
RESEARCH ARTICLE

A Contemporary Approach to the Oldest International Crime

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Maritime piracy began to re-emerge a decade ago, mostly off the coast of Somalia, thereby presenting major economic, security and humanitarian concerns. Prosecuting piracy raises many issues, not in the least because traditional maritime piracy from 200 years ago is so notably different from contemporary piracy. The present article describes the Public International Law and Policy Group's formation of the High Level Piracy Working Group (HLPWG), which since 2011 has been producing memoranda on major issues in contemporary piracy prosecution. The issues span the legal foundations of piracy prosecution, including how to criminalise certain acts and how to exercise jurisdiction over such acts. Laws governing the use of force could apply to government or private actors when capturing and apprehending pirates. Once captured, there are questions of extraditing and transferring these pirates. Moreover, when such pirates are eventually brought to trial, there are pre-trial, evidentiary, substantive and post-prosecution issues to consider. The article also explores the merits and likelihood of creating an international piracy court. It shows how the HLPWG has influenced legal and policy developments today that draw on the distant past, and will undoubtedly have an enduring legacy in the future.

Keywords: Piracy; Maritime security; Jurisdiction; Somalia; International crimes

I. Introduction

After 200 years of near dormancy, maritime piracy, arguably the oldest international crime, began to re-emerge a decade ago as a major economic and humanitarian concern. Whereas historically piracy was popularly associated with such places as the Caribbean Sea, the modern version is centred on Somalia, one of the poorest and most dysfunctional countries in the world.¹ At its apex, roughly between 2010 and 2012, piracy off the coast of Somalia was estimated to cost the world more than \$12 billion, which includes the price of everything from counter-piracy naval operations to higher insurance rates for commercial shippers to ransom payments.² Piracy has also significantly restricted the delivery of food aid to perennially drought-stricken Somalia, ultimately resulting in thousands of deaths.³ While the world saw a temporary downturn in Somali piracy from 2013 to 2016,⁴ many experts believe the incidents of piracy will increase again in the future when the international community begins to draw down its anti-pirate armada off the

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¹ Gretchen Luchsinger (ed), *Somalia Human Development Report 2012* (UNDP 2012), xix, 25, 48.

² This figure concerns the year 2012 alone. See Quy-Toan Do and others, *The Pirates of Somalia: Ending a Threat, Rebuilding a Nation* (The World Bank 2013).

³ Robyn Curnow and Eoghan Macguire, 'Piracy Delaying Vital Food Aid from Reaching Somalia' *CNN* (London, 11 November 2011) <<http://edition.cnn.com/2011/11/03/business/mpa-piracy/>> accessed 22 March 2017.

⁴ The International Chamber of Commerce's International Maritime Bureau reported in 2016 that maritime piracy has fallen to its lowest in 21 years. In total, 64 crewmembers have been taken hostage in the first six months of 2016, which is down from 250 in 2015. See International Chamber of Commerce International Maritime Bureau, 'Piracy and Armed Robbery Against Ships: Report for the Period 1 January-30 September 2016' (2016) <https://www.icc-ccs.org/index.php?option=com_download-monitor&file=uploadreport/2016_Q3_IMB_Piracy_Report.pdf/> accessed 24 March 2017.

east coast of Africa.⁵ Indeed, certain incidents in late 2016 and early 2017 confirm Somali piracy is still a threat.⁶ Meanwhile, piracy is proliferating on Africa's west coast, transforming the threat into a two-ocean challenge.⁷

In combating modern piracy, one of the key initiatives has been the increase in prosecutions across the globe. As Kontorovic observes, Somali piracy has perhaps become the highest-volume area of international criminal law by national courts prosecuting extraterritorial crimes.⁸ Between 2006 and 2014, more than 400 Somali pirates were brought to justice in at least 15 different countries.⁹ Government attorneys have aggressively prosecuted these modern pirates with a panoply of new legal authorities and approaches. Meanwhile, modern pirates are increasingly represented by sophisticated defence counsel who have raised novel issues. As a result, there have been far more developments in the law relating to piracy in the last six years than in the preceding 300 years. This exemplifies the fluidity of public international law. As explained below, the resurgence in pirate attacks, after a multi-century latency period, meant existing international standards had to be reinterpreted to solve challenges this resurgence presented. As with other areas of law that address novel issues brought about by socio-technological change, the law has had to be applied creatively to modern piracy. The present article first describes the formation of the High Level Piracy Working Group (HLPWG); second, it outlines six main issues in the prosecution of piracy today, on which the Working Group produced memoranda; and it concludes by considering the merits of creating an international piracy court. The article shows how the HLPWG has influenced legal and policy developments today that draw on the distant past, and will undoubtedly have an enduring legacy in the future.

II. Creation and Work of the High Level Piracy Working Group

In 2011, the Public International Law and Policy Group (PILPG),¹⁰ convened a HLPWG chaired by Professor Michael Scharf. The Working Group was devoted to addressing the numerous legal challenges posed by modern maritime piracy, focusing especially on how best to facilitate prosecutions of captured pirates. The Working Group comprised over thirty key actors in counter-piracy efforts, including representatives of the US Department of State, Department of Defence, and Department of Justice; as well as judges, practitioners, NGO officials, and leading academics from several countries. The Working Group's mandate was to provide legal and policy advice to domestic, regional, and international counter-piracy mechanisms, with the goal of helping to create effective responses to the growing piracy threat.

During the four years of its operation, the Working Group provided legal assistance to judges and Ministry of Justice officials in Kenya, the Seychelles, and Mauritius, which have established UN-supported regional piracy courts and prisons. The Group also forged relationships with other regional and international partners, including the UN Office of Drugs and Crime and the UN Contact Group on Somali Piracy. In all, the members of the Working Group have prepared nearly fifty research memoranda on cutting-edge issues raised by modern piracy prosecutions.¹¹ Teams from the Working Group went on missions to Kenya, the Seychelles, and Mauritius to provide copies of these memoranda and expert advice to the Attorneys-General, prosecutors, and judges who are actively prosecuting piracy.

