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## Talking Foreign Policy: A Roundtable on Piracy

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A stylized world map in a light blue-grey tone, showing the outlines of continents and major landmasses. It is set against a background of a faint grid of latitude and longitude lines.

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TALKING FOREIGN POLICY:  
A ROUNDTABLE ON PIRACY

# TALKING FOREIGN POLICY: A ROUNDTABLE ON PIRACY<sup>1</sup>

*Broadcast quarterly, “Talking Foreign Policy” is a one-hour radio program, hosted by Case Western Reserve University Law Professor Michael Scharf, in which experts discuss the salient foreign policy issues of the day. The September 6, 2013 broadcast addresses the persistent problem of modern-day maritime piracy.*

*In a recent interview, Professor Scharf said: “We want to cover the most salient and interesting foreign policy topics in each program.”<sup>2</sup> Because international policy issues are so prominent in a day-to-day news cycle but often can be difficult to grasp, Professor Scharf pitched the idea for “Talking Foreign Policy” to WCPN 90.3 ideastream, Cleveland’s NPR affiliate, late last year. He then lined up a few colleagues known for their ability to discuss complex foreign policy topics in an easy-to-digest manner. Sort of a radio version of the McLaughlin Group, each episode features a regular cast of participants, with Professor Scharf serving as host. This broadcast featured:*

- *The human rights expert: Roméo Dallaire, Retired U.N. Force Commander based in Rwanda during the Rwandan Genocide. Lt. Gen. Dallaire has since written two best-selling books and has been elected as a Canadian Senator. He currently works with many different human rights campaigns focused on ending the global problem of child soldiers.*
- *The Judge: Rosemelle Mutoka, Kenyan judge who has presided over seven piracy cases based in Kenyan courts.*
- *The international law professor: Milena Sterio, law professor at Cleveland State University; and*
- *The Prosecutor: Sulakshna Beekarry, Head Prosecutor for the Mauritius trials on international piracy.*

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1. Transcript edited and footnotes added by Cox Center Fellows Aaron Kearny and Nathan Nasrallah.
  2. *School of Law Professor’s Radio Show Gets Green Light: Set to Air March 1*, THE DAILY (Feb. 27, 2012), <http://thedaily.case.edu/news/?p=5769>.

*Archived broadcasts (both in audio and video format) of “Talking Foreign Policy” are available at: [law.cae.edu/TalkingForeignPolicy](http://law.cae.edu/TalkingForeignPolicy). The edited transcript of the September 6, 2013 broadcast appears below.*

TALKING FOREIGN POLICY:  
MARITIME PIRACY – SEPTEMBER 6, 2013 BROADCAST

MICHAEL SCHARF: Welcome to Talking Foreign Policy, I am your host Michael Scharf, Associate Dean of Case Western Reserve University School of Law. In today’s broadcast we’ll be discussing the persistent problem of maritime piracy. We’ll begin our discussion with General Roméo Dallaire, the U.N. Force Commander who tried to save the Tutsis during the 1994 Rwandan Genocide. Nick Nolte played him in the award-winning 2005 film *Hotel Rwanda*. Since then General Dallaire has been appointed as a Canadian senator, written two best-selling books and is the founder of the Roméo Dallaire Child Soldier Initiative<sup>3</sup> at Dalhousie University in Nova Scotia. Thanks for being with us General.

ROMÉO DALLAIRE: Thank you.

MICHAEL SCHARF: I would like to start off by asking you to tell us a little about your journey from U.N. Force Commander to human rights advocate, focusing on child soldiers.

ROMÉO DALLAIRE: It was very much based on the experience in Rwanda. Previous to that, I was a NATO commander, so we were essentially engaged in classic warfare at the end of the Cold War. All these new imploding nations and failing states got us involved in a number of countries. The Rwandan mission that I commanded, which ultimately ended with the genocide in Rwanda, brought me face to face with the ability of human beings to be able to destroy each other on massive scales and with near impunity. Also, the use of youths and children, using youth militias to conduct a lot of this destruction and those traumas of 1994. I was able to then nurture this feeling that there had to be something better in the world than simply letting these catastrophic failures happen, and so I got engaged in trying to get back into the field and trying to prevent some of it from happening.

MICHAEL SCHARF: Now you have written two best-selling books. The first one was *Shake Hands with the Devil*<sup>4</sup> and it’s a powerful

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3. To learn more about General Dallaire’s Child Soldiers Initiative, see <http://www.childsoldiers.org>.

4. ROMÉO DALLAIRE WITH BRENT BEARDSLEY, *SHAKE HANDS WITH THE DEVIL: THE FAILURE OF HUMANITY IN RWANDA* (2003).

indictment of the international community's inaction in the face of genocide in Africa. Do you think the world has learned the lessons from Rwanda now that it is twenty years later?

ROMÉO DALLAIRE: It is interesting the way you put it, in a professorial way, "they learned a lesson." I think they learned to create some tools that would prevent that from happening. As an example, and I think the dominant example, is the Responsibility to Protect doctrine that was finally approved in 2005 in the General Assembly,<sup>5</sup> which essentially the world signed up to. (It) states that if a nation is massively abusing the human rights of its own people or can't stop it, we, and all the other nations under the U.N., must go in and intervene to protect. So that was an extraordinary product that was brought about. The problem, however, with that is that although they have learned that and they know it's there, they are not applying it. They are not operationalizing it.

MICHAEL SCHARF: So, for example, with respect to Syria, Obama has been saying we have to take action for humanitarian reasons. And other countries, and members of our Congress here in the United States, are saying it's not legal to do so and we have no obligation.<sup>6</sup>

ROMÉO DALLAIRE: Well, both are wrong. In fact it starts as far back as Libya as we went in sort of half-cocked sending in air forces, where, in fact Gaddafi said, "I am going to crush these cockroaches."<sup>7</sup> Those were exactly the same words used by the extremists in Rwanda that brought about the Responsibility to Protect. And we should have put boots on the ground to protect the civilians and ultimately not have them (Libyans) bleed in trying to establish some order. Well, Syria offered us exactly the same situation, but we didn't take it up. When I was asked two years ago, which was already six months into the Syrian campaign, "What do you think we should be doing?" I said, "We should be applying Responsibility to Protect, but there haven't been enough people killed to actually provide the politicians in this world who have the ability to intervene to want to intervene." So the will to intervene is not behind the Responsibility to Protect.

