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# Enhancing International Efforts to Prosecute Suspected Pirates

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## ENHANCING INTERNATIONAL EFFORTS TO PROSECUTE SUSPECTED PIRATES

*Jennifer Landsidle\**

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### I. INTRODUCTION: THE U.S. GOVERNMENT’S APPROACH

Since the initial conception of the U.S. strategy to combat piracy off the coast of Somalia, the United States has recognized that any effective counter-piracy strategy must include a plan to ensure that individuals who commit acts of piracy will be held accountable for their actions.<sup>1</sup> The United States has sought to accomplish this by: (1) advocating for all States to criminalize piracy under their domestic law and for States Parties to implement their relevant obligations under the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention) and other applicable international conventions;<sup>2</sup> (2) urging States to use these laws to prosecute suspects when they are directly victimized by a pirate attack, e.g., the flag State or State of nationality of the crew or owner of the vessel;<sup>3</sup> (3) seeking to conclude arrangements or agreements with regional States and common victim States outside the region in order to facilitate the transfer of suspected pirates for prosecution in their national courts;<sup>4</sup> and (4) working with the international community to enhance the

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<sup>1</sup> See NAT’L SECURITY COUNCIL, COUNTERING PIRACY OFF THE HORN OF AFRICA: PARTNERSHIP & ACTION PLAN 12 (2008).

<sup>2</sup> *Id.* at 13.

<sup>3</sup> *Id.*

<sup>4</sup> See *id.* at 13–14.

capacity of these States to prosecute suspected pirates and imprison those convicted.<sup>5</sup>

Successful implementation of this strategy has always been dependent on the support of the international community. The Contact Group on Piracy off the Coast of Somalia (Contact Group), an ad-hoc international mechanism of more than fifty participating countries and international organizations established in January 2009 to coordinate the international response to piracy off the coast Somalia, has provided the primary forum for coordination of the international community's counter-piracy strategy.<sup>6</sup> Legal issues related to the prosecution and imprisonment of pirates have been addressed primarily by the Legal Working Group of the Contact Group, or Working Group 2, chaired by Denmark.<sup>7</sup> The Legal Working Group brings together Contact Group participants' legal experts in order to develop practical legal guidance for States wrestling with the challenges associated with apprehending, transferring, and prosecuting suspected pirates.<sup>8</sup> The Legal Working Group also provides a forum for the exchange of information and lessons learned by States through their experiences;<sup>9</sup> every Working Group meeting begins with a tour-de-table for States to update the group on any changes to domestic piracy-related legislation, national prosecutions, or other relevant developments. Finally, the Legal Working Group has provided a forum for a robust discussion among States about whether some prosecution mechanism, beyond national prosecutions, would enhance the international community's ability to deliver judicial consequences for piracy, or what other creative solutions might be brought to bear to address this challenge.

## II. SUCCESSES TO DATE AND PERSISTENT CHALLENGES

At present, according to the United Nations Office on Drugs and Crime (UNODC), over one thousand Somali pirates in twenty States around the world are either on trial for, or have been convicted of, acts of piracy.<sup>10</sup> Among these, twenty-eight suspected pirates have been transferred back to the United States to stand trial for attacks on U.S. vessels, nationals or inter-

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<sup>5</sup> *Id.* at 14.

<sup>6</sup> *International Response: Contact Group*, U.S. DEP'T OF STATE, <http://www.state.gov/t/p/m/ppa/piracy/contactgroup/index.htm> (last visited Jan. 3, 2012).

<sup>7</sup> *Id.*

<sup>8</sup> *See Working Group 2*, CONTACT GROUP ON PIRACY OFF THE COAST OF SOMALIA, <http://www.thecgps.org/work.do?action=workSub2> (last visited Jan. 3, 2012).

<sup>9</sup> *Id.*

<sup>10</sup> 7 U.N. Office on Drugs and Crime, Counter-Piracy Programme: Support to the Trial and Related Treatment of Piracy Suspects 11 (Sept.-Oct. 2011), [http://www.unodc.org/document/s/Piracy/UNODC\\_Brochure\\_Issue\\_7\\_WV.pdf](http://www.unodc.org/document/s/Piracy/UNODC_Brochure_Issue_7_WV.pdf).

ests.<sup>11</sup> These national prosecutions demonstrate that, just as piracy has been successfully prosecuted in national courts for hundreds of years, modern Somali piracy can be successfully prosecuted in ordinary national courts by any willing State with the basic judicial capacity to do so.