The Working Group memoranda had a direct effect in developing the law and policy related to prosecuting maritime pirates. The memorandum on prosecuting the preparatory crime of sailing with piratical equipment as an act of piracy (discussed in more detail below), for example, was quoted extensively in a decision of the Seychelles Supreme Court.¹² The memorandum on addressing the challenges of child pirates led

⁵ Mugambi Mutegi, 'Piracy Fears as NATO Pulls Ships from Indian Ocean' *Business Daily* (Nairobi, 16 December 2016) <<https://asokoinsight.com/news/piracy-fears-as-nato-pulls-navy-ships-from-indian-ocean-kenya>> accessed 22 March 2017.

⁶ Johnathan Saul, 'Ships More at Risk After First Somali Pirate Attack in Years: Officials' (*Reuters*, 8 November 2016) <<http://www.reuters.com/article/us-shipping-piracy-somalia-idUSKBN1331UJ>> accessed 22 March 2017; Frank Gardner, 'Somalia Ship Hijack: Maritime Piracy Threatens to Return' *BBC News* (London, 16 March 2017) BBC <<http://www.bbc.com/news/world-africa-39283911>> accessed 22 March 2017.

⁷ Gordon Ripinski, 'Increasing Attacks: Piracy Shifts Coasts in Africa' *Spiegel Online International* (Hamburg, 19 July 2013) <<http://www.spiegel.de/international/world/threat-of-pirates-grows-off-west-coast-of-africa-a-912089.html>> accessed 22 March 2017.

⁸ Eugene Kontorovic, 'The Problems of Pirate Punishment' in MP Scharf, MA Newton and M Sterio (eds), *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes* (CUP 2015) 299.

⁹ *ibid* 299–300.

¹⁰ For information on PILPG and its activities, see <<http://publicinternationallawandpolicygroup.org/>>.

¹¹ The memoranda can be found on the website of the Frederick K Cox International Law Center <<http://law.case.edu/Academics/Academic-Centers/Cox-International-Law-Center/Henry-T-King-Jr-War-Crimes-Research-Office/Search-Results/view/search/t/True/k/False/q/piracy>> accessed 22 March 2017.

¹² 'Case Western Reserve War Crimes Research Office Memo Cited in Major Piracy Judgement' (*The Case Western Daily*, 21 August 2012) <<http://thedaily.case.edu/case-western-reserve-war-crimes-research-office-memo-cited-in-major-piracy-judgment/>> accessed 22 March 2017.

to PILPG Board Member Milena Sterio and Michael Scharf being invited to present the Working Group's findings and recommendations to a meeting of the UN Contact Group on Somali Piracy in Copenhagen, Denmark.¹³

The following is an overview of the piracy prosecution issues the Working Group explored. Actors such as the Working Group have successfully contributed to the downturn in piracy off the coast of Somalia. In 2009, Kontorovich noted that '[t]he abject failure of the international response to piracy in the Gulf of Aden is a cautionary tale about the limits of international law'.¹⁴ Since then, however, the immediate danger of Somali piracy has significantly reduced.¹⁵ The HLPWG is a laudable example of how groups of various stakeholders and actors spanning law, academia, governmental bodies and NGOs, can together utilise international law to mitigate piracy. In sum, these actors have come up with 'solutions to international problems like piracy [that] (...) not only focus on reforming legal and practical tools but (...) also stimulate new perspectives in the development of international law'.¹⁶

III. Key Legal Issues in Combatting Maritime Piracy

This section examines some of the major conclusions of the Working Group, organised thematically. The issues span the legal foundations of piracy prosecution, including how to criminalise certain acts and how to exercise jurisdiction over such acts. Having established the legal foundations, the section then outlines legal concerns throughout all phases of combatting maritime piracy. It covers how laws governing the use of force could apply to government or private actors when capturing and apprehending pirates. Next, it discusses challenges when extraditing and transferring captured pirates. When such pirates are eventually brought to trial, there are pre-trial, evidentiary, substantive and post-prosecution issues to consider. The following sketches the Working Group's conclusions on the myriad issues contemporary maritime piracy raises.

A. The Legal Foundations for Prosecuting Suspected Pirates

An initial theme addressed by the Working Group's memoranda concerned the legal foundations for the prosecution of pirates.¹⁷ Piracy prosecutions in relevant jurisdictions have been based on domestic incorporation or application of customary international law on piracy, the United Nations Convention on the Law of the Sea, and/or the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation.¹⁸ Several of the Working Group's memoranda analyse the relative merits of these three different, but often complementary, approaches to piracy prosecution. They examine the substantive laws and procedures of each one, and contain recommendations on the best approaches for States adopting domestic legislation on piracy. The Working Group discerned that there is currently no comprehensive approach to modern piracy legislation at the domestic level. Working Group memoranda examine how States have incorporated the international law of piracy into their own domestic legal frameworks and the different approaches States have taken to define piracy in their national courts.

One memorandum within this theme examines whether the payment of ransoms to pirate hostage takers can be criminalised as a method of disrupting the piratical business model.¹⁹ Within the statutory regimes of individual States, there are currently three approaches to banning ransom payments: virtual prohibition, partial prohibition, and targeted prohibition. Italy, the sole State enforcing a virtual ban on ransom

¹³ Cleveland State University, 'Professor Sterio Helps Prepare for Somali Piracy Trials' (13 December 2012) <<https://www.law.csuohio.edu/newsevents/news/professor-sterio-helps-prepare-somali-piracy-trials>> accessed 22 March 2017.

¹⁴ Eugene Kontorovich, 'Piracy and International Law' (*Jerusalem Center for Public Affairs*, 8 February 2009) <<http://jcpa.org/article/piracy-and-international-law/>> accessed 22 March 2017.

¹⁵ Until November 2016, the last reported piracy attack had been in February 2014. See Saul (n 6).

