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## Essay

### Rethinking Contemporary Counter-Piracy Policy

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#### INTRODUCTION

Traditional piracy often evokes the image of swashbuckling sailors, independent from the rest of society and roaming the seas to seek their fortune. The image has been heavily romanticized by Hollywood and other sources of popular folklore, much like the cowboys in the western United States.<sup>1</sup> In reality, modern piracy presents a significant threat to the international community, by endangering innocent lives, interfering with important shipping routes, and imposing significant costs through enforcement efforts and ransoms paid to pirates. Yet piracy has proven exceedingly difficult to combat for a variety of reasons.

While developments in international law have improved regulation efforts of many other areas of maritime policy, piracy still occurs offshore of many destitute states, exploiting the inherent jurisdictional difficulties of policing the high seas and sovereign waters of disadvantaged coastal states who are unable to provide adequate enforcement resources themselves.

This Essay argues that present approaches to combatting the pestilence of piracy overlook a foundational detail in making critical assumptions to design anti-piracy policies. Part I discusses basic background provisions of the United Nations Convention on the Law of the Sea (UNCLOS) which relate to international piracy. Part II recognizes important limitations of relevant UNCLOS provisions, which, among other factors have allowed piracy to gain a foothold in certain regions. Part III compares the shortcomings of UNCLOS to the practical

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1. See, e.g., *PIRATES OF THE CARIBBEAN: THE CURSE OF THE BLACK PEARL* (Walt Disney Pictures 2003) (portraying an eccentric pirate's adventures as entertaining and often comedic despite his identity as an outlaw).

realities of the regions plagued with piracy, ultimately arguing that policy decisions must recognize the fact that piracy is a business, and the decision of putative pirates to commit the crime of piracy is largely a rational economic decision, based on an evaluation of benefits and costs of committing the crime. The Essay concludes that expanded efforts at criminal deterrence will not be effective at preventing the crime of piracy, absent any alternatives to crime facing putative pirates.

### I. UNCLOS PROVISIONS ADDRESSING PIRACY

Piracy appears in only a handful of provisions within Part VII of UNCLOS.<sup>2</sup> This is likely due to the lack of practical problems in piracy at the time of drafting.<sup>3</sup> However, the sections which do address piracy serve several important purposes, namely defining the crime of piracy and establishing a system of universal jurisdiction.<sup>4</sup>

#### A. CRIMES AGAINST MANKIND

The crime of piracy is considered in the same class of crimes as others such as slavery and genocide—crimes against mankind.<sup>5</sup> This understanding of the nature of the criminal act not only informs the UNCLOS provisions addressing the issue of piracy on the high seas,<sup>6</sup> but also creates difficult limits of international power to fight this heinous crime against the well-being of mankind.<sup>7</sup>

One of the important ways UNCLOS affects anti-piracy policy is through its definition of piracy as a criminal act. Like any other crime, piracy is defined in a way which establishes the relevant “elements” of the offense, distinguishing it from a number of other deplorable acts on the high seas.<sup>8</sup> These elements are:

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2. United Nations Convention on the Law of the Sea pt. VII, Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

3. Robin Churchill, *The Piracy Provisions of the UN Convention on the Law of the Sea—Fit for Purpose?*, in *THE LAW AND PRACTICE OF PIRACY AT SEA: EUROPEAN AND INTERNATIONAL PERSPECTIVES* 9, 10 (Panos Koutrakos & Achilles Skordas eds., 2014).

4. UNCLOS, *supra* note 2, at arts. 100–08.

5. Yvonne M. Dutton, *Bringing Pirates to Justice: A Case for Including Piracy within the Jurisdiction of the International Criminal Court*, 11 *CHI. J. INT’L L.* 197, 203 (2010).

6. See UNCLOS, *supra* note 2, at art. 100 (recognizing the duty of all nations to cooperate in combatting piracy on the high seas).

7. See Dutton, *supra* note 5, at 206–08 (describing inherent difficulties of combatting piracy under the UNCLOS framework).

8. See UNCLOS, *supra* note 2, at arts. 100–08.

[A]ny illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or passengers of a private ship or a private aircraft, and directed: . . . on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; . . . against a ship, aircraft, persons, or property in a place outside the jurisdiction of any State . . .<sup>9</sup>

This definition of the crime is similar to definitions used by other states to define the crime of piracy within their sovereign waters.<sup>10</sup> Finally, another important part of the UNCLOS definition of piracy is the statement of jurisdiction: in order to fall under the UNCLOS definition of piracy, the act must occur outside of any state's sovereignty, in the waters which in other contexts are managed for the "common heritage of mankind."<sup>11</sup>

In addition to defining the crime of piracy, UNCLOS also establishes what has become known as "universal jurisdiction" for the purposes of combatting piracy, a distinctive feature not found in other provisions of the agreement addressing different topics.<sup>12</sup> The creation of universal enforcement jurisdiction reflects the nature of piracy as a "crime against mankind."<sup>13</sup> By definition, piracy under UNCLOS occurs in any area outside of any state's sovereign waters.<sup>14</sup> States have the authority to develop their own policy within their sovereign waters,<sup>15</sup> however, these regulatory schemes are not regulated under

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9. *Id.* at art. 101 (numbering omitted); *see also* Churchill, *supra* note 3. UNCLOS also addresses piracy in the context of aircrafts, however, this Essay focuses on the regulation of ships under various UNCLOS provisions.

10. *See, e.g.*, Ricardo Gosalbo-Bono & Sonja Boelaert, *The European Union's Comprehensive Approach to Combatting Piracy at Sea: Legal Aspects*, in *THE LAW AND PRACTICE OF PIRACY AT SEA*, *supra* note 3, at 95–104.

11. *Cf.* UNCLOS, *supra* note 2, at art. 136.

12. *See id.* at art. 105.

