MEMORANDUM FOR THE
REGIONAL ANTI-PIRACY PROSECUTION AND INTELLIGENCE
COORDINATION CENTRE

ISSUE:
COLLECTING, RETAINING, AND PRESERVING
EVIDENCE IN PIRACY PROSECUTIONS

PUBLIC INTERNATIONAL LAW & POLICY GROUP (PILPG)

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I. INTRODUCTION:

This memorandum is provided in response to a request from the United Nations Office on Drugs and Crime (UNODC) and the new Regional Anti-Piracy Prosecutions and Intelligence Coordination Centre (RAPPICC) in The Seychelles. The research is conducted as a partnership between the University of Washington (UW) School of Law and the High Level Piracy Working Group of the Public International Law and Policy Group (PILPG.) In this phase of the research, five papers are submitted together, all with electronic copies of the key documents and articles cited. This phase of research is a part of a larger project sponsored by PILPG to support counter-piracy prosecutions. A number of related research papers are available and may be cited in this memo, copies of the related memos may be requested through the faculty coordinator.¹

Maritime piracy is a violent, acquisitive crime, transnational in nature because a ship is considered the sovereign territory of the nation whose flag she flies. It is organized because commandeering a ship at sea requires considerable planning and some specialized expertise. The following memo focuses on one aspect of the piracy problem: that found off the coast of Somalia and in the Gulf of Aden. This area has seen the largest share of global piracy attacks in recent years, instability ashore has created a growing sea based phenomena.² For now the most effective way to deal with the prosecution and imprisonment of suspected pirates is to improve the capacity of regional States.³ For the purposes of this memo the term “forum States” will refer to Kenya, Seychelles, Mauritius and the United Republic of Tanzania, the States in the

¹ Frederick M. Lorenz JD, LLM is the UW faculty coordinator for this project and can be reached at fmlorenz1@gmail.com
² For a good source on maritime piracy and potential solutions to the problem, go to the web site of Oceans Beyond Piracy at http://oceansbeyondpiracy.org/
region that are either prosecuting piracy cases with United Nations assistance or are engaged with UNODC to consider the possibility of doing so.

The Regional Anti-Piracy Prosecutions and Intelligence Coordination Centre (RAPPICC) is located in Seychelles and will have a new permanent building scheduled to open in January of 2013. The director and initial staff were provided by the UK Serious Organized Crime Agency (SOCA.) 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. RAPPICC plans to use collected information to assemble “evidence packs” for use in prosecutions, analyze the piracy business model and track the money sources, and coordinate with international law enforcement partners to tactically disrupt the profitable business of piracy. At this time RAPPICC has no independent legal identity, it uses existing, effective, lawful pathways to share information and transfer evidence between the sovereign nations represented in the centre as provided for by international law and Security Council Resolutions.

A large amount of information on piracy is currently being collected by multiple agencies, but there are many challenges to the collection, retention and dissemination of information and later translating that information into evidence that can be used in court. At present there is a lack of clear guidance on these issues, limiting closer working relationships. This project will attempt to identify lawful pathways to share information based on applicable laws. The ultimate goal is to increase State and local capacity to deal with pirates and their networks, and to prosecute them effectively.

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This memorandum will examine the practical complications involved with collecting, retaining, and presenting evidence in piracy prosecutions. It will assess the legal evidentiary framework of the key regional states, examine recent developments to deal with these issues, and will provide some conclusions on the extent to which this evidence can be made admissible in court. Finally, it will make recommendations designed to assist in the effective prosecution of piracy cases.

II. SUMMARY OF CONCLUSIONS:

Piracy prosecutions are fraught with evidentiary issues. There are challenges at all stages of the prosecution, from the initial investigation to the final presentation in the courtroom. Overall, these complications can be grouped into a few major categories. The first category centers on issues involving adequacy of the evidence, either at apprehension or at trial. The second category covers the challenges in gathering and sharing physical evidence (i.e. evidence collected at the scene). The third category encompasses problems with using witnesses, including issues related to reliability and availability. The fourth category includes issues in utilizing classified information. Finally, the fifth category addresses human rights concerns about potential violations resulting from the collection, retention, or use of certain evidence.