¹⁶ Lucas Bento, 'Toward an International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish' (2011) 29 *Berkeley Journal of International Law* 399, 454.

¹⁷ See Sandra Hodgkinson, 'The Governing International Law on Maritime Policy' in MP Scharf, MA Newton and M Sterio (eds), *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes* (CUP 2015); Sandra Hodgkinson, 'The Incorporation of International Law to Define Piracy Crimes, National Laws, and the Definition of Piracy' in MP Scharf, MA Newton and M Sterio (eds), *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes* (CUP 2015); Ved Nanda, 'Exercising Universal Jurisdiction over Piracy' in MP Scharf, MA Newton and M Sterio (eds), *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes* (CUP 2015); Milena Sterio, 'Incorporating International Law to Establish Jurisdiction over Piracy Offenses: A Comparative Examination of the Laws of the Netherlands, South Korea, Tanzania, India and Kenya' in MP Scharf, MA Newton and M Sterio (eds), *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes* (CUP 2015).

¹⁸ UN Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (adopted 10 March 1988, entered into force 1 March 1992) 1678 UNTS 221.

¹⁹ PILPG, 'Payment of Piracy Ransoms' (2011) PILPG Legal Memorandum <[http://law.case.edu/Portals/0/Documents/War-Crimes-Research-Portal/memoranda/PILPG_Issue_17\(1\)_Ransoms.pdf](http://law.case.edu/Portals/0/Documents/War-Crimes-Research-Portal/memoranda/PILPG_Issue_17(1)_Ransoms.pdf)> accessed 23 March 2017.

payments, places a temporary freeze on all domestically located assets of all relatives of an Italian hostage.²⁰ Many States including the UK, the US and Germany have enacted a large number of blanket laws prohibiting the financing of terrorists.²¹ Whilst both terrorists and pirates perform hijacking and hostage-taking, these laws have not generally been applied to pirates because their goals are monetary rather than political.²² Further, the UK High Court of Justice has held that payment of ransoms is not only legal, but was to be encouraged.²³ This is because, if military and diplomatic efforts fail, paying ransoms to pirates is the only viable option to secure a ship's crew.²⁴ Finally, the US recently adopted the first targeted prohibition by banning the transfer of assets to specifically named pirate lords and their associates.²⁵

Among the most significant memoranda in this theme was the one prepared for the Seychelles Piracy Court on whether the Seychelles could apply universal jurisdiction to prosecute individuals arrested in a 'mother ship' on the high seas with piratical equipment, lacking evidence of a completed or imminent piratical attack.²⁶ The case involved a vessel apprehended with dozens of Kalashnikov rifles, rocket-propelled grenades, grappling hooks, and extra long ladders.²⁷ The arrested individuals claimed they were simply fishermen, but the presence of such equipment indicated that they were in fact preparing for a piratical attack. The legal difficulty is that mere preparation, including possession of crime-related equipment, is usually not sufficient to prove 'attempt', and the universal jurisdiction for piracy only covers attempt and completed acts of piracy. To overcome this difficulty, the PILPG researchers dug up 150-year old precedents from when the US and the UK were trying to end the slave trade.²⁸ As with modern piracy, apprehending and arresting merchant vessels for participating in the slave trade was challenging because the vessels were often found with equipment for slavery (boilers and water containers of unusual size, shackles, handcuffs, and secret compartments), but with no slaves on board. In these cases, the US Supreme Court held that 'as soon (...) as the preparations [for slavery as evidenced by the presence of such equipment] progressed so far, as clearly and satisfactorily to show the purpose for which they are made, the right of seizure attaches.'²⁹ The Seychelles Piracy Court quoted from this PILPG memorandum and cited the slavery cases in holding that possession of piratical equipment on the high seas is sufficient for proving the universal jurisdiction crime of attempted piracy.³⁰ This important precedent will make it much easier for countries throughout the world to exercise universal jurisdiction over pirates. Using 150-year-old precedents is in line with the recommendation to examine 'previous plagues of piracy [and similar problems] and how they were defeated' – no matter how many centuries ago they occurred – and apply these lessons from history to curb present day Somali piracy.³¹

B. The Legal Framework for the Use of Force Against Pirates

A second theme revolved around how the law governing the use of force applies to combating piracy and apprehending pirates by government and private forces.³² Working Group memoranda analyse the governing framework for the use of force under the UN Convention on the Law of the Sea and associated law enforcement principles, including the right to board, search and visit, and the right of hot pursuit. The memoranda also examine the specific authorisations for the use of force against pirates under United Nations Security Resolutions applicable to counter-piracy efforts off the coast of and in Somalia.³³ In addition, the memoranda explore specific issues with regard to the three multinational counter-piracy task forces operating in the Gulf of Aden, including applicable law, rules of engagement, and coordination between and

²⁰ *ibid* ii, iv.

²¹ *ibid* ii.

²² *id.*

²³ *Masefield AG v Amlin Corporate Member Ltd* (2010) EWHC 280.

²⁴ *id.*

²⁵ United States Presidential Documents, Executive Order No 13536, 75 CFR 19869 (12 April 2010). See also US Department of the Treasury Office of Foreign Assets Control, 'Somalia Sanctions: Information on Persons Listed in the Annex to Executive Order 13536 of 12 April 2010' (22 September 2010).

²⁶ PILPG, 'Can the Seychelles Criminalize Possession of Piratical Equipment, and Apply it to Foreign Nationals Found Outside of the Seychelles under Either Universal or Protective Jurisdiction?' (2012) PILPG Legal Memorandum.

²⁷ *The Republic v Mohamed Abdi Jama & Six Others* [2012] CS 53.

²⁸ *The Slavers (Kate)* (1864) 69 US 350, 361; *The Slavers (Sarah)* (1864) 69 US 366; *The Slavers (Weathergage)* (1864) 69 US 375.

²⁹ *Weathergage* (n 28) 380.