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5. Responsibility to Protect, G.A. Res. 63/308, U.N. Doc. A/RES/63/308 (Sept. 14, 2009).
  6. See Paul Campos, *Striking Syria Is Completely Illegal*, TIME (Sept. 5, 2013), <http://ideas.time.com/2013/09/05/obamas-plan-for-intervention-in-syria-is-illegal/> (explaining that the U.N. Charter only allows states to attack other states if there is a Security Council resolution, or if the attacking state is acting in self-defense).
  7. See *Libya Protests: Defiant Gaddafi Refuses to Quit*, BBC (Feb. 22, 2011), <http://www.bbc.co.uk/news/world-middle-east-12544624>.

MICHAEL SCHARF: Now, in Rwanda we were talking about 800,000<sup>8</sup> slaughtered in four months. In Syria, the recent estimates were 1,400 people were killed by recent chemical weapons attack, but maybe 100,000 people have been killed since the fighting began in March of 2011.<sup>9</sup> How many do you think would be enough before the scales tip in favor of some sort of humanitarian intervention?

ROMÉO DALLAIRE: You are hitting the heart of the problem. How many humans have got to suffer for those who have the capability of responding, and considering those humans equal to them, to be worth us taking those risks and going in and helping them? And we haven't broken that code. We've found means of maybe how we should do it, but we haven't found the willingness of our leaders. Our politicians who are risk advisers are not statesmen who are prepared to take risks to demonstrate responsibility, demonstrate a lot of willingness to move to a higher plane than self-interest. Those statesmen aren't there, and that's why we are into number crunching. And to be quite honest, the recent gas attacks and chemical attacks are a crime against humanity. So fine, bring in the International Criminal Court, but that is not the red line in reality if we are responsible towards the Responsibility to Protect. The red line was two years ago and we didn't intervene. Now it's nearly impossible unless you get a ceasefire and move in a separation force under the U.N. to permit then a future negotiation stage.

MICHAEL SCHARF: Let's now talk a little bit about child soldiers, because that's what you have been working on lately. Your recent best-seller *They Fight Like Soldiers, They Die Like Children*<sup>10</sup> is about the problem of child soldiers and you make the case that the international community is ignoring that problem at its own peril. Can you elaborate on that?

ROMÉO DALLAIRE: It's very much peer focused. Many of the nations that are seeing the use of child soldiers, either by government forces or non-state actors, are countries where the demographics are such that 50 percent, sometimes more, of the population are under the age

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8. Roland Adjovi & Nandor Knust, *Rwanda*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INT'L LAW, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1343?rskey=m769fW&result=2&prd=EPIL> (last updated Sept. 2010).
  9. Josh Levs, *Syria 'Red Line' Debate: Are Chemical Weapons in Syria Worse Than Conventional Attacks?*, CNN (Aug. 28, 2013), <http://www.cnn.com/2013/08/27/world/meast/syria-chemical-weapons-red-line/index.html>.
  10. ROMÉO DALLAIRE WITH JESSICA DEE HUMPHREYS, *THEY FIGHT LIKE SOLDIERS, THEY DIE LIKE CHILDREN: THE GLOBAL QUEST TO ERADICATE THE USE OF CHILD SOLDIERS* (2010).

of eighteen, which is the age under the Optional Protocol on Child Rights where children are not to be recruited nor used in operations and conflict.<sup>11</sup> So you've got this massive reserve of youth that is being abused, and they are seeing each other so used and it can sort of perpetuate itself because, you know, "I went through it so maybe this is the way we can do it and let's keep it going." So the greatest risk of the child soldiers is the fact that it can be an instrument of war, a weapon of war, that can sustain itself time after time, because the demographics are permitting it to happen.

MICHAEL SCHARF: Yes, and you have gone from looking at child soldiers to now focusing on an even more narrow problem, that of child pirates, maritime pirates. So your recent editorial in the *Toronto Globe and Mail* was headlined *Child Pirates are Everybody's Problem*.<sup>12</sup> Can you tell us why we should be concerned about child piracy?

ROMÉO DALLAIRE: Because the impact of them is of course an economic one that is directly related to our self-interests, our economic self-interests, but also the child piracy has this funny way, in my perspective, of going beyond its borders. This is not a border-restricted use of children like, let's say, child soldiers which would be in a nation, a conflict zone, and apart from the LRA who have been sort of very mobile . . .

MICHAEL SCHARF: That's the Lord's Resistance Army, which operates in northern Uganda and Sudan.

ROMÉO DALLAIRE: Yes, and they are now in the Central African Republic and are being supported by Sudan to subvert South Sudan.<sup>13</sup> So it gets pretty complicated, but apart from that particular group, the others are very localized. So the question is, with pirates it spreads. We are seeing Western Africa now also seeing a surge in the use of piracy and the availability again of youths who can be given empowerment by weapons and indoctrination.

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11. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict arts. 1, 2, *opened for signature* May 25, 2000, 2173 U.N.T.S. 236 (entered into force Feb. 12, 2002).
  12. Roméo Dallaire et al., *Child Pirates Are Everybody's Problem*, THE GLOBE & MAIL (Feb. 10, 2012), <http://www.theglobeandmail.com/commentary/child-pirates-are-everybodys-problem/article544972/>.
  13. THE RESOLVE LRA CRISIS INITIATIVE, HIDDEN IN PLAIN SIGHT: SUDAN'S HARBORING OF THE LRA IN THE KAFIA KINGI ENCLAVE, 2009-2013, at 4-5 (2013).