13. Dutton, *supra* note 5, at 203. Universal jurisdiction is provided to nations as a method of furthering international efforts to stop crimes against humanity by allowing any nation to prosecute criminal acts even when they did not occur within that nation's ordinary jurisdictional boundaries. *See Universal Jurisdiction*, INT'L JUST. RES. CTR., <https://ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/#:~:text=The%20term%20%E2%80%9Cuniversal%20jurisdiction%E2%80%9D%20refers,community%20or%20international%20order%20itself%2C> [https://perma.cc/UL72-RZNM] (last visited Nov. 27, 2020). Other commonly recognized crimes against humanity include acts such as war crimes, genocide, and torture, which are viewed as harming the international community merely by their occurrence. *Id.*

14. UNCLOS, *supra* note 2, at art. 101(a).

15. *See id.* at arts. 2, 25(1) (explaining coastal state's sovereignty over territorial sea).

UNCLOS and create further challenges in the pursuit of a cooperative effort to combat piracy.<sup>16</sup>

B. MULTINATIONAL AGREEMENTS AND OTHER MEASURES TO SUPPLEMENT UNCLOS' REGULATION OF PIRACY

In addition to UNCLOS's limited provisions addressing piracy, nations have entered into outside agreements with each other to combat the regulatory challenge created by piracy.<sup>17</sup> These measures generally are authorized by United Nations Security Council Resolutions.<sup>18</sup> Perhaps the two most significant of these agreements are shiprider agreements to supplement the flag state jurisdiction principle under UNCLOS and the supplemental jurisdiction created for combatting the crime of piracy off the coast of Somalia.<sup>19</sup>

Shiprider agreements bestow jurisdiction of a state other than the ship's flagged nationality by allowing for the placement of a foreign law enforcement official on the ship.<sup>20</sup> This practice relies on multinational agreements and was authorized following Security Council Resolution 1851.<sup>21</sup> In effect, this arrangement allows ship owners to end run the severe jurisdictional shortcomings created by UNCLOS's flag state framework, and instead apply the law of the shiprider's home state to the ship.<sup>22</sup>

Notably, Security Council Resolution 1846 allows states to enter Somali waters and use any force necessary to police against the crime of piracy as if it were occurring on the high seas.<sup>23</sup> This measure allows developed nations to substitute their enforcement abilities for the limited maritime enforcement ability of Somalia given the latter's limited financial ability to support a navy or other enforcement entity,

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16. *See infra* Part I.B.

17. *E.g.*, Gosalbo-Bono & Boelaert, *supra* note 10, at 119 (describing arrangements which allow for the transfer of piracy suspects for transportation and prosecution).

18. *Id.* at 109–10 (describing the United Nations Security Council's position that piracy off the coast of Somalia constitutes a "threat to international peace and security in the region" and extending authorization to combat piracy beyond merely the "high seas.") (citation omitted).

19. *Id.* at 95.

20. *See id.* at 9, 118.

21. S.C. Res. 1851 (Dec. 16, 2008).

22. *See* Gosalbo-Bono & Boelaert, *supra* note 10.

23. S.C. Res. 1846, ¶ 10 (Dec. 2, 2008); *see also* Anna Petrig, *Human Rights in Counter-Piracy Operations: No Legal Vacuum but Legal Uncertainty*, in *PIRACY AT SEA* 31, 33 (Maximo Q Mejia, Jr., Chie Kojima & Mark Sawyer eds., 2013).

effectively extending “universal jurisdiction” for purposes of piracy inside sovereign Somali waters.

Thus, policy tools like shiprider agreements and Security Council Resolution 1846 have allowed cooperating states to build on the basic flag state regime established in UNCLOS for the specific purpose of combatting piracy in high-risk areas.

## II. LIMITATIONS AND SHORTCOMINGS OF UNCLOS PROVISIONS RELATING TO PIRACY

While UNCLOS includes provisions explicitly defining piracy and the related jurisdictional scheme of states to address piracy,<sup>24</sup> the brevity of this section leaves a number of noteworthy gaps in the overall framework. Some of these issues are tied to other portions of UNCLOS and are simply the result of incompatibility between various sections, others are a function of broader international realities. The practical impact of these shortcomings is increased difficulty in the efforts of states to combat piracy.

### A. LIMITATIONS INHERENT IN THE UNCLOS JURISDICTIONAL SCHEME

UNCLOS’ grant of universal jurisdiction applies to the areas outside of existing state jurisdictional areas.<sup>25</sup> While this allows nations the ability to address piracy occurring in the high seas, it does not affect the rights of states to exercise policing authority in the waters of another nation. In a perfect scenario, global nations would work to combat piracy occurring in their territory. However, in practice this is far from the case, as coastal states’ efforts present a highly variable web of regulation.<sup>26</sup>

The unfortunate reality of crimes such as piracy is that given a gap in the global armor against the crime, piracy will fester in states with weaker preventative measures.<sup>27</sup> Piracy thrives in nations with

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24. UNCLOS, *supra* note 2, at arts. 100, 101, 105.

25. *See id.* at art. 101(a).

26. Compare U.N. Secretary-General, *Report of the Secretary-General on the Situation in Somalia*, ¶¶ 16–23, U.N. Doc. S/2009/684 (Jan. 8, 2010) (describing instability in Somalia and ongoing pirate activity off the nation’s coast), with Gosalbo-Bono & Boelaert, *supra* note 10, at 95–104 (providing details of the EU’s policies relating to piracy). *See also* Marelize Schoeman & Benjamin Haeefe, *Piracy and Organised Crime at Sea: Following the Money Trail*, in *PIRACY AT SEA*, *supra* note 23, at 205 (noting the subtle differences in various nations’ definitions of the crime of piracy).