³⁰ See 'Case Western Reserve War Crimes Research' (n 12).

³¹ Max Boot, 'Pirates, Then and Now: How Piracy Was Defeated in the Past and Can Be Again' (2009) 88 Foreign Affairs 94, 94.

³² See Laurie Blank, 'The Use of Force Against Pirates' in MP Scharf, MA Newton and M Sterio (eds), *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes* (CUP 2015); Mark Vlastic, 'The Use of Force by Private Parties Against Suspected Pirates' in MP Scharf, MA Newton and M Sterio (eds), *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes* (CUP 2015).

³³ See, *inter alia*, UNSC Res 2316 (9 November 2016) UN Doc S/RES/2316; UNSC Res 2246 (10 November 2015) UN Doc S/RES/2246.

among national forces. Similarly relevant is the question of how international law applies to the use of force by private security forces. As the shipping industry has increasingly and with successful results employed armed guards on commercial vessels, memoranda prepared by the Working Group examined the parameters of the law governing the use of force, and how private persons may employ it against pirates.³⁴ Individual actors who violate these principles may be liable for civil damages and pirates may be entitled to have their prosecution dismissed as a result of mistreatment suffered at the hands of capturing authorities.³⁵

C. Extraditing and Transferring Captured Pirates

A third theme examined extradition and transfer of captured pirates.³⁶ States whose ships must traverse both territorial waters and the high seas want to protect their interests, but they are wary about prosecuting pirates in their courts because of evidentiary problems and the fear that these criminals will seek asylum. Consequently, several nations have executed transfer agreements with other countries, such as Kenya, Mauritius, and the Seychelles, that have expressed a willingness to prosecute pirates in their courts.³⁷ The Working Group's memoranda point out, however, that transferring pirates to these countries has not been as seamless as the parties involved would desire. Practical concerns include preservation of evidence, providing adequate health and security for prisoners, and dealing with the complexity of criminal prosecutions. There have been reports of human rights violations in the receiving countries, leading to a debate about what duties capturing countries owe to pirates, and when and to whom those countries may transfer pirates.

D. Pre-trial and Evidentiary Issues When Trying Suspected Pirates

A fourth theme addressed pre-trial issues.³⁸ One memorandum examined the principle of 'speedy trial rights' for accused parties through a survey of domestic criminal courts, international criminal courts, and regional human rights tribunals, such as the European Court of Human Rights, and the American and the African human rights systems.³⁹ The memorandum concludes that the guarantee of a trial within a reasonable time is a general principle of law. Consequently, all States that prosecute pirates should continue to respect the suspected pirates' speedy trial rights; doing otherwise could jeopardise the legacy and legitimacy of national piracy prosecutions. The memorandum considers the question of what methods nations undertaking piracy prosecutions may use in order to avoid unreasonable and undue delays in proceedings. Methods include managing the pre-trial phase, the trial phase, and the post-trial phase through the use of relatively simple procedural devices.

Another memorandum concerning this theme explored evidentiary issues in pirate prosecutions, focusing on the UN-supported Regional Anti-Piracy Prosecutions and Intelligence Coordination Centre (RAPPICC).⁴⁰ The RAPPICC is designed to gather intelligence about piracy from Joint Intelligence Teams, EUROPOL and INTERPOL, along with international law enforcement and military partners and the maritime industry. The RAPPICC plans to use collected information to assemble 'evidence packs' for use in prosecutions, analyse the piracy business model and track the money sources, and coordinate with international law enforcement partners to tactically disrupt the profitable business of piracy. A plethora of information on piracy is currently being collected by multiple agencies. However, many challenges exist as to the collection, retention and dissemination of information and later translating that information into evidence that can be used in court. The memorandum describes these practical complications involved with collecting, retaining, and

³⁴ Matthew Langton and Laurie Blank, 'Piracy and International Humanitarian Law' (2012) PILPG Legal Memorandum <[http://law.case.edu/Portals/0/Documents/War-Crimes-Research-Portal/memoranda/26\(2\)_Use_of_Force_2012.pdf](http://law.case.edu/Portals/0/Documents/War-Crimes-Research-Portal/memoranda/26(2)_Use_of_Force_2012.pdf)> accessed 24 March 2017.

³⁵ *ibid* 23.

³⁶ See Frederick M Lorenz, 'Transfer of Suspected and Convicted Pirates' in MP Scharf, MA Newton and M Sterio (eds), *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes* (CUP 2015).

³⁷ *id.* For an overview of the myriad agreements.

³⁸ See Milena Sterio, 'Pirates' Right to a Speedy Trial' in MP Scharf, MA Newton and M Sterio (eds), *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes* (CUP 2015). See also Frederick M Lorenz and Kelly Paradis, 'Evidentiary Issues in Piracy Prosecutions' in MP Scharf, MA Newton and M Sterio (eds), *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes* (CUP 2015).

³⁹ PILPG, 'Memorandum for the Mombasa Law Court of Kenya Re: Piracy Trials' (2010) PILPG Legal Memorandum <http://law.case.edu/Portals/0/Documents/War-Crimes-Research-Portal/memoranda/PILPG_Issue_28_Jurisdiction_Kenya_Courts.pdf> accessed 24 March 2017.

⁴⁰ Kelly Paradis and Frederick M Lorenz, 'Collecting, Retaining, and Preserving Evidence in Piracy Prosecutions' (2012) PILPG Legal Memorandum <http://law.case.edu/Portals/0/Documents/War-Crimes-Research-Portal/memoranda/9_Evidence_UWash.pdf> accessed 24 March 2017.

presenting evidence in piracy prosecutions. It assesses the legal evidentiary framework of the key regional States, examines recent developments to deal with these issues, and provides insights about the extent to which this evidence can be made admissible in court.

