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Maritime Piracy: A Sustainable Global Solution

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A stylized world map in a light blue-grey tone, showing the outlines of continents and major oceanic regions. It serves as a background for the top section of the cover.

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MARITIME PIRACY: A SUSTAINABLE GLOBAL SOLUTION

Paul R. Williams & Lowry Pressly

MARITIME PIRACY: A SUSTAINABLE GLOBAL SOLUTION

Paul R. Williams & Lowry Pressly†*

Maritime piracy is a complex transnational security concern characterized by emerging international finance operations and organization, an oversupply of labor, and a low cost of market entry. This article provides a realistic picture of the driving forces behind maritime piracy in areas such as Southeast Asia, the Gulf of Aden, and the Gulf of Guinea. By examining some of the assumptions and proposed solutions in counter-piracy literature and policy, this article exposes some piracy illusions and proposes a sustainable, global response that addresses the persistent threat of modern maritime piracy. Today's manifold piracy challenges call for a multifaceted approach. Accordingly, this article sets forth a sustainable remedy that incorporates onboard security, an international tribunal to coordinate and secure the prosecutions of pirate organizers and financiers, and a set of policies that allows private industry to innovate while internalizing a greater portion of the political, legal, and economic costs of the shipping industry.

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I. INTRODUCTION

Articles on maritime piracy often begin by setting a rich scene, calling to mind the swarthy buccaneers of piracy's golden age, describing the new breed of AK-47-toting Somali pirates, or by laying out some truly sensational statistics. Freightened as the subject is by tales of romance and adventure, yardarm hangings, and faith slavery, articles on piracy naturally lend themselves to dramatic hooks and entertaining anecdotes. Clever titles abound.¹ The problem of global piracy, however, is both more serious and less exciting than these anecdotes suggest, and if we are to take a clear-eyed assessment of the issue, then it behooves us to get an accurate, global context before we begin to address the problem.

Despite the recent media attention to maritime piracy, including a forthcoming blockbuster about the MV *Maersk Alabama* hijacking starring Tom Hanks, the hype surrounding contemporary maritime piracy has been somewhat overblown. Indeed, incidents of maritime piracy have declined sharply in recent years. In 2012, 297 ships were attacked: 174 of those ships were boarded, and only 28 were successfully taken.² Those numbers are down from 439 attacks with 45

1. See, e.g., Peter T. Leeson, *An-arrgh-chy: The Law and Economic of Pirate Organization*, 115 J. POL. ECON. 1049, 1049 (2007).

2. ICC INT'L MAR. BUREAU, PIRACY AND ARMED ROBBERY AGAINST SHIPS: REPORT FOR THE PERIOD 1 JANUARY - 31 DECEMBER 2012, at 11 (2013).

ships taken in 2011,³ and 445 attacks and 53 hijackings at global piracy's peak in 2010.⁴ Given the many thousands of ships that transit the 140 million square miles of open ocean every year, the odds of any one being attacked are obviously very low. Indeed, even in the highly pirated waters off the coast of Somalia, where 40 percent of all pirate attacks occur, the odds of a ship getting hijacked are estimated to be only between 1 in 750 and 1 in 1,100.⁵ Nevertheless, the annual cost of piracy to the global economy is estimated to be upwards of \$18 billion.⁶

And yet, despite the recent downturn in pirate attacks, it is becoming increasingly clear that current efforts are not likely to be successful at putting an end to the global maritime piracy problem any time soon.⁷ Ninety percent of international trade moves by sea, including 60 percent of the world's crude oil,⁸ a figure that is only likely to increase in the coming years.⁹ Moreover, just as the bulk of pirate activity shifted from Southeast Asia to the Gulf of Aden to the Gulf of Guinea, piracy continues to spread across the globe. Pirate attacks are on the rise in the oil rich, security poor coast of West Africa, where understaffed law enforcement balks at confronting pirates with rocket-propelled grenades (RPGs).¹⁰ In fact, the number

3. *Id.*

4. *Id.*

5. THE WORLD BANK, *THE PIRATES OF SOMALIA: ENDING THE THREAT, REBUILDING A NATION* 25 (2013).

6. *Id.* at 5.

7. *See Somali Piracy: Just Taking a Break*, THE ECONOMIST (Oct. 23, 2012), <http://www.economist.com/blogs/baobab/2012/10/somali-piracy> (explaining that a number of vessels and crew members are still being held by pirates in Somalia, and piracy organization is still in place).

8. ELIZABETH ANDERSON ET AL., *ONE EARTH FUTURE, SUPPRESSING MARITIME PIRACY: EXPLORING THE OPTIONS IN INTERNATIONAL LAW* 2 (2009).

9. *See* INT'L MAR. ORG. & MAR. KNOWLEDGE CTR., *INTERNATIONAL SHIPPING FACTS AND FIGURES – INFORMATION RESOURCES ON TRADE, SAFETY, SECURITY, ENVIRONMENT* § 2.1 (2012), *available at* <http://www.imo.org/KnowledgeCentre/ShipsAndShippingFactsAndFigures/TheRoleandImportanceofInternationalShipping/Documents/International%20Shipping%20-%20Facts%20and%20Figures.pdf> (explaining how shipping has been integral to global economic growth, and “if the trade growth trend of the last 150 years continues . . . by 2060 the 8 billion tonnes of cargo will have grown to 23 billion tonnes).

10. Joe Bavier, *Insight: Nigerian Pirate Gangs Extend Reach off West Africa*, REUTERS (May 29, 2013), <http://in.news.yahoo.com/insight-nigerian-pirate-gangs-extend-reach-off-west-071154846.html> (“Pirates’ use of rocket-propelled grenades to halt ships leave Ivory Coast’s police feeling helplessly outgunned.”).

of ships attacked off the coast of West Africa recently surpassed the number of attacks off the coast of Somalia and the Gulf of Aden.¹¹ However, West Africa is not the only area that is seeing an increase in pirate activity. Piracy is on the rise everywhere from Indonesia to Peru, Singapore, and Bangladesh.¹²

A few elements of maritime piracy have made the profession attractive across the centuries and continents: entry into the market is easy, start-up costs are low, and the potential returns are high. Today, pirate revenues are at an all-time high, whether in the form of ransoms in the Gulf of Aden or black market oil sales in the Gulf of Guinea. Start-up costs are also at an all-time low; all one really needs to become a pirate is a skiff, some sailors, and probably some basic gear, all of which is mass produced and readily available (an AK-47 rifle sells between \$100 and \$200 in Somalia,¹³ and cutlasses, grappling hooks, ladders, etc. are substantially cheaper). Moreover, mechanisms of community finance, like the “pirate stock exchange” in Haradhere, Somalia, put mounting a small-time pirate expedition within the hands of any enterprising fisherman.¹⁴ Given the well-publicized successes of Southeast Asian and Somali pirates, it should not be surprising that poor criminals from Bangladesh to Nigeria are getting into the business.¹⁵

The modus operandi of maritime pirates—be they Nigerian, Somali, or Indonesian—has persisted more-or-less unchanged from the

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11. Alan Cowell, *West African Piracy Exceeds Somali Attacks, Report Says*, N.Y. TIMES (June 18, 2013), http://www.nytimes.com/2013/06/19/world/africa/west-african-piracy-exceeds-somali-attacks-report-says.html?_r=1&.
 12. *See Live Piracy & Armed Robbery Report 2013*, ICC COMMERCIAL CRIME SERVS., <http://www.icc-ccs.org/piracy-reporting-centre/live-piracy-report> (last visited June 23, 2013); *see also IMB Reports Drop in Somali Piracy, but Warns Against Complacency*, ICC COMMERCIAL CRIME SERVS. (Oct. 22, 2012), <http://www.icc-ccs.org/news/811-imb-reports-drop-in-somali-piracy-but-warns-against-complacency> (reporting the spread of piratical attacks in the Gulf of Guinea and South East Asia).
 13. GRADUATE INST. OF INT’L STUDIES, SMALL ARMS SURVEY 2007, at 279 (2007).
 14. James Kraska, *Freakonomics of Maritime Piracy*, 16 BROWN J. WORLD AFF. 109, 115 (2010).
 15. Indeed, in just five years the average pirate ransom jumped from just \$150,000 to over \$5 million. FIN. ACTION TASK FORCE, ORGANISED MARITIME PIRACY AND RELATED KIDNAPPING FOR RANSOM 10 (2011), *available at* <http://www.fatf-gafi.org/media/fatf/documents/reports/organised%20maritime%20piracy%20and%20related%20kidnapping%20or%20ransom.pdf>

days of Barbarossa and Ned Low.¹⁶ What does present a new and particularly difficult challenge for the counter-piracy community, however, is the transnational business model of some of today's pirate organizations. Maritime piracy has evolved from an essentially localized phenomenon of ad hoc banditry conducted by local criminals to one funded by the global networks of transnational organized crime.¹⁷ Never before has it been so easy to transfer start-up funds and profits across seas and national boundaries. Unlike the pieces of eight of yesteryear, today's pirate gains come in the form of cash or black market goods, which are quickly converted to cash, and these funds quickly disappear into the world's formal and informal banking networks.¹⁸ Further complicating the issue, the sources of transnational pirate finance and organization have become deeply intertwined with legitimate and criminal forms of private enterprise.¹⁹ These organizations are capable of funding sophisticated piracy operations from hundreds or thousands of miles away.²⁰ Accordingly, the most successful of the localized counter-piracy efforts have merely pushed the pirates and their financiers into other waters.²¹

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16. PHILIP GOSSE, *THE HISTORY OF PIRACY* 1 (Dover Publ'ns 2007) (1932) (explaining that throughout history, piracy follows a well-defined cycle); see also J. L. Anderson, *Piracy and World History: An Economic Perspective on Maritime Predation*, 6 J. WORLD HISTORY 175, 184 (1995) (describing the "piracy cycle" outlined by Philip Gosse).
 17. See, e.g., Jatin Dua & Ken Menkhaus, *The Context of Contemporary Piracy*, 10 J. INT'L CRIM. JUST. 749, 761 (2012); Mark T. Nance & Anja P. Jakobi, *Laundering Pirates? The Potential Role of Anti-Money Laundering in Countering Maritime Piracy*, 10 J. INT'L CRIM. JUST. 857, 860, 874 (2012); Caroline Copley, *Somali Piracy Becoming a "Criminal Enterprise,"* REUTERS (Feb. 16, 2011), <http://www.reuters.com/article/2011/02/16/somalia-piracy-enterprise-idAFLDE71F27E20110216>.
 18. Nance & Jakobi, *supra* note 17, at 868.
 19. See Dua & Menkhaus, *supra* note 17, at 761 (stating that financing flows through illicit means of human smuggling as well as through the legal trade of dhow and livestock); Nance & Jakobi, *supra* note 17, at 860, 874 (noting that pirate financing can manifest in many different patterns, and knowing whether the source is extra-regional can inform an effective counter-piracy strategy).
 20. See Dua & Menkhaus, *supra* note 17, at 761 (describing how piracy financing comes from both local clan sources as well as multinational banks); Nance & Jakobi, *supra* note 17, at 860, 874 (emphasizing the transnational nature of piracy the extra-regional location of many pirate financiers).
 21. See U.N. OFFICE ON DRUGS & CRIME [UNODC], *TRANSNATIONAL ORGANIZED CRIME IN WEST AFRICA: A THREAT ASSESSMENT* 51 (2013) (explaining, for example, that once Benin was reclassified as "risky," due to piracy attacks, the cost of business there increased to the point that business halted, and piracy was displaced to Togo).