Although these evidentiary issues are pervasive, investigators and courts are making headway in developing strategies to combat these problems. To handle challenges to sufficiency of the evidence, some courts are looking to “equipment laws” to justify piracy convictions under traditional theories of circumstantial evidence. To avoid problems associated with gathering evidence, there has been a concentrated effort to train officers, court personnel, and those in the shipping industry. The use of shiprider agreements, global databases, and legal assistance treaties has enhanced investigation and information sharing. To tackle complications with
witnesses, some jurisdictions are approving the use of video testimony which has the potential for significant impacts on piracy prosecutions. Additionally, courts have been able to successfully overcome some of the obstacles related to the use of classified information in terrorism prosecutions, and these cases might provide some guidance for the future. Overall, despite the difficulties for both investigators and prosecutors involved in piracy prosecutions, there have been positive developments in many areas.

III. GENERAL DISCUSSION OF EVIDENTIARY ISSUES:

Piracy prosecutions are burdensome and complex. They consume valuable resources and present many logistical and legal barriers for a prosecuting nation to overcome. Accordingly, many nations and organizations are deterred by these obstacles, and few apprehending states are willing to undertake these prosecutions themselves. As Brad Kieserman, Chief of the U.S. Coast Guard’s operation law group stated, “Prosecuting can be difficult because the effort often exceeds the benefit.”5 Indeed, the effort that goes into a piracy prosecution is substantial. Kieserman points out, “You get flags from one country, witnesses from another, suspects from another—how do you put that all together in court?”6 It is a daunting task for a prosecuting forum state to assemble a case in this globalized world, and there are many practical complications.

Some of the biggest challenges facing investigators and prosecutors in piracy cases are related to collecting and properly preserving evidence. Evidence can take a variety of forms and may include the following: physical evidence including that collected on board (i.e. equipment, weapons, ammunition) or that collected from a suspected pirate (i.e. DNA), witness testimony,  

6 Id.
audio or videotape recordings, surveillance footage, photographs, and more. Each type of evidence presents its own unique set of logistical challenges during an investigation, while the evidence is retained and preserved, and later in the courtroom. The most common challenges related to evidence are discussed below.

A. Challenges Related to Adequacy of Evidence:

The first evidentiary issue that arises is lack of evidence to support a suspected pirate’s arrest or conviction. Unless pirates are caught in the act, investigators are powerless to do much more than search for contraband, and this may result in scant evidence. This was seen in September 2008, when special forces in the Royal Danish Navy intercepted two Somali fishing boats in the Gulf of Aden and arrested ten suspected pirates. The men had been found with assault weapons and handwritten notebooks detailing how to split spoils with warlords, but the Danish government was not convinced it could convict them. After holding the men for six days, they decided to let the suspects go. Similarly, in a span of fourteen months, British Navy personnel boarded six suspected pirate ships off of Somalia, where they found a total of 66 pirates, each of whom were armed. However, despite the abundance of weapons, including rocket-propelled grenade launchers, assault rifles, pistols and ammunition, all of the men were released. Defence Minister Baroness Taylor remarked that there was “‘insufficient evidence’ to arrest anyone.” The Russian Navy encountered a similar problem in May 2010, when it, too, captured and released ten pirates citing an insufficient legal basis to keep them in detention.

\[7\] Id. at 1.
\[8\] Id.
\[9\] Jason Groves, Navy Gives Somali Pirates Food and Water... Then Lets Them Sail Off Scott Free, MAIL ONLINE (UK), Jan. 27, 2010, at 3.
\[10\] Telegraph Media Group, Somali Pirates Captured and Released by Russian Navy ‘Have Died’, TELEGRAPH (UK), May 12, 2010, at 1.
Not only is this predicament common, but the “principal reason” for the release of piracy suspects and armed robbers at sea is a lack of evidence sufficient to support prosecution. In fact, recent statistics indicate that nine out of ten piracy suspects detained by the British Royal Navy and other maritime forces in the Gulf of Aden or Indian Ocean are released without trial. Even when nations do arrest and bring charges against suspected pirates, lack of evidence may also be an issue in the courtroom. This was demonstrated in a recent trial of alleged pirates in The Netherlands, which had “a notable lack of physical evidence, and a shortage of witnesses.” Furthermore, prosecutors often have very little evidence to show intent of the alleged pirates which makes it very complicated for prosecutors to prove that there has even been a criminal act. Although both “operat[ing]” a pirate vessel and “intentionally facilitating” piratical acts can be prosecuted as piracy under the United Nations Convention on the Law of the Sea (UNCLOS), proving this is “problematic when a skiff cannot be linked directly to a particular attack.” In the Dutch trial, the alleged Somali pirates stated that although their initial intention had been to hijack the Dutch ship, they abandoned these plans, and they were just fishing and had problems with their motor. This excuse is typical, and one Kenyan attorney remarked that all of his clients used the same excuse for why they had been caught on the high seas with weapons: they were just “fisherman who needed to protect themselves.” However, without evidence to prove otherwise, prosecutors will have a difficult time making their case.