MICHAEL SCHARF: So what percentage of pirates are children, would you say? Is it around 50 percent?

ROMÉO DALLAIRE: Well, the figures seem to be about a third or so, but imagine when they are on the seas and you got people on big ships, naval ships or other ships, and they are opening fire against the pirates. Are they able to discern whether or not this is an adult or a youth? What we are seeing are a lot of these kids being killed.

MICHAEL SCHARF: When they do discern who is a child and who is an adult, many of the countries have a policy that is sort of like the local fishing policy, when you catch a fish that's too small you have to send it back, so they call it "catch and release." Do you think that is the right way to be treating the juvenile pirates?

ROMÉO DALLAIRE: Absolutely not! In fact, the link that brought us in to child piracy comes from child soldiers, which is what is happening on the ground before they're actually deployed. If on the ground you have an atmosphere that permits this to happen, you have recruitment and re-recruitment, of course they are going to go to sea, and you have a problem. So how do we curtail it on the ground? I am a strong advocate for a non-punitive juvenile type of court process in which the youth that are taken, they are not incarcerated, (but) they are held. In the process of this non-punitive juvenile court, they are given the opportunity of being rehabilitated and reintegrated and ultimately are able to be extracted from that cycle of, if not banditry and piracy, maybe even conflict and fighting if conflict erupts.

MICHAEL SCHARF: What about the adults? What can be done to discourage them from recruiting the children?

ROMÉO DALLAIRE: Take every one of them, throw them in jail, and throw away the key!

MICHAEL SCHARF: So in fact, what we're hearing is that some courts around the world are increasing the penalty when an adult pirate is found on a ship with children. They're treating that as an aggravating factor. And that can send a signal that might have a deterrent effect.

It is time for a short break. When we return we will bring three of the world's leading experts on piracy into the conversation, stay with us.

MICHAEL SCHARF: Welcome back to talking foreign policy, brought to you by Case Western Reserve University and WCPN 90.3 ideastream. I'm Michael Scharf, and I am joined in studio by General Roméo Dallaire, Judge Rosemelle Mutoka of Kenya, piracy prosecutor Sulakshna Beekarry of Mauritius and professor Milena Sterio of the Cleveland Marshall College of Law. We are talking about the problem of child pirates. Let me begin with Sulakshna Beekarry. To prepare

for your first piracy cases in Mauritius, I understand that your government studied the best international practices and adopted a state-of-the-art approach. Walk us through what that means. What does your government do when an accused pirate appears to be a juvenile?

SULAKSHNA BEEKARRY: I have to say, we have not faced that issue in practice yet, but it is an issue which is expected, and guidelines have been discussed, a draft put up, but not yet finalized with other states of the region, in particular the Seychelles. Now, these guidelines would include what to do in that situation and how to determine an age, going from teeth examination and a lot of other medical ways of attaining the real age.

MICHAEL SCHARF: That's because everybody they catch, knowing that there's often a catch and release policy, will say, "I may have a beard and a low voice but I am only fourteen," right?

SULAKSHNA BEEKARRY: And how do you know who is speaking the truth and who isn't? But I feel as well that the decision might come much earlier. It might come on a decision to accept that at transfer or not where juveniles are involved, but this remains to be seen in the future.

MICHAEL SCHARF: Judge Rosemelle Mutoka, you spent 2011 in the United States as a distinguished jurist in residence at Case Western Reserve, and we are glad to have you back in Cleveland. You have presided over seven piracy cases in Kenya. Were any of those juvenile cases?

ROSEMELLE MUTOKA: Thank you, Michael. Yes, I have presided over seven cases. I have concluded three that had no juveniles. But at least two of them had juveniles. Before my court, it is not very common for the pirate defendants to claim that they are juveniles. In fact, they avoid saying that, and you perhaps just want to look at them, and because of their size and the way they appear, you perhaps think you should take them for age assessment, because they will not tell you; that was not my experience.

MICHAEL SCHARF: Now that is very interesting, so where I thought everybody would want to claim to be a juvenile either because they are fearful of the pirates that hired them or for other reasons, they are all claiming to be adults when you suspect they are actually under age?

ROSEMELLE MUTOKA: It is an interesting phenomenon, and the reason for it became evident later in the process. When they came in, we had the challenge of communication because they speak Somali and they can't communicate in the language of our court, English.

What became evident to us later was the fact that they did not want to be separated from each other. They knew that if they were classified as juveniles, then they would be taken to a juvenile facility. That meant they would be kept away from their comrades, which they did not want. So they would not admit they were juveniles.

MICHAEL SCHARF: Now, from our conversations I know that you had all sorts of special care for these convicted pirates. You sent them to special prisons, not as part of the regular population. You helped educate them so that if they were illiterate they could learn to read and write. What was your thinking on that?

ROSEMELLE MUTOKA: It is because we had juveniles among the convicted pirates, and we wanted to make sure that the juveniles in particular were protected and received special care. It was easier to group them all together in a special facility because of the issue of language. If you had them together in one place it was easier to arrange for an interpreter to be with them and to be able to communicate with, not only just among themselves and the prison authorities, but also when they had people visiting, because there was a lot of interest in these cases and we had a lot of people coming from all over the world.

MICHAEL SCHARF: How long were the sentences usually?

ROSEMELLE MUTOKA: The first case we had, the first case registered in Kenya, was 2007. The first conviction was in 2009 and each one of them was sentenced to serve twenty years imprisonment, and immediately they appealed. Subsequently they received sentences between five and seven years, and right now that seems to be the trend. There is one case from about two years ago where the sentence was to serve twenty years, and the only reason is because people died as a consequence of their acts of piracy.

MICHAEL SCHARF: So there were murders? They were convicted of murder?

ROSEMELLE MUTOKA: No, not murder. They were charged with piracy, not murder, but people were killed during the attack.

MICHAEL SCHARF: When these pirates are in the Kenyan jails as part of rehabilitation, you do educate them, you teach them to read and write, is that part of it?

