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Looking for a Jurisdiction for Somali Pirates

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The reluctance to punish

On 27 April 2010 the United Nations Security Council adopted the last of a rather long series of Resolutions devoted to dealing with a problem that international relations theory did not expect to reappear in the twenty-first century: the resurgence of piracy in the Gulf of Aden. While previous Resolutions urged states to act effectively against piracy, this new one is devoted to addressing a more specific issue that has also faced unprepared good-willing states and their navies: what do to with the pirates once they are arrested? The Security Council is well aware that many suspected pirates have been arrested by various national navies and then released without facing any trial. How is it possible? For how long will it last? And, more importantly, what can be done about it?

Whoever has a smattering of international law is perfectly aware that the law of piracy at sea already provides willing states with a fully equipped toolkit.[1] The age in which states exercised their rivalry by using privateers against the vessels of competing powers has long gone. For several decades, if not centuries, the act of piracy at sea has returned to being just a private crime. It can therefore be expected that each state able to arrest a suspected pirate would place him on trial.[2] The law against piracy at sea developed in a very linear way, giving states the opportunity to exercise universal jurisdiction upon individuals suspected of being 'Blackbeard's colleagues' and unanimously considered *hostes humani generis* (enemies of humankind).

However, the crime of piracy has been sleeping for so long that also the procedures to punish it have become rusty. Most of the piracy at sea experienced before the resurgence in the Gulf of Aden was, and still is, localised. In Asia and West Africa, pirates exercise vicious robberies that are much less disturbing for world politics. The pirates in the Gulf of Aden have dramatically changed this perspective: harboured in a failed state that is not able to control its coasts and patrol its territorial waters, Somali pirates have become much more audacious. They have managed to hijack some of the world's largest ships, kidnap crews and secure millions of American dollars in ransom, most of which is used to finance further criminal activities. And, last but not least, for several months if not years, if eventually caught red-handed by one of the several navies that are now patrolling the Gulf, rather than facing a trial and long years in prison, the hostages have been gently escorted offshore by their capturers.

It is true that the rate of bloody crime has been contained and that the number of hostages that have been killed is so far very small, but it is also true that one of the most important maritime routes of the world is no longer safe. Ship-owners are increasingly asking governments to take firm action. Insurance companies are being forced to update their premiums and deal with specialised firms able to carry out negotiations with the pirates that have taken possession of the ships.

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The data collected by the International Maritime Bureau (IMB)—a non-governmental organisation funded by ship-owners—show that the risk of being attacked by a skiff waving the Jolly Roger is much greater, in fact almost double, than the probability of incurring any other kind of maritime accident. The statistics speak for themselves: actual or attempted attacks have been 239 in 2006, 263 in 2007, 293 in 2008 and 406 in 2009.[3] Moreover, it is estimated that about half of the actual attacks are not reported because of the burden and slowness connected to successive investigations.[4]

Navies of Western states have been the protagonists of several fast-track arrest-and-release episodes. The reason why suspected pirates have been released is that a very old crime in a new age has found states and the other damaged players unprepared. Western states are, in fact, those that have the maritime forces to patrol the Gulf of Aden and have the greatest interest in returning to safe commercial navigation. But Western states also have to satisfy sophisticated systems of legal guarantees, a demanding public opinion and a large number of attentive human rights organisations. It is certainly not easy for them to deal satisfactorily with suspects arrested in the middle of the sea. In some cases they have preferred to wash their hands of the matter and return the pirates to the coast.

Tough clashes and gentle arrests in the high sea

Other navies have been less gentle than this. Although many of the high seas confrontations with suspected pirate vessels are likely to be unreported, two episodes involving the Indian and the Russian navies, respectively, are instructive. The first involved the Indian navy approaching a suspected vessel in November 2008 which was later discovered to be a Thai fishing trawler seized by pirates. The navy ship *Tabar* returned fire, sinking the trawler and killing the suspected pirates as well as the fifteen kidnapped fishermen who were on board.