11 ROBIN GEISS AND ANNA PETRIG, PIRACY AND ARMED ROBBERY AT SEA, 185 (Prof. Dr. Ulrich Seiber, Ed., Vol. 1, 2011).
12 Ian Drury, Failure to Prosecute Pirates Beggars Belief, say MPs as it’s Revealed 90% of All Suspects are Freed Without Trial, MAIL ONLINE (UK), Jan. 5, 2012, at 1.
These complications, stemming from a lack of evidence, “illustrat[e] the difficulty of prosecuting piracy cases and why so many captured sea bandits are let go.”\textsuperscript{17}

**B. Challenges Related to Gathering and Preserving Evidence:**

A second set of challenges involve the collection, retention and transportation of physical evidence. Under Article 105 UNCLOS, persons encountered on a pirate ship, or a ship taken by piracy and under the control of pirates, may be arrested.\textsuperscript{18} Additionally, property found on such ships may be seized.\textsuperscript{19} A “thorough investigation is critical” because it protects the quality of the physical evidence, prevents it from being destroyed, and helps prevent witnesses from being overlooked.\textsuperscript{20} However the initial on-the-spot investigation “has not always been carried out in an ideal manner.”\textsuperscript{21} Consequently, as discussed above, the potential for lack of evidence from deficient procedures may devastate a prosecution – leading either to release of suspected pirates before arrest or acquittals of the suspects at trial.

Challenges arise when investigators attempt to collect or preserve evidence during an investigation. One reason is that pirates are able “dispose of evidence quickly and permanently”\textsuperscript{22} thereby preventing any physical evidence from being recovered. This has been a frequent claim of British Ministers, who contend that pirates often throw weapons and other equipment overboard when spotted by anti-piracy patrols.\textsuperscript{23} Other problems occur when the actual collection of physical evidence begins, as many investigators lack the training or resources

\textsuperscript{17} Associated Press, *supra* note 9, at 1.

\textsuperscript{18} Geiss, *supra* note 7, at 66.

\textsuperscript{19} *Id.*


\textsuperscript{21} *Id.* at 89.

\textsuperscript{22} gCaptain Staff, *UK Foreign Affairs: Analysis of Pirate “Catch and Release” Off the Coast of Somalia [Report]*, GCAPTAIN (Jan. 26, 2012), gCaptain.com.

\textsuperscript{23} Ian Drury, *supra* note 8, at 1.
to do it properly. International navies often serve as the initial investigator in a piracy prosecution, but because they are more focused on military issues, “[t]he procedures and capabilities of navies to collect and preserve evidence are not uniform and in many cases do not meet investigative best practice.”\textsuperscript{24} Moreover, even when investigating officers are brought in, they also face severe challenges because of their skill level and tools available to them. These include “low level of basic investigation skills and the lack of established operational procedures, infrastructure, transport, and search or forensic equipment.”\textsuperscript{25} Finally, it is likely that those interested in prosecuting would “have to collect evidence from a location thousands of miles away from home”\textsuperscript{26} which can be an expensive and burdensome task for that particular nation.

In addition to the problems with the collection of evidence, physical evidence also creates problems when prosecutors are preparing for trial. One logistical challenge is that the capturing vessel has to comply with the rules of evidence and procedure for whichever territory the trial will be in. This holds true “regardless of the nationality of the suspect, victim, ship, cargo or capturing forces.”\textsuperscript{27} As a result, prosecutions may be fall apart if the prosecuting nation’s rules were not followed at the outset. Consider the following example provided by one observer: “In Kenyan trials, where the use of a firearm is alleged, the firearm should be produced. If this type of information is not known in advance, prosecutions may be compromised.”\textsuperscript{28} As the prosecuting nation is not always known at the time of the investigation, it is difficult to ensure that the proper procedures and rules will be followed, and thus, prosecutors might not have the