ROSEMELLE MUTOKA: Yes, that is part of it.

MICHAEL SCHARF: So let me ask this—it's been said that short sentences and decent jails, three square meals with educational opportunities, is not much of a deterrent for people facing famine in their own country. Some have even compared the treatment of the

Somali pirates in Kenya, in the Seychelles, and in other countries, as similar to going to university.<sup>14</sup> Is that a fair criticism?

ROSEMELLE MUTOKA: Well, I do not agree with that. I think that is a very simplistic approach to what has been done. Actually, when you think about the fact that in Somalia there is a complete breakdown in law and order and most of these young men that are used to committing piracy offenses are not educated, so they look for something to do. If you take out (these men), it doesn't matter how many you take out because there are still others available. So it's not so much the fact that you think you are going to pass a message to people who really don't care. They are looking for a livelihood, so for them that is collateral damage, you move on, so I think that argument is simplistic when you look at what's happening in Somalia.

MICHAEL SCHARF: So prosecution is not really going to deter anybody no matter what the penalty? In the U.S. they have given some life sentences,<sup>15</sup> for example, and the prosecutors in their closing arguments said, "We need to give them the most serious penalty." In fact, they were asking for the death sentence in order to send a signal back in Somalia that piracy won't pay. What I hear you saying is they are not listening in Somalia. It doesn't matter what signals the prosecution is sending in foreign courts. That's not being heard by the populations that are resorting to piracy.

ROSEMELLE MUTOKA: I am not saying that it's not effective; I do believe, of course, that it may be a deterrent, but I don't think it's a deterrent to the extent that you say, "If you give long sentences of course that would stop them." Because these are desperate young people who are looking for a livelihood, so my argument and my experience is that they are contrite about the things that have happened. If you talk to them one on one, they will tell you that, and most of them who have been sentenced by Kenyan courts have tried to get something else to do because of course now, after educating them and talking to them, they feel that there's something else they can do with their lives. Somali's are enterprising people; they are very hardworking people.

MICHAEL SCHARF: Do they obtain employment in Kenya or do you send them back to Somalia after they have served their sentence?

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14. See Jessica Hatcher, *Somali Pirates Find Life in Kenyan Jail More Comfortable Than on Ocean Waves*, THE GUARDIAN (Aug. 16, 2013), <http://www.theguardian.com/world/2013/aug/16/somali-pirates-kenya-jail-indian-ocean>.
15. See, e.g., Brock Vergakis, *Jury Recommends Life Sentences for Somali Pirates*, USA TODAY (Aug. 2, 2013), <http://www.usatoday.com/story/news/nation/2013/08/02/somali-pirates-jury-life-sentences/2613527>.

ROSEMELLE MUTOKA: They are usually sent back to Somalia, but you know, Kenya has a unique situation where we have Somali-Somalis and we have Kenyan-Somalis, and of course the only difference between them is the border. They speak the same language. So, where as we make orders for repatriation, and they are sent back, but you know the systems we have in place do not ensure that they go back, and they stay back, in place in Somalia.

MICHAEL SCHARF: Let's bring Professor Milena Sterio into the conversation. Milena, before the break General Dallaire gave us his prescription for solving the problem of child piracy, and we just heard Judge Mutoka's discussion of how Kenya dealt with child and youthful pirates. What would you add to that, and do you agree with the approach that they are enumerating?

MILENA STERIO: Yes, I do agree with the approaches, and it would be great if either one of us could say or do something that would, in the short term, solve the problem of child piracy. That is not the case, unfortunately, but we can certainly offer best practices or recommendations. So I think the proper approach is definitely trying to ascertain the suspected pirate's age from an early stage so that they can be appropriately treated, separated from the adult population, and provided with those educational opportunities. When it comes to the prosecution and then the sentencing, the age of the suspected defendants should definitely be taken into account. Then once we are talking about sending them to an appropriate correctional facility to serve their sentences, they should definitely be sent to a facility for juveniles where those educational rehabilitation opportunities are present. It might be easier said than done but . . .

MICHAEL SCHARF: How do we know what the line is between a juvenile and an adult? Are we talking about eighteen years of age?

MILENA STERIO: So there is really no consensus in the international community as to the appropriate age of minimal criminal responsibility. There is a United Nations convention called the Convention on the Rights of the Child<sup>16</sup> that defines a juvenile as anybody who is under eighteen, so under that convention the age would be eighteen. However, when it comes to the prosecution treatment of suspected juveniles, it's often up to each country and the domestic juvenile system to determine where we set that minimum age of criminal responsibility.

MICHAEL SCHARF: Where do we set that in the United States?

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16. Convention on the Rights of the Child art. 1, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 44 (entered into force Sept. 2, 1990).

MILENA STERIO: In the United States it really depends from jurisdiction to jurisdiction. The minimum could be as early as seven or eight. In some jurisdictions the prosecutor will have the discretion to charge somebody as an adult or not. But certainly in the United States when somebody is fifteen or sixteen, many times when it comes to violent crimes, we treat them as adults.

MICHAEL SCHARF: So, in particular, those people who are older teenagers, sixteen, seventeen and a half, they are, under the current approach, being treated as juveniles. And the current approach seems to be very black and white, very rigid. Are you advocating a looser approach where you look at facts and circumstances like they would do in the United States?

MILENA STERIO: If you adopt an approach that says that you should take the person's age into account, into consideration, that gives you the flexibility to then say, "If you are thirteen we'll give you a lighter sentence. If you're seventeen, which is much closer to eighteen, however arbitrary that age might be, we might give you a slightly harsher sentence."

MICHAEL SCHARF: Ok, now looking at the other side trying to not deter the child pirates but deter the people that are recruiting and using them, I wonder if we can go back to General Dallaire and focus on what they do to deter use of child soldiers. Recently, the ICC, International Criminal Court, prosecuted a military commander for the recruitment of child soldiers as a crime against humanity, is that right?