Although maritime piracy is, as U.S. Admiral Michael Mullen recognized, a “transnational security challenge,” the solutions offered tend to be localized in scope.²² To be sure, localized solutions to piracy have been effective in tamping down or eliminating maritime piracy in areas such as the Strait of Malacca and the Caribbean, though the emergence of pirates in other shipping lanes supports the rather self-evident conclusion that localized solutions have not addressed the problem of piracy worldwide.²³ The millions of miles of underdeveloped coastline and open ocean will continue to permit the launching of pirate attacks, and so long as there are poor men along these shorelines, there will be a ready supply of pirate labor. Thus the implication of the new transnational paradigm—characterized by transnational networks of finance and organization, the oversupply of pirate labor, and the ease of market entry—is that successful localized strategies will ultimately fall short of addressing what is essentially a global problem.²⁴

A global problem calls for a global solution. Such a solution, moreover, must be sustainable in the long-term, since pirates are always poised to return to their trade if enforcement efforts fade. The solutions offered in the current piracy literature, however, either fail to account for the global nature of modern maritime piracy, are politically and economically unsustainable, or both. This article will proceed by clarifying some operative misconceptions and illusions in the current counter-piracy literature in order to offer a sustainable, global solution to maritime piracy that focuses both on deterrence at the point of attack and disruption of transnational networks of organization and finance. This top-down, bottom-up approach has three fundamental components: (1) using private security on ships to raise the cost of starting a successful pirate expedition to a level beyond the reach of the littoral world’s fishermen and small time gangsters; (2) establishing an international piracy court to cut off the sources of funding that are required to mount a successful pirate expedition given the raised start-up costs; and (3) allowing private

22. MICHAEL G. MULLEN, THE NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA 15 (2011), *available at* http://www.jcs.mil/content/files/2011-02/020811084800_2011_NMS_-_08_FEB_2011.pdf.

23. See Richard Valdmanis & Jonathan Saul, *W. Africa Pirates Adapt After Nigeria Crackdown*, REUTERS (Sept. 21, 2011), www.reuters.com/article/2011/09/21/ozatp-piracy-westafrica-idAFJ0E78K0FM20110921 (quoting a U.S. official, “[t]hese guys [the pirates] are like roaches—once you try and stomp on them they are going to go somewhere else”).

24. INTERPOL Secretary-General Ron Noble said, “INTERPOL has long asserted that maritime piracy is a classic transnational crime problem which may occur on the high seas but is part of a wider global network” Nance & Jakobi, *supra* note 17, at 874.

industry the space to innovate and experiment with effective deterrence techniques while holding industry responsible for its share of the political, legal, and economic costs of those efforts.

II. RIGHTING THE SHIP: CLARIFYING MISCONCEPTIONS OF PIRACY'S CAUSES AND CURES

A. *Piracy: An Expansive View*

Before addressing the proposed solutions to the problem of maritime piracy, it is important to understand exactly what that problem is. The international law definition of maritime piracy, as codified in the U.N. Convention on the Law of the Sea (UNCLOS), is an “illegal act[] of violence or detention, or any act of depredation, committed for private ends” beyond a state’s twelve-mile territorial waters.²⁵ Most incidents of depredation for private ends at sea, however, take place within a state’s territorial waters and therefore do not qualify as piracy in this technical sense.²⁶ Although the UNCLOS definition may reflect centuries of customary international law and a respect for national territorial sovereignty, it is not particularly useful for developing a counter-piracy strategy. Thus, it should not be surprising that the international counter-piracy community tends to talk about something more expansive when it considers the piracy problem.²⁷

Taking a survey of the piracy literature, both academic and journalistic, it seems that the problem as commonly identified is not merely armed robbery outside of a state’s territorial waters, nor is it attempted piracy; the problem is the actual hijacking of ships, irrespective of distance from shore.²⁸ This makes sense, since some

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25. U.N. Convention on the Law of the Sea art. 101, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].
26. See JAMES KRASKA, CONTEMPORARY MARITIME PIRACY: INTERNATIONAL LAW, STRATEGY, AND DIPLOMACY AT SEA 38 (2011); Peter Chalk, *Piracy off the Horn of Africa: Scope, Dimensions, Causes and Responses*, 16 BROWN J. WORLD AFF. 89, 90 (2010), *available at* http://relooney.fatcow.com/SI_FAO-Africa/Piracy_14.pdf.
27. See, e.g., THE WORLD BANK, *supra* note 5, at 87 (noting various “piracy typologies” to describe different types of piracy).
28. Indeed, even the Fourth Circuit Court of Appeals recently affirmed this conception in *United States v. Shibin*, 722 F.3d 233, 242 (4th Cir. 2013) (reiterating that “the international viewpoint that piracy committed on the high seas is an act against all nations and all humankind and that persons committing those acts on the high seas, *as well as those supporting those acts from anywhere*, may be prosecuted by any nation under international law”). See also S.C. Res. 2015, paras. 5, 16, U.N. Doc. S/RES/2015 (Oct. 24, 2011) (considering robberies at sea occurring both within the twelve nautical mile territorial zone (armed robbery at sea) and those occurring without (piracy) to be the appropriate subject

mild harassment from nearby skiffs or even some light arms or RPG fire from a distant skiff that does not result in a hijacking would hardly have consequences on global commerce or pose a significant threat to life and limb, whereas a hijacking is a major blow to trade and human safety regardless of its location. When academics and policymakers talk about counter-piracy success, we do not envision a world in which no ships are harassed—a vision too utopian to be taken seriously—but rather one in which merchant ships worldwide can leave their ports of origin, transit international waters, and offload their cargoes at their destinations without being hijacked.²⁹

Strangely, however, the problem of piracy is often treated as a symptom of a larger problem rather than the disease itself.³⁰ Certain socioeconomic and geopolitical conditions—weak law enforcement, high unemployment and poverty, access to sea lanes and weapons—undoubtedly enable the existence of piracy, but when a commentator makes an assertion such as, “piracy cannot be eliminated without addressing its root causes,”³¹ it begs the question: What of piracy is left if no ships can be hijacked? That is to say, even if piracy is a symptom of the factors that enable crime to flourish, can there be a

matter of an international “anti-piracy court”); Chalk, *supra* note 26, at 90; Nacha (Poi) Udomsrirungruang & Andrijana Valladares, *Combating Piracy in the Long-Term Through Development Efforts*, in TASK FORCE 2012: THE CHALLENGE OF PIRACY OFF THE HORN OF AFRICA 18, 18 (2012) (positing that successful counter-piracy efforts requires addressing the root causes of piracy); KRASKA, *supra* note 26, at 38; *see generally* MARTIN N. MURPHY, SMALL BOATS, WEAK STATES, DIRTY MONEY 7–21 (2009) (describing the various conceptions of piracy and its interplay with politics and international law).

29. This vision obviously skims over personal yachts and other types of non-economic maritime activity, an elision that is typical in the literature. This article will track that practice for a few reasons, though its conclusions will apply to merchant shippers and pleasure cruisers alike. Yachts and pleasure craft make up a very small portion of the ships transiting areas in which pirates operate; a few high profile hijackings notwithstanding, the connection between contemporary maritime piracy and yachters is negligible. Yacht owners, moreover, do not provide a vital economic service to the world, unlike maritime shipping, nor are they compelled to transit dangerous pirate waters like some merchant shippers and food aid transports are. Accordingly, pleasure cruisers should be strongly encouraged to not sail around areas of high pirate danger and advised to take precautionary measures similar to those recommended for merchant shippers.
30. *See, e.g., Ending Somali Piracy: Go After the System, Not Just the Pirates*, THE WORLD BANK (Apr. 11, 2013), <http://www.worldbank.org/en/news/feature/2013/04/11/ending-somali-piracy-go-after-the-system-not-just-the-pirates> (shifting the focus of counter-piracy measures to root causes and the underlying political system in Somalia).
31. Udomsrirungruang & Valladares, *supra* note 28, at 18.

workable solution to the problem that does not address those underlying “root causes”?

A sustainable solution to global maritime piracy requires refocusing the debate on the actual phenomenon of piracy, not the socioeconomic and geopolitical conditions that allow it to flourish.³² This approach requires one to look carefully at the actual pirates who board and take ships, their financiers and organizers, and the maritime vessels and state navies that are involved in counter-piracy efforts.

B. The Development Illusion

Perhaps the most common solution to the issue of maritime piracy can be summed up in the words of NATO Commander General John Craddock: “You don’t stop piracy on the seas. You stop piracy on the land.”³³ To be sure, this truism finds support in history, but solving the problem of piracy without leaving the shore is unrealistic. From the anti-pirate crusades of Pompey the Great in the first century BCE³⁴ to the elimination of piracy in the Caribbean and North Africa some two millennia later, pirates were typically effectively suppressed only when pursued into their land-based hideaways and, to put it somewhat euphemistically, were “forcefully destroyed along with their strongholds and sanctuaries.”³⁵ In the millennia before the development of international humanitarian law, a successful implementation of this strategy typically ended with pirate equipment in ashes and the pirates themselves tortured and killed.³⁶

In the twenty-first century, it is no longer acceptable to crucify pirates or to summarily hang them from the yardarm. This is not to say that the land incursion model has fallen completely out of favor, however, since in 2010 the U.N. Security Council passed Resolution 1851, enabling naval forces in the Gulf of Aden to pursue pirates onto Somali soil in a kind of “reverse hot-pursuit.”³⁷ A handful of EU

32. The conditions which permit flourishing piracy are simply the necessary conditions for crime of any sort plus access to shipping lanes.

33. Kraska, *supra* note 26, at 54.

34. Anderson, *supra* note 16, at 184; *see generally* DAVID ABULAFIA, *THE GREAT SEA: A HUMAN HISTORY OF THE MEDITERRANEAN 196–97* (2011).

35. Donald J. Puchala, *Of Pirates and Terrorists: What Experience and History Teach*, 26 CONTEMP. SECURITY POL’Y 1, 13 (2005).

36. For example, see Caesar’s infamous, and perhaps apocryphal, crucifixion of the pirates who had previously kidnapped him. *See* Plutarch, *PLUTARCH’S LIVES VOL. VII: DEMOSTHENES AND CICERO, ALEXANDER AND CAESAR* 447 (E. H. Warmington ed., Bernadotte Perrin trans., Harvard Univ. Press 1919).

37. S.C. Res. 1851, para. 2, U.N. Doc. S/RES/1851 (Dec. 16, 2008); S.C. Res. 1950, para. 4, U.N. Doc. S/RES/1950 (Nov. 23, 2010); Craig

Naval Force helicopter attacks notwithstanding, the on-land strategy of search and destroy has largely been abandoned for one of development.³⁸ The development solution to maritime piracy has two deeply related, though occasionally separately proposed strands: (1) development of rule of law and domestic law enforcement capability such that pirates will no longer be able to operate in a state or region with impunity;³⁹ and (2) economic development such that alternative livelihoods are available and appealing to would-be pirate foot soldiers.⁴⁰

The development solution has a number of faults. First, unless one proposes to develop all available shorelines near shipping lanes to the point that they will either be effectively policed or sustain appealing alternative livelihoods, it is essentially a localized—i.e., non-global—solution. In the era of transnational pirate finance and near-ubiquitous availability of weapons and equipment, a localized solution will necessarily meet with only limited success in combating piracy worldwide.

The development solution also begs the question of how exactly to go about achieving its ends, even on a less-than-global scale. In taking the focus of most of the contemporary literature—Somalia, for example—it seems misguided to talk of developing the Somali domestic economy and rule of law to a point where pirates will abandon piracy.⁴¹ The prospect of a functioning state in Somalia, or coastguards up to the task of combating and apprehending pirates in the Gulf of Guinea, is not a likely one in the foreseeable future.⁴² Scale this problem up to the rest of the underdeveloped littoral world that is or can be beset by piracy, and one is left with a solution that is cost-prohibitive and practically infeasible.⁴³ Development is a possible

Thedwall, Note, *Choosing the Right Yardarm: Establishing an International Court for Piracy*, 41 GEO. J. INT'L L. 501, 510 (2010).

