the 21st-century military is exploring less violent and more high-tech means of warfare, such as messing electronically with the enemy’s communications. . . . are ‘non-kinetics.’” Op-ed, Peter Catapano, *War of Semantics*, N.Y. TIMES OPINATOR (March 25, 2011, 7:03 PM), <http://opinionator.blogs.nytimes.com/2011/03/25/war-of-semantics/> (quoting Timothy Noah from Slate).

<sup>38</sup> NATIONAL SECURITY COUNCIL, COUNTERING PIRACY OFF THE HORN OF AFRICA: PARTNERSHIP & ACTION PLAN, at 3 (Dec. 2008), available at [http://www.marad.dot.gov/documents/Countering\\_Piracy\\_Off\\_The\\_Horn\\_of\\_Africa\\_-\\_Partnership\\_Action\\_Plan.pdf](http://www.marad.dot.gov/documents/Countering_Piracy_Off_The_Horn_of_Africa_-_Partnership_Action_Plan.pdf)

<sup>39</sup> MOHAMED SAHNOUN, SOMALIA: THE MISSED OPPORTUNITIES 18 (1994).

<sup>40</sup> Rep. of the Monitoring Group on Somalia, *supra* note 17, at 6-12. “Somalia’s frail Transitional Federal Government has struggled ineffectually to contain a complex insurgency that conflates religious extremism, political and financial opportunism, and clan interests.” Regarding government forces in Somalia, “[t]he security sector as a whole lacks structure, organization and a functional chain of command,” attributable to, among other things, poor command and control and a lack of resources. *Id.*

<sup>41</sup> See note 18 for a list of these reports.

## The Somali Piracy Challenge

Indian Ocean should also, “enforce the arms embargoes on Somalia and Eritrea through boarding and inspection of suspicious vessels.”<sup>42</sup>

Two UN-directed reports focused primarily on judicial and prosecutorial issues, one of which was chaired by Claude Heller (2010)<sup>43</sup>, the other prepared by Ambassador Ahmedou Ould-Abdallah (2008).<sup>44</sup> These reports represent landmark examinations of the desperate situation in Somalia, particularly emphasizing the global impact of instability and violence in ungoverned areas. Dozens of subject matter experts were involved along with hundreds of interviews and extensive discussions. Separately conducted and tasked, the reports collectively describe the situation with incomparable depth, context, and background. The 2008 report by Ambassador Ahmedou Ould-Abdallah stated:

For nearly twenty years, Somalia has been a failed state, a virtual black hole in the international community, divorced from the world economy, regional and global institutions, and the rule of law. So long as its problems were confined within its borders, the rest of the world could ignore the problem.<sup>45</sup>

Piracy changed that perspective, as commercial ships from dozens of nations, some transporting humanitarian aid, were attacked for ransom with increasing frequency. Beginning in the mid-1990s, armed groups hijacked ships claiming they were the authorized “coast guard” charged with protecting their nation’s fishing resources. The illegal attacks dramatically increased in the years following the 2004 Indian Ocean tsunami that killed more than 200,000 and destroyed thousands of boats and jobs.<sup>46</sup> A *New York Times* article in 2008 stated Somalia, “is in chaos, countless children are starving and people are killing one another in the streets of Mogadishu, the capital, for a handful of grain. But one particular line of work – piracy – seems to be openly benefiting from all the lawlessness and desperation.”<sup>47</sup> Diverse and varied organizations such as the United Nations, World Food Program, and African Union (AU), have worked to address Somalia’s numerous challenges, but crime, poverty and famine continue to plague the country.

Change in Somalia is not easily attainable and as the Heller report noted, “efforts to restore peace and security to Somalia are critically undermined by a corrosive war economy that corrupts and enfeebles State institutions.”<sup>48</sup> The report further concluded that:

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<sup>42</sup> Rep. of the Monitoring Group on Somalia and Eritrea, *supra* note 15, ¶¶ 450-51.

<sup>43</sup> Rep. of the Monitoring Group on Somalia, *supra* note 17.

<sup>44</sup> Piracy off the Somali Coast: Final Report, *supra* note 25.

<sup>45</sup> *Id.* § 6.

<sup>46</sup> See *Possible Options*, *supra* note 3; see also Aaron S. Arky, Trading Nets for Guns: The Impact of Illegal Fishing on Piracy in Somalia (Sept. 2010) (Thesis, Naval Postgraduate School), available at [http://edocs.nps.edu/npspubs/scholarly/theses/2010/Sep/10Sep\\_Arky.pdf](http://edocs.nps.edu/npspubs/scholarly/theses/2010/Sep/10Sep_Arky.pdf).

<sup>47</sup> Jeffrey Gettleman, *Somalia’s Pirates Flourish in a Lawless Nation*, N.Y. Times, Oct. 30, 2008, [http://www.nytimes.com/2008/10/31/world/africa/31pirates.html?\\_r=1&pagewanted=1](http://www.nytimes.com/2008/10/31/world/africa/31pirates.html?_r=1&pagewanted=1).

<sup>48</sup> Rep. of the Monitoring Group on Somalia, *supra* note 17, at 7.



## The Somali Piracy Challenge

The limited ability of the Transitional Federal Government to adequately pay government officials and security forces is handicapped by endemic corruption at all levels: commanders and troops alike sell their arms, sometimes to their adversaries. Armed opposition groups. . . claim that they obtain arms, ammunition and equipment from [TFG] forces and affiliated militias, either by seizing them on the battlefield or by purchasing them.<sup>49</sup>

Piracy is a manifestation of difficulties within Somalia<sup>50</sup> that resonates throughout East Africa. The crime of piracy has spawned a market for new professions that includes intermediaries, negotiators and interpreters, and has affected the real estate markets with pirates purchasing real estate in Kenya.<sup>51</sup> The report states, “[t]he entire region has not only suffered from the negative economic effects of piracy, but has also witnessed a gradual increase in illegal activities connected with piracy (money-laundering, destabilization of the real estate sector, trafficking of weapons and migrants), which are partially replacing legal activities.”<sup>52</sup>

Moreover, members of the terrorist group Al-Shabaab and pirate militias are able to “officially” enter foreign countries in Europe, North America and Asia with illicitly obtained, government-issued visas.<sup>53</sup> The operation is remarkably simple:

Politicians claim they need to travel on official business, such as an invitation to address a Diaspora group or attend a conference, accompanied by a bogus delegation of government officials (and occasionally family members). Such requests are typically accompanied by a note from the Somali Embassy, often with a supporting letter from a minister, the Speaker of Parliament, or one of his deputies. If the request meets with approval, the other members of the “delegation” pay as much as \$15,000 for the opportunity to travel abroad with few ever returning to Somalia. Yet, with the country’s economic system in shambles, the reality of the

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<sup>49</sup> *Id.*; see also, Rep. of the Monitoring Group on Somalia and Eritrea, *supra* note 15, at 11-12 (stating, “[t]he principal impediments to security and stabilization in southern Somalia are the Transitional Federal Government leadership’s lack of vision or cohesion, its endemic corruption and its failure to advance the political process. Arguably, even more damaging is the Government’s active resistance to engagement with or the empowerment of local, de facto political forces elsewhere in the country. . . More than half of Somali territory is controlled by responsible, comparatively stable authorities that have demonstrated, to varying degrees, their capacity to provide relative peace and security to their populations.”).

<sup>50</sup> The French Permanent Representative to the United Nations, Jean-Maurice Ripert asserted that, “piracy is killing,” and cited to the millions of Somali’s that are reliant on food aid and emergency relief, of which approximately 95 percent arrive by sea. Stake Out by Ambassador Jean-Maurice Ripert, Permanent representative of France to the U.N., Following the adoption of UNSCR 1846 (Dec. 2, 2008), [http://www.diplomatie.gouv.fr/en/IMG/pdf/Stake\\_out\\_by\\_Ambassador\\_Jean-Maurice\\_Ripert.pdf](http://www.diplomatie.gouv.fr/en/IMG/pdf/Stake_out_by_Ambassador_Jean-Maurice_Ripert.pdf).