The second episode occurred on 6 May 2010, when Russian forces were engaged in a military operation aimed at freeing the oil tanker *Moscow University*. The eleven kidnappers were fired upon by the Russians, which provoked the killing of one of them and the release of the tanker. The military head of the operation concluded that there were no trial opportunities in Russia and the ten surviving pirates were 'released' 300 miles off the coast without water, food and any navigation device. According to the declarations of a Russian high-ranking defence ministry official, the pirates did not have any possibility of safely reaching the coast. The end of this episode is, however, disputed: some journalists suggested that the official version could be an attempt to hide the killing of all of the pirates during the rescue operation. It is difficult to know what actually happened; nevertheless, it is a serious violation of human rights to use excessive force to free a hijacked ship and, above all, to leave pirates in the high sea to their own fortune.

Should the behaviour of the Russian navy be considered the implementation of a new anti-piracy doctrine? In fact, some months before, Russian President Medvedev declared, half in jest, that since norms on what to do with captured pirates are still unclear, it would be better returning to our forefathers' methods, which presumably includes hanging them from their vessels' masts. There is no official register for these 'quick and dirty' encounters of military ships with suspected pirates in high sea since nobody cares to report them. But it is quite clear that each navy can act using its own discretion.

Western navies are much gentler with pirates—so gentle in fact that often they

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have escorted suspected pirates to shore. For example, the NATO Operation Ocean Shield does not have any common legal framework to arrest pirates, or any mechanism to transfer them to a third party for trial. If a NATO vessel seizes suspect pirates, the question regards only the national state of the seizing warship.

Yet it is self-evident that powerful states cannot send their expensive maritime forces to patrol the Gulf of Aden in order to restore safe sea routes and, when they eventually manage to capture suspected pirates, just release them. If navies will limit themselves to having a preventive role, and not also a repressive role, they will have a never ending job. Navies certainly have had a tremendous impact in terms of increasing security in the Gulf. This security has to deal with two opposing trends: on the one hand, there is the increasing number of pirates and the improved quality of their equipment as a consequence of the ransoms paid; on the other hand, there is the greater deterrence exercised by navies and by new onboard forms of protection, which make it more difficult to seize a ship.

Attempted attacks have in fact almost doubled, while the successful ones have not. It can be argued, as expected, that the number of pirates has increased as a consequence of the ransoms paid, but to seize a ship has become more difficult. On the basis of the IMB's statistics, in 2008 successful attacks have been 38 per cent of the attempted ones, while in 2009 the percentage has decreased to 22 per cent. During the first months of 2010, the total number of attacks seemed to be decreasing for the first time, while there was a shift of the areas of massive attacks southward from the Gulf of Aden to the Indian Ocean.[5]

The number of pirates directly involved with piracy at sea is limited and most estimates converge in thinking they are in the range of 1,000–2,000.[6] If this is the actual number, the arrest, trial and detention of suspected pirates can make some difference. It is therefore logical that the 'international community'—this baroque name that designates the common interest of a large number of governments and of the multinational business sector—has been busy trying to find solutions.

A forgotten legal framework and a new global context

Is there any middle ground between the indiscriminate killing of suspected pirates and their gentle escort to the coast? What are the legal instruments that states can use? Both the 1958 Geneva Convention on the Law of the Sea and the 1982 United Nations Convention on the Law of the Sea (hereinafter UNCLOS) authorise states to try suspected pirates. Moreover, the norms on universal jurisdiction have become part of international customary law, allowing states that did not ratified these Conventions to prosecute pirates, collecting even the gratitude of the international community. Therefore, any state has an uncontroversial power to seize any ship suspected of being used by pirates, arrest its crew and bring them to its territory for trial in its courts. The 1988 Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (hereinafter the SUA Convention) goes even further since member states have a precise duty to adopt all the national laws necessary to assure the prosecution of any act of violence in the high sea.[7] Without the need to evoke the controversial notion of universal jurisdiction, the SUA Convention asks states to prosecute or extradite the suspects, either because the ship has its nationality (flag state), the crime has occurred in its territorial waters (territorial state), or because the suspects are its citizens (state of active nationality). The SUA Convention makes it clear that

whenever there is a pirate, there must be at least one competent national court to try him—at least as far as states party to the Convention are concerned.[8]

In the case of Somalia, the UN Security Council has further broadened the powers of the states patrolling the area, removing the limit of territorial waters for the hot pursuit of suspected pirate vessels. With Resolutions 1816 and 1851, the Security Council has allowed states even to enter into Somali territory, although subject to the additional consent of the Transitional Federal Government. By all means, it seems that life should have become more difficult for pirates and easier for those willing to prosecute them. So far, however, navies have seldom decided to exercise such powers. There has been a surprising reluctance of Western powers to use legal methods to judge pirates. Costs, an unclear code of conduct, onerous guarantees imposed by human rights and refugees law or a simple lack of interest have all contributed for several years to leaving the crime without punishment. There are, however, a few exceptions that are more revealing than the norm.