38. See, e.g., Yara Bayoumy, *EU Helicopters Strike Somali Pirate Base on Land*, REUTERS (May 15, 2012), <http://www.reuters.com/article/2012/05/15/us-somalia-piracy-idUSBRE84E0YN20120515>

39. See Christopher Totten & Matthew Bernal, *Somali Piracy: Jurisdictional Issues, Enforcement Problems and Potential Solutions*, 41 GEO. J. INT'L L. 377, 414 (2009).

40. See Kraska, *supra* note 14, at 118.

41. In its report, the World Bank offers a typical question-begging conclusion: "This report calls for a negotiated political contract between local stakeholders and the [Somali] *central government*." THE WORLD BANK, *supra* note 5, at 175 (emphasis added).

42. See, e.g., Ludger Schadomsky, *No Stability in Sight for Somalia*, DEUTSCHE WELLE (June 20, 2013), <http://www.dw.de/no-stability-in-sight-for-somalia/a-16896385>.

43. It seems somewhat odd that organizations like the World Bank would, in their solutions to maritime piracy, take on instead the much larger

solution to the problems of crime and poverty in Somalia, perhaps, but it is not a solution to the global threat of piracy. Piracy crises are unlikely to be solved solely by the availability of alternative, legal livelihoods.⁴⁴

Cost and practical impossibility aside, the development solution is also essentially unsustainable for political reasons. The case of Somalia is again illustrative. When Somalia had a functioning state and law enforcement apparatus under dictator Siad Barre (including the largest army in Africa),⁴⁵ piracy off its coastline was rare.⁴⁶ However, when the government collapsed in the civil war of 1991, state authority disappeared and fertile piracy conditions emerged.⁴⁷ Although Somalia is a somewhat extreme example, the same political unsustainability hazards occur across the globe, whether in the form of civil conflict, regime change, or government incompetence and corruption. Simply put, a development solution is only as strong as the government of each individual littoral state; as a global approach, counter-piracy development is only as strong as its politically weakest link. Moreover, a development solution that relies on national rule-of-law development also presumes that states will actually want to stop the influx of foreign capital from ransoms and black market sales. In light of the significant flow of foreign hard currency into pirate-supportive states, as well as the often corrupt public administrations in the affected regions, the assumption that littoral states will cooperate in the fight against maritime piracy and its accompanying finance networks seems highly questionable.⁴⁸

The shortcomings of the development solution also point to a huge oversight in the counter-piracy literature. When discussing necessary conditions of piracy, the one actual necessary condition is almost never mentioned: a ship that can be taken. Of course socioeconomic and political structural conditions play an instrumental role in the proliferation of piracy, but boats launched from any shores can hijack a ship, and ransoms are so high that criminals will not

and more difficult goal of legal and economic development. This might be explained by the fact that development is the World Bank's business, its area of expertise, and the source of much of its vocabulary.

44. Indeed, it is clear that pirates are getting into and staying in the piracy industry for non-subsistence reasons. The proliferation of luxury goods and status symbols in Somali pirate towns attests to this fact. *See, e.g.,* Nance & Jakobi, *supra* note 17, at 869.
45. OLIVER RAMSBOTHAM & TOM WOODHOUSE, *ENCYCLOPEDIA OF INTERNATIONAL PEACEKEEPING OPERATIONS* 222 (1999).
46. *See* Gary E. Weir, *Fish, Family, and Profit: Piracy and the Horn of Africa*, 62 *NAVAL WAR COLL. REV.* 15, 17 (2009).
47. *Id.*; *see also* MURPHY, *supra* note 28, at 101.
48. *See* Nance & Jakobi, *supra* note 17, at 860–61.

likely be dissuaded from piracy by the availability of alternative legitimate livelihoods (armed robberies and kidnappings on land are still common in the developed world, after all). Thus, the solution to piracy *per se*—not to the conditions that drive young men to crime—must have something to say about preventing hijackings at the point of attack.

C. *The State Navies Illusion*

While historically state navies have had successes in combating piracy, a solution that relies on state navies to combat contemporary maritime piracy will be both ineffective and unsustainable. The international community has deployed a substantial naval force to the Gulf of Aden in response to the spike in pirate attacks off the coast of Somalia.⁴⁹ At any given time, a loose coalition of 20 to 32 naval vessels patrols the 2.9 million square nautical mile Gulf of Aden and its adjacent waters (an area over 1.5 times the size of Europe).⁵⁰ Some commentators have credited this force with the downturn in successful pirate attacks off the coast of Somalia,⁵¹ though even the most ardent supporters of naval patrols rarely propose it as anything more than a short-term fix.⁵²

In fact, naval forces seem merely to have been present at the decline in successful pirate hijackings. Despite the unprecedented international counter-piracy naval mobilization in 2008, pirate attacks and hijackings off the coast of Somalia continued to increase annually, peaking in 2010-2011, only to decline a year later when private security onboard ships rose from 10 percent to 50 percent.⁵³ The following year, as private security usage became more common (adoption is estimated to be as high as 70 percent⁵⁴), pirate attacks

49. See KRASKA, *supra* note 26, at 95.

50. The WORLD BANK, *supra* note 5, at 158; Yvonne M. Dutton, *Gunslingers on the High Seas: A Call for Regulation*, 24 DUKE J. COMP. & INT'L L. 107, 118 (2013); Bibi van Ginkel & Lennart Landman, *In Search of a Sustainable and Coherent Strategy*, 10 J. INT'L CRIM. JUST. 727, 736 (2012).

51. See, e.g., THE WORLD BANK, *supra* note 5, at 8; Totten & Bernal, *supra* note at 39, 414–15 (finding that the international naval forces have been particularly helpful because Somalia lacks its own navy).

52. For an example of this thinking, see KRASKA, *supra* note 26, at 79 (“The naval forces from distance states should serve as a temporary gap-filler until the capacity of regional nations can be developed.”).

53. THE WORLD BANK, *supra* note 5, at 86; Dutton, *supra* note 50, at 108.

54. Ben West, *The Expensive, Diminishing Threat of Somali Piracy*, STRATFOR (Nov. 8, 2012), <http://www.stratfor.com/weekly/expensive-diminishing-threat-somali-piracy>.

and hijackings plummeted to a five-year low.⁵⁵ The lack of correlation between the deployment of state naval patrols and the decline of successful pirate attacks in the Gulf of Aden is striking, particularly in contrast to the very strong correlation between the use of private security personnel and that same diminution.

Despite the estimated \$1.27 to \$1.5 billion that some thirty states are spending on counter-piracy naval patrols every year, navies have at best a highly limited effect.⁵⁶ Naval patrols and convoys have proven useful and effective when guarding high priority shipments, like humanitarian aid, and when escorting transit groups, but they are only effective at preventing successful pirate attacks if they are in the immediate vicinity of the merchant ship at the time of the attack.⁵⁷

Naval warships are not well suited to counter-piracy operations. Since it can take anywhere from hours to days for a naval vessel to reach the coordinates of a reported pirate attack (by which time the attack is typically over), naval forces are actually quite limited in their ability to combat piracy at the point of attack.⁵⁸ Although the U.S. Navy SEALs have shown spectacular prowess in small-scale, special ops counter-piracy and hostage rescue operations,⁵⁹ using massive warships to deter pirate skiffs is, in the words of one Italian naval officer, like “going after someone on a bicycle with a truck.”⁶⁰

Despite the massive international effort and public expense, military experts find the current counter-piracy force patrolling the Gulf of Aden to be hugely insufficient for the task of combating

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55. *Piracy Falls in 2012, but Seas off East and West Africa Remain Dangerous, Says IMB*, ICC COMMERCIAL CRIME SERVS. (Jan. 16, 2013), <http://www.icc-ccs.org/news/836-piracy-falls-in-2012-but-seas-off-east-and-west-africa-remain-dangerous-says-imb>.
56. THE WORLD BANK, *supra* note 5, at 158 (citing a 2011 Oceans Beyond Piracy Report); JAMES BROWN, LOWY INST. FOR INT’L POL’Y, *PIRATES AND PRIVATEERS: MANAGING THE INDIAN OCEAN’S PRIVATE SECURITY BOOM* 5 (2012), *available at* <http://lowyinstitute.org/publications/pirates-and-privateers-managing-indian-oceans-private-security-boom>.
57. Dutton, *supra* note 50, at 118.
58. Ginkel & Landman, *supra* note 50, at 736 (explaining that given the size of the waters that are patrolled, it can sometimes take days for a counter-piracy naval vessel to reach the attack); *see also* BROWN, *supra* note 56, at 4 (reiterating that Somali piracy is too widespread for naval forces alone to combat).
59. *See, e.g.*, Jeffrey Gettleman et al., *U.S. Swoops in to Free 2 from Pirates in Somali Raid*, N.Y. TIMES (Jan. 25, 2012), <http://www.nytimes.com/2012/01/26/world/africa/us-raid-frees-2-hostages-from-somali-pirates.html?pagewanted=all>.
60. Jeffrey Gettleman, *Pirates Outmaneuver Warships off Somalia*, N.Y. TIMES (Dec. 15, 2008), http://www.nytimes.com/2008/12/16/world/africa/16pirate.html?pagewanted=all&_r=0.

piracy, even in that relatively small region. EU Gulf of Aden Naval Force Atalanta commander Major General Buster Howes thinks that “83 [warships] would be needed in order to provide response conditions of half an hour,”⁶¹ while William Wechsler, former U.S. Deputy Assistant Secretary of Defense for Counternarcotics and Global Threats, suggests that “all the navies in the world could not possibly protect such a space.”⁶² A piracy solution that relies on naval patrols even in this relatively small corner of the sea would be akin to snuffing out armed robbery in New York City with a handful of beat cops or “patrolling an area the size of France” with a single police car.⁶³ Indeed, Somali pirates responded to the Gulf of Aden naval patrols by shifting their operations to the unpatrolled waters of the Red Sea,⁶⁴ and attacks are likewise on the rise in regions where the patrols do not operate.⁶⁵

Though naval patrols do have a deterrent effect on attacks in their immediate vicinity, they will only continue to have this limited effect as long as they remain deployed in counter-piracy operations. It seems unlikely that in an era of economic austerity and military cuts the world’s navies can be trusted to commit to such a strategy in the long-term. On the other hand, putting the firepower directly onboard ships has proven to be a highly efficient and cost-effective piracy deterrent. Indeed, ships that hire private security personnel—or that rent state military personnel—at a tiny fraction of the cost of naval operations have yet to be hijacked even once.⁶⁶ The increasing adoption of private security contractors, however, has given rise to another illusion and unwarranted fear in the counter-piracy literature regarding the undesirability of replacing navies with private-sector hired guns: the fear of a “Blackwater moment.”⁶⁷

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61. By which time it would almost always be too late. *See* Dutton, *supra* note 50, at 118.
62. *Id.*
63. Charlotte Eagar, *To Catch a Pirate: The British Ex-Servicemen Battling to Protect International Shipping from the Clutches of Somali Pirates*, THE DAILY MAIL (Dec. 20, 2011), <http://www.dailymail.co.uk/home/moslive/article-2071108/British-ex-servicemen-battling-protect-international-shipping-Somali-pirates.html>.
64. THE WORLD BANK, *supra* note 5, at 91.
65. *See* Cowell, *supra* note 11.
66. Sonia Rothwell, *Somali Piracy: Gone for Good?*, STRATFOR (May 20, 2013), <http://www.stratfor.com/the-hub/somali-piracy-gone-good>.
67. This phrase refers to an incident in which Blackwater contractors unjustifiably shot and killed innocent civilians in Iraq in 2007. Michelle Wiese Bockmann & Alan Katz, *Shooting to Kill Pirates Risks Blackwater Moment*, BLOOMBERG (May 8, 2012), <http://www.bloomberg.com/news/2012-05-08/shooting-to-kill-pirates-risks-blackwater-moment.html>; Dutton, *supra* note 50, at 110.