27. *See* Brian Wilson, *The Somali Piracy Challenge: Operational Partnering, the Rule of Law, and Capacity Building*, 9 *LOY. U. CHI. INT’L L. REV.* 45, 52 (2011) (“For nearly twenty years, Somalia has been a failed state, a virtual black hole in the international community, divorced from the world economy, regional and global institutions, and

struggling economies and government structures given the lack of meaningful enforcement efforts.<sup>28</sup> States such as Somalia and Kenya have become contemporary hotbeds for piracy.<sup>29</sup> For states like Somalia, combatting piracy presents a difficult undertaking for numerous reasons, such as the associated costs and a lack of priority by local governments to address the problem.<sup>30</sup>

Efforts to police and prosecute piracy activities can be exorbitantly expensive given the necessary costs of establishing an oceangoing presence as well as the requisite components of the associated judicial system. For underdeveloped nations where piracy has gained a foothold, these costs can be prohibitively expensive.<sup>31</sup> In Somalia, following the civil war and the resulting degradation of society, enterprising criminals looked to the seas recognizing the large value of goods transiting the coastline and the lack of law enforcement in the area.<sup>32</sup> With the lack of a Somali armed force in the waters, these criminals could operate free from government interference.<sup>33</sup>

In underdeveloped and severely economically disadvantaged states like Somalia, the national economy is poor, and the local people suffer from deficient living conditions.<sup>34</sup> Given a choice of allocating extremely limited government funds between the health of the residents and piracy enforcement efforts, it seems understandable these

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the rule of law.” (citation omitted)).

28. Ahmed Khalif Bile, *Warships Alone Will Not Curb Piracy Off the Somali Coast: Lessons from Puntland, State of Somalia*, in PIRACY AT SEA, *supra* note 23, at 157 (noting piracy has become a “new phenomenon” in Somalia since it was practically nonexistent when the government was stable and functioning prior to the fall of the Siyad Barre regime in 1991).

29. *Id.* at 156–68 (showing the heightened level of piracy activity in Somalia since the nation has become increasingly unstable).

30. *Cf.* Charles Marts, *Piracy Ransoms—Conflicting Perspectives*, ONE EARTH FUTURE FOUND. 7 (Aug. 13, 2010), [http://oceansbeyondpiracy.org/sites/default/files/attachments/ransom-charlie\\_marts.pdf](http://oceansbeyondpiracy.org/sites/default/files/attachments/ransom-charlie_marts.pdf) [<https://perma.cc/K5ZG-NLX3>].

31. *E.g.*, Anna Bowden, Kaija Hurlburt, Eamon Aloyo, Charles Marts & Andrew Lee, *The Economic Cost of Maritime Piracy*, ONE EARTH FUTURE FOUND. 19 (Dec. 2010), <http://oceansbeyondpiracy.org/sites/default/files/attachments/The%20Economic%20Cost%20of%20Piracy%20Full%20Report.pdf> [<https://perma.cc/37DH-2822>] (estimating the prosecution costs per pirate at \$52,000 in nations like Kenya and the Seychelles, \$246,000 in European nations, and \$335,733 in North American countries).

32. Bile, *supra* note 28, at 157–58.

33. *Cf. id.* at 158 (noting the Somali Coast Guard was dismantled with the fall of the Siyad Barre government).

34. Dutton, *supra* note 5, at 211 (noting the average income in Somalia for 2008 was \$500).

states would prioritize humanitarian efforts over policing piracy off their coasts.<sup>35</sup>

#### B. FLAGS OF CONVENIENCE

The jurisdictional regime for ships on the high seas created in Article 91 also proves problematic in a number of situations, notably, the system proves deficient in the context of rendering aid to ships subjected to acts of piracy.<sup>36</sup> “Flagging out,” or selective registration of ships creates a perverse incentive structure, with many wealthy ship-owners opting to register and flag vessels in poor or underdeveloped nations due to the favorable tax structure of those nations and resulting cost savings.<sup>37</sup> This practice of registering a ship with a distant nation is commonly referred to as using a “flag of convenience.”<sup>38</sup>

Apart from the immediate issues of overall legitimacy this raises for the system of maritime registration, the widespread use of flags of convenience enables and encourages piracy by providing a source of targets in distant waters—extra vulnerable because they have little or no recourse through their flag state when attacked by pirates. In other words, the now-ubiquitous practice of sailing under flags of convenience further attracts and enables enterprising pirates in countries like Somalia.

UNCLOS Article 94 delineates the duties of a nation to a ship it has granted registration.<sup>39</sup> Among these duties are the duty to exercise their jurisdiction over the ships flying their flag.<sup>40</sup> Inherent in this duty is the responsibility of the flag state for the safety of ships bearing its flag when confronted by a dangerous situation, including a pirate attack.<sup>41</sup> While this may seem a logical expectation for a nation licensing

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35. Cf. Caitlin Stapleton Kaprove, *The Law and Economics of Piracy at Sea*, in *PIRACY AT SEA*, *supra* note 23, at 114 (noting it may be less costly for some states to tolerate infrequent pirate attacks and simply pay the resulting ransom costs).

36. See UNCLOS, *supra* note 2, at arts. 91, 92, 94.

37. Allan Mendelsohn, *Flags of Convenience: Maritime and Aviation*, 79 J AIR L. & COMMERCE 151, 152 (2014) (discussing the financial savings of flagging a ship or aircraft with a port of convenience).

38. *Id.* at 151.

39. UNCLOS, *supra* note 2, at art. 94.

40. *Id.*

41. The flag state’s responsibility for the safety of its flagged ships is broadly described in UNCLOS as follows: “Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, *inter alia*, to: (a) the construction, equipment and seaworthiness of ships; (b) the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments; (c) the use of signals, the maintenance of communications and the prevention of collisions.” *Id.*

a ship to sail under its jurisdiction, in practice the implications of this rule are not as straightforward.