<sup>51</sup> Lang Rep., *supra* note 10, ¶ 16.

<sup>52</sup> *Id.* ¶ 27.

<sup>53</sup> Rep. of the Monitoring Group on Somalia, *supra* note 17, at 33.

## The Somali Piracy Challenge

situation is that the individuals who can afford to pay such sums are often those who profit from piracy, or leaders of armed groups.<sup>54</sup>

The Heller Report addressed the necessity of regional/international assistance and intervention. The diplomatic and operational partnering to combat piracy, discussed in detail below, could serve as the template for approaching broader Horn of Africa security issues, governance and economic development.<sup>55</sup>

A 2011 press release from the Counter-Piracy Directorate, Government of Puntland, Somalia recommended that, “. . .the international community. . . pursue an integrated approach that tackles the source of piracy, mainly economic disadvantages by creating job opportunities and improving the livelihoods of coastal communities.”<sup>56</sup> Collaboratively confronting piracy in East Africa could produce beneficial results, including strengthening relationships among regional states, strengthening relationships between states and maritime powers, and strengthening relationships between Somalia and shipping nations.

Counter-piracy operations also expose an important element of African security - the need for professional militaries. The deployments of coast guards coupled with well-trained land forces that institutionalize the rule of law are critical to security and stability.<sup>57</sup> Somalia is currently developing a coast guard in part because of international and regional assistance. While this is certainly a step in the right direction, much more is needed to expand the fledgling coast guard's operational capability and military capacities.

A Somali coast guard must address training, resources, and the platforms required to address piracy, as well as illegal fishing and other asymmetric threats in the littorals. Operational capability and military capacity challenges are not unique to Somalia. For instance, a representative of Liberia's recently created coast guard said, “[w]e are working with grandpa zodiacs with 42 horse power motors.”<sup>58</sup> Furthermore, collaboration between multiple navies and coast guards also poses challenges, as operational units may speak different languages, use different equipment and have different training and legal authorities.

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<sup>54</sup> *Id.*

<sup>55</sup> Global and regional organizations, including the United Nations (including the UN Office on Drugs and Crime and the UN Development Programme), International Maritime Organization, European Union (EU), International Criminal Police Organization (INTERPOL) and North Atlantic Treaty Organization (NATO), among others, are actively supporting repression efforts.

<sup>56</sup> *Press Release from Abdirizak M. Ahmed (Ducaysane), Director General, Counter-Piracy Directorate, Ministry of Maritime Transport, Ports and Counter-Piracy, Government of Puntland, Somalia*, GAROWE ONLINE (Feb. 25, 2011), [http://www.garoweonline.com/artman2/publish/Press\\_Releases\\_32/Press\\_Release.shtml](http://www.garoweonline.com/artman2/publish/Press_Releases_32/Press_Release.shtml); *see also Transcript of Statement by Russian minister of Foreign Affairs Sergey Larvov at the UN Security Council Meeting on Fighting Piracy and Armed Robbery Off the Coast of Somalia, New York, December 16, 2008*, MINISTRY OF FOREIGN AFFAIRS OF THE RUSSIAN FEDERATION (Dec. 17, 2008), [http://www.un.int/russia/new/MainRoot/docs/off\\_news/171208/newen1.htm](http://www.un.int/russia/new/MainRoot/docs/off_news/171208/newen1.htm).

<sup>57</sup> A shipping industry representative in Indonesia stated a well developed and resourced coast guard was necessary to curb violations and crimes at sea. Ridwan Max Sijabat, *Coast guard 'key to maritime security'*, THE JAKARTA TIMES, Sept. 21, 2011, <http://www.thejakartapost.com/news/2011/03/19/coast-guard-%E2%80%98key-maritime-security%E2%80%99.html>.

<sup>58</sup> David Lewis, *U.S. helps African navies with floating academies*, REUTERS, Apr. 20, 2010, <http://www.reuters.com/article/2010/04/20/us-africa-usa-navies-idUSTRE63J2K620100420>.

## The Somali Piracy Challenge

However, sustained deliberate planning, interoperability training, and partnering commitments can bridge those differences and build capacity. Interoperability could include standardized operational procedures, the development of commonly used terms and phrases between patrol aircraft and surface assets, as well as ensuring that communications equipment is functional with the systems on a partner's platforms. If the ultimate goal is a criminal proceeding, states must be aware of its partner's evidence collection and case package requirements for prosecution, as each legal system is unique.

Even if a State cannot deploy naval assets to the Gulf of Aden, opportunities exist to support counter-piracy operations and best management practices.<sup>59</sup> Partnering, as well as ensuring sufficient legal authorities and judicial capacity exist, are all central to the maintenance of a more secure operating environment.<sup>60</sup> The related issues of piracy and the law will be discussed in further detail below.

### III. Legal Issues Associated with Piracy

#### A. Maritime Piracy

Maritime piracy is a violation of international law and a universal crime that imposes a duty on all states to cooperate in its repression.<sup>61</sup> While multiple international treaties proscribe piracy, seizing control of a ship and taking hostages, prosecuting piracy remains a particularly difficult operational and legal issue.

The 1982 United Nations Convention on the Law of the Sea (LOS Convention),<sup>62</sup> the framework for peacetime maritime security cooperation, defines piracy as any illegal act of violence, detention, or depredation, committed outside of territorial waters for private ends by the crew or passengers of a private ship or aircraft against another ship, person or crew.<sup>63</sup>

The piracy definition in the LOS Convention emerged from customary international law as well as the 1958 Convention on the High Seas.<sup>64</sup> While inside

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<sup>59</sup> In addition to the deployment of operational assets, logistics assistance, criminal prosecutions and financial contributions reflect counterpiracy support.

<sup>60</sup> Successfully responding to maritime threats requires knowledge, platforms and the law. Jeff Kline, *Maritime Security*, in *SECURING FREEDOM IN THE GLOBAL COMMONS* 67, 73 (Scott Jasper, ed., 2010).

<sup>61</sup> United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3, art. 100 available at [http://www.un.org/depts/los/convention\\_agreements/texts/unclos/UNCLOS-TOC.htm](http://www.un.org/depts/los/convention_agreements/texts/unclos/UNCLOS-TOC.htm) [hereinafter LOS Convention]. Article 100 states, "Duty to Cooperate in the repression of piracy: All states shall cooperate to the fully possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State."

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* art. 101 (defining piracy as consisting of the following acts, "(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).")

<sup>64</sup> "Piracy is well-established and specifically and clearly codified in Article 15 of the Convention on the High Seas of 1958 and in Article 101 of the United Nations Convention on the Law of the Sea of

## The Somali Piracy Challenge

territorial waters, crimes like “armed robbery at sea” can be prosecuted by the host country because these crimes do not enjoy universal jurisdiction status and are generally the responsibility of the coastal state.<sup>65</sup> The 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention),<sup>66</sup> which proscribes the unlawful seizure or control of a vessel by force or threat or other form of intimidation, also provides legal authority to punish piratical acts.<sup>67</sup> The 157 State parties to the SUA Convention<sup>68</sup> represent almost 95 percent of the gross tonnage amongst the world’s merchant fleets, and in 2005, State parties at the IMO amended the Convention to proscribe, among other things, the maritime transport of weapons of mass destruction.<sup>69</sup>

In addition to LOS Convention and the SUA Convention, the United Nations Convention Against Transnational Organized Crime (UNTOC) and the International Convention Against the Taking of Hostages (Hostages Convention) provide additional legal frameworks for prosecutions of Somali pirates. UNTOC was adopted by General Assembly resolution 55/25 on November 15, 2000, and entered into force September 29, 2003.<sup>70</sup> The UNTOC has three protocols,<sup>71</sup> requiring that State parties:

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1982. . . [This] definition is both reflective of customary international law and universally accepted by states.” Declaration of the U.S. Department of State’s Legal Adviser Harold Hongju Koh, ¶ 9; U.S. v. Hassan, et al., Criminal No. 2:10cr56 (E.D. Va. Sept. 3, 2010).