E. Issues with the Merits of Piracy Prosecution: Responsibility, Liability, and Juvenile Offenders

A fifth theme focused on the merits of a piracy prosecution.⁴¹ One memorandum examined the difficulties in the transposition of the doctrine of command responsibility from its historic mooring in the laws and customs of warfare into the context of piracy prosecutions.⁴² The memorandum argues that extending the doctrine of command responsibility into the context of piracy could, in theory, provide another tool for targeting the real authority figures that control pirate operations. Extrapolating a modernised variation of command responsibility as a form of personal liability for those authority figures responsible for the orchestration of organised piracy could become an effective tool for focusing on the big fish rather than the minnows.

Another memorandum examined whether piracy courts can utilise the concept of joint criminal enterprise, a theory of liability developed by the international criminal tribunals for war crimes trials.⁴³ Application of this theory of liability would make it substantially easier to convict persons who facilitate piracy operations, including recruiters; financiers; hostage negotiators; and suppliers of vessels, weapons, food, and equipment. This example shows how international criminal law can be (re)interpreted to guide approaches to liability in piracy cases.

A particularly interesting memorandum under this theme examined the challenge of dealing with juvenile pirates.⁴⁴ Partially as a result of the unforeseen consequences of the 'catch and release' approach to juvenile pirates, the recruitment and use of child pirates has steadily expanded. It is now estimated that up to one third of pirates operating off the Coast of Somalia at any given time are under 15 years old. The prevalence of juveniles among those who are captured by international naval forces patrolling the Indian Ocean complicates the treatment of captured pirates. This is true through all phases of the judicial process, from the moment of capture to the moment of repatriation or sentencing. The memorandum on prosecuting child pirates reviews the international legal norms related to the treatment of juveniles under national and international law and considers practical issues associated with the prosecution of juvenile pirates. Juvenile-specific legal issues arise when considering the release of a juvenile immediately upon capture, determining the age of a suspected pirate, detaining a suspected pirate pre-trial, ensuring adequate representation during trial, and, upon a juvenile being found guilty, sentencing said juvenile.

As mentioned above, Sterio and Scharf were invited to present PILPG's research and recommendations about child piracy to the UN Contact Group on Somali Piracy Finally.⁴⁵ Based on the Working Group's work, four proposals were offered for the UN's consideration. First, it was suggested that younger pirates be subject to dental and hand x-ray examinations upon capture to determine their age. At present, captured pirates in their late teens and twenties frequently claim to be under 16, hoping to be released as juveniles. Second, it was proposed that judges treat going to sea with juvenile pirates as an aggravating factor at the sentencing stage of proceedings. This could be achieved within the existing framework of judicial discretion, without the need for new legislation.⁴⁶ Third, it was suggested that captured pirates also be charged with the offense of recruitment and use of child pirates as a crime against humanity, in addition to piracy. The precedent for doing so can be drawn from the analogous charge of recruiting and suing child soldiers, of which defendants

⁴¹ See Michael A Newton, 'Piracy and the Problem of "Command Responsibility"' in MP Scharf, MA Newton and M Sterio (eds), *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes* (CUP 2015). See also Jon Bellish, 'The Issue of Juvenile Piracy' in MP Scharf, MA Newton and M Sterio (eds), *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes* (CUP 2015).

⁴² Laura M Eshbach, Amy Bernard and Frederick M Lorenz, 'The Extent to Which Joint Criminal Enterprise or Co-Perpetration Doctrine is Suitable for an International Piracy Tribunal' (2011) PILPG Legal Memorandum <http://law.case.edu/Portals/0/Documents/War-Crimes-Research-Portal/memoranda/PILPG_Issue_7_JCE_Pirates.pdf> accessed 24 March 2017.

⁴³ Ben Golden, Janice Goh and Frederick M Lorenz, 'The Extent to Which Command Responsibility is Suitable for an International Piracy Tribunal' (2011) PILPG Legal Memorandum <http://law.case.edu/Portals/0/Documents/War-Crimes-Research-Portal/memoranda/PILPG_Issue_18_CommandResponsibility_Pirates.pdf> accessed 24 March 2017; *The Prosecutor v Duško Tadić* (Appeals Chamber Judgment) IT-94-1-A (12 July 1999).

⁴⁴ PILPG, 'Prosecuting Child Pirates' (2011) PILPG Legal Memorandum.

⁴⁵ See Cleveland State University (n 13).

⁴⁶ The Supreme Court of the Seychelles subsequently implemented our suggestion, holding that '[t]he use of juveniles by the adult offenders in such violent acts of piracy is an aggravating factor which in my view should enhance the punishment to be meted out to the other adult offenders'. See *R v Farad Ahmed Jama and Others* [2013] SCSC 17.

have been convicted before international tribunals.⁴⁷ Any State Party to the ICC's Rome Statute,⁴⁸ including Kenya, Mauritius, and the Seychelles, should be able to prosecute crimes against humanity under their legislation that implements the Rome Statute. The final proposal was to begin to prosecute child pirates themselves, but ensure prosecutions take place under the special procedures and treatment required for prosecuting juvenile offenders of serious crime under international law.⁴⁹

F. Post-Prosecution Considerations

A final theme examined post-prosecution issues including whether acquitted or convicted pirates could successfully seek asylum rather than being sent back to Somalia.⁵⁰ The High Level Working Group concluded that, although the international law applicable to asylum and non-*refoulement* protections sought by pirates is not immediately apparent, an opportunistic, asylum-seeking pirate would face significant obstacles in his claim for protection. First, to claim asylum, he would have difficulty establishing himself as having a well-founded fear of persecution based on race, religion, nationality, social group, or political opinion. These factors are independent of his status as a pirate, but may be viable given the circumstances of a particular individual's case. Assuming the pirate can produce evidence in support of such a claim, success remains unlikely. They would likely be barred from asylum due to their previous serious crimes, which would include piracy. The UN High Commissioner for Refugees has issued guidelines that clarify that most pirates would be excluded because of this 'serious non-political crime' prong. Specifically, 'murder, rape and armed robbery would undoubtedly qualify as serious offences', and 'acts of hijacking will almost certainly qualify as a "serious crime"'.⁵¹