Many of the nations that offer themselves as ports of convenience do so merely as a clerical service to increase revenues.<sup>42</sup> These nations provide shipowners a home port for vessel registration with the benefit of reduced tax and other regulatory costs, but lack the physical assets to provide “full-service” benefits offered by wealthier nations.<sup>43</sup> Wealthy nations have established naval forces, which regularly serve a protective function for ships registered in their country because they can easily coordinate with vessel owners.<sup>44</sup> In contrast, ships sailing under a “flag of convenience” to evade regulatory costs keep owner information anonymous through holding companies and can be much more difficult to coordinate rescue efforts with when faced with a hostage situation occurring in a distant corner of the globe—even leaving owners on their own to negotiate ransoms with pirates in some cases.<sup>45</sup>

In many cases, the actors taking advantage of flags of convenience are often wealthy multinational shipping corporations or affluent individual vessel owners.<sup>46</sup> For the average boatowner, the effort of seeking registration in this manner is not worth the marginal benefits from the port of convenience. But for owners of large vessels engaged in international commerce, the benefits are magnified, making the cost savings much more appealing. Shipping companies that choose to “flag out” their vessels under a flag of convenience gain cost savings associated with lower registration fees, liberal employment laws, and less exacting safety standards.<sup>47</sup> Spread across a fleet of large container ships, savings to a corporate shipping company can be massive, especially considering the fact that vessels registered this way are not required to have ever been physically present in their home port.<sup>48</sup> And even faced with the risks of piracy, wealthy shipowners may find

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42. See Mendelsohn, *supra* note 37, at 152.

43. See *id.*

44. Cf. CAPTAIN PHILLIPS (Columbia Pictures 2013) (depicting a U.S. navy rescue effort of a U.S. flagged cargo ship, *Maersk Alabama*, hijacked by Somali pirates in 2009).

45. See, e.g., Calixto Caniete, *MV Renuar: 133 Days of Fear, Helplessness, and Hopelessness*, in PIRACY AT SEA, *supra* note 23, at 285 (describing the horrific experience of being held hostage on a hijacked Panamanian-flagged cargo ship without any military intervention while pirates attempted to negotiate a ransom with the vessel owner).

46. Mendelsohn, *supra* note 37, at 152.

47. Stewart Sibert, *Thinking Outside of the Icebox: Charting a New Course Through the Northwest Passage*, 36 B.U. INT'L L. J. 341, 370–71 (2018) (citing Mendelsohn, *supra* note 37, at 152).

48. *Id.* at 370.



that the cost of an occasional hijacking still results in a net savings for their bottom line.<sup>49</sup> But these decisions, rooted in cost savings to businesses, are unlikely to account for intangible costs posed by the piracy problem as a whole.

The flag of convenience scenario creates a sizeable opportunity for piracy to thrive on the shortcomings of UNCLOS in establishing a system of flag-state jurisdiction. Large ships, flagged with ports of convenience, and carrying valuable cargo fall victim to pirate attacks, leaving the owners little recourse outside of hostage negotiations with the occupying pirates.<sup>50</sup> In many cases, shipowners' costs pile up as the hostage situation drags on, giving pirates a strong negotiating position to extort sizeable payments.<sup>51</sup> Pirates have learned to exploit this weakness, seeing it as a major economic opportunity as compared to the poor alternatives in the struggling economies of their home countries.<sup>52</sup>

The ultimate jurisdictional problem evident in UNCLOS is the lack of international states' authority to police against crimes of piracy inside sovereign state waters. This inherent flaw in the overall system of combatting a crime against humanity such as piracy undermines the scheme of universal jurisdiction by allowing piracy to thrive in pockets of poor regulation and enforcement.

### III. ADDRESSING THE SCOURGE OF PIRACY

A successful system for combatting piracy in today's world must supplement the limited effectiveness of UNCLOS and account for the practical realities of the areas where piracy thrives. In order to adequately address this problem, policymakers should recognize pirates as rational economic actors and further must reconsider the assumptions they make about punishment theories in designing the criminal justice system combatting piracy.

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49. Cf. Anna Bowden et al., *supra* note 31, at 25–26 (providing extensive data on piracy attacks and costs in 2010).

50. See, e.g., Caniete, *supra* note 45, at 285. Compare *STOLEN SEAS* (Brainstorm Media 2012) (investigating a ship flagged with port of convenience that was unsupported by military forces and whose owners were forced to negotiate and pay ransom), with *CAPTAIN PHILLIPS*, *supra* note 44 (depicting the U.S. Navy responding to a hostage situation on a U.S. flagged cargo ship).

51. Cf. Caniete, *supra* note 45, at 285 (describing the rotting cargo onboard the hostage ship during the tenure of a pirate occupation).

52. See, e.g., George Kiourktsoglou & Alec D. Coutroubis, *Somali Piracy: Understanding the Business Model*, in *PIRACY AT SEA*, *supra* note 23, at 261.

## A. ECONOMIC REALITIES IN PIRACY-RIDDEN AREAS

As noted previously in Part II.A, areas that suffer from high rates of piracy activity are often economically disadvantaged and lack a stable system of government.<sup>53</sup> These factors have several impacts on the regulation of piracy in these regions, shaping the incentive structure of pirates and those considering taking up piracy. Effective anti-piracy policy must recognize these practical realities.

Economies in states such as Somalia are largely dysfunctional and high levels of unemployment abound.<sup>54</sup> This background makes the appeal of criminal enterprises such as piracy much higher. Commentators often liken piracy to other types of organized crime, comparing the structure and execution of these types of crime.<sup>55</sup> In diminished economies, piracy provides a lucrative business, earning an estimated \$238 million in ransom money in 2010.<sup>56</sup> Some commentators have gone so far as describing the business of piracy as reaching an “almost industrial scale.”<sup>57</sup> The presence of such sizeable a source of income in a state suffering from severe economic depression may provide a strong incentive for individuals to participate in illicit acts such as piracy.

Looking to the history of states presently confronted with growing problems of piracy reveals that the climate conducive to piracy is a recent phenomenon rather than a long-standing issue.<sup>58</sup> For example, Somalia endured a violent civil war and the government’s control over the state spiraled out of control in the years that followed.<sup>59</sup> Piracy was not a problem prior to the political unrest in Somalia, but has since gained a foothold in the nation.<sup>60</sup> Indeed, the issue of piracy was not prominent to the signatory nations at the time of UNCLOS’s

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53. *E.g.*, Bile, *supra* note 28, at 157–58 (describing the rise of piracy in Somalia as the government became destabilized and economic prospects dwindled for residents).

54. *Id.* at 171 (noting the level of unemployment in Puntland and Southern and Central Somalia as high as sixty percent) (citation omitted); *see also* Kiourktsoglou & Coutroubis, *supra* note 52, at 261 (noting the average gross national income per capita in Somalia is \$287) (citation omitted).