<sup>65</sup> J. Ashley Roach, *Agora: Piracy Prosecutions; Countering Piracy Off Somalia: International Law and International Institutions*, 104 AM. J. INT’L L. 397 (2010).

<sup>66</sup> Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221, 27 I.L.M. 668 (1988) [hereinafter SUA Convention]. The SUA Convention was approved at the International Maritime Organization in Rome on March 10, 1998 and entered into force on March 1, 1992. The SUA Convention entered into force for the United States on March 1995. See Violence Against Maritime Navigation, 18 U.S.C. §§ 2280-2281 (2008).

<sup>67</sup> See S.C. Res. 1846, U.N. Doc. S/RES/1846 (Dec. 2, 2008); S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008) (addressing the SUA and providing in part, “reiterating that the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (“SUA Convention”) provides for parties to create criminal offences, establish jurisdiction, and accept delivery of persons responsible for or suspected of seizing or exercising control over a ship by force or threat thereof or any other form of intimidation. . . .” Some States, however, do not have legislation that enables prosecution under SUA for piratical acts or assert SUA is inapplicable to piratical acts because it was drafted in a counterterrorism context).

<sup>68</sup> Status of Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221, 27 I.L.M. 668 (1988) available at <http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20-%202011.pdf>.

<sup>69</sup> Amendments to the 1988 SUA Convention were approved at the IMO in 2005 and entered into force in 2010 after ratification by the twelfth state. The protocols promulgated a new legal framework to combat the proliferation of weapons of mass destruction and their delivery systems on board vessels and platforms at sea. The protocols also criminalize the conduct of those who transport terrorists or use a ship as a weapon. They further provide enforcement mechanisms to facilitate non-flag state boarding of vessels of being involved in such illicit activity and mandate that a state party either prosecutes or extradites suspected SUA offenders. See *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf*, INT’L MARITIME ORG., <http://www.imo.org/About/Conventions/ListOfConventions/Pages/SUA-Treaties.aspx> (last visited October 25, 2011).

<sup>70</sup> United Nations Convention against Transnational Organized Crime and its Protocols, *supra* note 7.

<sup>71</sup> *Id.* The three protocols “target specific areas and manifestations of organized crime: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; the Protocol

## The Somali Piracy Challenge

[1] commit themselves to taking a series of measures against transnational organized crime, including the creation of domestic criminal offences (participation in an organized criminal group, money laundering, corruption and obstruction of justice); [2] the adoption of new and sweeping frameworks for extradition, mutual legal assistance and law enforcement cooperation; and [3] the promotion of training and technical assistance for building or upgrading the necessary capacity of national authorities.<sup>72</sup>

The Hostages Convention was adopted December 17, 1979, and entered into force on June 3, 1983. With regard to piracy, the hostage convention applies:

To the offense of direct involvement or complicity in the seizure or detention of, and threat to kill, injure, or continue to detain a hostage, whether actual or attempt, in order to compel a State, an international intergovernmental organization, a person, or a group of persons to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage.<sup>73</sup>

Provided there is national legislation – a challenge for several nations – the confluence of treaties and appropriate jurisdictional provisions allow prosecution for the act of threatening to seize a ship, firing at a ship, seizing control of a ship, stealing from passengers, stealing cargo, re-flagging a ship, holding hostages, and/or securing ransom.<sup>74</sup> While there is no consensus on criminalizing the possession of equipment used for piracy such as grappling hooks, national legislation could address required elements.

Because of issues associated with piracy legislation, including geography and jurisdiction as well as capacity, some countries have recommended the development of a multilateral instrument to combat piracy or, alternatively, the development of model legislation. In view of currently existing international treaties, a multilateral instrument is not necessary, though model legislation would be beneficial.

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against the Smuggling of Migrants by Land Sea and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition.”

<sup>72</sup> *Id.*

<sup>73</sup> International Convention Against the Taking of Hostages (Hostages Convention), *opened for signature* Dec. 17, 1979, G.A. Res. 146 (XXXIV), U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (1979) (entered into force June 3, 1983).

<sup>74</sup> In just the United States, pirates could be charged with violating 18 U.S.C. § 1651(2011) (piracy on the high seas); 18 U.S.C. § 111 (2011) (assault on federal officials); 18 U.S.C. § 113 (2011) (assault on the high seas); 18 U.S.C. § 371 (2011) (conspiracy); 18 U.S.C. § 844(i) (2011) (use of explosive against property used in foreign commerce of the United States or against any property used in an activity affecting foreign commerce of the United States); 18 U.S.C. § 1659 (2011) (plundering a ship); 18 U.S.C. § 2111 (2011) (robbery on the high seas); 18 U.S.C. § 2280 (2011) (Maritime violence/hijacking of a ship); 18 U.S.C. § 2232 (2011) (assaults on U.S. nationals overseas); 18 U.S.C. § 2232a (2011) (use of WMD against nationals outside of the U.S.); *see also* 18 U.S.C. § 7(1) (2011) (Special Maritime and Territorial Jurisdiction of the United States); the U.S. CONST., art. I, § 8.; NATIONAL SECURITY COUNCIL, COUNTERING PIRACY OFF THE HORN OF AFRICA: PARTNERSHIP & ACTION PLAN (Dec. 2008), *available at* [http://www.marad.dot.gov/documents/Countering\\_Piracy\\_Off\\_The\\_Horn\\_of\\_Africa\\_-\\_Partnership\\_Action\\_Plan.pdf](http://www.marad.dot.gov/documents/Countering_Piracy_Off_The_Horn_of_Africa_-_Partnership_Action_Plan.pdf).

## The Somali Piracy Challenge

Even with legislation, a variety of issues may still exist.<sup>75</sup> Authority to arrest must be clearly detailed and given either to the police, other law enforcement officials, coast guard, or naval assets. Collecting evidence, maintaining a chain of custody, and ensuring the procedural rights of suspected pirates are other potentially difficult issues. Finally, the delivery of evidence to the prosecuting state, the transfer of suspects to the prosecuting state, and the timeliness of bringing a suspected pirate before a judge are additional challenges.

International law regarding piracy, as well as the authority for counter-piracy operations is based primarily on a combination of flag state concepts<sup>76</sup> and universal jurisdiction. For example:

The general rule on the high seas is that the flag state has exclusive jurisdiction over ships flying its flag (and over the persons and items on board). Except as otherwise specifically provided or agreed, foreign flag ships on the high seas may not be boarded, searched or detained without the consent of the flag state. Nevertheless, on the theory that pirates are enemies of all mankind, international law has long maintained an exception to the rule, which authorizes all states to board, search and detain pirate ships and pirates. Conceptually, it can be said that all flag states have already consented to the boarding of ships flying their flag that are suspected of piracy. This exception extends to the seizure, arrest and prosecution of pirates and pirate ships.<sup>77</sup>

Piracy attained universal jurisdiction status, “not because it is uniquely heinous, but instead, because of the threat that piracy poses to orderly transport and commerce between nations and because the crime occurs statelessly on the high seas.”<sup>78</sup> Though piracy is a universal crime, a state that criminally charges a pirate must have national legislation, prison capacity and the political will.