ROMÉO DALLAIRE: That's right, but it was a long, long, glacial exercise to get that first conviction. But it's also been very difficult to get the court to fully grasp the impact of these children when they are recruited in order to establish the right level of punishment to be given to the adults. One of the reasons it's difficult to establish that is that when you are bringing these children in as witnesses or they're young, nineteen, twenty, and the Court is in The Hague, there's a whole exercise of that, but the defense is also very, very powerful. The defense lawyers are just taking the witnesses apart because of what they've gone through. The girls especially—they've been raped, they've been abused, they have a child or two, they are probably even sick with AIDS. The defense tactics are destroying the witnesses' ability to provide the court with a sustained logical explanation of what has happened to them. In the recent case before the International Criminal Court that resulted in the prosecution having to withdraw the charge of rape. Where we know the individual was engaged in rape on a series of occasions but they just could not get the witnesses to talk about it in court.

MICHAEL SCHARF: The case you are talking about is the Lubanga case.<sup>17</sup> They did end up convicting Lubanga of recruiting child soldiers . . .

ROMÉO DALLAIRE: Well, he only got fourteen years, while the guy has been using all kinds of children and he's been slaughtering and killing and using them as we were using World War I soldiers, you know, in frontal assaults and having them be blown away. He's been throwing kids back into the bush when they are injured, when they are sick. I mean the scale of what this individual has done is off any of our scales. But he ends up with only a fourteen-year sentence.

MICHAEL SCHARF: So you're saying that that case did not send the signal you wished it had?

ROMÉO DALLAIRE: It's not strong enough yet; it's a start, because we finally got it there, but the handling, how we can handle this, is not resolved. How can we protect the witnesses so that they are going to be credible in front of the court to be able to bring the right sentence?

MICHAEL SCHARF: Now, when countries in the area like Mauritius, Kenya, and the Seychelles are prosecuting the pirates that the United States and the European Union are apprehending, they often are prosecuted not just under the crime of piracy as defined in the U.N. Law of the Sea Convention,<sup>18</sup> but sometimes under other terrorism conventions, for things like hostage taking and hijack of a ship. Do you think they should also prosecute the pirates for crimes against humanity using the precedent of the International Criminal Court's conviction of Lubanga?

ROMÉO DALLAIRE: This is a great opening to the maturing of the whole international judicial system. Can crimes against humanity be prosecuted in domestic courts? I say, absolutely. In Canada, we recently prosecuted a genocidier from Rwanda, though we did so for multiple murders because we did not have a statute criminalizing crimes against humanity.

MICHAEL SCHARF: Let us go back to our prosecutor from Mauritius, Reshma Beekarry. Would your country be able to prosecute crimes against humanity? Do you have that crime on your books?

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17. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment, ¶¶ 896, 913, 1351 (Mar. 14, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf>.

18. 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].

RESHMA BEEKARRY: Interestingly, our thinking has gone in that direction, but with a slight variation. Two years ago, we reached an agreement with the ICC. The ICC will be coming to sit in Mauritius and to have those crimes prosecuted in our local courts. We actually enacted a piece of legislation called the International Criminal Court Act 2011 in Mauritius. And for us, that is a novel idea. We have not quite reached the kind of thinking you are mentioning, Professor Scharf. We could give it thought; but it could take quite a bit of thought.

MICHAEL SCHARF: So there is the possibility that if Mauritius finds itself with a major recruiter of child pirates, you could prosecute that person not just for piracy, but maybe for the crime against humanity of recruiting child pirates like the ICC has done for recruiting child soldiers?

RESHMA BEEKARRY: Possibly. I would think the seed for that has already been sown. We have already opened the door for the ICC to come and sit and for us to start looking towards bigger crimes. Until now, these crimes have only been prosecuted in The Hague.

MICHAEL SCHARF: Now, there is one little wrinkle here. Piracy is normally, as I understand it, a crime committed in international waters, on the high seas. But where is the recruitment being committed? That is on dry land. I will turn this to our professor from Cleveland State, Milena Sterio. Is there any recent precedent for prosecuting dry land piracy?

MILENA STERIO: Yes. We actually have very interesting, important recent precedents on that in the United States courts. There have been two cases—one called Ali<sup>19</sup> and the other one called Shibin<sup>20</sup>—where the defendants were essentially prosecuted for aiding and abetting piracy (facilitating piracy) for acts that they committed from dry land. They were prosecuted under the United States Piracy Statute.<sup>21</sup> One of them was convicted and received a life sentence; and the other one's proceedings are still ongoing. In both instances, the United States courts have accepted this notion that you can commit acts of facilitation on dry land and be prosecuted as a pirate.

MICHAEL SCHARF: Tell us about this Ali case. What was he actually doing?

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19. United States v. Ali, 718 F.3d 929, 933–34 (D.C. Cir. 2013).

20. United States v. Shibin, 722 F.3d 233, 235 (4th Cir. 2013) (affirming the fifteen-count conviction of Mohammad Saaili Shibin for his involvement in two piracies by acting, *inter alia*, as ransom negotiator).

21. 18 U.S.C. § 1651 (2012).

MILENA STERIO: Ali was essentially a hostage negotiator. After there were hostages taken by Somali pirates, he had facilitated the negotiation of the ransom. He, I think, had stepped foot onboard the vessel; but the vessel, at that point, was in the Somali territorial waters. So Ali, the defendant himself, had never acted on the high seas. He had committed other acts of negotiating the ransom from Somalia (dry land).<sup>22</sup>

MICHAEL SCHARF: Wasn't his defense that he was actually trying to facilitate the rescue and the release of the victims?

MILENA STERIO: Yes. He basically claimed that he was a good guy, since he was trying to help the release of the hostages. Of course, United States prosecutors did not buy that argument and prosecuted him as a piracy facilitator, instead of a hero.