D. *The Private Security Personnel Illusion, or Fear of a
“Blackwater Moment”*

Given the unsustainable economic and political cost of patrolling navies and the proven effectiveness of private security personnel, much of the discussion of piracy solutions has turned to the use of private maritime security contractors. Though there was a time when private industry claimed to be wary of carrying private security on ships—citing concerns of escalating violence and cost—maritime shippers have rapidly changed their minds in light of on-ship security’s proven effectiveness.⁶⁸ Today, private security carriage is a part of best management practices in the shipping industry.⁶⁹ In light of this development, commentators worry about the suitability of private contractors for counter-piracy work, specifically about the misuse of force by private contractors. There is a widespread fear of a coming maritime contractor “Blackwater moment.”

Alleged reluctance on the part of the maritime shipping industry notwithstanding, the overwhelming trend is toward outfitting ships with either private or state security personnel.⁷⁰ Today, nearly three out of four ships transiting the Gulf of Aden carry private security personnel, a proportion that would probably be even higher if some merchant ships were not protected, however efficiently, by state navy escorts and transit groups.⁷¹ Shippers will be reluctant to increase their costs so long as naval vessels guard them for free, even though the costs of protection are more efficiently borne by the shippers.⁷² Indeed, the ostensible reluctance of industry to hire private security personnel may be due as much to free-riding on naval expenditures and broad externalization of security costs as it is to concerns about the state monopolization of deadly force.⁷³

Underlying most of the arguments against the use of private security personnel is an assumption that private security contractors

68. See Dutton, *supra* note 50, at 129.

69. BMP 4: BEST MANAGEMENT PRACTICES FOR PROTECTION AGAINST SOMALI BASED PIRACY §§ 8.14–8.15 (2011), *available at* http://www.mschoa.org/docs/public-documents/bmp4_low_res_sep_5_2011.pdf [hereinafter BMP4].

70. See West, *supra* note 54. The U.S. has authorized the use of private security personnel for over a century. Dutton, *supra* note 50, at 134.

71. Dutton, *supra* note 50, at 117 (indicating that the international community still spends \$1 billion to support naval patrols).

72. The irony here is that it is probably cheaper overall—for shippers, the global community, and consumers—to hire private security contractors. See *infra* Section III.C.

73. Indeed, the Dutch government has banned the use of private contractors on its ships because of fears that their usage would undermine its monopolization of deadly force. BROWN, *supra* note 56, at 9–10.

are somehow inherently more dangerous to innocent life than are uniformed soldiers. This assumption is not borne by evidence. In the first place, contractors are typically former military personnel “with shipping industry-accredited safety and training qualifications.”⁷⁴ Failing a credentials gap, ship owners have also cited Somali firepower and fears of escalating violence as reasons they have been reluctant to adopt armed security details.⁷⁵ This objection ignores the incentive structure that drives piracy. Pirates are profit seeking, rational utility maximizers, who have extremely strong incentives to inflict as little damage as possible to the ship, the cargo, and, in instances of piracy for ransom, the crew. It also seems self-evident that if a ship owner faced the choice between some extra damage to an unhijacked ship and one that was captured, she would clearly choose the former.

Recent experience with private security personnel, both on land and at sea, also seems to indicate that they are at least as unlikely to attack civilians as are uniformed soldiers and marines. That is to say that if the concern about private security personnel relates to the misuse of force, there is no evidence to support the claim that contractors are less trustworthy than uniformed military personnel. Indeed, reported cases of counter-piracy collateral damage involved two Italian marines aboard an Italian flagged tanker;⁷⁶ Russian soldiers aboard a Norwegian tanker who shot and killed unarmed fishermen while private security personnel held their fire;⁷⁷ Russian soldiers aboard a Russian flagged tanker who either executed Somali pirates or left them in a boat to die;⁷⁸ as well as Indian and other unidentified international naval forces.⁷⁹ Though there are reasons to suspect the use of force on the high seas is underreported, the available evidence indicates that private security personnel have not to date been responsible for non-justifiable civilian casualties in the

74. *Id.* at 7.

75. Chalk, *supra* note 26, at 97.

76. See Annie Banerji & D. Jose, *Insight: Murder Trial of Italian Marines in India Navigates Murky Waters*, REUTERS (June 9, 2013), <http://in.reuters.com/article/2013/06/09/us-india-italy-marines-insight-idINBRE9580GB20130609>.

77. See Alan Katz, *Fighting Piracy Goes Awry With Killings of Fishermen*, BLOOMBERG (Sept. 17, 2009), <http://www.bloomberg.com/news/2012-09-16/fighting-piracy-goes-awry-with-killings-of-fishermen.html>.

78. See *Somali Pirates Captured and Released by Russian Navy ‘Have Died,’* THE TELEGRAPH (May 12, 2010), <http://www.telegraph.co.uk/news/worldnews/piracy/7713375/Somali-pirates-captured-and-released-by-Russian-navy-have-died.html>.

79. Katz, *supra* note 77.

course of counter-piracy activities.⁸⁰ Of course, this is not proof that state marines are more dangerous than private contractors, but it does cast into doubt the assumption that state forces are inherently safer. In light of the relative parity of private and public security, it seems that the general aversion to the use of private security personnel stems not from experience, but rather from general intuitions about state monopolization of force.

It is unclear why one should assume that force in the hands of private contractors is necessarily more worrisome than state monopolization. If anything, private security personnel are subject to more serious oversight and sanctions than their military counterparts. As civilians, private security personnel are subject to the jurisdiction of criminal and civil courts in ways that state military personnel are not. Though jurisdictional issues can be confused by the combination of the contractor's state, the ship's flag state, the victim's state, and, if applicable, the state in whose territorial waters a criminal act takes place, it is practically always the case that private citizens may only use deadly force in self-defense. Whereas military personnel acting on behalf of a state generally enjoy sovereign immunity and will almost certainly not be extradited from their home state to face criminal trial elsewhere, private citizens acting as onboard security personnel enjoy no such special status under the law.⁸¹ A private contractor can be sued for wrongful death or tried for murder in domestic courts, while a state marine or sailor would most likely be subject to a court martial at worst. Indeed, for a long time industry has preferred military personnel to private contractors for this very reason, believing that state marines and sailors simply "have better protection from prosecution, and more certain legal status."⁸²

Similarly, official military personnel face significantly less liability for destroying the boats and equipment of fishermen suspected of piracy. It is common practice for a military ship that has taken control of suspected pirates to destroy their equipment, even if there is no evidence of piratical intent, and to drop the men on Somali soil.⁸³ The loss of a skiff, of course, is a tremendous blow to the livelihood of any fisherman unlucky enough to cross wakes with a

80. Private Maritime Security Companies (PMSCs) have been responsible for the deaths of pirates; however, the evidence tends to indicate that the use of force was justified self-defense. *See, e.g.,* Alan Cowell, *In First, Private Guards Kill Somali Pirate*, N.Y. TIMES (Mar. 24, 2010), http://www.nytimes.com/2010/03/25/world/africa/25pirate.html?_r=0.

81. The outlying case of the Italian Marines aboard the *Enrica Lexie* notwithstanding. *See* Banerji & Jose, *supra* note 76 (reporting that the Italian Marines are being tried in India).

82. BROWN, *supra* note 56, at 9.

83. KRASKA, *supra* note 26, at 116.

military vessel, and it seems justice would demand that the fisherman have some avenue of restitution. If a state navy destroys a boat without sufficient justification, however, the individual fisherman has no recourse; rather he must rely on his nation state to sue the state of the aggressor party under UNCLOS in either the International Court of Justice (ICJ) or the Law of the Sea Tribunal (LOS Tribunal).⁸⁴ It is frankly unimaginable that a state would take up the cause of a single fisherman, let alone many, in a very costly and potentially diplomatically harmful international trial. Private citizens and corporations, however, are subject to the law in ways that states are not, and presumably a private citizen or corporation would be subject to jurisdiction in at least one state where fishermen could seek redress.

If anything, the enormous legal and public relations backlash after the eponymous “Blackwater moment” demonstrates how private corporations face greater penalties for misbehavior than do state military forces. Private security companies are much more sensitive to reputational costs than state navies, since in the highly competitive industry of private security, a firm that gets a reputation for bad acts (and more importantly, bad PR) will lose business to one who does not behave badly. In light of the significant difference in criminal, civil, and reputational liability between private security and military personnel, it seems that private security might in fact be preferable for on-ship counter-piracy duty.

Of course there are some worrisome elements regarding the use of private security at sea. The use of private armed escort vessels, as opposed to security on-ship, raises serious concerns, as these vessels are more capable of being used for illegal, non-defensive counter-piracy purposes.⁸⁵ Private armed vessels are still subject to flag state jurisdiction, however, as well as territorial sea and victim party jurisdiction. Moreover, any non-self-defensive use of force at sea by a private vessel would qualify as piracy under UNCLOS and/or crimes at sea under the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA), and therefore subject the aggressor ship to universal or *aut dedere aut judicare* jurisdiction.⁸⁶ A good argument may still be made for some sort of

84. See UNCLOS, *supra* note 25, arts. 106, 110(3), 1833 U.N.T.S. at 437, 438 (stipulating that where seizure of a ship is not justified, the state making the seizure is liable to the state whose vessel has been captured and/or damaged).

85. See BROWN, *supra* note 56, at 8 (stating that armed escort vehicles “operate by establishing exclusion zones around the client ship and challenging suspicious boats that approach them”).

86. See UNCLOS, *supra* note 25, art. 101, 1833 U.N.T.S. at 436; Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation art. 3, *opened for signature* Mar. 10,

uniform regulation, and some international efforts are underway.⁸⁷ However, unless states adopt international regulation or model rules into law, these rules will serve as best management practices at most and will not have the full incentivizing force of the law. Moreover, unless best management practices are enacted into law and enforced across the littoral world, they will present a patchwork solution to an essentially global problem.

Part of the problem with onboard private security personnel is that different states have different rules regarding the transit of weapons and security personnel through their territorial waters and into their ports. South Africa, for instance, has stated that it will not allow armed security contractors into its ports,⁸⁸ while other states make ships pay for the privilege.⁸⁹ In response to the variety of laws preventing security personnel coming into ports, the industry has adapted. Some states, like Spain, the Netherlands, France, and Russia, have begun to rent their soldiers to private vessels,⁹⁰ while some private security companies have developed “floating armories” and procedures for offloading their weapons either in international waters or at friendly ports before entering into a merchant ship’s port of call.⁹¹ Although these innovations save shipping companies the time and money otherwise consumed by registering guns with the port city or stopping elsewhere en route,⁹² some commentators worry that floating armories will contribute to lawlessness and a high-seas patrolled by scofflaw cowboys.⁹³ This does not seem like the most logical conclusion to draw from the facts, but rather one driven by the

1988, 1678 U.N.T.S. 221 (entered into force Mar. 1, 1992) [hereinafter 1988 SUA Convention] (defining piracy and other offenses). The international piracy court proposed by this article would act as a strong check on aggressive behavior by private security companies. *See infra* Section III.B.

87. *See, e.g., 100 Series Rules: An International Model Set of Maritime Rules for the Use of Force*, <https://100seriesrules.com/> (last visited Mar. 13, 2014) (providing “an international model set of RUF as against which, Privately Contracted Armed Security Personnel (PCASP) may be professionally trained”).

88. Dutton, *supra* note 50, at 124.

89. For example, Djibouti sells annual permits to PMSCs to allow them to operate from its ports, while Sri Lanka rents out state-owned weapons. *Id.* at 121.

90. *See* BROWN, *supra* note 56, at 9.

91. *See* Oscar Rickett, *Piracy Fears over Ships Laden with Weapons in International Waters*, THE GUARDIAN (Jan. 10, 2013), http://www.lowyinstitute.org/files/brown_pirates_and_privateers_web.pdf.