States have been willing to use a muscular approach when their own nationals are victims of hijacking. Typical cases include the seizure of French yacht *Le Ponant* and of the American cargo ship *Maersk Alabama*: in both cases, the respective national navies arrested the pirates and put them into the hands of their national courts. From the juridical viewpoint, they have been following the criteria of the flag state and, more importantly, passive nationality jurisdiction. Perhaps more relevant has been the political viewpoint: France and the United States have been able to please their public opinion by showing that the national government was able to protect its citizens abroad. In both cases, presidents Nicholas Sarkozy and Barack Obama have personally greeted the kidnapped citizens when they arrived home.

Yet the arrest, transfer and prospective prosecution of these pirates are just part of the story. When the kidnapped crews are not clearly associated with the nationality of a powerful Western state, there is no eager agent that makes a serious attempt to capture them and release the hostages through force. And so for several years ships have continued to be hijacked, crews to be kidnapped, ransoms to be paid and captured pirates to be released. Only a few apprehended Somali pirates are suffering the consequences of their actions. The wind is changing, however, and some states have become eager to use their courts. Significant examples include the following:

In April 2010, American prosecutors charged eleven alleged pirates that, probably by mistake, made a ridiculous attempt to hijack two warships of the United States Navy. In May 2010, a Yemeni tribunal sentenced to death six pirates that killed two people during the seizure of an oil tanker, condemning six others to ten years' imprisonment. In June 2010, a Dutch Court condemned five pirates who hijacked a Dutch vessel to five years' imprisonment.

Why have so few pirates been at the bar, and most of those who have only in very recent months? Although the reasons are more political than legal, the available legal framework is also somehow unsatisfactory. First of all, many countries still lack an internal set of rules for prosecuting individuals suspected of piracy; even if international norms are quite clear, the lack of appropriate internal laws is a hampering factor. Second, there are legal and logistical difficulties in transporting defendants, evidence and witnesses to courts that are often thousands of miles away: the costs associated with a fair trial are too onerous. Third, while the advantage of seizing and trying a group of pirates will be collective, the economic costs and the political risks would be paid for by the capturing nation only.

It would be certainly cheaper to try the suspected pirates in the region, but here Western states have to struggle against their own norms and policies protecting human rights: suspects cannot be transferred to countries that practice torture and where fair trials are not guaranteed. More generally, the *non-refoulement* principle forbids returning an individual to a territory where there is the risk of being persecuted or abused.[9] In other words, Western states are able to seize the pirates because they have efficient military capacity and political muscle to get them, but they are also more reluctant to bring the suspects home to trial because they have to face more disadvantages than advantages.

Searching new judicial instruments

This has led to search for other, cheaper and more effective solutions. Many states have found it convenient to sign bilateral agreements with states in the region to assure all the procedural needs of the trial. The United Kingdom, the United States, the European Union and Denmark have all signed Memoranda of Understanding with Kenya for the transfer of captured pirates to its jails for being tried in front of African judges. In November 2009, 111 pirates were waiting for trial after having been handed over to Kenya, 74 of which on the basis of the provisions of the Memorandum of Understanding (MOU) with the EU. The willingness of states in the region to try and jail suspected pirates is also related to negotiations. For example, the Kenyan government announced in April 2010 its intention to no longer accept pirates for trial because of its overburdened judicial system. However, the resources made available by the international community increased and two months later a new high-security courtroom in Mombasa was opened for piracy as well as for other crimes.

More recently, a similar agreement has been signed with the Republic of the Seychelles. The Seychelles was quick to change its criminal code to allow jurisdiction over piracy, and the first trial was concluded on 26 July 2010, in which eleven pirates were sentenced to ten years in prison. Under this premise, it is not surprising that Mauritius and Tanzania also have announced their willingness to prosecute pirates.