At the same time, despite the sheer number of prosecutions worldwide, there is little evidence that these prosecutions are having an effective deterrent effect.<sup>12</sup> In addition, the international community continues to face a number of challenges that hinder the ability of States to bring pirates to justice.<sup>13</sup> Following the pirate attack on the *S/V Quest*, and the murder of the four Americans on board the yacht, Secretary of State Hillary Rodham Clinton called for a comprehensive review of the Department's counter-piracy strategy, and enhancing the international community's ability to prosecute and incarcerate pirates has been one key aspect of that policy review.<sup>14</sup>

As the U.S. government has examined the strategy, one of the primary challenges is that many States, to varying degrees, have not demonstrated sustained political will to criminalize piracy and prosecute suspected pirates who attack their interests.<sup>15</sup> The world's largest registry States (so-called "open registries" or "flags of convenience") have generally proven either incapable or unwilling to prosecute suspected pirates who attack their ships,<sup>16</sup> and many of the world's largest crew and ship-owner States have proven equally unwilling or unable to step forward.<sup>17</sup> Many States are understandably daunted by the prospect of prosecuting their first piracy case in modern memory, and still others have expressed concerns that it would be difficult to remove Somali national suspects from their territory in the event

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<sup>11</sup> *Id.*

<sup>12</sup> Andrew J. Shapiro, Assistant Secretary, Bureau of Political-Military Affairs, U.S. Dep't of State, Remarks to International Institute for Strategic Studies: U.S. Approaches to Counter-Piracy (Mar. 30, 2011), <http://www.state.gov/t/pm/rls/rm/159419.htm> ("We have not seen evidence that the prosecutions to date have had a deterrent effect, probably not least because pirates are reaping enormous returns with little risk.").

<sup>13</sup> See LAUREN PLOCH ET AL., CONG. RESEARCH SERV., R40528, PIRACY OFF THE HORN OF AFRICA 34–36 (2011) ("Questions regarding legal jurisdiction, due process for detained pirate suspects, and the role of foreign military forces in anti-piracy law enforcement activities complicate current U.S. and international operations against pirates in the Horn of Africa region.").

<sup>14</sup> See Andrew J. Shapiro, Assistant Secretary, Bureau of Political-Military Affairs, U.S. Dep't of State, Statement before the Subcommittee on Terrorism, Nonproliferation, and Trade of the House Foreign Affairs Committee: Confronting Global Piracy (June 15, 2011), <http://www.state.gov/t/pm/rls/rm/166249.htm>.

<sup>15</sup> Shapiro, *supra* note 12.

<sup>16</sup> See *id.*

<sup>17</sup> See *id.*

they are acquitted or, if convicted, after they conclude any prison sentence.<sup>18</sup> Finally, especially in the Horn of Africa region, States have become increasingly reluctant to accept suspects (or additional suspects) for prosecution, not because of the expense or challenges of the prosecution itself, but rather because of limited prison capacity and the long-term costs of post-conviction imprisonment.<sup>19</sup>

### III. LOOKING AHEAD: STRATEGIES FOR ENHANCING EFFORTS TO PROSECUTE SUSPECTED PIRATES

In order to address these persistent challenges, and building on the existing strategy, there are a number of areas where the international community can enhance its approach to ensure that pirates are held accountable for their crimes.