The non-*refoulement* question is important, varies by country, and implies reaching a high threshold to justify not being returned to one's country. The pirate must show that there is a real risk of being subjected to torture (in some countries, it must be torture with government acquiescence) or cruel, inhuman or degrading treatment, as in the European Convention on Human Rights⁵² and the Human Rights Committee's interpretation of the International Covenant on Civil and Political Rights.⁵³ This cannot be a generalised fear of such a risk; the pirate must prove that his situation is uniquely dangerous. Accordingly, while there is a chance that some pirates may be able to successfully make such a submission, it is a fact-dependent inquiry. One must demonstrate unique circumstances and substantial grounds for belief of torture upon return, which would seem to be fairly uncommon in order to avail oneself of the non-*refoulement* protections.⁵⁴ The Working Group's memoranda on the issue of asylum will be important in convincing countries around the world to undertake prosecution of Somali pirates.

IV. The Prospects for an International Piracy Court

Much of the High Level Working Group's work focused on facilitating the prosecution of Somali pirates in domestic courts around the world. Even with significant international assistance, it may be many years before Somalia is able to provide fair and effective trials for accused pirates or be able to detain them in prisons that meet international standards. Though these difficulties exist twenty countries have stepped in to fill the void and provide the necessary international assistance.⁵⁵ This final section discusses the idea of an internationalised tribunal⁵⁶ as a final prosecutorial tool in the fight against piracy.⁵⁷

⁴⁷ *The Prosecutor v Sam Hinga Norman* (Decision on Preliminary Motion Based on Lack of Jurisdiction "(Child Recruitment)") SCSL-2004-14-AR72(E) (31 May 2004) 1, 9.

⁴⁸ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.

⁴⁹ PILPG, 'Prosecuting Child Pirates' (n 44) 28–29.

⁵⁰ Kontorovich, 'The Problems of Pirate Punishment' (n 8). See also Yvonne M Dutton, 'The Potential for Asylum-Seeking by Convicted Pirates' in MP Scharf, MA Newton and M Sterio (eds), *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes* (CUP 2015).

⁵¹ UNHRC, 'Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees' (4 September 2003) UN Doc HCR/GIP/03/05, paras 14, 27.

⁵² *Soering v the United Kingdom* (1989) 11 EHRR 439.

⁵³ UNCHR, 'General Comment No 20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment' adopted at the Forty-fourth Session (10 March 1992) UN Doc HRI/GEN/1/Rev.1, art 7.

⁵⁴ *Soering* (n 52) para 88.

⁵⁵ James Kraska and Brian Wilson, 'Combatting Pirates of the Gulf of Aden: The Djibouti Code and the Somali Coast Guard' (2009) *Ocean and Coastal Management* 1, 2.

⁵⁶ Internationalised Tribunal is a term for mixed international-domestic tribunals of various kinds, ranging from the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, to the Ugandan High Court's War Crimes Chamber, and the Iraqi High Court.

⁵⁷ See Michael P Scharf, 'Conclusion: Is There a Case for an International Piracy Court?' in MP Scharf, MA Newton and M Sterio (eds), *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes* (CUP 2015).

To deal with difficult cases of international criminality, in the past two decades, the international community has established ad hoc international criminal tribunals (*e.g.* the International Criminal Tribunal for the former Yugoslavia in The Hague and International Criminal Tribunal for Rwanda in Arusha), hybrid international criminal tribunals (*e.g.* the Special Court for Sierra Leone in Freetown and the Extraordinary Chambers in the Courts of Cambodia in Phnom Penh), regional international criminal tribunals (*e.g.* the Extraordinary African Chambers in Senegal) and internationalised domestic courts (*e.g.* the Iraqi High Tribunal in Baghdad and the War Crimes Chamber in Bosnia Herzegovina). PILPG has provided assistance to each of these tribunals and was asked to examine whether one or more of these models would be useful for the prosecution of Somali and other maritime pirates.

In 2011, the UN Security Council adopted Resolution 1976,⁵⁸ which urged the consideration of an 'extraterritorial Somali anti-piracy court' as described in the Report of Jack Lang, the Special Advisor to the Secretary General on Legal Issues Related to Piracy off the Coast of Somalia.⁵⁹ The Lang proposal called for a tribunal modelled on the Lockerbie Court, where the United Kingdom temporarily located a Scottish trial court, applying Scottish law, in the Netherlands in order to prosecute the two Libyan nationals accused of the 1988 bombing of Pan Am Flight 103.⁶⁰ Under this approach, a special Somali court, with Somali and/or foreign judges, would apply Somali law in prosecuting piracy off the coast of Somalia. The Lang proposal suggested that the Court be housed at the building in Arusha, Tanzania that currently serves as the headquarters of the International Criminal Tribunal for Rwanda, which is concluding its final trials and appeals.

To examine the merits of the Lang proposal it is helpful to begin with a brief history of the Lockerbie affair. In 1988, Pan Am Flight 103 exploded, as a result of the detonation of an incendiary device, over Lockerbie, Scotland, killing 259 passengers and crew. After two years of investigation, the bomb was traced back to Libyan Secret Service agents who had been operating in Malta. The United States and United Kingdom demanded that Libya turn over the accused perpetrators. Libya refused, arguing that they would not receive a fair trial in either country. In an effort to induce Libya to surrender the accused, in 1991 the UN Security Council imposed economic sanctions on Libya, which ultimately cost the Libyan economy an estimated \$48 billion USD.⁶¹ A decade later, the three countries negotiated a unique solution involving a Scottish Court applying Scottish law, sitting in an abandoned US air force base in the Netherlands called Camp Zeist.⁶²