92. *See id.*

93. *See id.*

aforementioned faulty assumption that private guards are ipso facto more dangerous. Rather, these perceptions seem to indicate that private security companies are capable of adapting rapidly and creatively to the exigencies of the counter-piracy fight, while remaining committed to operating within the tangled web of international and domestic laws.⁹⁴

The experience of state naval patrols and private security contractors in counter-piracy operations demonstrates the effectiveness of having security personnel on ship. The use of onboard private security is both an integral part and the first prong of a sustainable solution to the global problem of maritime piracy and will be discussed at greater length in Section III.

E. The Foot Soldier Illusion

Although nine out of ten pirates captured at sea are set free, many have in fact faced trial, principally in Kenya and the Seychelles, though also in the United States and Europe.⁹⁵ Indeed, more than 1,000 pirate foot soldiers currently await trial in twenty countries around the world.⁹⁶ It is often claimed that this strategy of focusing anti-piracy efforts on pirate foot soldiers—i.e., those doing the actual pirating—will not be effective in suppressing maritime piracy.⁹⁷ There is a great deal of truth to this assessment. Since meaningful socioeconomic development across the littoral world—e.g., Somalia, Bangladesh, Nigeria, Peru, Yemen—is years if not generations away, and ransoms are at an all-time high, the supply of financially desperate young men will outstrip the demand for pirate foot soldiers for the foreseeable future. Moreover, due to a variety of evidentiary

94. *See id.* The floating armories, for instance, are efforts to comply with both international conventions and the panoply of domestic laws regulating the transit of arms.

95. *See* Shashank Bengali, *Suspected Pirates Face Unprecedented Trial in U.S. Court*, L.A. TIMES (June 1, 2013), <http://articles.latimes.com/2013/jun/01/world/la-fg-somali-pirates-20130602>; Richard Allen Greene, *Pirates Get 5 Years in First Trial in Europe*, CNN (June 17, 2010), <http://www.cnn.com/2010/WORLD/europe/06/17/netherlands.pirate.trial/>.

96. *Ransom Money Laundered by Pirates Affects Stability in the Horn of Africa, Says UNODC Chief*, U.N. OFFICE ON DRUGS & CRIME (Feb. 22, 2012), <https://www.unodc.org/unodc/en/frontpage/2012/February/ransom-money-being-laundered-by-pirates-affects-stability-in-the-horn-of-africa-says-unodc-chief.html>.

97. *See, e.g.*, Press Release, Security Council, In Race Between Pirates and International Community, Pirates Clearly Winning, Secretary-General's Top Legal Adviser on Piracy Warns Security Council, U.N. Press Release SC/10164 (Jan. 25, 2011) ("Nine out of 10 pirates captured by national navies had to be released because no States were prepared to accept them and no jurisdiction was prepared to prosecute them.").

and political problems, captured pirates almost never face trial, and even if they were all arrested and indicted, it is unlikely that there would be enough cell space in enough willing countries to house them all.⁹⁸ Although apprehending low-level pirates does have some counter-piracy effect insofar as the pirates must acquire new equipment and re-staff their crews, it is highly doubtful that the threat of capture and unlikely trial will significantly deter foot soldier pirates.⁹⁹

It is not the case, however, that counter-piracy measures directed at low-level pirates are per se useless. Private security contractors have effectively stopped piracy, as far as their ships are concerned, by focusing their prevention efforts exclusively on the foot soldiers, while ignoring the larger socioeconomic context.¹⁰⁰ The incentives of potential incarceration are too abstract to deter desperate, hungry boys; the incentives presented by a ship carrying armed guards, on the other hand, are decidedly more immediate. To argue that focusing anti-piracy efforts on foot soldiers instead of the larger context is ineffective in stopping piracy is like arguing that burglar alarms do not solve the problem of burglary; while this may technically be true, deterrence measures at the point of attack are an important component of a larger, more comprehensive strategy.

This is not to say that trials have no place in an effective global counter-piracy strategy. There is a great deal of potential upside to trying and convicting the financiers and organizers of piracy. Although it may be true that the thousands if not millions of potential pirate foot soldiers will not be dissuaded by the threat of prosecution, it seems reasonable to assume that the financiers of piracy might be. Pirate financiers are a much smaller lot, are significantly more sophisticated, and have much more to lose than a subsistence fisherman or farmer, who has turned to piracy for survival.¹⁰¹ If the threat of prosecution becomes real, and if there are

98. FOREIGN AFFAIRS COMMITTEE, PIRACY OFF THE COAST OF SOMALIA, 2010–12, H.C. 1318, ¶¶ 78–87 (U.K.) (outlining the challenges with gathering evidence sufficient for piracy prosecutions, the jurisdictional constraints and problems with national piracy laws, and issues of prison capacity in prosecuting states).

99. Nevertheless, it may even be the case that post-hoc judicial intervention can be successful, if only the penalties for conviction are ratcheted up to the appropriate level of incentive. Instances of piracy off the coast of Somalia plummeted, for example, when the Islamic Courts Union controlled most of southern Somalia in 2006–2007 and instituted a penalty of hand amputation for those convicted of piracy. Chalk, *supra* note 26, at 94.

100. See Rothwell, *supra* note 66.

101. See, e.g., Associated Press, *Somali Piracy Backed by International Networks*, NBC NEWS (Dec. 10 2008), http://www.nbcnews.com/id/28158455/ns/world_news-africa/t/somali-piracy-backed-international-

no holdout safe haven states, then at the very least pirate financiers will be forced to alter their behavior.¹⁰² To put it another way: pirate financiers are the majority stakeholders of global maritime piracy, and disrupting and disabling their finance and organizational networks will be a necessary component of a sustainable and global counter-piracy approach.¹⁰³

F. *The Domestic Prosecutions Illusion*

The efficacy of trying low-level pirates aside, the crime of piracy is perhaps the oldest, and definitely least controversial, use of universal jurisdiction, and states have indicated that they want to see pirates face trial.¹⁰⁴ After a few years of pirate prosecutions, however, a fatigue of low-level pirate trials has begun to set in.¹⁰⁵ At the same time, the international community has stressed the need to disrupt the transnational networks of pirate finance.¹⁰⁶ Since there is no solution to the problem of transnational finance analogous to the provision of guns on ships, it seems that law enforcement and courts must intercede.¹⁰⁷ In light of this, the question becomes not whether

network/undefined#.UciKSOuA-Mg (stating that transnational pirate syndicates have been traced as far as Canada and Europe, and earn millions from the ransom payments).

102. This reasoning supports the call for an international piracy court. *See infra* Section III.B.
103. *See* THE WORLD BANK, *supra* note 5, at 118, 173 (emphasizing that eradicating piracy “will require a paradigm shift away from the perpetrators and toward the enablers of piracy”).
104. *See* Totten & Bernal, *supra* note 39, at 391 (noting that piracy is a violation of customary international law and a threat to all nations; thus, universal jurisdiction applies).
105. *See, e.g.,* Kevin J. Kelley, *How Kenya Backed out of Piracy Trials*, DAILY NATION (Sept. 2, 2011), <http://www.nation.co.ke/News/How-Kenya-backed-out-of-piracy-trials/-/1056/1229564/-/153vrutz/-/index.html> (indicating that Kenya has backed out of its memorandum of understanding due to concerns that Kenya was becoming a second “Guantanamo Bay”).
106. *See, e.g.,* Andrew J. Shapiro, *Testimony Before the House Committee on Transportation and Infrastructure’s Subcommittee on Coast Guard and Maritime Transportation* (Apr. 10, 2013), U.S. DEP’T OF STATE, <http://www.state.gov/t/pm/rls/rm/2013/207361.htm>; *see also* UNODC, *supra* note 21, at 50 (highlighting that “shore support” and money laundering are key elements to the crime of piracy).
107. *See* Damien McElroy, ‘Al Capone’ Strategy to Defeat Piracy, THE TELEGRAPH (Oct. 25, 2012), <http://www.telegraph.co.uk/news/worldnews/piracy/9633408/Al-Capone-strategy-to-defeat-piracy.html> (suggesting law enforcement is required to tackle piracy “kingpins”); *Press Release U.N. Security Council Supports Interpol and Europol Role in Combatting Maritime Piracy*, EUROPOL (Nov. 24 2010), [https://www.europol.europa.eu/content/press/un-security-council-](https://www.europol.europa.eu/content/press/un-security-council)

to try those involved in pirate finance and organization, but where to try those involved.

Some commentators argue that domestic courts or specialty piracy tribunals in states nearby to a pirate event are best suited for trying pirates and their financiers.¹⁰⁸ Historically, captured pirates did typically face trial in domestic courts, either of their home jurisdiction or the flag state jurisdiction of the pirated ship.¹⁰⁹ A problem arises, however, when the most appropriate jurisdiction is incapable or unwilling to conduct pirate trials or to incarcerate convicted offenders. Somalia is the most glaring contemporary example of this phenomenon, though it is hardly unique in the ineffectiveness of its domestic courts. Since Somalia lacks anything resembling a functional criminal justice system, it is incapable of satisfactorily trying the pirates operating in its waters and on its shores. In response to this problem, states in the region and around the world have accepted universal jurisdiction over pirate cases. And though there has been a broadly construed general preference for trials in regional states, pirates have faced trial in jurisdictions ranging from the Netherlands to the United States.¹¹⁰

Although local ownership and prosecutions in a state that has some sort of non-universal jurisdiction over a pirate or pirate financier is probably ideal, the fact is that for the foreseeable future, there are going to be states, like Somalia, where this is not possible, as well as nearby states that are non-cooperative.¹¹¹ With a few notable exceptions, states are becoming less and less willing to take pirates from other nations who have no connection to their jurisdiction whatsoever. The United States, for instance, tries pirates caught attacking U.S. ships or ships laden with U.S. cargo in the Gulf of Aden or the Red Sea, but offloads similar pirates caught attacking

supports-interpol-and-europol-role-combating-maritime-piracy-653
(recognizing that Europol's and INTERPOL's law enforcement capabilities and resources can target piracy networks).

108. See Helmut Tuerk, *The Resurgence of Piracy: A Phenomenon of Modern Times*, 17 U. MIAMI INT'L COMP. L. 1, 38–39 (2009).
109. See J. Ashley Roach, *Agora: Piracy Prosecutions, Countering Piracy off Somalia: International Law and International Institutions*, 104 AM. J. INT'L L. 397, 414 (2010).
110. See, e.g., Eileen Hsieh, *Five Pirates Stand Trial in the Netherlands*, CNN (May 26, 2010, 3:09 A.M.), <http://www.cnn.com/2010/WORLD/europe/05/25/netherlands.pirates.trial/>.
111. Cf. Ginkel & Landman, *supra* note 50, at 742 (noting situations where the flag state would have universal jurisdiction to arrest and prosecute pirates, but either have not incorporated international law norms into their domestic laws, or are not willing to exercise this jurisdiction).

non-U.S. flagged ships on Kenya or the Seychelles.¹¹² It is becoming apparent, moreover, that East African states have foreseen a jurisdictional race to the bottom that uses their criminal justice systems as dumping grounds for pirates and have accordingly ceased extending jurisdiction to any and all pirates caught somewhat nearby.¹¹³ Kenya, for instance, cancelled the Memoranda of Understanding it signed with the United States, the United Kingdom, and the European Union, citing fears of becoming a “second Guantanamo” for the pirates whose actions disproportionately affect wealthy nations.¹¹⁴

It is important to note that, unlike piracy, money laundering or the financing of piracy are not crimes of universal jurisdiction and thus present serious jurisdictional difficulties for any would-be prosecutorial state not directly involved with the transaction or pirate event. Though it is relatively uncontroversial for a Somali pirate who hijacked a Korean vessel in international waters to be tried in Kenya or the Netherlands, the Yemini financier of that crime would not likely be tried in the same courtroom.¹¹⁵ Thus, while domestic courts somewhat local to a pirate event might be suitable for trying foot soldiers, they are particularly ineffective at punishing and deterring pirate financiers.