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<sup>75</sup> “Another problem continues to be the inadequacy of domestic piracy legislation, including in the United States. Only domestic courts are competent to try pirates: there is no international court with jurisdiction. As an example of the problem, on August 17, 2010, a U.S. federal district court judge dismissed a piracy charge on the grounds that firing a weapon at a ship (the USS Ashland (LSD-48)) to force it to stop and be boarded did not amount to an act of piracy. In its analysis of the piracy statute, 18 U.S.C. Section 1651, the district court applied the U.S. Supreme Court’s definition of piracy as ‘robbery’ – and there was allegation of robbery. The district court did not take into account that Article 15(3) of the 1958 Geneva Convention on the High Seas (to which the United States is a part and which is therefore part of the ‘supreme Law of the Land’) defines piracy to include ‘any act of inciting or of intentionally facilitating an act described’ as piracy. Two months later, a different judge in the same district court came to the opposite conclusion.” J. Ashley Roach, *Suppressing Somali Piracy – Next Steps*, 14 AMER. SOC. INT’L L. INSIGHTS, at para. 7 (2010) available at <http://www.asil.org/insights101201.cfm>. The case in which the piracy charge was dismissed is *United States v. Said*, No. 2:10cr57, (E.D. Va. Aug. 17, 2010).

<sup>76</sup> See LOS Convention, *supra* note 61, art. 94 (listing duties of the flag state: “Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag”). See generally, Craig H. Allen, *Revisiting the Thames Formula: The Evolving Role of the International Maritime Organization and Its Member States in Implementing the 1982 Law of the Sea Convention*, 10 SAN DIEGO INT’L L. J. 265 (2009).

<sup>77</sup> J. Ashley Roach, *Agora: Piracy Prosecutions; Countering Piracy Off Somalia: International Law and International Institutions*, 104 AM. J. INT’L L. 397, 400 (2010), available at <http://www.asil.org/ajil/July2010selectedpiece.pdf>.

<sup>78</sup> *U.S. v. Yousef*, 327 F.3d 56, 104 (2nd Cir. 2003).

## The Somali Piracy Challenge

Additional legal challenges include enforcing statutes that may be judicially interpreted to have limitations (e.g., laws that require a nexus to the country instead of providing for universal jurisdiction) and, as noted above, rulings on the length of time it may take to bring a suspected pirate from operational assets in the Gulf of Aden to a courtroom. For example, a district court in Rotterdam, Netherlands, held in 2010 that the passage of 40 days to bring a suspected Somali pirate before a judge in Europe was “too long.”<sup>79</sup> The Court held that bringing the suspects to court “could and should have been done earlier,” and that this delay constituted a breach of article 5 of the European Convention on Human Rights (ECHR).<sup>80</sup>

The Rotterdam court did not dismiss the conviction<sup>81</sup> despite holding there was a “breach” of ECHR article 5, which provides in part that “everyone arrested or detained . . . shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial.”<sup>82</sup>

Though issues related to the duration of detention will continue to be examined in criminal cases involving piracy and drug trafficking, these inquiries must balance the unique scope of at-sea boarding missions, the distances involved between location of capture and location of prosecution, and the fact that expeditious transfer of suspects and evidence is not always possible.

In addition to operational and judicial challenges, jurisdiction over crimes committed in the maritime domain could involve overlapping authority amongst flag, port and coastal states, with defendants, victims, and witnesses hailing from a variety of nations. Additionally, ship schedules, witness availability, interpreter availability, and the remuneration of witness expenses, many of whom are mariners, may be logistical challenges that can affect the outcome of the trial.

Despite those difficulties, over the past five years more than 1,000 pirates have been either convicted or transferred for prosecution in 18 countries.<sup>83</sup> However,

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<sup>79</sup> *Judgment Case Somali Pirates*, DE RECHTSpraak (June 17, 2010), <http://www.rechtspraak.nl/Organisatie/Rechtbanken/Rotterdam/Nieuws/Pages/Judgemen-tcase-Somali-pirates.aspx> (this link goes to the website of the Dutch Judiciary and may require the reader to select “English” on the top right corner of the webpage). The court also held, “All 5 suspects have received a 5-year prison sentence. The sentence is lower than the 7 years demanded. Although to a minor extent, it has been taken into consideration that in other comparable cases the arrested suspects were released and will not be tried. It has furthermore been taken into consideration that detention in the Netherlands forms a heavy burden on the suspects, who are far from home and can not, or hardly, maintain contact with their families in Somalia.” *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> An appeal of the court’s decision affirming the conviction could possibly be heard by the European Court of Human Rights.

<sup>82</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, June 1, 2010, 213 U.N.T.S. 221, available at [http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG\\_CONV.pdf](http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf).

<sup>83</sup> Countries that have thus far prosecuted Somali pirates or detained in anticipation of a prosecution are: Somalia (TFG, Puntland and Somaliland), Yemen, Kenya, Seychelles, Oman, United Republic of Tanzania, Maldives, France, Germany, Netherlands, Spain, Belgium, United States, South Korea, India, Malaysia, Madagascar and Japan. Lang Rep., *supra* note 9, ¶ 42 (explaining that in the United States, as of May 2011, approximately 28 pirates were convicted or pending prosecutions for five separate piratical acts).

## The Somali Piracy Challenge

after interdictions by naval forces, many more pirates have had their weapons and gear either confiscated or destroyed and then been released.<sup>84</sup> Some of those released are *suspected pirates*, having not yet attempted to hijack a ship. Even though gear on the ship, such as grappling hooks, a cache of weapons and electronic equipment may be make their intentions apparent, most countries do not have the ability, or interest, to prosecute *attempted piracy*. In contrast, releasing pirates who have committed piratical acts undermines the considerable naval and diplomatic efforts unfolding to enforce the rule of law.

Focusing on the operational, judicial, and capacity issues are crucial, because as one study asserted, “[t]he imprisonment requirement by the end of 2011 might be as high as 2,000 persons.”<sup>85</sup> In examining why some pirates have been released the Lang Report correctly noted, “warships do not always have secure location in which to keep such persons, so naval forces must be able to transfer them swiftly,” suggesting that when transfer does not occur the pirates are often released.<sup>86</sup>

Several proposals have suggested creating international piracy courts.<sup>87</sup> Examining any multinational security challenge collaboratively is useful, but legal authority, in accordance with customary international law as reflected in the LOS Convention, as well as in the SUA Convention, already exists. However, prosecutions are a challenge for many countries because there may not be domestic legislation, an articulated political interest in prosecuting pirates or judicial/prison capacity. Regardless, the development of an international piracy court raises separate investigative, detention, and trial and appellate issues that may prove more difficult than current concerns.

Other legal challenges involve private contractors, known by the recently created phrase: Privately Contracted Armed Security Personnel (PCASP) on board ships<sup>88</sup> as well as the deployment of privately-contracted armed escort vessels.

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<sup>84</sup> *Id.* ¶ 43; see also Jane Clinton, *Why Navy Had to Free Brutal Sea Gangsters*, EXPRESS.CO.UK (April 10, 2011), <http://www.express.co.uk/posts/view/239754/Why-Navy-had-to-free-brutal-sea-gangsters> (quoting the British Foreign Office Minister Henry Bellingham “I can assure you that we are raising our game on this. I don’t want to see any more catch and release. If pirates are captured and tried that sends a much stronger signal.”).

<sup>85</sup> Possible Options, *supra* note 3, at 17.

<sup>86</sup> Lang Rep., *supra* note 9, ¶¶ 53-54.

<sup>87</sup> Patrick Worsnip, *UN Council suggests special Somali piracy courts*, REUTERS, April 27, 2010, <http://af.reuters.com/article/topNews/idAFJ0E63R02T20100428> (stating “the resolution, a rare Russian initiative on the council, expressed concern over such cases, calling them a failure that ‘undermines anti-piracy efforts of the international community.’”); see also, S.C. Res. 1976, ¶ 26, U.N.Doc. S/Res/1976 (Apr. 11, 2011) (which states in part, “decides to urgently consider the establishment of specialized Somali courts to try suspected pirates both in Somalia and the region, including an extraterritorial Somali specialized antipiracy court. . .”).