MICHAEL SCHARF: What is the difference between that case and the situation of insurance companies? If you are insured by a company like Lloyds of London, your vessel is hijacked, and the pirates say, "We want a million dollars for the release of your vessel and its crew;" Lloyds of London sends in a hostage negotiator, who handles everything. Then, they pay it off and maybe jack up your insurance premium for the future. Everybody lives happily ever after, especially Lloyds of London, who is making a fortune. Why should Lloyds of London not be prosecuted under the Ali precedent?

MILENA STERIO: Good question. There is a provision in the United Nations Convention of the Law of the Sea that might make prosecution of insurance companies difficult. In the article that deals with aiding and abetting, it says the defendant must intentionally facilitate.<sup>23</sup> So the insurance companies could make the argument that they are not really "intentionally" doing anything. If anything, they are helping after the fact. But I agree with you. It is a fine line.

MICHAEL SCHARF: Ok. And this guy Ali, I have heard that he was the highest-level pirate prosecuted in modern times. Is that right?

MILENA STERIO: That is right. And by the way, the Ali case is the only modern piracy case based on universal jurisdiction in the United States courts. Ali had no nexus and no connection to the United

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22. *See Ali*, 718 F.3d at 930 (holding that the prosecution: (1) for aiding and abetting piracy and the extraterritorial scope of hostage taking were consistent with the law of nations; (2) for conspiracy to commit piracy was inconsistent with international law; and (3) for hostage taking did not violate due process).

23. UNCLOS, *supra* note 18, art. 101(c), 1833 U.N.T.S. at 436.

States; the victims were not American, he was not American, and the case occurred in Somalia. So it's really a fascinating case.

MICHAEL SCHARF: So the highest-level guy is just a negotiator. No kingpins, no financiers, no top people have been prosecuted?

MILENA STERIO: Not yet. But this opens the door for those kinds of prosecutions, at least in the United States. Now we know that, in U.S. courts, if you commit acts on dry land of aiding and abetting piracy (facilitating piracy), and that can include financing a future pirate attack, you can be prosecuted for piracy.

MICHAEL SCHARF: Judge Mutoka was saying earlier that Kenya has only been prosecuting the foot soldier pirates that they capture, and she is not absolutely sure if there is a deterrent effect. I guess if these people are fungible and they are just the foot soldiers, this is sort of like trying to deal with the narcotics trade by just going after the so-called mules. What we learned in that area is until you start going up to the leaders of the cartel, you are not able to make a big difference. General Dallaire, what does that say about our strategy for combating piracy? Are we going about it all wrong by just plucking the foot soldiers off from the vessels and prosecuting them?

ROMÉO DALLAIRE: I think that there has got to be concurrent activity. You can't stop prosecuting the pirates and only focus on the financiers. In the case of the child soldiers and the child pirates that continue to be recruited, used, and later become the casualties, we meet judicial solutions for them as best we can. I think that you have to keep at that to make a responsible action in that regard. However, where we are failing is not pursuing action before the International Criminal Court, equating acts of piracy to crimes against humanity. But the International Criminal Court does not have its own police. If the pirate kingpins are in a nation that is a failing state, which does not have a rule of law or a basis for wanting to go after those guys, how do you get into a sovereign state, go after them, and haul them out? That is where there is a nuance that I think has not yet been pursued. When we introduced the Responsibility to Protect<sup>24</sup> doctrine, we began to question whether the Westphalian concept of sovereignty was still absolute. Now, we can intervene for a good reason in certain cases. I would argue that piracy is affecting the international community. We should find a means of actually getting people to go after the bad guys and haul them out.

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24. See Adrienne Margolis, *Responsibility to Protect – Turning Intervention into an Obligation*, 62 INT'L B. NEWS 17, 20 (2008) (commenting that the Responsibility to Protect doctrine initially assumes state sovereignty to the extent that the state is willing and able to protect its people; if it cannot, then the international community may have to intervene).

MICHAEL SCHARF: Now, Judge Mutoka, you have told me that the bad guys (the financiers) are living pretty openly and well in Kenya. Can you tell us a little bit about that?

ROSEMELLE MUTOKA: Yes. Actually, research has shown that there is a lot of investment of piracy proceeds in Kenya. In fact, statistics show that there is about \$2.1 billion that has been invested in Kenya and cannot be accounted for.<sup>25</sup> Of course, then, it has something to do with organized crime. And piracy is an organized crime . . .

MICHAEL SCHARF: So they are not investing it in the stock exchange; they are investing it in narcotics trade and such things.

ROSEMELLE MUTOKA: Exactly. Then, they invest in real estate. One of the effects of investing in that kind of business or venture is that they have to use illegal means. There is a lot of bribery in order for them to be able to get licenses and to do what they are doing. Eventually, the Kenyan economy is affected very negatively by this.

MICHAEL SCHARF: But your government does not seem to be doing a lot about these pirates who are living openly, driving fancy cars, and living in big mansions. How do you explain that?

ROSEMELLE MUTOKA: In fact, I think that because of a need to do something about it, the chief justice in my country decided that we are going to set up an international crimes division. He said that one of the main reasons we are setting it up is that the economy is mortally threatened by international related crimes. This division is going to deal with all manner of international related crimes, including piracy, trafficking, narcotics trade, and so on. I believe that, through this effort, the obligation will fall on law enforcement agencies to do something about these crimes, particularly money laundering. That is where you can be able to get a hold of this kind of investment in Kenya.

MICHAEL SCHARF: We have been discussing some interesting approaches to try to deter the pirates: going after the financiers, the money launderers, and the recruiters. It is time for a short break. When we return, we are going to look at what needs to be done to prevent a resurgence of piracy when the anti-piracy naval forces have to depart the Indian Ocean, which is going to happen soon. Stay with us. We will be right back.

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25. Jaiindi Kisero, *Mystery of Sh164bn Smuggled into Kenya*, DAILY NATION (May 20, 2010), <http://www.nation.co.ke/News/Mystery%20of%20Sh164bn%20smuggled%20into%20Kenya/-/1056/922780/-/5xcvlhz/-/index.html>.