55. Schoeman & Haeefe, *supra* note 26, at 203.

56. *The Economic Cost of Piracy*, OCEANS BEYOND PIRACY, <https://www.ics-shipping.org/docs/default-source/Piracy-Docs/the-economic-cost-of-piracy.pdf> [<https://perma.cc/L437-ZEC4>].

57. *See* Marts, *supra* note 30, at 20–21 (citation omitted).

58. *Cf.* Schoeman & Haeefe, *supra* note 26, at 207 (noting relevant societal factors in Somalia which have allowed piracy to thrive).

59. *See* Bile, *supra* note 28, at 157 (“Piracy can be considered a new phenomenon in Somalia since it was virtually non-existent when there was a stable and functioning government.”).

60. *Id.*

drafting.<sup>61</sup> Yet even if the drafters were aware of this issue, it is unclear how UNCLOS could have been better constructed to address piracy within nations' sovereign waters in anticipation of such a problem. After all, a large focus of UNCLOS was securing coastal states' sovereignty over their own coastal waters.<sup>62</sup> To expressly provide for outside nations' enforcement within a coastal state's territorial waters would in the same breath abrogate the very sovereignty UNCLOS originally aimed to establish.<sup>63</sup>

Given the nature of the crime of piracy, those choosing to engage in piracy face a substantial amount of personal risk. Pirates are often recruited as young males and work as foot soldiers before advancing in the ranks of the hierarchical structure.<sup>64</sup> Pirates attempting to commandeer vessels at sea are often faced with armed resistance in the form of formal military forces or third-party contractors acting in a similar capacity.<sup>65</sup> The number of pirates killed in the pursuit of vessels at sea is undetermined because of limited reporting requirements for various military forces operating in the regions. However, estimates suggest that in a five-month period in 2011, 62 pirates were

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61. Churchill, *supra* note 3, at 9, 10.

62. See, e.g., UNCLOS, *supra* note 2, at art. 2 ("The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.").

63. *Id.*

64. Schoeman & Haefele, *supra* note 26, at 207 (describing the various structures of pirate groups).

65. Anastasia Miskedaki, *Greek Commandos Protect Vessels Against Somalian Pirates*, GREEKREPORTER (Apr. 22, 2011), <https://world.greekreporter.com/2011/04/22/greek-commandos-protect-vessels-against-somalian-pirates/> [<https://perma.cc/8USP-KANR>] (describing the work of private mercenaries hired by shipping companies to protect ships passing through high-risk areas). Although this practice has become ubiquitous in the shipping industry, there still remain legal questions about this practice which go beyond the scope of this Essay. See Int'l, Maritime Org., *Interim Guidance to Private Maritime Security Companies Providing Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area* (May 25, 2012), <https://www.register-iri.com/wp-content/uploads/MSC.1-Circ.1443.pdf> [<https://perma.cc/BN3S-PF85>] (attempting to provide guidance to help clarify the role and expectations for privately contracted armed security forces while acting to defend ships against piracy efforts). *But see* U.S. NAT'L SEC. COUNCIL, COUNTERING PIRACY OFF THE HORN OF AFRICA: PARTNERSHIP & ACTION PLAN 9 (2008), <https://www.hsdl.org/?view&did=232031> [<https://perma.cc/45J8-85FH>] (recognizing that in some cases, the National Security Council believes "properly screened and certified third-party security providers with firearms, operating in compliance with applicable coastal, port, and flag State laws may be an effective deterrent to pirate attacks off the Horn of Africa.").

killed at sea.<sup>66</sup> This substantial death rate for pirates demonstrates the very real risk of partaking in these crimes. Yet the ongoing nature of the problem evinces that pirates are nevertheless willing to accept this risk in order to participate in the business.

B. SHORTCOMINGS OF APPLYING TRADITIONAL THEORIES OF CRIMINAL PUNISHMENT TO CONTEMPORARY PIRACY

In considering how to design and implement a way to combat piracy equivalent to other “criminal justice” systems, a thorough analysis of punishment theory is crucial, given the unique circumstances surrounding pirates and the states they function in. One classic utilitarian criminal punishment theory views punishment as necessary for its deterrent effect on would-be offenders;<sup>67</sup> another, “incapacitation,” focuses on the value of restricting offenders so they cannot go on to commit further crimes.<sup>68</sup> Conversely, the backwards-focused concept of “retributivism” seeks to give a criminal a measure of “just deserts” based on the harm of their criminal act.<sup>69</sup> These theories are often included as assumptions underlying the design of criminal justice systems.<sup>70</sup> However, in facing the significant challenge of contemporary piracy, relying too heavily on these theories when designing a justice system for pirates is unlikely to have meaningful long-term impacts absent additional efforts.

When assessing the crime of piracy under criminal punishment theory, policymakers should recognize the fact that this is an *economic* crime.<sup>71</sup> As noted, the crime of piracy largely functions as an organized crime in nations with undeveloped economies, providing a lucrative

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66. This figure represents seven percent of the estimated 2,000 pirates in Somalia. See Kaija Hurlburt, *The Human Cost of Somali Piracy*, in PIRACY AT SEA, *supra* note 23, at 304.

67. See, e.g., Isaac Ehrlich, *On the Usefulness of Controlling Individuals: An Economic Analysis of Rehabilitation, Incapacitation, and Deterrence*, 71 AM. ECON. REV. 307, 307 (1981); Mike C. Materni, *Criminal Punishment and the Pursuit of Justice*, 2 BR. J. AM. LEG. STUDIES 263, 289 (2013) (quoting PLATO, PROTAGORAS 43 (Benjamin Jowett trans., Serenity Publishers, 2009)).

68. Materni, *supra* note 67, at 294.

69. *Id.* at 266 (describing the most basic view underlying retributivism as “justice = giving offenders what they deserve.”).

70. E.g., Richard S. Frase, *Sentencing Principles in Theory and Practice*, 22 CRIME & JUST. 363, 388 (1997) (noting that the Minnesota Sentencing Guidelines incorporate both retributive and nonretributive goals).