It is not even clear that littoral states would want to convict high value targets and pirate financiers, since pirate incomes account for major inflows of foreign hard currency and purchase a great deal of political capital, nor is it evident that regional courts would always

112. See Mateo Taussig-Rubbo, *Pirate Trials, the International Criminal Court and Mob Justice: Reflections on Postcolonial Sovereignty in Kenya*, 2 HUMAN. 51, 58 (2011) (finding that when the U.S. could have exercised universal jurisdiction to prosecute, it declined to do so and sent the captured pirates to Kenya); Warren Richey, *Somali Pirate Gets 25-Year Sentence: Will It Be a Deterrent?*, THE CHRISTIAN SCIENCE MONITOR (Apr. 7, 2011), http://www.csmonitor.com/USA/Justice/2011/0407/Somali-pirate-gets-25-year-sentence-Will-it-be-a-deterrent?nav=topic-tag_topic_page-storyList.

113. See Kelley, *supra* note 105; see also S.C. Res. 1851, *supra* note 37, pmbl. (“Noting with concern that the lack of capacity, domestic legislation, and clarity about how to dispose of pirates after their capture, has hindered more robust international action against the pirates off the coast of Somalia and in some cases led to pirates being released without facing justice . . .”).

114. Kelley, *supra* note 105.

115. The law has begun to adapt to this problem, with some states exercising universal jurisdiction over the crimes of aiding and abetting piracy. See, e.g., *United States v. Shibin*, 722 F.3d 233, 242 (4th Cir. 2013). Reliance on the evolution of the domestic law of aiding and abetting piracy worldwide, however, will present another patchwork solution to the problem and will fall short for the reasons already enumerated.

provide fair hearings and satisfactory prison facilities if they were to undertake pirate prosecutions.¹¹⁶ Kenya, for instance, has set up an anti-money laundering agency, purportedly to combat pirate financing, but the agency's commitment to actually prosecuting offenders has been seriously called into question by domestic and international observers.¹¹⁷ Indeed, Kenya's anti-money laundering agency has been placed on the Financial Action Taskforce's "Black List," meaning that the Taskforce, the world's intergovernmental anti-money-trafficking agency, considers the Kenyan agency to be high-risk and non-cooperative in the fight against money laundering and terror funding.¹¹⁸ Nigeria's government—to take another representative example—is likewise perceived to be notoriously corrupt and is reported to profit from the black market sale of pirated oil.¹¹⁹ Corrupt and vulnerable law enforcement and judicial systems in these states are not exceptional; rather they are emblematic of the serious problem that corruption poses for a piracy solution that relies on regional trials of pirate finance.

The fact is that the problem of transnational pirate funding and money laundering is particularly unsuitable for prosecution in domestic courts. Even if this were not the case, however, a solution of domestic prosecution of pirate finance would fail as a global solution, since success demands domestic enforcement in problem jurisdictions across the globe. In the context of patchwork regional solutions, it is not hard to imagine a jurisdictional race to the bottom in which the states that turned a blind eye or refused to prosecute pirate financiers were rewarded for their inattention with a substantial influx of foreign hard currency in the form of ransom payments and/or black market profits. If the international community truly wants to arrive at a solution for global piracy, not just to push it from one shipping lane to another, and its finance from one unregulated jurisdiction to

116. See, e.g., THE WORLD BANK, *supra* note 5 at 7–8 (noting that as much as 86 percent of pirate proceeds go to purchasing political capital); Mark Doyle, *Nigeria's Piracy—Another Form of Oil Theft*, BBC (June 18, 2013), <http://www.bbc.co.uk/news/world-22956865> (reporting that roughly 20 percent of black market pirated oil goes to government enforcement agencies in the form of bribes).

117. *Kenya FRC to Fight Money Laundering*, THE EAST AFRICAN (Apr. 12, 2012), <http://www.theeastafrican.co.ke/business/Kenya-FRC-to-fight-money-laundering/-/2560/1390946/-/view/printVersion/-/5u9jl6/-/index.html>.

118. *Id.*; *Public Statement*, FIN. ACTION TASK FORCE (June 21, 2013), <http://www.fatf-gafi.org/topics/high-riskandnon-cooperativejurisdictions/documents/public-statement-june-2013.html>.

119. Doyle, *supra* note 116; see also UNODC, *supra* note 21, at 50 (describing the high number of piracy attacks occurring in Nigeria).

another, then the transnational problem of pirate finance must be met with an international solution.

G. The Existing International Courts Illusion

Since the ultimately ineffective domestic prosecutions of foot soldiers are increasingly undesired by the world community, and because prosecutions of pirate financiers are necessary but particularly unsuited for domestic courts, it follows that an international court would be called for in the fight against global maritime piracy. Three existing international courts—the ICJ, the LOS Tribunal, and the International Criminal Court (ICC)—have been suggested as suitable for pirate trials,¹²⁰ but unfortunately none of these courts are willing, able, or suitable to accept jurisdiction over pirate financiers and organizers.

Neither the ICJ nor the LOS Tribunal has the personal criminal jurisdiction required to prosecute high value pirates. Rather, both courts have only the authority to settle disputes between party states.¹²¹ Essentially, what a piracy prosecution would look like in either the ICJ or the LOS Tribunal is that one state—say, France—would sue another state—say, Somalia—for its failure to uphold its vague and arguably permissive duty under UNCLOS (and/or the SUA Convention in the ICJ) to “co-operate to the fullest possible extent in the repression of piracy.”¹²² It is hard to imagine such a scenario coming to pass and even harder to claim that it would in any way be a prosecution of, or an effective tool in the fight against, piracy. There are some arguments for augmenting the jurisdictions of the LOS Tribunal and the ICJ to include personal criminal

120. See, e.g., Thedwall, *supra* note 37, at 501 (proposing that the LOS Tribunal, which is modeled after the ICJ, be expanded to include criminal jurisdiction over piracy); ANDERSON ET AL., *supra* note 8, at 14 (discussing the expansion of ICC jurisdiction to cover piracy); Yvonne M. Dutton, *Bringing Pirates to Justice: A Case for Including Piracy Within the Jurisdiction of the International Criminal Court*, 11 CHI. J. INT’L L. 197, 201 (2010) (positing that the ICC is the best forum for piracy offenses).

121. Statute of the International Court of Justice art. 36, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 [hereinafter ICJ Statute]; UNCLOS, *supra* note 25, art. 105, 1833 U.N.T.S. at 437. The LOS Tribunal settles disputes only under UNCLOS, whereas the ICJ can settle disputes arising under any international treaty or agreement. See *The Tribunal*, INT’L TRIB. FOR THE LAW OF THE SEA, <https://www.itlos.org/index.php?id=15&L=0> (last visited Mar. 14, 2014).

122. UNCLOS, *supra* note 25, art. 100, 1833 U.N.T.S. at 436. Though the 1988 SUA Convention doesn’t explicitly criminalize piracy, it does call on party states to detain individuals who commit robbery and assault on the high seas and to prevent such actions going forward. 1988 SUA Convention, *supra* note 86, arts. 3(1), 7(1), 13(1)–(2), 1678 U.N.T.S. at 224, 227, 230–31.

jurisdiction for pirates, but it seems unlikely to happen.¹²³ Ultimately, the LOS Tribunal and the ICJ are not well-suited to hear individual criminal cases, as every element of these tribunals—from the organizational structure to the personnel (e.g., the lack of a prosecutor's office) to the physical facilities—is designed for non-criminal cases between state parties.

Similarly, the ICC is not a good fit for piracy cases. Not only do the crimes of piracy and piracy finance—relatively ordinary offenses compared to the ICC's purview of genocide, crimes against humanity, war crimes, and aggression—not fit within the court's subject matter jurisdiction, but also the drafters of the Rome Statute considered adding piracy to the Court's jurisdiction and intentionally left it out.¹²⁴ Moreover, trying piracy cases in the ICC could do a great deal to weaken the Court's normative power throughout the world. To try what would amount to armed robbers—be they Somalis who captured a tanker for ransom or Nigerians stealing cellphones from ferries—or even the high value criminals of pirate finance, alongside genocidaires and war criminals, would be a waste of the Court's political capital and a diminution of the Court's normative power as the voice for the victims of “unimaginable atrocities that deeply shock the conscience of humanity.”¹²⁵

Thus, it seems that a new international tribunal would be necessary to effectively try the transnational financiers and organizers of global maritime piracy. Along with the usage of onboard security, an international piracy tribunal is the second prong of the sustainable, global solution to maritime piracy. Such a court could be established under Chapter VII of the U.N. Charter and will be discussed in more detail in Section III below.

H. The Private Sector Illusion

A common refrain among the shipping industry and international observers is that states should bear the responsibility for the fight against piracy.¹²⁶ One can imagine why industry might want to hold this line: shippers think that they benefit enormously from the more-or-less free (i.e., broadly externalized) protection of state navies, limited though it may be.¹²⁷ It is less clear, however, why academics

123. See Totten & Bernal, *supra* note 39, at 379–80.

124. *Draft Statute for an International Criminal Court*, [1994] 2 Y.B. Int'l L. Comm'n 26, 68, U.N. Doc. A/CN.4/SER.A/1994/Add.1 (Part 2) (citing to Comment 1(d)).

125. Rome Statute of the International Criminal Court pmbl., July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

126. See Dutton, *supra* note 50, at 149.

127. It is not at all clear that a state naval strategy actually saves merchants money; see *supra* note 72 and accompanying text; *infra* Section III.C.

and policymakers have been so reluctant to call for room for the market to innovate and experiment with various private solutions, especially since the bulk of anti-piracy gains have come from the private sector. Ultimately, it seems this reticence in the literature stems from concerns about state monopolization of violence and unsupported assumptions about rogue contractors shooting first and asking questions later.

The question of who should be responsible for the fight against piracy has both normative and empirical dimensions. As a normative matter, it is unclear that there is any good reason to restrict the defensive use of weapons on the high seas to state navies. A common worry in the literature is that “permitting private citizens to engage in activities that have thus far been reserved for state military personnel poses risks.”¹²⁸ Aside from the fact that a loaded gun anywhere on the high seas poses risks, this argument is a strawman: the function of private contractors on ships is exclusively one of self-defense, a privilege never exclusively enjoyed by military personnel. The use of offensive force by private contractors would be another matter altogether—and a potential cause for concern—but the restriction of a few guards with rifles onboard a merchant ship almost necessarily limits their activities to defensive measures. Offensive use of force should be—and *is*—considered beyond the pale for ride-along guards.¹²⁹

Amid the rhetoric of the “war” and the “fight against piracy,” it is easy to forget that the most effective counter-piracy measure to date, the use of on-ship security personnel, is essentially self-defensive. The use of force in response to imminent deadly force is no more normatively suited to soldiers than it is to civilians. Likewise, few would argue that the justified use of deadly force in self-defense by private citizens on the high seas is any less justifiable than it would be on land, especially given the fact that pirates almost always fire their weapons and absolutely mean to do harm.¹³⁰ Indeed, the right of personal self-defense qualifies as customary international law, is one of the “general principles of law recognized by civilized nations,”¹³¹ and has even been expressly codified in international law.¹³² Very few

128. See, e.g., Dutton, *supra* note 50, at 109.

129. The potential of PMSCs operating armed vessels is somewhat more worrisome, since those are more capable of being used offensively. See *infra* Section III.A.

130. THE WORLD BANK, *supra* note 5, at 89 (noting that Somali Pirates, for instance, opened fire in 92 percent of attacks in 2009 and 2010).

131. ICJ Statute, *supra* note 121, art. 38(1)(c) (stating that the general principles are a source of international law covered by the ICJ).