Implementation of the solution required a series of agreements between the United Kingdom and Libya, and the United Kingdom and The Netherlands, as well as new legislation in the United Kingdom.⁶³ The Lockerbie bombing trial, which began in the spring of 2000, was the most expensive criminal proceeding in UK history.⁶⁴ After a nine-month trial, with 230 witnesses, the Scottish Court in the Netherlands found one of the two defendants (Megrahi) guilty and the other (Fhimah) not guilty.⁶⁵ Megrahi was sentenced to life in prison, with a minimum of 20 years, to be served in Scotland, per The Netherlands/UK Agreement.⁶⁶ Fhimah was released to Libya. Defendant Megrahi exercised his right to an appeal and in March 2002, the Scottish Appeal Court concluded that the trial court decision was based on 'real and convincing' evidence,⁶⁷ and ruled that 'none of the grounds of appeal is well founded'.⁶⁸ A year and a half after the appeal decision, the Security Council adopted Resolution 1506 (2003) lifting the 1991 sanctions.⁶⁹

⁵⁸ UNSC Res 1976 (1 April 2011) UN Doc S/RES/1976.

⁵⁹ Contact Group on Piracy off the Coast of Somalia, 'Report to the Secretary-General on Possible Options to Further the Aim of Prosecuting and Imprisoning Persons Responsible for Acts of Piracy and Armed Robbery at Sea' (26 July 2010) UN Doc S/2010/394.

⁶⁰ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of the Netherlands Concerning a Scottish Trial in the Netherlands (adopted 18 September 1998, entered into force 8 January 1999) 2062 UNTS 81.

⁶¹ *id.*

⁶² David R Andrews, 'A Thorn on the Tulip – A Scottish Trial in the Netherlands: The Story Behind the Lockerbie Trial' (2004) 36 Case Western Reserve Journal of International Law 307, 308. Andrews served as the Legal Adviser of the US Department of State, as the Ambassador and Special Negotiator for Iran/US Claims, and received the Distinguished Service Award (the highest civilian honour) from the US State Department in part for his lead role in establishing the Scottish Court in the Netherlands for the trial of the Lockerbie Bombing.

⁶³ The United Kingdom High Court of Justiciary (Proceedings in the Netherlands) [1998] United Nations Order 1998, SI 1998/2251.

⁶⁴ 'Lockerbie Bomber Allowed Appeal' *BBC News* (London, 28 June 2007) <http://news.bbc.co.uk/2/hi/uk_news/scotland/6246574.stm> accessed 24 March 2017.

⁶⁵ See Andrews (n 62).

⁶⁶ *id.*

⁶⁷ *Abdelbaset Ali Mohamed Al Megrahi v HM Advocate* [2002] JC 99.

⁶⁸ *id.*

⁶⁹ UNSC Res 1506 (12 September 2003) UN Doc S/RES/1506.

The Lockerbie Model of an extraterritorial court was tested a few years later in the remote Pitcairn Islands.⁷⁰ The high profile case involved seven defendants accused of raping young girls on an island with only forty-five total inhabitants.⁷¹ Trying the case locally would have required bringing in judges, prosecutors, and defence attorneys, who would be limited by lack of air service, the 8-day boat trip to the nearest major port, poor communications, and general lack of infrastructure.⁷² Citing the Lockerbie model, local officials decided to adopt special legislation and negotiate an Agreement with New Zealand to set up an extraterritorial Pitcairn court with Pitcairn judges applying Pitcairn law, located in New Zealand, while New Zealand agreed to provide prison space if there were convictions.⁷³

A. How Well Would the Lockerbie Model Work as a Venue for Prosecuting Somali Pirates?

Five problems have been identified that have greatly diminished the international community's interest in the Lang proposal. This article examines each in turn. The first problem is the lack of any central Somali government from which to draw court personnel. A fair trial requires independent, competent judges, meticulous preparation by the prosecution and competent defence counsel. There are currently only 220 judges in all of Somalia, including the autonomous regions of Puntland and Somaliland.⁷⁴ Although the Somali courts have long been in disarray, the international community has, in recent years, developed effective methods for training and assisting judges, prosecutors, and defence counsel where domestic infrastructure falls short. An example is the Iraqi High Tribunal (IHT), which tried the leaders of the Baath party for war crimes and crimes against humanity following decades of authoritarian rule and sectarian strife.⁷⁵ But the IHT required international experts to assist the judges, prosecutors, and defence team prior to and throughout the trial. Similarly, an Extraterritorial Somali court would require a great deal of international participation, including having international judges serve alongside Somali judges, and translators to enable the international judges to understand the trial participants.

The second problem concerns the application of Somali law. The Lockerbie Tribunal had the advantage of drawing upon the established law and jurisprudence of Scotland. In contrast, the status of Somali Law and Penal Code is best characterised as in flux. Somalia's legal system is widely considered to have 'no national system' and to be 'a mixture of English common law, Italian law, Islamic sharia, and Somali customary law'.⁷⁶ Although Somalia has signed the UN Law of the Sea Convention (UNCLOS), it has not implemented its piracy provisions in domestic law.⁷⁷ Rather than attempting to apply Somali national law, a better approach would be to apply the customary international law on piracy, the UNCLOS, and the SUA Convention.

A third problem involves courthouse security. The proposed ICTR courthouse has been used to detain and try those accused of war crimes and crimes against humanity during the 1994 genocide in Rwanda. The ICTR facility includes courtrooms, offices, meeting space, jail space, along with the technological requirements for high profile international criminal trials.⁷⁸ Modifying these facilities for piracy trials would be far easier than the costly Camp Zeist conversion for the Lockerbie trial. But the Rwandan defendants tried in the ICTR are not part of a well-organised, well-financed, deadly criminal group with ties to the al Qaeda terrorist network. Security would have to be increased substantially for pirate trials in light of the dangers posed by the backgrounds of the defendants.

⁷⁰ Adam C Clanton, 'How to Transfer Venue When You Only Have One: The Problem of High Profile Criminal Jury Trials in American Samoa' (2007) 29 *Hawaii Law Review* 325, 356.