71. See Ehrlich, *supra* note 67, at 308 (“Essential to a comprehensive economic model of crime is the assumption that potential offenders, victims, buyers of illegal goods and services, and the law enforcement authorities all behave according to the fundamental rules of maximizing behavior.”).

business opportunity where none previously existed.<sup>72</sup> The obvious problem created by these circumstances is the supply of additional pirates following the apprehension of an original offender.<sup>73</sup> Criminal scholars refer to this problem as “replacement.”<sup>74</sup> Creating a justice system with the aim of capturing and incarcerating offenders will only reduce the problem of piracy if another opportunistic pirate does not step forward to fill the shoes of the captured pirate following his arrest. This challenge has been faced by lawmakers prescribing criminal punishments in other sectors, such as drug dealing, and has enjoyed a low success rate in such applications.<sup>75</sup>

As previously noted, nations such as Somalia face abject poverty and a virtually non-existent state infrastructure.<sup>76</sup> “Since 1991, no functioning government has existed in Somalia. While the Transitional Federal Government (TFG) may represent Somalia in international venues, the TFG faces tremendous resource, organization, and capacity problems.”<sup>77</sup> Put simply, the local economy is in shambles.<sup>78</sup> Thus the lack of valuable alternative choices for putative criminals must be considered rather than blithely assuming stiffer punishments will deter piracy.

Individuals considering joining others to commit acts of piracy have few comparable options to earn money in nations like Somalia.<sup>79</sup> In order to succeed in deterring a given act through criminal punishment, the balance of punishment against alternative acts must favor the alternative acts.<sup>80</sup> However, in the case of current piracy strongholds, poor national economies prevail and economic opportunity for

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72. See Wilson, *supra* note 27, at 45, 47 (suggesting the proceeds of Somali piracy between 2008 and early 2011 may be as high as \$400,000,000).

73. *Cf. id.* at 45, 48 (“Even though thousands of pirates have been captured since 2008, the illicit business model continues.”).

74. *E.g.*, Neal Kumar Katyal, *Deterrence’s Difficulty*, 95 MICH. L. REV. 2385, 2429 (1997).

75. *Cf. id.* (noting criminals may simply shift to another similar crime or criminal act given the deterrent threat of criminal punishment and also recognizing the potentially negative effect that deterrence enforcement can have if less capable criminals are captured and replaced by more effective criminals).

76. See, *e.g.*, Wilson, *supra* note 27, at 45, 51.

77. *Id.* at 51 (citation omitted).

78. *Id.* at 45, 51.

79. See Kiourktsoglou & Coutroubis, *supra* note 52, at 261.

80. See generally Donald A. Dripps, *Rehabilitating Bentham’s Theory of Excuses*, 42 TEX. TECH. L. REV. 383 (2009); Thomas S. Ulen, *Skepticism About Deterrence*, 46 LOY. U. CHI. L.J. 381 (2014) (discussing basics of deterrence theory).

the average young person is otherwise next to nil.<sup>81</sup> Bob Dylan perhaps said it best: “when you ain’t got nothin’, you got nothin’ to lose.”<sup>82</sup> To use more traditional economic terms, the decision of people in this situation is inelastic with regards to the threat of punishment—their minds are highly unlikely to be changed.<sup>83</sup> Given the practical realities of societies where piracy flourishes, simply applying long-held academic theories of punishment to address the problem is of limited effectiveness and actors are unlikely to select the non-crime alternative.

### C. LAW & ECONOMICS THEORY APPLIED TO PIRACY

When designing policy to promote certain behavior, policymakers can utilize economic tools to produce the resulting actions they desire. Theories of law and economics consider the motives of the people impacted by potential laws with the understanding that they respond to economic incentives and disincentives based on the principle of “efficiency.”<sup>84</sup> Efficiency in this context refers to the generating of maximum benefits for the most parties while minimizing negative costs.<sup>85</sup> Importantly, this type of legal analysis is employed beyond pure business regulations, and commonly used in the criminal justice context.<sup>86</sup> And in fact, this method of analysis more naturally lends itself to policymaking in order to combat the challenge of piracy, given the inherent businesslike nature of the pirates’ actions.

Much like the deterrence theory of punishment, law and economics theory operates with the understanding that the actors have the ability to evaluate their options and make a reasoned decision based upon their assessment of benefits and drawbacks of a given course of

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81. Bile, *supra* note 28, at 157–58 (noting the average pirate in Somalia is between the ages of 16–30).

82. BOB DYLAN, *Like a Rolling Stone, on HIGHWAY 61 REVISITED* (Columbia Records Co. 1965).

83. *Inelastic*, INVESTOPEDIA (July 14, 2019), <https://www.investopedia.com/terms/e/inelastic.asp> [<https://perma.cc/6F58-CLCJ>].

84. *Law and Economics*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY, <https://www.iep.utm.edu/law-econ/> [<https://perma.cc/N3HQ-M4YE>] (last visited Nov. 28, 2019). See generally Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985) (discussing basics of law and economic theory’s application to criminal law theory).

85. *Law and Economics*, *supra* note 84.

86. See, e.g., Ehrlich, *supra* note 67 (analyzing various theories of criminal justice using an economic methodology).

action.<sup>87</sup> This assumption is referred to as the rational actor.<sup>88</sup> Rational actors do not necessarily have high-level knowledge, but rather are aware of the potential benefits or costs of an action.<sup>89</sup> When applied in the context of criminal law, policymakers consider the balance of benefits to costs faced by potential criminals in crafting a system of law and punishment.<sup>90</sup>

Looking to present anti-piracy thinking, it is apparent the analysis of the deterrent and retributivist effect of punishment has overlooked a glaring detail—the lack of viable alternatives for putative pirates. As noted previously, the economy of piracy-ridden states are exceedingly poor with rampant unemployment and very little lucrative work on land.<sup>91</sup> As a result, for young men seeking to earn a living in these nations, piracy in many ways is the “only show in town.”<sup>92</sup> This simple fact injects the deterrence equation with a striking imbalance in favor of undertaking criminal enterprise. In Somalia, this was not the case before the national economy crashed.<sup>93</sup> Piracy in Somalia has only become a problem since civil war and political destabilization brought the nation’s economy to its knees.<sup>94</sup> In other words, piracy was born as an industry of economic desperation.