<sup>88</sup> See Interim guidance on use of privately contracted armed security personnel on board ships agreed by IMO Maritime Safety Meeting, INT’L MARITIME ORG. (May 20, 2011), <http://www.imo.org/mediacentre/pressbriefings/pages/27-msc-89-piracy.aspx> (accessed October 25, 2011); see also INTERNATIONAL CODE OF CONDUCT FOR PRIVATE SECURITY PROVIDERS, ¶ 1, available at <http://www.news.admin.ch/NSBSubscriber/message/attachments/21143.pdf> (addressing, among other things, the use of force, training, management of weapons, incident reporting and grievance procedures; the Code has been developed and endorsed by more than 60 private companies in the shipping industry and was distributed to state representatives at the Maritime Safety Committee meeting in May 2011 at the IMO).



## The Somali Piracy Challenge

Interim guidance was developed at the International Maritime Organization for flag states, port and coastal States and ship owners, operators and masters regarding PCASP, though it is not binding and there exists no international, state-endorsed guidance<sup>89</sup> on private vessels.<sup>90</sup>

IMO Secretary General Efthimios E. Mitropoulos praised “the development of guidance to the industry and recommendations to flag States on the use of privately contracted armed security personnel on ships scheduled to sail through Indian Ocean areas exploited by pirates launching their operations from Somalia or mother ships.”<sup>91</sup>

There was progress at the IMO, yet much work remains to ensure effective oversight/regulation of privately contracted security. The Report of the Monitoring Group on Somalia and Eritrea noted:

Regulations imposed by the Governments with which the companies are registered, if they exist, may prove to be either unenforced or unenforceable. Armed private maritime security companies have no official status under the United Nations Convention on the Law of the Sea, which raises serious questions with respect to liability for actions they may take and the damage, injuries or deaths they may cause.<sup>92</sup>

National laws regarding a duty to report attacks and the use of force vary and possession of weapons, use of force, and criminal/civil accountability,<sup>93</sup> must all be addressed. Of the approximately 20 attacks by Somali pirates on ships with armed security teams through March 2011, none have been successful.<sup>94</sup>

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<sup>89</sup> *IMO approves further guidance on privately contracted armed security personnel*, INT’L MARITIME ORG. (Sept. 16, 2011), <http://www.imo.org/mediacentre/pressbriefings/pages/47-piracyguidance.aspx> (referencing the approved Maritime Safety Committee circulars for dissemination).

<sup>90</sup> *See IMO approves further interim guidance on privately contracted armed security personnel*, INT’L MARITIME ORG. (Sept. 16, 2011), <http://www.imo.org/mediacentre/pressbriefings/pages/47-piracyguidance.aspx>; *Interim Recommendations for port and coastal states regarding the use of privately contracted armed security personnel on board ships in the high risk area*, INT’L MARITIME ORG. (Sept. 16, 2011), <http://www.imo.org/MediaCentre/HotTopics/piracy/Documents/1408.pdf> (discussing how private security vessels raise additional legal issues, including, potentially, authorization from the state in which it is registered/flagged).

<sup>91</sup> *Interim guidance on use of privately armed security personnel on board ships agreed by IMO Maritime Safety Meeting*, INT’L MARITIME ORG. (May 20, 2011), <http://www.imo.org/MediaCentre/PressBriefings/Pages/27-MS-89-piracy.aspx>.

<sup>92</sup> Rep. of the Monitoring Group on Somalia and Eritrea, *supra* note 15, ¶ 181. The report also noted that, “very little data exists on the number of private maritime security companies operating, the arms and ammunition in their possession, their area of operations or the vessels they may use as escorts.” *Id.*

<sup>93</sup> Coast Guard Authorization Act, H.R. 3619, 111th Cong. § 8107 (2010) (§ 8107. Use of force against piracy provides, “An owner, operator, time charterer, master, mariner, or individual who uses force or authorize the use of force to defend a vessel of the United States against an act of piracy shall not be liable for monetary damages for any injury or death caused by such force to any person engaging in an act of piracy if such force was in accordance with standard rules for the use of force in self-defense of vessels prescribed by the Secretary.”); *see also*, Self-Defense of Vessels of the United States, 76 Fed. Reg. 4706 (Jan. 26, 2011).

<sup>94</sup> Sharon Weinberger, *State Department Says No to Merc Ships At Sea (Updated)*, WIRED, Apr. 15, 2011, <http://www.wired.com/dangerroom/2011/04/state-department-says-no-to-merc-at-sea/> (quoting Andrew Shapiro, Assistant Secretary of State for Political-Military Affairs, “I would note that, to date, not a single ship employing armed guards has been successfully pirated.”). The Report of the Monitoring

## The Somali Piracy Challenge

Some nations currently provide guidance to their flagged vessels. In the United States, Maritime Security Directives and Port Security Advisories address, among other things, operational issues, such as self-defense, the use of deadly force, the use of non-deadly force, retreat, defense of the vessel and other property, training, possession of firearms, reporting, communications, licensing, and means of identification and permissible durations of watch.<sup>95</sup>

While not a maritime instrument, the Montreux Document from 2008 on private military and security companies (PMSCs) during armed conflict is instructive.<sup>96</sup> The Montreux Document, “addresses substantive legal concerns [including] individual accountability for misconduct in different jurisdictions, and the authorities’ duty to oversee and screen the actions of firms for potential misconduct. . .”<sup>97</sup>

Another challenge to the prevention of piracy is the lucrative nature of the ransoms secured by successful pirates. As such, a state’s ability to identify, trace, freeze, seize, and confiscate criminal assets is paramount.<sup>98</sup> Neutralizing the illicit flow of money will definitely affect piracy operations – either through trailing/monitoring the money, pursuing organizers and financiers, restricting ransom payments or pursuing goods/property associated with piracy. The Report of the Monitoring Group on Somalia and Eritrea stated, “Piracy financing is more complex than widely believed. The notion that ransom payments disappear straight into pirates’ pockets, and are then transferred to Dubai, Nairobi and Mombasa to invest real estate and commerce, is simplistic and in some ways misleading.”<sup>99</sup>

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Group on Somalia and Eritrea noted one incident in which pirates initially boarded a ship escorted by privately contracted armed security personnel, but were not successful in seizing control, stating, “[o]n 2 March 2011, the sailing yacht *Capricorn* was attacked and boarded by Somali pirates in the Arabian Sea, 729 nautical miles east of Puntland, despite being escorted by a private security vessel from private maritime security company Naval Guards Ltd. The two sailors barricaded themselves inside the yacht, which allowed an escort vessel to retake the yacht after a brief exchange of fire with the pirates. No casualties were reported on either side.” Rep. of the Monitoring Group on Somalia and Eritrea, *supra* note 15, n.153.

<sup>95</sup> See U.S. DEPARTMENT OF HOMELAND SECURITY, UNITED STATES COAST GUARD, PORT SECURITY ADVISORY (3-09) GUIDANCE ON SELF-DEFENSE OF OTHERS BY U.S.-FLAGGED COMMERCIAL VESSELS OPERATING IN HIGH RISK WATERS (2009); U.S. DEPARTMENT OF HOMELAND SECURITY, UNITED STATES COAST GUARD PORT SECURITY ADVISORY (5-09) (REV 1) MINIMUM GUIDELINES FOR CONTRACTED SECURITY SERVICES IN HIGH RISK WATERS (2009); MARSEC Directive 104-6 (Rev.5), 76 Fed. Reg. 2402 (Jan. 7, 2011).