First and foremost, all States must ensure that they have the necessary domestic laws and procedures to facilitate the prosecution of suspected pirates. International law provides a robust framework for dealing with piracy, but this framework must be implemented by States in order to be effective. Law enforcement and/or naval authorities must have the necessary domestic legal authorities to carry-out counter-piracy operations, including the apprehension and transfer of captured suspects, and States must have in place criminal statutes that provide a basis for prosecuting these suspects. The United Nations Security Council has repeatedly called—in increasingly urgent terms—on all States to criminalize piracy, and States should ensure that they have criminal statutes in place that provide a basis for prosecuting not only suspected pirates captured at sea, but also those who finance or otherwise facilitate acts of maritime piracy.<sup>20</sup> The definition of piracy under customary international law, reflected in Article 101 of the 1982 UN Convention on the Law of the Sea, clearly covers those who knowingly incite or intentionally facilitate an act of piracy by, for example, providing the financing for the skiffs, engines, weapons and other gear used to pirate a ship.<sup>21</sup> However, even States that have criminalized piracy might not have

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<sup>18</sup> Jennifer Landside, *Bringing Pirates to Justice*, DIPNOTE: U.S. DEP'T OF STATE OFFICIAL BLOG (May 16, 2011, 11:00 AM), [http://blogs.state.gov/index/php/entries/bringing\\_pirates\\_to\\_justice/](http://blogs.state.gov/index/php/entries/bringing_pirates_to_justice/).

<sup>19</sup> *Id.*

<sup>20</sup> S.C. Res. 1918, ¶ 2, U.N. Doc. S/RES/1918 (Apr. 27, 2010); S.C. Res. 1976, ¶13, U.N. Doc. S/RES/1976 (Apr. 11, 2011); S.C. Res. 2015, ¶ 9, U.N. Doc. S/RES/2015 (Oct. 24, 2011).

<sup>21</sup> The definition is as follows:

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,

criminalized it to the full extent of the Article 101 definition. States should examine whether the definition of piracy under their domestic law needs to be expanded to encompass the full definition under international law and/or whether there are other criminal charges that could be brought against an individual who finances or otherwise facilitates an act of piracy.

Second, the international community should support the expansion of prison capacity in the region, especially in Somalia, and the application and implementation of a prisoner transfer framework for Somali pirates convicted outside of Somalia. UNODC is working to construct and refurbish prisons in both Puntland and Somaliland.<sup>22</sup> With the consent and cooperation of Somali authorities, these prisons could be used to house pirates convicted in Somalia or in other States around the world. In the latter case, Somali pirates convicted outside of Somalia could be transferred back to serve their sentences in Somalia, pursuant to a prisoner transfer framework. Such a prisoner transfer framework would serve the same purpose underlying international prisoner transfers more generally, including the idea that an offender is more likely to be successfully rehabilitated and, eventually, reintegrated into society if the offender serves his prison sentence in his home country. The Chairman of the Legal Working Group has been working with UNODC to facilitate the development of such a framework, with the full support of the Contact Group.<sup>23</sup> The hope is that increasing prison capacity throughout the region and developing such a framework to allow for the controlled transfer of convicted pirates back to Somalia will encourage more States to prosecute suspected pirates in the first place.

While this framework may be sound from a legal perspective, the success of this approach will depend in large part on the cooperation and political support of Somali authorities in Puntland and Somaliland. These authorities must pass the necessary domestic legislation to support prisoner transfers and must commit to working with the United Nations to ensure

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against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; (b) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; (c) Any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

United Nations Convention on the Law of the Sea, art. 101, Dec. 10, 1982, 1833 U.N.T.S. 397.

<sup>22</sup> See e.g., 6 U.N. Office on Drugs and Crime, Counter Piracy Programme: Support to the Trial and Related Treatment of Piracy Suspects 3 (June 2011), [http://www.unodc.org/documents/Piracy/UNODC\\_Brochure\\_Issue\\_6\\_WV.pdf](http://www.unodc.org/documents/Piracy/UNODC_Brochure_Issue_6_WV.pdf).

<sup>23</sup> See U.N. Secretary-General, *Report of the Secretary-General on the Modalities for the Establishment of Specialized Somali Anti-Piracy Courts*, ¶ 33, U.N. Doc. S/2011/360 (June 15, 2011) (noting the Chairman's assistance with a transfer framework memorandum of understanding between Somali authorities and Seychelles).

transferred pirate prisoners are secure and will be treated in accordance with applicable international human rights standards, an essential requirement for many transferring States.