\textsuperscript{24} Maritime Piracy, INTERPOL.COM (last updated Aug. 18, 2011).
\textsuperscript{28} FOREIGN AFFAIRS COMMITTEE, WRITTEN EVIDENCE FROM DR. DOUGLAS GUILFOYLE, Jan. 5, 2012.
necessary evidence required by the forum State laws. A second challenge is presented if the physical evidence must be transported for trial.\textsuperscript{29} One of these obstacles is the high cost associated with preserving evidence and transporting it to the prosecutorial venue.\textsuperscript{30} Another problem is that many regional states do not have “the necessary arrangements in place to receive pirates, along with evidence and witnesses, for trial in their courts.”\textsuperscript{31} These issues present many challenges for prosecutors and may pose overwhelming barriers to a successful prosecution.

C. Challenges Related to Witnesses:

Witness testimony can be crucial to a piracy prosecution, but this evidence can also be the most difficult to secure, as there are many practical problems when witnesses are involved. Most of the time, key witnesses are “sailors, marines or crewmembers with no mailing address who spend all year at sea,”\textsuperscript{32} and many be subject to military orders. Thus, a naval state has to decide which is more important – the trial of the pirate suspect or the continued assignment of the witness to regular duties. Additionally, crewmembers change ships and companies regularly, making them difficult to identify, locate, and bring to trial. It is likely that by the time a prosecution is at the trial stage, the multinational crews will have returned to their homes, or will be halfway around the world on another assignment. This problem is compounded by the fact that many witnesses are reluctant to testify. This situation may have a number of causes. First,

\textsuperscript{29} Andrew J. Shapiro, Assistant Secretary, Political-Military Affairs, U.S. Dep’t of State, Keynote Address to American University Law Review Symposium: Counter-Piracy Policy: Delivering Judicial Consequences (Mar. 31, 2010).
\textsuperscript{30} Elizabeth Anderson et al., Suppressing Maritime Piracy: Exploring the Options in International Law, (One Earth Future, 2010).
\textsuperscript{32} Annemarie Middleburg, Piracy in a Legal Context: Prosecution of Pirates Operating Off the Somali Coast, 86, (Wolf Legal Publishers 2011).
many former hostages are unwilling to travel to courts in the region, perhaps some of these concerns arising from fears about personal security. Second, if essential personnel are attending a trial far away, then naval or commercial operations might be impeded by their absence. Naval officers would be pulled away from their regular duty if they are called upon to testify, this could affect the security and military readiness of the unit. Similarly, a crewmember’s absence from the commercial shipping industry will likely strain its resources too, as captains, pilots, or masters of commercial vessels are absent from work. This reluctance can be very problematic for a prosecutor, because he has “little standing to compel testimony and instead must rely on voluntary cooperation.”

Additionally, even if a witness is willing to testify, securing a witness’s presence at trial requires a tremendous amount of effort. The logistics are often coordinated by the military and the navy, because there is no power to compel the attendance of witnesses at trial, and this is “enormously costly in terms of naval time and resources.” There are huge expenses involved with the transport of these witnesses, as they must travel long distances to appear at the site of the trial. Furthermore, even after securing a witness at the site of the trial, the costs continue, as language barriers often require properly trained translators. Not only can it be difficult to find Somali translators, but the proceedings must often be translated twice, and sometimes three times, depending on the languages of the defendants and witnesses. As a result of these logistical, practical and financial concerns, many prosecutors are forced “to decline cases

33 Captain Staff, supra note 17.
34 Andrew J. Shapiro, Assistant Secretary, Bureau of Political-Military Affairs, Remarks to the Atlantic Council: Turning the Tide on Somali Piracy (Oct. 26, 2012).
35 ROGER MIDDLETON, PIRATES AND HOW TO DEAL WITH THEM, Chatham House Briefing Note, Apr. 22, 2009.
36 Dutton, supra note 21, at 23.
37 Dutton, supra note 21, at 31.
because they do not believe the required witnesses will be available when the case goes to trial.”