<sup>96</sup> INT’L COMM. OF THE RED CROSS, THE MONTREUX DOCUMENT ON PERTINENT INTERNATIONAL OBLIGATIONS AND GOOD PRACTICES FOR STATES RELATED TO OPERATIONS OF PRIVATE MILITARY AND SECURITY COMPANIES DURING ARMED CONFLICT (2008), available at <http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/humlaw.Par.0078.File.tmp/Montreux%20Broschuere.pdf>.

<sup>97</sup> *Id.* at 5 (stating, “the Montreux Document is not the final word in all questions – regulatory or otherwise – associated with PMSCs. This was never the intention. It does not endeavour to establish new regulations but simply seeks to provide guidance on a number of thorny legal and practical points, on the basis of existing international law.” The Montreux Document also seeks to debunk, “the prevailing misconception that private contractors operate in a legal vacuum.”).

<sup>98</sup> The United Nations Office on Drugs and Crime (UNODC) has provided significant assistance and support to developing national legislation proscribing piracy.

<sup>99</sup> Rep. of the Monitoring Group on Somalia and Eritrea, *supra* note 15, at 228 (Annex 4.3, ¶ 1).

## The Somali Piracy Challenge

The detection of money in financial institutions scattered across multiple nations will require domestic and international information sharing between law enforcement and intelligence personnel. It may also require that states adjust restrictive regulations to enable such cooperation. A Government Accountability Office report released in March 2011 concluded:

Multiple agencies collect or examine information on pirates' financial activities, including DOD, Justice, State, and the Treasury. However, officials agree that information their agencies gather on pirate finances is not being systemically analyzed, and it is unclear if any agency is using it to identify and apprehend pirate leaders or financiers. U.S. efforts to track and block pirates' finances in Somalia are hampered by a lack of government and formal banking institutions there.<sup>100</sup>

Curtailling financing and imposing legal consequences is an important component of a broader strategy to stop an environment that thrives on illegitimately secured funds. A separate 2011 study that assessed the costs of transnational crimes asserted drugs generated \$320 billion in illicit funds, counterfeiting \$250 billion, human smuggling, \$31 billion and oil, \$10.8 billion.<sup>101</sup>

### IV. Analysis: The Underlying Infrastructure Sustaining Piracy

#### A. The Development and Execution of an Attack

While the methods vary by which transnational threats unfold, each provides insight into tactics, techniques, procedures, and more broadly, the network of the respective transnational threat. In 2011, some pirate organizations modified their business model by offering a twenty percent discount for a limited time on ransom payments to encourage payment.<sup>102</sup> Pirates realized there are considerable logistical costs, such as food and medical necessities, associated with detaining hundreds of hostages.

Although being adaptive is important to sustained effectiveness, organization is perhaps more critical as the Lang Report asserts it is organization that has sustained Somali pirates.<sup>103</sup> For example, “[p]irates continue to show evidence of organization, with well-defined networks and hierarchies of financiers, senior

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<sup>100</sup> Caldwell and Pendleton, *supra* note 9, at 13. Separately, in April 2011, Andrew Shapiro of the U.S. State Department stated that the United States was developing a, “more energetic and comprehensive approach to piracy, with a special focus on pirate leaders and financiers on shore.” Keith Johnson, *FBI Snatches Alleged Pirate Inside Somalia*, WALL ST. J., Apr. 14, 2011, <http://online.wsj.com/article/SB10001424052748704547804576261301548767880.html>.

<sup>101</sup> Jeremy Haken, *Transnational Crime in the Developing World*, GLOBAL FINANCIAL INTEGRITY (Feb. 2011), <http://transcrime.gfip.org/>.

<sup>102</sup> *Pirates Discount Hijacked Ships*, NEWS24, Mar. 13, 2011, <http://www.news24.com/Africa/News/Somali-pirates-Hijacked-ships-sale-2011031>. A pirate identified as “Hussein” remarked that, “We have changed our previous strategies. We have altered our operations and ransom deals with modern business deals. We want to free ships within a short period of time instead of keeping them for a long time and incurring more expenses in guarding them. We have to free them at a lower ransom so that we can hijack more ships.” *Id.*

<sup>103</sup> Lang Rep., *supra* note 9, ¶ 15.

## The Somali Piracy Challenge

leaders and seagoing pirate crews.”<sup>104</sup> Some pirate organizations even have rank structures and provide training for new recruits.

Taking advantage of the operating environment is another key enabler to the effectiveness of an attack. Somali pirates have exhibited ability to take advantage of the operating environment in Somalia:

Somali piracy is unique in many regards, as Somalia does not have a natural coastal terrain of the sort that is usually favourable [sic] to pirates. Pirates in other parts of the world typically operate in areas with numerous forested inlets and islands, where ships could be hidden from aerial and maritime surveillance while they are being renamed and repainted. Instead, Somali pirates developed on-land sanctuaries from which they can launch pirate attacks and conduct ransom negotiations. This, no doubt, affects their choice to focus on hostages rather than cargo. What may have been considered a deficiency has resulted in a very positive outcome for the pirates: the amounts they command for ransoms far exceed what they could have gained through robbery.<sup>105</sup>

As piracy is planned on shore, examining the land-based structure is also critical to assessing the extent of the illicit activity and the accompanying repression options. Prior to engaging in an attack, considerable financial and organizational development is necessary, which requires as much as \$70,000 in seed money.<sup>106</sup> The Heller report addressed the methodical Somali piracy construct that has generally, but certainly not always, involved between eight to twelve participants who remain at sea until a target is hit. Those participants earn a “class A share” upon a ransom payment. These pirates get underway with at least two skiffs, weapons, fuel and other supplies. Another group consisting of up to 12 individuals provide land support for the operation and earn a “class B share.”<sup>107</sup> A pirate could receive \$35,000 to \$50,000, though the amount of the ransom will determine the exact payment.<sup>108</sup> Moreover, additional incentives exist for being the first on a hijacked ship, such as a Toyota Land Cruiser.<sup>109</sup>

Mother ships are an additional element of an attack. For instance, in March 2011, Indian naval assets rescued the crew of the fishing trawler Vega 5, captured 61 pirates and seized “large numbers of small arms and a few heavy weapons.”<sup>110</sup> The pirates had used the vessel as a mother ship to launch attacks on other ships since December 2010.

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<sup>104</sup> Caldwell and Pendleton, *supra* note 9, at 3.

<sup>105</sup> THE GLOBALIZATION OF CRIME, *supra* note 6, at 198; *see also* Final Report, *supra* note 25.

<sup>106</sup> Lang Rep., *supra* note 9, ¶ 96.

<sup>107</sup> Rep. of the Monitoring Group on Somalia, *supra* note 17, at 99.

<sup>108</sup> Frank Langfitt, *Inside The Pirate Business: From Booty to Bonuses*, NPR, Apr. 15 2011, <http://m.npr.org/news/front/135408659?singlePage=true>. The article quoted Stig J. Hansen, who interviewed more than 30 pirates, regarding ransom payments.

<sup>109</sup> *Id.*

<sup>110</sup> *Indian Navy Captures 61 Pirates on Mozambican Ship*, BBC NEWS SOUTH ASIA, March 14, 2011, <http://www.bbc.co.uk/news/world-south-asia-12729629> (stating that the capture of 61 pirates, “is thought to be among the largest group of pirates to be captured”).