Existing policies aimed at capture and incarceration of pirates fail to recognize this unfortunate reality. Pirates willingly face the extreme risks of the open ocean and armed resistance in order to execute their crime.<sup>95</sup> Policymakers could increase severity of punishment, but the apparent inelasticity of pirates to high fatality risks suggests this would have little or no effect in deterring the crime given the dearth of viable alternative income sources. In short, existing policy largely fails to recognize that pirates, as rational economic actors,

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87. Patrick J. Keenan, *The New Deterrence: Crime and Policy in the Age of Globalization*, 91 IOWA L. REV. 505, 508 (2006) (“[P]otential offenders weigh the utility they will receive from the activity against two factors: the probability of being caught engaging in the activity and the sanction they would suffer if caught.”).

88. *Id.*

89. *Id.*

90. See, e.g., Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469, 474 (1897) (“We learn that for everything we have we give up something else, and we are taught to set the advantage we gain against the other advantage we lose, and to know what we are doing when we elect.”).

91. See Kiourktsoglou & Coutroubis, *supra* note 52, at 261.

92. *Id.*

93. Bile, *supra* note 28, at 157–59.

94. *Id.*

95. See *supra* Part III.A.2.

are sensitive to both risks *and* rewards—sticks and carrots<sup>96</sup>—and instead has focused solely on punitive measures to deter potential criminals.<sup>97</sup>

Policymakers in more traditional intra-state criminal justice systems often debate about the efficacy of various punishments in preventing further criminal acts.<sup>98</sup> A common suggestion posited in this debate is to simply increase the severity of punishment and similar disincentives.<sup>99</sup> In other words, the assumption is that putative pirates will be deterred if policy decisions simply raise the inherent cost of committing the crime of piracy.<sup>100</sup> From a law and economics perspective, however, it seems the suggestion to simply “hit them harder” may not present the most effective course of action.<sup>101</sup> This is demonstrated by both history and the realities of the crimes of piracy currently being committed.<sup>102</sup> Indeed, it is unclear whether even a death penalty for captured pirates would effectively deter putative criminals given the overwhelming risks they already are willing to assume (not to mention this would almost certainly be an untenable solution for human rights reasons<sup>103</sup>).

In the case of modern anti-piracy efforts, sticks remain the prevailing tools of choice. Various naval forces, paramilitary contractors,

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96. See, e.g., Gerrit De Geest & Giuseppe Dari-Mattiacci, *The Rise of Carrots and the Decline of Sticks*, 80 U. CHI. L. REV. 341, 354 (2013) (defining carrots and sticks as used in economic theory).

97. See, e.g., Dutton, *supra* note 5, at 200 (“But if pirates are not arrested, prosecuted, and ultimately punished, it is unlikely they will be deterred . . .”); Henry Fouché, *The Law Enforcement Approach to Sea Piracy: Overcoming Challenges to Effective Investigation and Prosecution of Somali Pirates*, in PIRACY AT SEA, *supra* note 23, at 67–79 (describing methods for more effective investigation and prosecution of pirates). But see David M. Ong, *Alternative Approaches to Piracy and Armed Robbery in Southeast Asian Waters and off the Horn of Africa: A Comparative Perspective*, in THE LAW AND PRACTICE OF PIRACY AT SEA, *supra* note 3, at 294 (advocating for a shore-based, long term solution to piracy rather than a militaristic effort to combat piracy on the seas).

98. Compare Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968) (describing the supposed deterrent effect of raising the “price” of committing crimes), with Ulen, *supra* note 80 (questioning assumptions of deterrence and law-and-economics theories of punishment).

99. Dutton, *supra* note 5, at 200.

100. *Id.*

101. Cf. Holmes, *supra* note 90, at 470 (questioning the efficacy of deterrence theory: “What have we better than a blind guess to show that the criminal law in its present form does more good than harm? . . . Does punishment deter? Do we deal with criminals on proper principles?”).

102. Cf. Bile, *supra* note 28, at 157 (recognizing piracy has flourished in Somalia since the civil war and failure of the rule of law domestically).

103. See Gosalbo-Bono & Boelaert, *supra* note 10, at 119 (noting agreements between EU and Mauritius forbidding the death sentence for captured pirates).



and a judicial system (even though the overall system may not be overly effective) serve as disincentives to commit acts of piracy.<sup>104</sup> However, despite these significant disincentive components of the pirate justice system, the scourge of piracy lives on. Anti-piracy policies designed using law and economics principles may still prove to be effective because at this point, policymakers have largely underutilized the benefits side of the equation.

#### D. TREATING THE DISEASE RATHER THAN JUST THE SYMPTOMS

Current anti-piracy approaches can be described as reactive to the actions of pirates rather than proactive. In other words, the actors attempting to combat piracy only become involved after the crime has been committed. This is likely a function of the difficulty caused by jurisdictional sovereignty: other nations are not authorized to operate within another state's sovereign territory under UNCLOS.<sup>105</sup> However, continued efforts in this reactive manner will not stem the flow of pirate attacks without addressing the upstream factors which cause people to choose. The annual costs of patrolling these areas and ransoms paid to pirates are unlikely to decrease without an actual reduction in the rate of piracy.<sup>106</sup> Put simply, the current approach of apprehending and attempting to bring pirates to justice merely treats the symptoms of a much larger problem in failed states like Somalia without addressing the underlying cause.

UNCLOS Article 100 provides that all states shall cooperate in the effort to repress piracy.<sup>107</sup> Because this language does not provide an explicit statement of how to approach this goal, it could be construed to support either approach for addressing piracy (carrot or stick). Further, there is no reason to think the two approaches must be mutually exclusive. Conceptualizing the incentive structure of pirates as a balance of possible risks in committing a crime versus alternatives supports this idea. Using this understanding, nations could maintain existing efforts to capture pirates who have committed crimes against mankind, but could also focus on shifting other parts of the decision-

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104. Dutton, *supra* note 5, at 200.