D. Challenges Related to Classified or Sensitive Information:

Due to the fact that military and naval operations are often a source of evidence in piracy cases, another evidentiary challenge involves dealing with classified information or sensitive evidence that implicates national security. This is a serious concern for both investigators and prosecutors, as it could hamper efforts to both obtain this evidence in the first place, and make it admissible in court. This issue has been considered one of the most important challenges in terrorism cases. Generally, in terrorism prosecutions, issues arise when the government seeks to rely on evidence that is probative of the defendant’s guilt but which implicates intelligence sources, means of intelligence gathering, and intelligence priorities. Certainly, one could envision a situation where a navy has evidence probative of the defendant’s involvement in piracy, but refuses to provide that evidence for fear of compromising its operations.

Although this challenge has not been widely discussed in the realm of piracy, the difficulty in taking intelligence information and translating it into usable, law enforcement information is not a new problem. In fact, the Final Report of the National Commission on Terrorist Attacks Upon the United States (“the 9/11 Commission Report”) found that “information security policies and practices impede the robust forms of information sharing required to meet the threat of terrorism.” The report astutely stated that:

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39 Andrew J. Shapiro, supra note 30, at 4.
40 Executive Summary, HUMAN RIGHTS FIRST (Aug. 21, 2012), at 7.
41 Id.
Current security requirements nurture overclassification and excessive compartmentation of information among agencies. Each agency’s incentive structure opposes sharing, with risks (criminal, civil, and internal administrative sanctions) but few rewards for sharing information. No one has to pay the long-term costs of over-classifying information, though this costs – even in literal financial terms – are substantial. There are no punishments for not sharing information. Agencies uphold a “need-to-know” culture of information protection rather than promoting a “need-to-share” culture of integration.\

Reticence to share information can have a profound impact on a piracy investigation. As indicated above, a significant amount of information comes from operational units, such as military or navy ships, in the region. If this information is subject to overclassification, it will be difficult for law enforcement to acquire it for evidentiary purposes. Further complicating this is an impenetrable institutional culture. Not only does this “need-to-know” mentality limit information sharing, but it actively undermines it.

E. Challenges Related to Human Rights Considerations:

Another issue that may arise in a piracy prosecution is the potential for human rights violations in evidence-gathering. For example, human rights might be implicated with the collection of evidence from a suspected pirate, because it might violate the suspect’s right to privacy under national laws, or under Article 8 of the European Convention for Human Rights (ECHR). The first provision of this Convention “broadly extends the right to privacy to everyone under ECHR jurisdiction, including suspected pirates.”

If evidence is obtained in violation of a suspected pirate’s human rights, or it is obtained illegally, this may also impact the admissibility of such evidence in future proceedings.

44 See generally, Andrew Morgan, The Effect of Human Rights Norms on the Prosecution of Pirates with Specific Emphasis on Information Sharing and Right to Privacy, 10. (Paper Topic C, included with this paper).
Depending on the legal system of the prosecuting nation, an unlawful seizure or a human rights violation might invoke the power of the exclusionary rule. Generally, “evidence acquired through violations of the privacy right, as ‘an internationally recognized human right,’ may be excluded from use against the accused at trial.”45 Thus, it is very important for both investigators and prosecutors to be aware of any potential human rights concerns that are implicated when gathering or retaining evidence for a prosecution.

In sum, evidentiary challenges arise as early as the on-the-spot investigation and continue to plague a case throughout the trial. Generally, these issues can be grouped categorically, covering such topics as: sufficiency of the evidence, collecting and preserving evidence, using witnesses, utilizing classified information, and human rights concerns. These problems pose a variety of issues, are difficult to manage, and can often be very damaging to a prosecution.

IV. SUMMARY OF RELEVANT LAW:

Piracy is called the “original universal jurisdiction crime,” which means that a State can prosecute an individual who has committed piracy, even if the State has no link to the crime in question.46 However, because many states are hesitant to undertake piracy prosecutions, a few nations have emerged as target forums for these trials. These nations include Kenya, Seychelles, Tanzania, and Mauritius. In order to understand how evidentiary issues might be impacted by these different forums, the relevant law and history of piracy prosecutions in these four nations is briefly summarized below.

46 Middleburg, supra note 26, at 29.
A. Overview of the Legal System and Piracy Prosecutions in Kenya:

Kenya has a common law legal system. Section 371 of the Merchant Shipping Act 2009, along with section 369, covers the offense of piracy, and it was drafted with the assistance of UNODC. This Act reflects the definition of and jurisdiction over piracy offenses set out in article 101 of UNCLOS, and it also incorporates offenses such as hijacking, inciting or intentionally facilitating an act of piracy. Furthermore, “it does not prevent an individual from being charged with attempting or conspiring to commit, aiding or abetting, counselling or procuring an act of piracy” and amendments that would expand the law to include those offenses are currently under consideration by the Kenyan authorities. The relevant portions of the Criminal Procedure Code of Kenya have “proved adequate support for piracy trials.”