⁷¹ *id.*

⁷² Pitcairn Islands Bill [2002] (Amendment) Order 2002, SI 2002/2638.

⁷³ *id.*

⁷⁴ UNSC 'Report of the Secretary-General on the Modalities for the Establishment of Specialized Somali Anti-piracy Courts' (15 June 2011) UN Doc S/2011/360, Annex III.

⁷⁵ Michael A Newton and Michael P Scharf, *Enemy of the State: The Trial and Execution of Saddam Hussein* (St. Martin's Press 2008) 50–54.

⁷⁶ See 'Somali Penal System' <http://www.mongabay.com/history/somalia/somalia-penal_system.html> accessed 22 March 2017.

⁷⁷ Two autonomous areas within Somalia, Puntland and Somaliland, have implemented anti-piracy laws, but to date the authorities of the Transitional Federal Government of Somalia has refused to adopt legislation on piracy.

⁷⁸ See ICTR Newsletter (February–April 2004) 2, 5, 8, 10 <<http://unictr.unmict.org/sites/unictr.org/files/news/newsletters/April%202004%20ICTR%20Newsletter.pdf>> accessed 22 March 2017.

Fourth, the Lockerbie Model of an extraterritorial court can only be successful if it is properly funded. For Somalia, that would require significant international financial aid. Unlike the United Kingdom in the Lockerbie case, Somalia has virtually no resources to commit to such an initiative. By providing the funding, the international community naturally would have more control over the proceedings, and about a greater influence in determining the structure of the Court. But international funding for such a costly endeavour could divert donor money from the national piracy courts in the area. If there is to be a trade-off between the two, the national piracy courts should be given priority as they are inherently less expensive and more efficient than an internationalised court.

The final, and perhaps most significant, problem is capacity. To date, more than 1,000 piracy cases have been tried in more than 20 countries.⁷⁹ There are estimated to be about 50 main pirate leaders and 300 leaders of 'pirate attached groups'.⁸⁰ Based on the experience of the international tribunals, an extraterritorial piracy court at the ICTR could not prosecute more than a few dozen major cases.

To avoid a backlog of piracy cases a specialised international piracy court could follow the lead of the Statute of the Special Court for Sierra Leone. The SCSL's personal jurisdiction was limited to 'persons most responsible'; the piracy court would have to be similarly focused, dealing exclusively with major financiers and pirate leaders. It should not be seen as a substitute for continuing domestic prosecution of pirate foot soldiers. Pirate kingpins command sophisticated piracy networks that have adopted military structures and operate as cartels with investors, recruiters, paid crews, and ransom negotiators.⁸¹ The international community is slowly coming to recognise that removing pirate foot soldiers from the equation will do little to halt piracy if the financing and organisation of pirate operations remains uninterrupted.⁸² There is an almost limitless supply of young, desperate Somali men (and juveniles) willing to join the pirate networks as long as they have the potential to remain lucrative. The international anti-piracy focus is therefore beginning to shift to the financiers and kingpins.

When this new focus on targeting the pirate leadership begins to bear fruit, there will be serious concern about whether the current approach of domestic prosecutions in the countries in the region will be able to handle such complex cases involving such powerful defendants. It is unlikely that political will for an expensive Lockerbie style court or a full-blown international tribunal at the ICTR to prosecute hundreds or thousands of pirate foot soldiers as the Lang report envisions will be found. However, the international community may be more supportive of establishing an internationalised piracy tribunal if the defendants are in the highest echelons of command who are most responsible for the current scourge of piracy off the coast of Somalia. When that day arrives, PILPG and other similar organisations ought to use their extensive expertise to help establish the novel international institution, train its judges, and equip its prosecutors with vital research.

V. Conclusion

This article has told the story of how an NGO, the Public International Law and Policy Group, assembled expertise, built up a database of cutting edge research, and began to influence the international response to combatting the scourge of Somali piracy. PILPG is renowned for its work assisting war crimes trials. There were some who initially viewed PILPG's HLPWG as interlopers into their area of expertise and scholarship. However, it emerged that there were many similarities between war crimes and piracy prosecutions. In addition, PILPG's blueprint for providing research and consulting services to governments and courts worked as well in the area of piracy as war crimes. Further, the PILPG effort was marked by inclusiveness, with the Working Group expanding its membership as PILPG became ever more familiar with the established experts in the field. In the end, PILPG's piracy project made a significant impact and will have an enduring legacy. This impact and legacy shows how law- and policy-makers in the piracy field can look to history and then creatively apply public international law to present-day situations. In so doing, PILPG's High Level Piracy Working Group analysed the current manifestation of an old crime, and its output will almost certainly be useful for comparable situations when they arise in the future.

⁷⁹ Loide AN Lungameni, 'Counter-Piracy Programme' (2011) 6 UNODC Brochure, 2 <http://www.unodc.org/documents/Piracy/UNODC_Brochure_Issue_6_WV.pdf> accessed 22 March 2017.

⁸⁰ UNSC 'Letter Dated 24 January 2011 from the Secretary-General to the President of the Security Council' (25 January 2011) UN Doc S/2011/30, 35.

⁸¹ Mark Kirk, *Ending Somali Piracy Against American and Allied Shipping* (DIANE Publishing 2011).

⁸² Joshua Tallis, 'Is Somali Piracy Back?' (*Center for International Maritime Security*, 14 March 2017) <<http://cimsec.org/somali-piracy-back/31411>> accessed 24 March 2017.

Acknowledgements

As a final stage in its work, the High Level Working Group discussed in this article decided to publish its analysis, findings, and recommendations to a wider audience. It did so in the form of a book authored by some of its members, which focuses on the legal issues related to modern piracy prosecutions. See Michael P Scharf, Michael A Newton and Milena Sterio (eds), *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes* (CUP 2015). Parts of this article draw on that book.

Competing Interests

The authors serve as Managing Director (Michael Scharf) and Counsel (Mistale Taylor) respectively at the Public International Law & Policy Group.

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