132. Rome Statute, *supra* note 125, art. 31(1)(c), 2187 U.N.T.S. at 107; see also WAR BY CONTRACT: HUMAN RIGHTS, HUMANITARIAN LAW, AND

would argue that states ought to have monopolies on the use of force, even deadly force, in self-defense.

Private citizens are also restricted in the use of force in ways that state military forces are not. Generally, private citizens are more restricted than militaries in their use of aggressive force and face a higher burden in proving a use of defensive force is justified. Likewise, military forces are governed by flag state rules of engagement, which can vary from state to state, are often classified, and do not always have the force of law.¹³³ Private citizens, on the other hand, are governed at least by the criminal and civil law of a flag state, which rarely if ever permits the use of deadly force except in situations justified by self-defense and subjects violators to the jurisdiction of a domestic court.¹³⁴ Thus, the rules governing the use of force are generally neither better nor more uniform for military personnel than for private citizens, and experience indicates that military personnel are at least as likely to do harm to innocents as are private contractors.¹³⁵

It would also seem preferable that those who take on the risk of pirate attack—the merchant shippers—should bear the cost of mitigating the risks attendant on the benefits they derive from use of international shipping lanes. Shippers generally do not have to transit pirate-infested waters. For instance, it is marginally more expensive to go around the much safer Cape of Good Hope instead of through the Gulf of Aden—five trips on the former route equal six via the latter—and it does not seem fair to externalize the costs of industry's risk-taking on the taxpayers of naval-patrolling nations. Shipments of humanitarian aid to states adjacent to pirated waters do not have this option, of course, and the argument for affording them military escorts is probably stronger.

The incentives for security companies to stay within the bounds of the law are also stronger than those bearing on state navies. The political risk for state mistreatment of suspected pirates on the high seas is very low. No country is likely to go to war over the shooting or erroneous apprehension of fishermen suspected of piracy; rather the

PRIVATE CONTRACTORS 179 (Francesco Francioni & Natalino Ronzitti eds., 2011) (stating that the right to self-defense is codified as part of most national legislations as well as international law).

133. See Banerji & Jose, *supra* note 76.

134. They are also probably covered by the laws of their state of citizenship, the state of any potential victim, and the state of the territorial waters they may transit through.

135. Moreover, the problem of a failure to prosecute applies equally to military and private security personnel.

realistic worst-case scenario involves diplomatic amends-making.¹³⁶ A private security company that makes similar mistakes, however, risks criminal and civil censure, not to mention going out of business. These companies are profit-motivated and reliant upon the quality of their reputation, and they are not likely to succeed in the marketplace or qualify a ship owner for a decreased insurance rate, insofar as they are known to be international lawbreakers and/or ineffective counter-piracy forces.

As an empirical matter, recent experience demonstrates that where small-scale private security anti-piracy measures have met with great success, massive public international efforts have proven ineffective. A timeline comparing the development of state counter-piracy measures in response to the Somali crisis and the data on the events themselves is telling in its complete absence of a correlation between state action and pirate deterrence. In late 2008 and early 2009, the U.N. Security Council adopted numerous resolutions on piracy in the Gulf of Aden,¹³⁷ the Djibouti Code of Conduct was signed to coordinate anti-piracy efforts among regional states, wealthy trading nations signed Memoranda of Understanding with Kenya to try pirates, and the Contact Group on Piracy off the Coast of Somalia began meeting in January 2009.¹³⁸ Amid this burst of public international effort, there was a general expectation that piracy would decline.¹³⁹ Instead, attacks spiked.¹⁴⁰ It was not until the large-scale adoption of private or public guards on individual ships that the attacks in Somalia began to decline.¹⁴¹ Tellingly, this decline was accompanied by an increase in piracy incidents in regions of the world where the use of security personnel was comparatively rare.¹⁴²

136. The case of the Italian Marines facing trial in India is so unexpected and unusual that, until similar prosecutions arise, it may be treated as an outlier.

137. *See, e.g.*, S.C. Res. 1816, U.N. Doc. S/RES/1816 (June 2, 2008); S.C. Res. 1838, U.N. Doc. S/RES/1838 (Oct. 7, 2008); S.C. Res. 1846, U.N. Doc. S/RES/1846 (Dec. 2, 2008); S.C. Res. 1851, *supra* note 37; S.C. Res. 1897, U.N. Doc. S/RES/1897 (Nov. 30, 2009).

138. KRASKA, *supra* note 26, at 145.

139. *Id.*

140. ICC INT'L MAR. BUREAU, PIRACY AND ARMED ROBBERY AGAINST SHIPS: REPORT FOR THE PERIOD OF 1 JANUARY – 30 JUNE 2011, at 5–6 (2011) (showing that the total number of attacks in 2009 and 2010 were the highest since the initial resurgence of piracy in 2008).

141. *See* West, *supra* note 54.

142. *See* Cowell, *supra* note 11.

In recent years, the European Union and the United States have slashed tens of billions of defense spending.¹⁴³ In light of these cuts and the shifting geopolitical priorities they represent, it seems unlikely that states are going to commit to fighting piracy at sea in the long-term. Nor is it apparent that, even if a state naval solution were effective and affordable, states should have a monopoly on anti-piracy efforts, since the shipping companies themselves are in the best position to assess the risk of piracy, avoid the risk, and combat it at the point of attack. It is also fairer and more economical for the cost of protecting merchandise to be born at least in large part by those who receive the greatest benefit from its sale. To the extent that risks inherent in international shipping are not internalized by industry, the maritime shipping industry will be incentivized (and subsidized) to take risks that otherwise might not make economic sense.

Reliance on private industry accompanied by a strong regime of accountability (i.e., political, legal, and economic cost internalization) is the third prong of a sustainable global solution.

III. A SUSTAINABLE, GLOBAL SOLUTION

For the foreseeable future, underdeveloped coastline near shipping routes from which pirates can operate will be abundant, as will the supply of low-level pirate labor and equipment. The emergence of transnational pirate finance and organization has combined with an oversupply of pirate labor to make for a new transitional piracy paradigm. In light of this relatively new state of affairs, it is apparent that the old methods of fighting piracy will fail to suppress what is now essentially a global problem. At best, effective localized solutions will drive the funders to seek new markets in which to finance piracy. Nor will solutions that target only low-level pirate foot soldiers succeed, given the superabundance of ready, willing, and able pirate labor. Similarly, solutions that focus exclusively on the financiers of piracy will fail because of the low start-up cost of a small-scale pirate enterprise.

Unlike terrorists or other ideologically motivated actors, pirates and pirate financiers are profit-motivated, utility-maximizing opportunists, whose behavior can be altered by decreasing the profitability of the enterprise. However, pirate foot soldiers and pirate financiers are not responsive to the same types of incentives;

143. See, e.g., Steven Erlanger, *Shrinking Europe Military Spending Stirrs Concern*, N.Y. TIMES (Apr. 22, 2013), <http://www.nytimes.com/2013/04/23/world/europe/europes-shrinking-military-spending-under-scrutiny.html?pagewanted=all>; *Defence Spending: Squeezing the Pentagon*, THE ECONOMIST (July 6, 2013), <http://www.economist.com/news/united-states/21580460-wrong-way-cut-americas-military-budget-squeezing-pentagon>.

therefore, an effective and sustainable global solution must work both from the bottom up and from the top down. The sustainable, global solution proposed here will: (1) raise the cost of starting a successful pirate expedition to a level beyond the reach of the littoral world's fishermen and small-time gangsters; (2) cut off the sources of funding that are required to mount a successful pirate expedition given the raised start-up costs; and (3) allow private industry the space to innovate and experiment with effective deterrence techniques while holding industry responsible for its share of the political, legal, and economic costs of those efforts.¹⁴⁴

A. *Defensive Personnel on Ships*

Ships transiting high-risk areas should be encouraged to carry private security or military personnel onboard and to abide by other best anti-piracy practices, such as maintaining higher speeds through dangerous waterways, increasing vigilance, and outfitting ships with razor wire.¹⁴⁵ Not only are onboard security personnel more effective than navies, as they are guaranteed to be present at the point and time of attack, but their usage is economically sustainable in a way that naval patrols are not. Widespread use of private security personnel also likely reduces the drag of maritime piracy on the global economy better than state naval protection, since the relatively low costs of the security detail may furthermore be set off by a decrease in insurance rates. Indeed, the Chairman of the Lloyds of London Marine Committee confirmed that a discount is offered to those who carry security personnel, a break reported to be as high as 50 percent.¹⁴⁶

Armed security personnel onboard merchant ships transiting dangerous waters will be effective as part of a larger, collective counter-piracy strategy only if there is a high rate of participation,

144. This solution pertains principally, though not exclusively, to merchant ships. Private yachts and other non-merchant vessels should generally be discouraged from transiting waters where there is known pirate danger. However, the carriage of weapons or guards by non-merchant individuals would have a similar preventative effect and their self-defensive use is no less normatively suited to civilians on a pleasure cruise than it is to oil tankers. *See Southeast Asia Still Worst for Pirates Despite High-Profile Somali Attacks*, NEWS.COM.AU (Oct. 28, 2013, 12:44 PM), <http://www.news.com.au/world/southeast-asia-still-worst-for-pirates-despite-highprofile-somali-attacks/story-fndir2ev-1226746660014> ("Among the safest ships are those that employ armed guards—cruise companies as well as cargo ships have looked at this option.").

145. BMP4, *supra* note 69, at vi, 28.

146. Jonathan Sibun, *Typhon Fights Back Against Pirates*, THE TELEGRAPH (Jan. 15, 2012), <http://www.telegraph.co.uk/news/worldnews/piracy/9016188/Typhon-fights-back-against-pirates.html>.

since otherwise pirates will simply attack the unarmed ships.¹⁴⁷ Fortunately, this is the direction that industry and best practices are trending. As noted though, the prospect of thousands of ships with firearms onboard and in boats alongside them frightens some commentators.¹⁴⁸ It would probably be beneficial to discourage the use of private armored patrol boats, as their use increases the likelihood of private security contractors being used in an offensive manner. Efforts at uniform regulation of the industry are already underway.¹⁴⁹ Moreover, an authoritative maritime security company vetting and certification process, run by the International Maritime Organization (IMO) or a similar organization, could also have a beneficial regulatory effect. Participation in such a program could be incentivized if it were recognized by insurers as an exclusive badge of reliability and were accompanied by the authority of an insurance rate discount.

Still, it is not clear at present that more regulation is in fact necessary, since military and private security personnel are already subject to various rules regarding the use of force, and courts seem to be up to the challenge of prosecuting wrongdoers.¹⁵⁰ Evidentiary challenges notwithstanding, it is essential that flag states investigate and prosecute misuses of force at sea. It remains to be seen how the case of the two Italian marines of the *Enrica Lexie* will turn out, though the precedent set by their trial (and possible conviction) may prove to have a significant deterrent effect insofar as it opens malefactors to prosecution by both the flag state and the victim state.

B. An International Piracy Court

Although common carriage of security personnel is an effective deterrent to successful pirate attacks, it is not by itself a solution to the problem of global maritime piracy. The typical security detail of three to six armed guards can effectively deter a small to medium-scale pirate attack of the kind affordable by pirate entrepreneurs, but as pirates adapt to the presence of onboard security personnel, it is not hard to imagine larger-scale and more coordinated attacks that could overwhelm a single detail.¹⁵¹ Such

147. If participation gets to the point when ships are assumed to have security aboard, then free-riders will cease to become a security problem and become an economic one for shippers.

148. See BROWN, *supra* note 56, at 9 (“If unchecked, these fleets [of private armed patrol boats] could be more akin to seaborne vigilantes . . .”).

149. See, e.g., 100 *Series Rules*, *supra* note 87.

150. See, e.g., Banerji & Jose, *supra* note 76 (reporting that Italian marines are awaiting trial in India for fatally shooting Indian fishermen).