## The Somali Piracy Challenge

Mother ships provide additional infrastructure support to pirates, for example: If a ship is successfully hijacked and brought to anchor, the pirates and the militiamen require food, drink, qaad, fresh clothes, cell phones, air times, etc. The captured crew must also be cared for. In most cases, these services are provided by one or more suppliers, who advance the costs in anticipation of reimbursement, with a significant margin of profit, when ransom is eventually paid.<sup>111</sup>

Thus, if a hijacking results in a ransom payment, the supplier, financier, investors, local elders and participants share the money.<sup>112</sup> The tactics of pirates also reveal the extent of their intelligence:

The visual horizon at sea is normally about three miles. The ability of pirates to locate target vessels in vast expanses of sea has led some to conclude that pirates are being provided with GPS coordinates by informants with access to ship tracking data. Crews of some hijacked vessels have said that the pirates appear to know everything about the ship on boarding, from the layout of the vessel to its ports of call. Calls made by pirates from their satellite phones from captured ships indicate an international network.<sup>113</sup>

This well-developed organization underscores the deep integration of piracy in Somalia and the extent of the challenge in removing land-based support. Somali pirates, similar to Barbary Corsairs more than 200 years ago, continue to command respect and admiration ashore. Governance, and specifically, the institutionalization of law and order on land coupled with capacity are necessary first steps in changing this environment and eliminating piracy networks.

### V. Proposal: An International Model for Cooperation

A unity of effort against Somali pirates does exist, yet there is not a single nation, command, or unit in charge of all counter piracy efforts. The venues and newly created constructs that have drawn together an array of states, nongovernmental organizations, and the shipping industry highlight the unprecedented scope of cooperation.<sup>114</sup>

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<sup>111</sup> Rep. of the Monitoring Group on Somalia, *supra* note 17, at 99.

<sup>112</sup> Mark Leon Goldber, *The Somali Pirates' Business Model*, UN DISPATCH, March 17, 2010, <http://www.undispatch.com/the-somali-pirates-business-model> (stating that the supplier, financier and investors get 30 percent; local elders share 5-10 percent for anchoring rights, those receiving shares for support on land could get as much as \$15,000, with the remaining money, the profit, divided among the participants in the hijacking).

<sup>113</sup> THE GLOBALIZATION OF CRIME, *supra* note 6, at 198.

<sup>114</sup> *Background Information about the Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia (ReCAAP) and the ReCAAP Information Sharing Center (ISC)*, RECAAP INFO. SHARING CTR. (Sept. 4, 2006), <http://www.recaap.org/AboutReCAAP/ISC.aspx> (showing that states in other geographic areas affected by piracy and armed robbery at sea have also partnered efforts. As of May 2011, the parties to this agreement included: Bangladesh, Brunei Darussalam, Cambodia, China, Denmark, India, Japan, the Lao People's Democratic Republic, Myanmar, the Netherlands, Norway, the Philippines, the Republic of Korea, Singapore, Sri Lanka, Thailand and Vietnam).

## The Somali Piracy Challenge

The most strategically ambitious international effort in the fight against piracy has been the Contact Group on Piracy off the Somali Coast (CGPCS), established in 2009 following UN Security Council Resolution 1851. The CGPCS has facilitated discussions and coordination with diplomats, military personnel, lawyers, international organizations and the civilian industry.<sup>115</sup> This *ad hoc* international cooperation mechanism is emblematic of an emerging approach to collaboratively addressing transnational security threats. Participation is voluntary, as are contributions, and the organizations meetings are not conducted under the direction of the United Nations. The Contact Group started with approximately 20 participating States and by 2011 had grown to approximately 70.<sup>116</sup>

The Contact Group has five working groups: (1) Military and Operational Coordination, Information Sharing, and Capacity, (2) Judicial Issues, (3) Strengthening Shipping Self-Awareness and Other Capabilities (4) Public Information and (5) Financial Flows.<sup>117</sup> Each group is chaired by a representative from a different nation.<sup>118</sup>

Issues at the Contact Group have included the progress of States in establishing national piracy legislation and prosecution of pirates, regional capability development, and industry-focused self-protection measures, referred to as Best Management Practices.<sup>119</sup> At a Contact Group meeting in 2010, the Ministers of the Transnational Federal Government of Somalia, Puntland, and Galmudug provided a proposal for a Coastal Monitoring Force.<sup>120</sup>

The recently developed working group on financial flows “focuses on the illicit financial flows associated with piracy in order to disrupt the pirate enterprise ashore.”<sup>121</sup>

An equally ambitious *ad hoc* construct to discuss Somali piracy repression efforts has also emerged for operational issues. Shared Awareness and Decon-

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<sup>115</sup> *Fact Sheet from the First Plenary Meeting of the Contact Group on Piracy Off the Coast of Somalia*, U.S. DEP'T OF STATE, BUREAU OF POLITICAL-MILITARY AFFAIRS (January 20, 2009), <http://www.state.gov/t/pm/rls/fs/130610.htm> (stating that “the CGPCS offers participation to any nation or international organization making a tangible contribution to the counter-piracy effort, or any country significantly affected by piracy off the coast of Somalia.”).

<sup>116</sup> Plenary meetings have been held in the United States, Egypt, Japan, Greece, Norway, South Korea and Turkey. See *Contact Group on Piracy Off the Coast of Somalia*, U.S. DEP'T OF STATE, <http://www.state.gov/t/pm/ppa/piracy/contactgroup/index.htm> (last visited October 25, 2011).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* Working Group (WG) 1 is chaired by the United Kingdom; WG 2 is chaired by Denmark; WG 3 is chaired by the United States; WG 4 is chaired by Egypt and WG 5 is chaired by Italy. See *Fact Sheet for the Contact Group on Piracy off the Coast of Somalia*, U.S. DEP'T OF STATE (Jan. 14, 2009), <http://www.state.gov/t/pm/rls/othr/misc/121054.htm>.

<sup>119</sup> *Media Note from the Sixth Plenary Meeting of the Contact Group on Piracy off the Coast of Somalia*, U.S. DEP'T OF STATE (June 11, 2010), <http://www.state.gov/r/pa/prs/ps/2010/06/143010.htm> (stating that “industry and governments have continued to monitor the tactics used by Somali pirates and, based on evaluations, have revised Best Management Practices (BMPs) and other counter piracy guidance. . . . During the March 2010 meeting of WG3 (Working Group 3), it was decided that a survey would be conducted to determine how Administrations were disseminating and implementing BMPs. Of the 29 Administrations that attended the meeting, 18 Administrations responded included the four largest ship registries.”).

<sup>120</sup> *Id.*

<sup>121</sup> See *Contact Group on Piracy Off the Coast of Somalia*, *supra* note 116.

## The Somali Piracy Challenge

fliction Event (“SHADE”), a military forum that includes international law enforcement, the shipping industry, Combined Maritime Forces, European Union Naval Forces (EUNAVFOR), Maritime Security Centre Horn of Africa, NATO and international naval force representatives was established “to provide a forum in which the various military elements engaged in counter-piracy operations in the region can discuss their successes and challenges, share best practices and coordinate forthcoming activities.”<sup>122</sup>

A SHADE meeting in 2010, led by NATO, was characterized as fostering, “a spirit of cooperation and frank/honest discussions to allow all forces and nations to share information and work together to combat piracy off the coast of Somalia.”<sup>123</sup> SHADE meetings have included between 30 to more than 100 representatives from China, Russia, Japan, South Korea, Yemen, Seychelles, Egypt, Bahrain, Saudi Arabia and the United States among others, as well as maritime security and coordination agencies.<sup>124</sup> In September 2011, the 21st SHADE was held.<sup>125</sup>

In addition to SHADE, representatives from more than twenty countries met in Djibouti under the auspices of the International Maritime Organization (IMO) to develop a regional framework to cooperate against piracy.<sup>126</sup> The participating African and Arab states reached an agreement on a “code of conduct” to facilitate information sharing, regional training, capacity building, maritime domain awareness and updating legislation.<sup>127</sup>

In the United States, the alignment of federal departments in response to maritime threats occurs through the Presidentially-approved Maritime Operational Threat Plan (MOTR Plan).<sup>128</sup> The MOTR Plan directs executive departments,

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<sup>122</sup> Press Release, 18th SHADE Meets to Discuss Counter-Piracy from Commander, U.S. Naval Forces Central Command, U.S. Fleet Combined Maritime Forces (January 11, 2011), <http://www.cusnc.navy.mil/articles/2011/CMF003.html>.