Kenya’s jurisdiction over piracy offenses does not require a connection to Kenya, and it extends to acts committed anywhere on the high seas. As of December 2011, a total of 50 suspected pirates have been tried and convicted, 17 have been acquitted, and 93 were in custody pending trial. Kenyan prosecutors have cited to a number of evidentiary challenges related to these prosecutions. Those include difficulties with: gathering evidence (because suspects have destroyed it); preserving evidence (due to inadequate storage facilities, lack of space, and discarded exhibits); securing witnesses to testify, and dealing with the admissibility of

47 U.N. Secretary-General, supra note 20, at ¶ 58.
48 Id.
49 Id. at ¶ 60.
50 Id.
51 Mercy Gateru & Tom Imbali, Senior State Counsel, Presentation at the EU/UNODC Counter-Piracy Programme-Prosecutors Learning Exchange: Kenya’s National Experience on Piracy Cases (Dec. 6, 2011).
52 See James Thuo Gathii, Kenya’s Piracy Prosecutions, 104 Am. J. Int’l L. 416, 432 (July, 2010) (page 17 of PDF), discussing how the distance of witnesses can cause problems and citing to Rep v. Mohammed Said Ahmed and Seven Others (2008), Criminal Case No. 3486/08 (Chief Magistrate’s Court in Mombasa Kenya) (where the trial was delayed for more than a year because the witnesses were in Yemen, Hamisi).
evidence.\textsuperscript{53} However, with respect to the physical transfer of evidence, many do not see this as a potential challenge. In July 2009, Kenyan authorities published guidelines on their prosecutorial and evidential requirements, and naval states have been able to successfully use it.\textsuperscript{54}

\textbf{B. Overview of the Legal System and Piracy Prosecutions in Seychelles:}

Seychelles has a common law system. Section 65 of the Penal Code, as revised in March 2010, covers the offense of piracy and “reflects the definition and jurisdiction over piracy offenses set out in articles 101 to 107 of [UNCLOS], read in conjunction with article 58(2).”\textsuperscript{55} It allows prosecution for the full range of offenses, including attempt, incitement and conspiracy, and allows for the prosecution of foreign nationals involved in financing piracy. The relevant procedures of the Seychelles Criminal Procedure Code have “proved suitable to support piracy prosecutions.”\textsuperscript{56}

As of December 2011, a total of 63 pirates had been convicted in 7 cases.\textsuperscript{57} Prosecutors in Seychelles have also cited to a number of challenges.\textsuperscript{58} Those involving evidentiary issues include: lack of skills to collect and preserve evidence, highly mobile witnesses (pilots and sailors), lengthy trials due to multi-lingual witnesses (requiring interpreters).\textsuperscript{59} However, UNODC assisted the Seychelles authorities in drafting guidance on the procedural and evidential requirements for piracy prosecutions. This now serves as the basis upon which naval states

\textsuperscript{53} Mercy Gateru, \textit{supra} note 46.
\textsuperscript{54} U.N. Secretary-General, \textit{supra} note 20, at ¶ 80.
\textsuperscript{55} Id. at ¶ 41.
\textsuperscript{56} Id.
\textsuperscript{57} Hon. Mr. Justice Duncan Gaswaga, Head of Criminal Division, Supreme Court Seychelles, Presentation at Judicial Learning Exchange Programme: National Experiences and Challenges in Prosecuting Piracy Cases: Seychelles (Dec. 8, 2011).
\textsuperscript{58} Id.
\textsuperscript{59} Id.
transfer evidence to the Seychelles police force. These transfer arrangements are generally considered to be “straightforward.”\textsuperscript{60}