The fact that a Western ship arrests the pirates and that they are then transferred to countries in the region may create some procedural problems with the regional country's internal legislation. To prevent this, the Security Council has invited patrolling states to make use of the practice of ship-riders agreements—a very common and fruitful practice in the fight against drug trafficking, which entitles a law enforcement officer to make an arrest under the laws of his or her state when the officer is on a foreign vessel, avoiding criminals being allowed to take advantage of shared waters for illegal activities. Ship-riders possess the authority to assess piracy incidents, decide the best way to proceed with the capture, and secure the evidence needed by the courts of their state.

Still, Western states should continue to be worried about the fortune of the suspects they deliver since the prisoners' human rights can be violated. The Kenyan judicial system and its prisons are far from being best practice examples. Even if the treaties signed by Western states and the Resolutions of the Security Council put a great emphasis on fair trial and the protection of human rights, there is more than one reason to doubt that these targets will be achieved. There is the risk that the transfer of prisoners may replicate the notorious 'extraordinary renditions' not just for suspected terrorists, but also for suspected pirates.

Achieved results and possible actions

After more than three years of multinational naval operations, the more interesting achievements of the international community in the realm of a fair system of pirate prosecution came from the Contact Group on Piracy off the Coast of Somalia (CGPCS) and the United Nations Office on Drugs and Crime (UNODC). CGPCS is an informal group initiated by the United States in January 2009, endorsed by UN Security Council Resolution 1851 and currently composed of 45 countries and seven international organisations. It was principally conceived to coordinate political, legal and military efforts against piracy and to ensure that pirates are brought to justice. It manages a trust fund mainly aimed toward enhancing the prosecution capacities of states in the region, but also toward promoting the diffusion of anti-piracy messages in the Somali local media.

UNODC aims to coordinate international efforts against organised crime, and has implemented a large programme for judicial capacity building in Eastern Africa States. In particular, it focuses its attention on: the review of remand cases that has led to a reduction in the number of prisoners; the training of prosecutors and police forces; the provision of defence lawyers; mechanisms for the availability of evidence; and, above all, the improvement of conditions in prisons. A major concern is that prisons satisfy the basic necessities of inmates, including water, medical care, limited overcrowding, sewerage capacity, and blankets and mattresses. The commitments of UNODC are directed not only towards Kenya and the Seychelles, but also towards the pirates' territorial state; the organisation is also sponsoring the construction of two new prisons in Puntland and Somaliland, which should meet international standards. Hopefully, not just pirates but all prisoners will be able to benefit from the renewing of penitentiary institutes.

The simple presence of the UNODC international staff at local jails represents a strong deterrent against possible abuses against prisoners. But will this concern and supervision be sustainable in the long run, when the attention of the international community will be lower? To use tribunals and prisons of states in the region is not necessarily sustainable in the long term: the judicial and detention facilities cannot stand the pressure of sustaining all the trials, and the governments have already said that prisoners will be accepted on a case-by-case basis.

What else can be done? A wealth of proposals have been made,[10] and perhaps this is the most clear expression that the international community does not yet have a clear idea of how and where to act. The most comprehensive and authoritative stance has come from the Secretary-General who, at the request of the Security Council, has released a specific report.[11]

Seven different options are offered in the Secretary-General's report for prosecuting and imprisoning pirates. First of all, it is significant to look at what the report *does not* include. While academics discussed the possibility of resorting to the International Criminal Court, [12] the Secretary-General's report does not endorse this proposal. This seems reasonable since in a short period it may generate a high number of trials associated with piracy, thereby risking a serious blockage in ICC activities. Nor it would be dignified assigning competences over piracy—an international crime, but still a form of robbery at sea—to an institution created to judge the most heinous crimes of our age. Beyond the obvious consequence of trivialising a tribunal aimed to judge 'the most serious crimes of international concern', the deterrence factor may be weak and transferring prisoners to other courts will not contribute to

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improving local capacity building in legal proceedings.