MICHAEL SCHARF: I am Michael Scharf, and we are back with “Talking Foreign Policy.” I am joined in studio by a former U.N. force commander, a judge who has presided over dozens of piracy trials in Kenya, the Chief of Piracy Prosecutions of the island-country Mauritius, and an international law professor. We are talking about the scourge of maritime piracy. Let me go back to our prosecutor, Reshma Beekarry. In our final segment, let’s step back to discuss the big picture. Reshma, you know the prosecutors from the Seychelles. You know them from Kenya. You know them from several other countries. You have had a lot of discussions in order to get the best practices for your upcoming prosecutions. Do you think that the prosecutions all around the world are having a deterrent effect on piracy?

RESHMA BEEKARRY: I understand from discussions I have had that views are split on this. I do not think there has been any study to give us a definite answer as to whether these prosecutions are having a deterrent effect. I think some people have been quoting naval operations or the use of private guards as the real reason for a deterrent effect, so there is an issue there. As far as I am concerned, my personal feeling is that they actually do. Prosecutions send out a very strong signal that impunity is not going to be allowed, and you will be made to pay for it.

MICHAEL SCHARF: In the last segment, Professor Sterio was telling us about some of the recent precedents in the United States. Judge Mutoka, can you tell us about what you consider your most important piracy judgments in Kenya?

ROSEMELLE MUTOKA: I think it is the first one that I handled. It was a case where pirates hijacked a Norwegian ship, which was rescued by the Swedish Navy. The most interesting thing was that when the case came up for hearing before me, we had to have three sets of interpreters. We had a Somali interpreter for the Somalis; we had a Norwegian interpreter, who communicated with the Swedish interpreter. The Swedish interpreter would then take it back to the court interpreter, who would say it in English. That was very interesting. Eventually, I convicted the pirates and sentenced them to serve eight years imprisonment.

MICHAEL SCHARF: How many pirates, in total, have been convicted in Kenya?

ROSEMELLE MUTOKA: To date, 115 pirates have been convicted and seventeen cases with seventy-seven defendants are pending.

MICHAEL SCHARF: When those seventeen cases are over, is it correct that Kenya is “washing its hands” of these prosecutions and walking away?

ROSEMELLE MUTOKA: I would imagine that that is a correct summation. The prosecutions were based on understandings that were entered into between Kenya and the countries that would be affected by piratical attacks in the Horn of Africa. To my knowledge, we have not renewed any of the understandings that we had. The last case we had was last year. To date, they have not brought any new cases.

MICHAEL SCHARF: Was there sort of a quid pro quo? Was the United Nations giving money and assistance to Kenya in order to take on these pirate cases?

ROSEMELLE MUTOKA: I might not be able to correctly answer that, because I am not too sure about what went on behind the scenes. I only know what is on paper. I do know that there was a lot of assistance that was given towards improving the infrastructure. Technical assistance was also given to the judiciary, the President, and the police.

MICHAEL SCHARF: Is that money no longer flowing? Is that part of the calculus?

ROSEMELLE MUTOKA: I imagine that it is still there. We do have interest that has been expressed in areas of training, especially the training of judicial officers; this means that support is still being provided.

MICHAEL SCHARF: Let's go back to our prosecutor from Mauritius. Is Mauritius receiving international donor money to try to convince Mauritius to take on piracy cases?

RESHMA BEEKARRY: I am not sure I would make that link straight away. But the transfer agreement with the European Union came with an assistance package. This was fully related to the trials themselves, the training of prosecutors, and just having a secure courtroom with metal detectors, dogs, and video link facility. That is how far the assistance has extended.

MICHAEL SCHARF: Milena Sterio, you and I went to the Seychelles to assist in some piracy work, and we were told that the U.N. built a state of the art prison in their national park. Can you tell us about that?

MILENA STERIO: It wasn't actually a new prison, but rather a special prison wing, where the suspected pirates are being held. There was certainly assistance by one of the United Nations offices with respect to training the judges, the prosecutors, and the defense counsel. We've been focusing on the prosecution side, but the defense is also important for fair trials. I do know that the international community has been involved in helping.

MICHAEL SCHARF: I am sure that it is not just the money that convinces countries to prosecute. For instance, both in the Seychelles and Mauritius, tourism is being negatively affected by the perception that there are pirates in your waters. Reshma, your country worries about that as well, right?

RESHMA BEEKARRY: We do. It has affected the whole region in a lot of ways. You would not want it to continue.

MICHAEL SCHARF: The U.S. has also been prosecuting pirates, as Milena Sterio told us earlier about two recent cases of dry-land piracy. But there was also a case that was really unusual; it is not your typical piracy case. It involved the Sea Shepherd.<sup>26</sup> This is that vessel called the *Bob Barker* that you see in the T.V. series *Whaling Wars*. The vessel goes after the Japanese whaling fleets and tries to ram them to stop them from hunting endangered whales. What happened in that case, Milena?

MILENA STERIO: The Sea Shepherd case was just recently decided in the Ninth Circuit here in the United States. In that case, which was actually a civil law suit (private tort case), the judge in the Ninth Circuit found that a marine organization like the Sea Shepherd can be considered a piratical organization, as long as they are not operating on behalf of a government.<sup>27</sup> As long as they are operating for their own private purposes, it does not really matter that they are not sea robbers; they were ramming the whaling fleets to protect the whales.<sup>28</sup> If they are committing violent acts on the high seas, for the purposes of United States law, they can be considered pirates.

MICHAEL SCHARF: Greenpeace watch out, huh?

MILENA STERIO: [laughs] Yes, definitely.<sup>29</sup>

MICHAEL SCHARF: We have been talking about prosecutions, and we have been talking about precedents. And we've been debating

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26. *See* Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y, 708 F.3d 1099, 1101–02 (9th Cir. 2013) (holding “[y]ou don’t need a peg leg or an eye patch” to be a pirate and that the ramming of another ship constitutes the “violence” element of piracy.).