Third, while no one State or prosecution mechanism can or should shoulder the entire burden of prosecuting the number of piracy suspects captured every year by the international naval forces operating at sea, there may be some advantages to establishing a specialized piracy chamber or court in the region, operating under the national system of the State in which it sits. For example, the Republic of Seychelles, which has prosecuted over sixty suspected pirates to date, has volunteered to be a “regional prosecution center” on the condition that convicted pirates could then be transferred back to Somalia to serve their sentences,<sup>24</sup> highlighting in concrete terms why prison capacity and a functioning prisoner transfer framework are so important. Such a specialized court or chamber could help to address many of the challenges that the international community faces by providing a reliable venue in the region where naval forces could transfer well-evidenced cases with relative logistical ease. Such a chamber or court could also provide a focal point for international assistance and the development of expertise by investigators, prosecutors and judges tackling a number of these cases. Ideally, the national law of the State hosting such a court or chamber would already criminalize piracy to the full extent of international law and provide certain features that would likely prove advantageous in piracy cases, such as the ability for seafaring witnesses to provide testimony by video or written Statements, or the capacity for plea-bargaining or other incentives for cooperation in the investigation of higher-ranking members of the pirates’ criminal organization.

One of the advantages of establishing such a mechanism under the national law of the State in which it sits would be that the investment of international assistance to support the mechanism would benefit the national judicial system as a whole, providing positive externalities for rule of law overall. To ensure that the host State’s system would not be overwhelmed by the influx in piracy cases, it would be useful if the host State’s national law would allow foreign prosecutors, or even judges, to be seconded from other States to assist in the caseload. In the Seychelles, foreign prosecutors are already pitching in with piracy trials.<sup>25</sup>

Fourth, the international community should focus more strategic attention on going after the leaders, organizers and financiers of piracy operations. Over the past few years, it has become evident that Somali piracy

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<sup>24</sup> Landslide, *supra* note 18.

<sup>25</sup> 5 U.N. Office on Drugs and Crime, Counter Piracy Programme: Support to the Trial and Related Treatment of Piracy Suspects 8 (Feb. 2011), [http://www.unodc.org/documents/easterafrica/piracy/20110209.UNODC\\_Counter\\_Piracy\\_February\\_Issue.pdf](http://www.unodc.org/documents/easterafrica/piracy/20110209.UNODC_Counter_Piracy_February_Issue.pdf).

functions as an increasingly-organized criminal network.<sup>26</sup> While States must continue to prosecute suspected pirates captured at sea, authorities likely will need to seek out the masterminds of these attacks where they operate ashore. In order to do this, the international community must dedicate sufficient law enforcement resources to tracking and locating these individuals. Using existing law enforcement channels, including INTERPOL channels, States should exchange information with one another about pirate networks in order to map these networks and build successful prosecutions. As pirate leaders are identified, the international community must encourage local authorities to apprehend and prosecute these suspects and/or turn them over to other interested States for prosecution.

Finally, the international community—including the private shipping industry—must commit sufficient financial resources to fund all of these efforts. The Contact Group established a Trust Fund to Support Initiatives of States Countering Piracy off the Coast of Somalia to help defray the expenses associated with the prosecution and incarceration of pirates, as well as to support other initiatives of the Contact Group.<sup>27</sup> The Trust Fund was designed to accept contributions not only from States, but also from the maritime industry.<sup>28</sup>

#### IV. CONCLUSION

Piracy off the coast of Somalia is a phenomenon that will likely persist until some measure of governance and stability is achieved in Somalia, and there are tremendous parallel efforts underway to address that larger issue. From a legal perspective, the challenge of prosecuting suspected pirates benefits from robust and well-established international law on the subject. The key to success will be the implementation of this international legal framework by States, which will require sustained dedication of political will.

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<sup>26</sup> Shapiro, *supra* note 12 (“Somali piracy is an organized criminal enterprise, like a mafia or racketeering criminal organization.”).

<sup>27</sup> *Trust Fund to Support the Initiatives of States to Counter Piracy off the Coast of Somalia*, U.N. OFFICE ON DRUGS & CRIME, <http://www.unodc.org/easternafrika/en/piracy/trust-fund.html> (last visited Jan. 3, 2012).

<sup>28</sup> *Id.* (“Contributions to the Fund may be accepted from governments, intergovernmental or non-governmental organizations, private-sector organizations and the public at large, in accordance with the United Nations Financial Regulations and Rules.”).