The Secretary-General's report proposes the return to international tribunals, which could either follow the model of the ad-hoc tribunals instituted by the Security Council more than fifteen years ago for ex-Yugoslavia and Rwanda, or the mixed tribunals adopted for Sierra Leone, Cambodia and Timor East. These options would reduce drastically any perplexity about the fairness of prisoner treatment during and after the trial. After all, there has been a proliferation of international and hybrid criminal courts.[13] Nevertheless, as pointed out by both the Council of Europe's and the Secretary-General's reports, such an alternative obviously implies costs that states are not necessarily willing to bear and it may take too long to be instituted to represent an effective deterrence. Moreover, there is the danger that an international tribunal will divert resources from official development aid and will not contribute to improving the judicial apparatus of the states in the region.

Alternatively, the Secretary-General's report explores the possibility of making a greater use of local and regional facilities, either by creating a regional tribunal or by enhancing the judicial capabilities of the states in the region. All these options could imply the more or less intense participation of the United Nations and of other states.

Others have suggested the institution of an 'exclusion zone'—a sea area where vessels equipped with particular items like ladders, grappling hooks, weapons or even a manifestly insufficient store of food and water are presumed to be piratical vessels, inverting the burden of the proof.[14] These instruments (known also as 'equipment articles') have been repeatedly used in the struggle against slave trade in past centuries and against drug smuggling in recent times. Such a proposal will have the advantage of making it easier to collect the evidence needed in courts and will not require long forensic examination of the assaulted merchant ships. In fact, one of the reasons why ship-owners are often reluctant to report successful, and even more unsuccessful, assaults is to avoid delays associated with the collection of legal evidence. The institution of an exclusion zone will make life more difficult for suspected criminals and easier for merchant ships. Nevertheless, evidence-collecting remains a difficult task in a field where the tools for crime are easily hidden in the abyss by merely throwing it overboard.

Prospects

After some years of uncertainty, the international community now has a full menu for choice since, at the request of the 1918 Resolution of the Security Council, the Secretary-General has delivered a report with various options for prosecuting and imprisoning suspected pirates in the Gulf of Aden. Already the fact that the Security Council leaves open so many options shows that there is not yet a clear strategy on the methods that should be used to repress piracy in the region. There should be more options than either releasing the suspects or sinking their ships, and the Secretary-General provides states with the opportunity to choose how to act.

The economic interests associated with navigation in the area, the periodic complaints of the business community and the high costs involved in maintaining a fleet of military ships in the Gulf are all factors that should induce governments to pick at least some of the options suggested by the Secretary-General. Nevertheless, the proper way to sort the problem once and forever, of course, would not be to repress crime in high sea, but to recreate a Somali state able to control its coasts, preventing expeditions to hijack ships. Since it is more than twenty years since the Somali question was listed on the agenda of global governance, there is little hope that it can be

fixed with the resources and the political willingness that the international community has so far been willing to use.

In addition, the second-best solution—namely the integration of prevention with repressive measures—has been incredibly slow. In particular, there has been widespread reluctance to develop legal methods in spite of a well developed international law framework that will allow for it. It is difficult to explain this since Somali pirates have neither political protection nor serve the vested interests of any power. Perhaps the reluctance which for so many months has left captured pirates either shot dead or free is due to the unwillingness to introduce extraterritorial courts that can deal with the crimes recognised by international law.

Crimes committed by Somali pirates are much less vicious than the war crimes and crimes against humanity committed in Africa and elsewhere. Governments sponsoring ad hoc courts will have increasing difficulty in explaining why they devote so much attention to trying pirates and so little to repressing war criminals. Governments may be accused of using the sword of law to strike the petty rather than the egregious criminal. If this is the case, it is likely that none of the Secretary-General's options will be implemented.

Even if the landscape is changing and there is an increase in the willingness to exert justice, we can be sure that the men at the bar are not yet the 'big fishes' among Somali pirates. Piracy in the Gulf of Aden started as an individual act of desperation, but it is transforming fast into organised crime. The lords of piracy remain peacefully at home and can count on an almost ten million population basin of manpower, impatient to find a way to escape from the most anguished poverty. Under these premises, even if the judicial repression mechanisms worked properly and quickly, the plague of piracy would hardly disappear from the seas and oceans surrounding Somalia. Piracy remains a problem that can be actually solved only onshore, rebuilding the institutions able to administer justice and social policies in the Somali territory. The second best solution of jailing pirates may be just a short-term palliative.