27. *Id.* at 1102.

28. *Id.*

29. A few weeks after the broadcast, Russia arrested the crew of a Greenpeace vessel that had been protesting drilling in arctic waters, claiming that they were pirates. *See* Shaun Walker, *Greenpeace Activists Charged with Piracy by Russian Authorities*, THE GUARDIAN (Oct. 2, 2013), <http://www.theguardian.com/environment/2013/oct/02/greenpeace-activists-charged-piracy-russian-authorities>.

whether prosecutions deter piracy. Another deterrent is the use of private security guards,<sup>30</sup> with whom companies that own private vessels are contracting to protect their ships. And most importantly, several countries have sent armed vessels to patrol the waters off the coast of Somalia. General Dallaire, how many vessels would you say are out there? It sounds to me like there is an armada of U.S. and European vessels.

ROMÉO DALLAIRE: I do not have the figure, but I think you are quite right. It is a sizeable fleet, which includes Chinese and Russian vessels as well. It is a very polyglot fleet. There is a problem with using extreme measures (using the military) in any conflict or any situation with insurrections. The military takes a very definitive position, and the position is not one that can be sustained in the long term. It is not the normal course for a nation to always have its military deployed in a security role.

MICHAEL SCHARF: It is quite expensive, isn't it?

ROMÉO DALLAIRE: It is expensive, and it is not necessarily the most effective tool. When we moved all those naval assets there, we obviously recognized that this had a sort of finite time to it. This was because of the nature of the fleets that could be maintained there, the cost, and the like. The question that never seemed to be coming to the floor and that people have been avoiding is, "What happens when they leave?" They're going to leave. So the fear is that you leave a vacuum. So there have been these security companies and other arrangements made. I think that is where the international community fails. As an example, why isn't there a U.N. naval capability? We have U.N. land capabilities. When I was in Cambodia in 1992, we had a naval capability in that mission to fight pirates off Kompong Som. Why doesn't the U.N. have that? Why doesn't it have its own capability versus having to seek or wait for donor countries to provide?

MICHAEL SCHARF: It sounds almost like this is a surge. We can take an analogy from Iraq and Afghanistan and maybe go even farther back in history when the U.S. sent the marines against the Barbary pirates. In these cases, the hope was that if we have enough military assets there, we will finally defeat the pirates. Then, we can manage the situation on a lower level. But you're saying that is not going to happen. When they pull out those assets, you think piracy is going to spike.

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30. See generally Michael L. Mineau, *Pirates, Blackwater, and Maritime Security: The Rise of Private Navies in Response to Modern Piracy*, 9 J. INT'L BUS. & L. 63 (2010) (discussing the use of private security companies against pirates).

ROMÉO DALLAIRE: You have not broken the back of the whole system.

MICHAEL SCHARF: Is it possible to do that without solving the failed state that is Somalia?

ROMÉO DALLAIRE: This is where I come back to the question of sovereignty. If a sovereign nation, by its inept capabilities as a failing state, is putting a whole bunch of other nations at risk, there is surely a means by which the International Criminal Court and international community can handle something like that. That is why I have always felt that the ad hoc international tribunals, which led to the International Criminal Court,<sup>31</sup> was the first step in bringing global justice.<sup>32</sup> A new dimension is needed, and I think this is a great opportunity to try to bring international justice to another level of engagement in a case where a nation-state is, in fact, putting other nation-states at risk by its inability to curtail what is coming out of it.

MICHAEL SCHARF: Meanwhile, Somalia is like a vacuum; it is a lawless place. In fact, Al-Shabaab, which is a terrorist organization affiliated with Al-Qaeda, is on the border of Kenya. I understand that your government, Judge Mutoka, invaded Somalia to destroy the Al-Shabaab troops two years ago?

JUDGE MUTOKA: That is true, yes.

MICHAEL SCHARF: Are your troops still there?

JUDGE MUTOKA: They are still there. In fact, there has been a call from the Somali government that they should leave; but they are still there. The Kenyan government argues that it has to protect the border between Kenya and Somalia so that any cautions are not renewed there. You are aware that there have been a number of sporadic attacks, especially on churches; I've never understood that, though. The attacks have been attributed to Al-Shabaab. We feel as a country that Kenya has helped in bringing down piracy by ensuring that they do not get any routes in passage.

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31. See Hans-Peter Kaul, *International Criminal Court (ICC)*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INT'L LAW, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e42?rskey=jmkqkZ&result=1&prd=EPIL> (last updated Dec. 2010).

32. See generally Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22 (1999) (describing the history, scope, and structure of the Rome Statute).

MICHAEL SCHARF: I think what I'm hearing is that until Somalia has an effective government, a rule of law, and international justice helping out, the pirates are going to continue to flourish along with the drug traffickers and the organized criminals because that's what happens in a failed state. It is not just Somalia; there is also Yemen, and now pirates are breaking out in some weaker states on the west coast of Africa. We've heard today that just prosecuting is not enough, and just providing security is not enough; there needs to be a more holistic approach.

Well, it's time to wrap up the program. Hollywood has always glorified piracy. But in today's broadcast of "Talking Foreign Policy," we've seen that piracy is a scourge that continues to vex the international community. That is the version of piracy that you're going to see in the new Hollywood movie with Tom Hanks, *Captain Phillips*, which should be refreshing. If you want to weigh-in on the discussion or suggest a topic for the upcoming broadcast of "Talking Foreign Policy," please send an email to [talkingforeignpolicy@case.edu](mailto:talkingforeignpolicy@case.edu). Let me thank our outstanding panelists, who have come from far and wide. Again, we have Judge Mutoka, who has come from Kenya; General Dallaire, who has come from Canada; Prosecutor Beekarry, who has come all the way from Mauritius; and from just down the street we have Professor Sterio, from Cleveland State Law School. Thank you all. I'm Michael Scharf. You have been listening to "Talking Foreign Policy" produced by Case Western Reserve University and WCPN 90.3 ideastream.



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