C. Overview of the Legal System and Piracy Prosecutions in Tanzania:

The United Republic of Tanzania has a common law legal system. The two pieces of legislation that establish piracy as a criminal offense are the Penal Code of 1945 and the Merchant Shipping Act of 2003. The Penal Code was amended in May 2010 to reflect the definition of, and jurisdiction over, piracy as set out in article 101 and article 105 of UNCLOS, read in conjunction with article 58(2).\textsuperscript{61} Both the Penal Code and the Merchant Shipping Act provide the offenses of inciting or intentionally facilitating an act of piracy, and sections 22 and 23 of the Penal Code provide for the offenses of “enabling or aiding, aiding or abetting, counselling or procuring joint offenders in the prosecution of a common purpose and acts of omission, but not attempt to commit an offence.”\textsuperscript{62} Rules of evidence are outlined in the Evidence Act of 1967 and rules of criminal procedure are outlined in the Criminal Procedure Act of 1985. UNODC considers these acts to be a “satisfactory basis on which to conduct piracy prosecutions.”\textsuperscript{63}

As of January 2011, Tanzania has not yet conducted any piracy prosecutions, but there were two cases at the investigation stage.\textsuperscript{64} The prosecutor’s office has selected a unit responsible for these prosecutions, and it includes ten senior attorneys. Currently, Tanzania lacks any existing agreements to receive evidence from naval States operating in the region.\textsuperscript{65}

\textsuperscript{60} U.N. Secretary-General, supra note 20, at ¶ 55.
\textsuperscript{61} Id. at ¶ 98.
\textsuperscript{62} Id.
\textsuperscript{63} Id. at ¶ 101.
\textsuperscript{64} U.N. Secretary-General, supra note 20, at ¶ 101.
\textsuperscript{65} Id at ¶ 111.
D. Overview of the Legal System and Piracy Prosecutions in Mauritius:

Mauritius’ legal system derives from both common law and civil law systems. In December 2011, the Parliament adopted the Piracy and Maritime Violence Act. Like the Penal Code of Tanzania, this act “reflects the definition of and jurisdiction piracy as set out in articles 101 and 105 of UNCLOS, read in conjunction with article 58(2).” 66 Section 3 of the act defines piracy and the offenses of inciting or intentionally facilitating acts of piracy. 67 These provisions have the potential to allow for investigation into the financiers of piracy, and depending on the home State’s extradition agreements, could potentially result in the prosecution of these individuals. The Act specifically provides for the possibility of witness statements to be admitted in evidence in the absence of the witness. 68 Additionally, the relevant provisions of the Criminal Procedure Act are “a suitable basis on which to prosecute piracy offenses.” 69

As of January 2012, no transfers of suspected pirates or seized property had taken place, and no piracy trials have been conducted in Mauritius. The Director of Public Prosecutions set up a dedicated unit of prosecutors to try piracy cases and the courts appear to be well equipped. 70 The UNODC has assisted the Mauritius police establish guidance for the transfer of evidence, and it is anticipated that these transfers will be straightforward. However, Mauritius is far from the areas of the ocean where piracy is most rampant, and thus, it is important to be aware that unlike evidence, transporting suspects (and possibly witnesses) could be time consuming and costly. 71

66 U.N. Secretary-General, supra note 20, at ¶ 81.
67 Id.
68 Id.
69 Id.
70 Id. at ¶ 85.
71 Id. at ¶ 96.
V. PROGRESS IN RESOLVING EVIDENTIARY ISSUES:

Although evidentiary issues plague piracy investigations and trials, officials around the globe have been working to combat these many challenges. There have been developments across the board – in legislation, in investigatory techniques, in courtroom rules, and in judicial analysis. In order to see how these improvements have impacted evidentiary issues in piracy prosecutions, it is important to re-examine the categories of challenges discussed above where particular developments have been made.

A. Developments Regarding Adequacy of the Evidence:

Obtaining enough evidence to support the arrest and prosecution of a suspected pirate is a challenging task. One of the biggest obstacles is proving intent. If a pirate is not caught in the act, intent can be very difficult to prove, because many suspected pirates claim that they were simply fishermen that wanted to protect themselves. Without evidence to the contrary, it can be challenging for investigators and prosecutors to prove the crime of piracy. The consequence of this problem is severe – citing insufficient evidence as the reason, officials are forced to release a majority of the suspected pirates that are captured.