Notes

1 For an historical and legal overview on the law of piracy, see M. Bahar, 'Attaining optimal deterrence at sea: a legal and strategic theory for naval anti-piracy operations', *Vanderbilt Journal of Transnational Law*, vol. 1, 2007, pp. 32–121; D. Guyldfoyle, 'Counter-piracy law enforcement and human rights', *International and Comparative Law Quarterly*, vol. 19, 2010, pp. 142–63; M. Halberstam, 'Terrorism on the high seas: the Achille Lauro piracy and the IMO Convention on Maritime Safety', *America Journal of International Law*, vol. 82, no. 2, 1988, pp. 272–311; E. Kontorovich, 'A Guantanamo on the sea: the difficulties of prosecuting pirates and terrorists', *California Law Review*, vol. 98, 2010, pp. 243–61; A. J. Roach, 'Agora: piracy prosecutions', *America Journal of International Law*, vol. 104, 2010, pp. 243–61; J. E. Thompson, *Mercenaries, Pirates and Sovereigns*, Princeton, NJ, Princeton University Press, 1994.

2 No need to use gender neutral language in this case since all Somali pirates apprehended so far are men. The few exceptions to the rule are to be found either in the legendary Anne Bonny and Mary Read or in the few reported women pirates of our age active in the Chinese and Nigerian seas.

3 See the annual reports of the International Maritime Bureau (IMB) of the International Chamber of Commerce: *Piracy and Armed Robbery Against Ships, January–December 2008*, London, International Chamber of Commerce, January 2009; *Piracy and Armed Robbery Against Ships, January–December 2009*, London, International Chamber of Commerce, January 2010. All can be requested on the IMB Piracy Reporting Centre website: http://www.icc.ccs.org

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4 See the report of the Political Affairs Committee of the Parliamentary Assembly of the Council of Europe to Resolution 1722: B. Keles, *Piracy: A Crime and a Challenge for Democracies*, doc. 12193, 1 April 2010, available on the Assembly website: http://www.assembly.coe.int

5 See International Maritime Bureau (IMB) of the International Chamber of Commerce, *Piracy and Armed Robbery Against Ships, 1 January–30 June 2010*, London, International Chamber of Commerce, July 2010, available at: http://www.icc.ccs.org

6 See, among others, R. Middleton, *Piracy in Somalia: Threatening Global Trade, Feeding Local Wars*, Chatham House Briefing Paper, October 2008, available at: http://www.chatamhouse.org.uk

7 SUA Convention, Article 6, available on the website of the International Maritime Organization: http://www.imo.org

8 While Somalia did not ratify the Convention, all other states in the region are bound to its provisions.

9 Under international law, *non-refoulement* precludes states from returning a person to a territory where his life or freedom would be threatened or where he might be tortured or face persecution (see Article 33, 1951 Refugee Convention). The principle is, however, subject to various exceptions and, while it is commonly considered a customary principle, its nature of peremptory norm is not universally accepted. On its relationships with piracy, see D. Guilfoyle, 'Counter piracy law enforcement and human rights', *International and Comparative Law Quarterly*, vol. 59, 2010, p. 152.

10 See the report of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe to Recommendation 1913: S. Holovaty, *The Necessity to Take Additional International Legal Steps to Deal with Sea Piracy*, doc. 12194, 6 April 2010, available on the Assembly website: http://www.assembly.coe.int

11 United Nations Secretary-General, *Report of the Secretary-General on Possible Options to Further the Aim of Prosecuting (. . .)*, doc. n. S/2010/394, New York, United Nations, 26 July 2010.

12 See E. Andersen, B. Brookman-Hawe and P. Goff, *Suppressing Maritime Piracy: Exploring the Options in International Law*, Workshop Report, October 2009, p. 4 and ff., available at the American Society of International Law website: http://www.asil.org

13 See the census of the Project on International Courts and Tribunals of the New York University at: http://www.pict-pcti.org/index.html

14 See E. Kontorovich, *Equipment Articles for the Prosecution of Maritime Piracy*, Discussion Paper prepared for One Earth Future Foundation, available on the website of the Foundation: http://www.oneearthfuture.org