105. UNCLOS, *supra* note 2, at art. 2.

106. Achilles Skordas, *The Dark Side of Counter-piracy Policies*, in *THE LAW AND PRACTICE OF PIRACY AT SEA*, *supra* note 3, at 314 (citing JONATHAN BELLISH ET AL., *OCEANS BEYOND PIRACY, THE ECONOMIC COST OF SOMALI PIRACY 2012* at 13-18 (2012), <http://oceansbeyondpiracy.org/cost-of-piracy/economic>) (estimating the cost of 2012 military operations in response to the threat of piracy at \$1.09 billion).

107. UNCLOS, *supra* note 2, at art. 100.

making equation by encouraging meaningful alternatives.<sup>108</sup> Increasing economic rewards for alternative legitimate activities in combating piracy through “shore based” efforts to strengthen the local economy is one important way to shift the equation in favor of crime-free alternatives.<sup>109</sup> Similarly, other commentators have argued for development of critical economic infrastructure like roads in Somalia’s coastal areas to facilitate economic development in the regions currently plagued by the piracy industry.<sup>110</sup> Investing in the economy of the areas most heavily affected by piracy could yield disproportionate reductions of piracy. This general approach allows policymakers to maintain the existing deterrent effect of capture and punishment, yet shifts the overall balance of the crime’s attractiveness through a rising tide of attractive and legitimate alternatives to piracy.

Moreover, this approach aligns better with the foundational tenets of UNCLOS and international law than the current effort to fight violence with further violence.<sup>111</sup> This approach limits the need for further infrastructure in the international criminal law system, sidestepping many of the inherent limitations on nations ability to enforce violations of international law. As frequently noted, enforcement of piracy offenses is made difficult by the lack of voluntary involvement by nations closely tied to piracy areas, and the hesitance of other nations to initiate criminal proceedings in their own territory.<sup>112</sup> Focusing additional efforts on shaping the factors relevant to pirates at the point of the decision to commit a crime, rather than pursuing pirates after the crime eliminates the need for nations to create more judicial infrastructure. Ultimately, the goal is not to lock up more offenders

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108. See Ong, *supra* note 97, at 294 (arguing a successful effort to combat piracy should focus on state-building efforts, both increasing rewards and decreasing risks for alternative onshore activities). See also JAMES KRASKA, CONTEMPORARY MARITIME POLICY 84 (2011) (discussing the reasoning behind a deterrence-based approach to anti-piracy policy).

109. Ong, *supra* note 97, at 294.

110. Anja Shortland & Federico Varese, *Want to Stop Somali Piracy? Build Better Roads*, THE CONVERSATION (July 10, 2014), <https://theconversation.com/want-to-stop-somali-piracy-build-better-roads-29062> [<https://perma.cc/3PS3-WA9T>].

111. See UNCLOS, *supra* note 2, at Preamble; see also U.N. Charter, Preamble (“[T]o employ international machinery for the promotion of the economic and social advancement of all peoples. . . .”) (emphasis added).

112. Cf. Wilson, *supra* note 27, at 59 (noting the inherent difficulties of conducting an effective trial of pirates, such as multiple jurisdictions, limited witness availability, and interpreter availability). But see *id.* at 45 n.83 (noting that a large number of states have prosecuted captured pirates or detained pirates in anticipation of prosecution). It has also been suggested that states may hesitate to try pirates in their court system out of fear that the pirates would seek political asylum in their nation after being convicted. Dutton, *supra* note 5, at 219.

and mirror the phenomenon of the “prison industrial complex” currently ongoing in countries such as the United States.<sup>113</sup> Instead, the purpose of anti-piracy policy should focus on treating the problem, regardless of method. Furthermore, the overall approach of promoting meaningful economic opportunity better fits the stated goals of UNCLOS, the UN charter, and other international agreements.<sup>114</sup> In view of the foundational goal of improving living conditions for humanity worldwide expressed in these policies, policymakers should consider the value of constructive policy tools like “carrots” in the anti-piracy equation.

### CONCLUSION

Contemporary piracy presents policymakers with a complex multifaceted problem. While global leaders seek a tenable solution to reduce the rate of piracy activity, additional violence and human rights costs abound. And although the topic of piracy is briefly addressed in UNCLOS, inherent limitations, such as jurisdictional limitations and the use of flags of convenience provide enterprising pirates with the opportunity to gain a foothold in areas lacking a robust local economy and law enforcement structure.

The first step to addressing the problem of piracy is recognizing that modern piracy is a crime of both desperation and opportunity. Acknowledging that pirates’ actions are simply those of economically-motivated individuals will allow global leadership to craft policy which actually results in decreased piracy. A strategy purely based on deterrence through capture and punishment has not and will not work. Pirates are simply opportunists, trying to make the most of the resources available to them. Recognizing this reality makes their actions much more understandable.

Piracy exists in nations with little or no economic alternatives and is already committed in the face of extreme personal danger. Instead of the current punitive approach, efforts to address piracy should focus on the other side of the pirate’s decision-making balance—the carrot approach. Further, this approach can be effectuated without the major overhaul of UNCLOS which would otherwise be necessary to close the deficiencies currently allowing piracy to abound.

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113. See Angela Y. Davis, *Masked Racism: Reflections on the Prison Industrial Complex*, COLORLINES MAG. (Sept. 10, 1998), <https://www.colorlines.com/articles/masked-racism-reflections-prison-industrial-complex> [<https://perma.cc/MEA4-T7ES>].

114. See UNCLOS, *supra* note 2, at Preamble; U.N. Charter, Preamble.

Rather than operating in a reactive manner, other nations should engage proactively with the disease of piracy by attempting to stimulate economic alternatives for putative pirates. Working to support a healthy government and improved economy provides a proactive approach to combat the scourge of piracy within the existing international legal framework and consistent with the spirit of international comity.