151. See BROWN, *supra* note 56, at 3, 7 (“[P]rivate counter-piracy forces are already changing the way pirates operate.”).

attacks would require a degree of organization and start-up capital that can generally only be provided by the high value targets of transnational pirate financiers.

The United States, *inter alia*, has recognized the necessity of going after transnational pirate finance and organization, promising to adopt an “Al Capone” approach to arrest and hamstring the top twelve pirate financiers and organizers.¹⁵² Though it has yet to be seen how effective the United States’ proposed approach will prove—especially since it intends to steer clear of pirate activity per se—it seems that more will be required to effectively cut off global pirate finance. As the problem of pirate finance is transnational but not subject to universal jurisdiction, and since a piecemeal approach reliant wholly on domestic law enforcement and courts cannot be trusted to investigate, apprehend, and successfully prosecute pirate financiers, a coordinated international approach is in order.

The effective prosecution of the high pirate crimes of finance, organization, and money laundering calls for a new international piracy tribunal. The easiest, and most legitimate, way to constitute such a court would be under the auspices of the U.N., pursuant to a Security Council resolution based on the powers granted to it under Chapter VII of the U.N. Charter.¹⁵³ The Security Council has already passed a host of resolutions on Somali piracy under Chapter VII, authorizing states to use “all necessary means” in the fight against piracy,¹⁵⁴ and has also used Chapter VII to institute successful international tribunals in the past.¹⁵⁵ Indeed, the Security Council has passed a series of resolutions declaring its intention to consider establishing an international piracy court under Chapter VII of the Charter.¹⁵⁶

152. McElroy, *supra* note 107.

153. U.N. Charter art. 39 (“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”).

154. *See, e.g.*, S.C. Res. 1816, *supra* note 137, ¶ 7; *see also* S.C. Res. 1838, *supra* note 137, ¶ 3; S.C. Res. 1846, *supra* note 137, ¶ 10; S.C. Res. 1851, *supra* note 37, ¶ 6; S.C. Res. 1918, para. 2, U.N. Doc. S/RES/1918 (Apr. 27, 2010); S.C. Res. 1950, *supra* note 37, ¶ 2; S.C. Res. 2020, para. 3, U.N. Doc. S/RES/2020 (Nov. 22, 2011).

155. Chapter VII was the basis of both the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. S.C. Res. 827, ¶¶ 1–2, U.N. Doc. S/RES/827 (May 25, 1993); S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (Nov. 8, 1994).

156. *See, e.g.*, S.C. Res. 1976, para. 26, U.N. Doc. S/RES/1976 (Apr. 11, 2011); S.C. Res. 2015, *supra* note 28, ¶¶ 16–17; S.C. Res. 2077, para. 19, U.N. Doc. S/RES/2077 (Nov. 21, 2012) (calling for courts with “substantial international participation” to try “not only suspects

Though the organization of such a court would obviously be a matter for debate, there are a few important structural elements that should be present. The tribunal should limit its jurisdiction to high crimes of piracy, however those are to be defined, or high value targets, and its founding documents should include a mandate to pursue the financiers and coordinators of pirate organizations. Interestingly, given the current international law of piracy, such a mandate would extend to the financiers and directors of private security companies who use deadly force in non-self-defensive counter-piracy operations.¹⁵⁷ Thus, the court would serve as an effective deterrent for both pirate financiers and the private security corporations who might be tempted to misuse force at sea.

An office of the prosecutor capable of coordinating with international and domestic law enforcement would be another important structural element of a piracy tribunal. Various international and domestic law enforcement organizations have already begun investigations into pirate funding networks, though due to the transnational nature of those networks, each organization has only a piece of the overall picture.¹⁵⁸ For instance, INTERPOL formed the Maritime Piracy Taskforce in January 2010 to detail the organizational and financial structure of pirate networks and to assist

captured at sea, but also anyone who incites or intentionally facilitates piracy operations, including key figures of criminal networks involved in piracy who illicitly plan, organize, facilitate, or finance and profit from" piracy).

157. According to UNCLOS Article 101:

Piracy consists of any of the following acts:

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State

UNCLOS, *supra* note 25, art. 101, 1833 U.N.T.S. at 436.

158. See Pierre St. Hilaire, *Somali Piracy: Following the Paper Trail 2–3* (June 2012) (on file with the United Arab Emirates Counter Piracy Conference), *available at* <http://www.counterpiracy.ae/2012-briefing-papers> (recognizing that one of the biggest challenges to defeating piracy networks is the lack of information sharing between key agencies combating piracy).

in prosecuting “high value” targets¹⁵⁹ and is currently working alongside Europol’s Project Maritime Piracy,¹⁶⁰ but these organizations confront the limits of their institutional competence when infiltrating formal and informal finance and organizational networks in East Africa, for example. These international police organizations, in concert with the Financial Action Task Force, the U.N. Office on Drugs and Crime, and any number of domestic efforts like the U.S. Naval Criminal Investigative Service and other national intelligence services, could provide the office of the prosecutor with evidence sufficient for effective prosecutions. Likewise, the office of the prosecutor would serve as the coordination center that these varied global and regional counter-piracy efforts so sorely need.

Although some fear that an international piracy court would be prohibitively expensive, evidence suggests that it would probably be no more expensive than domestic trials in a comparably efficient legal system. The per day costs of the International Tribunal for the Former Yugoslavia, for instance, do not differ dramatically from those of U.S. domestic courts.¹⁶¹ It stands to reason that prosecutions in an international piracy court would cost no more than the highly complex war-crime trials. Moreover, the establishment of an international piracy tribunal would likely produce various economies of scale and integration. The accumulation of institutional knowledge and expertise and trying numerous high-level targets in the same place would likely result in efficiencies that would, if anything, decrease the global cost of piracy prosecutions.¹⁶² The financing mechanism of the IMO—whose contributions are based on a formula dependent primarily upon the tonnage of a state’s merchant fleet¹⁶³—

159. *Maritime Piracy*, INTERPOL, <http://www.interpol.int/Crime-areas/Maritime-piracy/Maritime-piracy> (last visited Mar. 14, 2014) (naming piracy leaders and financiers as such high-value individuals).

160. *Joint Efforts Against Maritime Piracy*, EUROPOL (Dec. 16, 2010), <https://www.europol.europa.eu/content/press/joint-efforts-against-maritime-piracy-643>.

161. David Wippan, *The Costs of International Justice*, 100 AM. J. INT’L L. 861, 863 (2006).

162. It would probably be least costly to follow the lead of global manufacturing and outsource all the prosecutions to a developing state where all costs are cheaper, but this is a bad idea for many reasons. See *supra* Section II.F. It would also be politically unsustainable. See *infra* Section III.C. Finally, for important neocolonialism objections to the “dumping” of piracy prosecutions on the developing world, see Taussig-Rubbo, *supra* note 112, at 60–61 (“[P]irate transfers and trials have been subject in Kenya to a variety of readings . . . [such as] it is being exploited as a dumping ground by wealthy states . . .”).

163. *Structure of IMO*, INT’L MAR. ORG. (last visited Mar. 14, 2014), <http://www.imo.org/About/Pages/Structure.aspx>.

presents a particularly fair, established, and sustainable means of funding such a court, since it would push costs down to states who would then most likely force private industry to internalize them via maritime taxes and fees.

C. *Market Solutions*

For the twofold global solution of protection on ships and an international piracy court for high value targets to be sustainable, the political and economic costs of protecting merchant vessels should be internalized by the maritime industry to the greatest extent possible. At present, international naval forces spend over a billion dollars per year on largely ineffective naval patrols.¹⁶⁴ In an era of near universal cutbacks in military spending, it seems inevitable that the current naval patrols will prove to be economically unsustainable.

Public expenditures on naval patrols are also politically unsustainable. Unlike private security companies, civilian-controlled militaries are limited by political will, which tends to turn against expensive, long-term military engagements, especially when the citizenry faces little danger itself and there is belt-tightening at home. Since navies cannot be relied upon to continue to police the seas into the long-term, any solution that does not force merchants to bear the cost of a long-term counter-piracy approach risks collapsing under the weight of political disfavor. Similarly, an international piracy court under the auspices of the U.N. would be largely immune from the reluctance of individual states to prosecute pirate finance, be it for reasons of political fatigue, or profit from the pirate economy.

Not only is internalizing costs in the maritime industry more fair than spreading them among the taxpayers of the naval force nations—since it is the shipping industry that runs the risk and most directly benefits from it—but it also makes economic sense. An anti-piracy model that relies on on-ship private security personnel will virtually eliminate the need to fund forces like Operation Atalanta and will eliminate or greatly reduce the number of ships hijacked and held for ransom, thus substantially reducing maritime piracy's drag on the world economy.¹⁶⁵ Moreover, the cost of hiring onboard

164. THE WORLD BANK, *supra* note 5, at 158 (citing Anna Bowden & Shikha Basnet, *The Economic Cost of Somali Piracy 2011*, at 2 (working paper) (on file with Oceans Beyond Piracy & One Earth Future Found.), available at http://oceansbeyondpiracy.org/sites/default/files/economic_cost_of_piracy_2011.pdf).

165. The wealth transfer model of piracy for ransom is incredibly inefficient, since, on average, \$120 million in ransoms cost the global economy between \$900 million and \$3.3 billion each year from 2008 to 2013. Brad Plumer, *The Economics of Somali Piracy*, WASH. POST (Mar. 3, 2013, 9:00 AM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/03/03/the-economics-of-somali-piracy/>. The discounted prices of

security is offset by a concomitant decrease in insurance rates. Similarly, if economies of scale and integration emerge from an international piracy tribunal, it stands to reason that it could present a net savings for the world economy. Thus, if anything, the large-scale adoption of private security on ships, combined with an international piracy court, should ultimately reduce the cost of shipping long-term (independent of all other factors unrelated to maritime piracy).

The market is also adaptive and reactive in ways that the public sector is not. Private industry can innovate as the pirates adapt to counter-pirate measures, and it can experiment and fail in ways that democratic states cannot or will not. Pirates quickly adapt to anti-piracy tactics.¹⁶⁶ Whereas state militaries are generally huge bureaucratic organizations unsuited to fast adaptation and innovation, individual private firms can switch tactics and try and discard new approaches at a pace that can rival pirate adaptation, if not surpass it.

IV. CONCLUSION

The catalogue of pirate myth is gigantic. The literary conceits of plank-walking and buried treasure propagated by Captain Charles Johnson,¹⁶⁷ and the piracy solutions of today's academics and policymakers, illustrate a hazard that attends discussions of maritime piracy. The temptation to understand the phenomenon in light of one's preconceptions or area of expertise—be it romantic literature or economic development—is great, and this temptation has resulted in both historical and policy-oriented literatures that are plagued by illusions and misconceptions. By critically examining some of the accepted wisdom and proposed solutions, this article has attempted to discern the pertinent facts from the persuasive illusions and to draw a pragmatic conclusion from them.

Today's transnational piracy paradigm calls for a solution that is both global and addresses modern piracy. In light of the recent decades of developments in maritime piracy, it has become clear that a multifaceted approach is called for. Our workable approach uses onboard security to deter pirates at the point of attack; an

the black market imply that piracy for theft and resale is also hugely inefficient.

166. See, e.g., Valdmanis & Saul, *supra* note 23 (“Nigerians . . . keep an eye on what the Somalis and other pirates are doing and incorporate inspired changes.”).

167. Charles Johnson, generally suspected to be a pseudonym for the novelist Daniel Defoe or Nathaniel Mist, penned the text that effectively set pirate tropes for three centuries. See generally CHARLES JOHNSON, A GENERAL HISTORY OF THE PYRATES (2d ed. 1724).

international court to coordinate and secure prosecutions against pirate financiers and to destroy their transnational criminal networks; and a set of policies that at once allows private industry to innovate while requiring it to internalize the maximum amount possible of the political, legal, and economic costs of the shipping industry. This approach will save blood and treasure in a way that spreads these savings across the littoral world.



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