<sup>123</sup> News Release, NATO Chairs Counter Piracy Meeting in Bahrain, Allied Maritime Command Headquarters Northwood (June 2, 2010), <http://www.manw.nato.int/pdf/Press%20Releases%202010/Jun%20-%20Dec%202010/SNMG2%202010%2019.pdf>; *see also*, *CMF hosts 21st SHADE Meeting*, COMBINED MARITIME FORCES (Sept. 27, 2011), <http://combinedmaritimeforces.com/2011/09/27/cmf-hosts-21st-shade-meeting/>.

<sup>124</sup> *CMF hosts 21st SHADE Meeting*, *supra* note 123.

<sup>125</sup> *Id.*

<sup>126</sup> Press Briefing, UAE Signs IMO Anti-piracy Code, International Maritime Organization, Briefing 23/2011 (April 18, 2011), <http://www.imo.org/MediaCentre/PressBriefings/Pages/UAE-signs-IMO-anti-piracy-Code.aspx> (showing that, as of April 18, 2011, the Djibouti Code of Conduct had 18 signatory states with approximately \$15 million contributed to a trust fund. The Code seeks to advance information sharing, regional training and capacity building, among others. Activities of the project implementation unit include: a regional training center in Djibouti, information sharing, national legislation, training, maritime situational awareness and project management. On February 1, 2011, the Sana'a Information Sharing Center became operational. Construction of a regional training center is slated to begin in Djibouti in 2011).

<sup>127</sup> *High-Level Meeting in Djibouti Adopts a Code of Conduct to Repress Acts of Piracy and Armed Robbery Against Ships*, INT'L MARITIME ORG. (January 30, 2009), [http://www5.imo.org/SharePoint/main/frame.asp?topic\\_id=1773&doc\\_id=10933](http://www5.imo.org/SharePoint/main/frame.asp?topic_id=1773&doc_id=10933) (stating that “the Code of Conduct further calls for the setting up of national focal points for piracy and armed robbery against ships and the sharing of information relating to incidents reported).

<sup>128</sup> The MOTR process was implemented in 2005 with an *interim* plan that is substantially similar to the *final* MOTR plan of October 2006. The MOTR plan is one of eight maritime plans, along with the

## The Somali Piracy Challenge

such as Justice, State, Defense and Homeland Security, to develop desired national outcomes and execute courses of action in a time-sensitive fashion.

The MOTR Plan process has been used more than 1,000 times in six years to address the U.S. Government response to migrants, drug smugglers, fishing incursions, piracy, and other maritime issues of national importance. The MOTR Plan integrates national level command and operations centers with agency subject matter experts through e-mail, phone calls, or via secure video teleconferences. The MOTR process has been effective because timely cooperation is directed, a necessity in the maritime domain. National-level coordinating processes exist in other countries, to varying degrees, to enable separate agencies, such as the national police, coast guard, or naval forces, to be in contact with foreign ministries and departments of justice to quickly, and collaboratively, make decisions.

Countering piracy presents a common threat that nations collectively can work against. In this regard, bilateral agreements have also significantly advanced repression efforts. In a 2011 U.S.-Indian Memorandum of Counter-Terrorism, U.S. Ambassador to India, Timothy J. Roemer, remarked that, “[m]aritime security can be an area where we can work together in the future. We know that these pirates are increasingly reaching out further and further off shore.”<sup>129</sup>

Considerable partnering with the civilian industry has occurred elsewhere, for example, “U.S. agencies, primarily the Coast Guard and the Maritime Administration, have worked with industry partners to facilitate collaborative forums, share information, and develop joint guidance for implementing counter piracy efforts.”<sup>130</sup> Regardless of the forum, collaboration is key to countering piracy.

## VI. Conclusion

Transnational threats, such as drug trafficking, human smuggling, and piracy are corrosive to stability and governance. The response to Somali piracy in diplomatic venues demonstrates the value of partnering and unity of effort against threats that transcend borders. In addition to action at the United Nations, the International Maritime Organization, multiple regional and international organizations, naval assets, flag States, ship owners, and the shipping community have contributed. With multiple venues addressing piracy, ensuring there is not redundancy of action will be challenging.

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National Strategy on Maritime Security, directed by National Security Presidential Directive 41/Homeland Security Presidential Directive 13, Maritime Security Policy, December 21, 2004. See *NSPD 41/HSPD 13 National Strategy for Maritime Security Supporting Plans*, DEP'T OF HOMELAND SEC., [http://www.dhs.gov/files/programs/editorial\\_0608.shtm](http://www.dhs.gov/files/programs/editorial_0608.shtm) (last visited October 25, 2011). The Presidential Directive provides, in part, that the Maritime Threat Response plan will ensure the, “seamless United States Government response to maritime threats against the United States.” *Id.*

<sup>129</sup> *US Looks at India as Strategic Partner to Counter Pirates: Timothy J Roemer*, DAILY NEWS & ANALYSIS, March 9, 2011, [http://www.dnaindia.com/india/report\\_us-looks-at-india-as-strategic-partner-to-counter-pirates-timothy-j-roemer\\_1517838-all](http://www.dnaindia.com/india/report_us-looks-at-india-as-strategic-partner-to-counter-pirates-timothy-j-roemer_1517838-all) (stating that the US and India could be strategic partners to confront piracy).

<sup>130</sup> Caldwell & Pendleton, *supra* note 9, at 11.



## The Somali Piracy Challenge

Continued collaboration against Somali piracy is critical to improving both the situation on the ground and the threat on water. Somalia may have unique humanitarian, governance, and development challenges, but the financial objectives of pirates are similar to other transnational crimes, like other threats, it will be imperative to disrupt and dismantle the networks and eliminate operating bases.

Collectively confronting Somali piracy and protecting navigational freedoms has provided a strong framework for increased maritime domain awareness, communication and sharpened legal authority. However, thousands of ships remain vulnerable to attack during transit in a two million square mile area. Lessons learned from confronting other organized criminal networks, including building capacity, institutionalizing the rule of law, pursuing leaders and those who provide external support, aggressively tracking the illicitly obtained money, and removing sanctuary have relevance in the fight against Somali pirates. Those lessons are equally relevant in ensuring maritime security in the Gulf of Guinea.<sup>131</sup>

The operational and diplomatic cooperation that has emerged to align action against Somali pirates is emblematic of a new period in international maritime security partnering. Sustaining the impressive and considerable efforts - which have made a positive difference in reducing the success rate of attacks - along with building capacity, expanding land-based efforts to pursue pirate leaders, and addressing financial issues, particularly with regional states in the lead, will be critical in transforming an environment that has now experienced a generation of impunity.

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<sup>131</sup> See *Ban calls for integrated strategy against maritime piracy in Gulf of Guinea*, U.N. NEWS CENTRE, October 19, 2011, <http://www.un.org/apps/news/story.asp?NewsID=40103&Cr=gulf+of+guinea&Cr1=>. United Nations Secretary-General Ban Ki-moon, “urged States and regional organizations in West Africa’s Gulf of Guinea to develop a comprehensive and integrated strategy to combat maritime piracy, which he said threatens to hinder economic development and undermine security in the region.” The Secretary-General remarked to the Security Council during a debate on piracy in the Gulf of Guinea that, “The threat is compounded because most Gulf [of Guinea] States have limited capacity to ensure safe maritime trade, freedom of navigation, the protection of marine resources and the safety and security of lives and property.”