An extremely important development to this problem came recently, in a 2012 Seychelles Supreme Court decision written by Judge Duncan Gaswaga, with the extension of “equipment laws” to the piracy context. After doing extensive historical research, Judge Gaswaga extracted the legal principle of “equipment laws” from old cases involving the prosecution of slave traders. Historically, slavery prosecutions posed an evidentiary problem identical to that presented in modern-day piracy prosecutions: the vessels had equipment suggestive of the crime,

72 Seychelles sets new Global Rules for Pirates’ Cases, SEYCHELLES NATION (Seychelles), July 31, 2012. The case, The Republic v. Mohamed Abdi Jama & Six Others, CS No. 53, July 25, 2012 (Seychelles) is not yet available online.
but there was no direct evidence to offer as proof (i.e. no slaves on board). In order to combat this challenge, courts utilized the principle of equipment laws which allowed for the conviction of slave traders based only on the existence of slavery equipment on board their vessels. Equipment clauses quickly became a standard in treaties in the 1800s. These clauses typically enumerated ten categories of proscribed equipment, and the presence of “any one or more” of the articles would be “prima facie evidence that the vessel was employed by the African slave trade.” This presumption could only be rebutted with “clear and incontrovertible evidence” that the vessel was employed in a lawful undertaking and the articles were indispensible for the lawful object of the voyage. This principle allowed for slavery convictions even though the slave traders had not been caught in the act, and it is believed that equipment clauses “contributed significantly in the campaign to reduce and eliminate the transatlantic slave trade.”

In his 2012 decision, Judge Gaswaga extended the concept of equipment laws to piracy prosecutions, establishing it as a new principle in piracy cases. Judge Gaswaga’s analysis is important, because it squarely addresses one of the most difficult evidentiary issues – the challenge of proving intent when perpetrators are not caught red handed. Judge Gaswaga noted the similarities between the offenses and stated: “I should relate the offence here with regard to the element of possession of piratical equipment or articles to that being in possession of slavery equipment, and draw an analogy since the evidence in this case basically proves the existence of

74 Id.
75 Id.
key piratical equipment like ladders.”

Possession of “piratical equipment”, he concluded, was sufficient to support a piracy conviction.

Criminalizing possession as a way of avoiding evidentiary difficulties is not a new concept. The 2005 Protocol for the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (henceforth 2005 SUA Protocol) criminalizes the transportation or possession on the high seas of certain equipment that could be used for serious crimes, even if the same equipment also has legitimate uses. Because it is difficult to prove that that a certain “dual-use” material is for an unconventional weapon, rather than for a legitimate use, the Protocol criminalizes possession of the equipment all together. Although none of the target forum States are signatories to this Protocol, as Professor Eugene Kontorovich argues, the “use of equipment laws to prove piracy should in fact be less controversial than the Protocol, because piracy is already a universally recognized crime; there is no international crime of designing or possessing unconventional weapons.”

Equipment articles for piracy could be promulgated through bilateral treaties, multilateral treaties, and Security Council resolutions, but the most effective of these would be domestic statutes.

In fact, both scholars and governmental officials have been advocating for States to pass domestic legislation criminalizing possession of piratical equipment. Many are frustrated that a “number of states in the region do not have laws against going equipped or with intent to commit

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76 Seychelles Nation, supra note 66.
77 Id.
78 Kontorovich, supra note 74, at 2.
79 Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, UNODC.ORG.
80 Id.
81 Kontorovich, supra note 14, at 8.
piracy, but only against the act of piracy itself.”

Four states in the region have such a law, but as one foreign Minister stated, “what we want is for countries like Kenya, Tanzania and Mauritius to change their laws as well.” As a recent British report indicated: “when pirates are observed in boats with guns, ladders and even hostages, it beggars belief that they cannot be prosecuted, assuming the states have the necessary laws in place and the will to do so.”

However, despite assurances that these laws are legitimate (they would not define a new crime, but rather, they would simply establish the elements of proof the existing crime of piracy or codify one way of demonstrating intent), such national laws in those countries have not been passed. Thus, the significance of Judge Gaswaga’s opinion, and Seychelles use of the piratical equipment principle, is especially highlighted by the general legislative inaction in the region.

The “piratical equipment” principle will facilitate the prosecution of piracy in a number of ways. As explained by Professor Kontorovich, equipment articles are “rules that create a judicial presumption of guilt.” In the piracy context, this means that a presumption of guilt would be created “for the crews of civilian vessels possessing certain specified equipment within a defined area of the high seas plagued by pirate attacks.” Examples of piratical equipment might include any the following: vessels less than a certain length, engines of a certain horsepower, grappling hooks, boarding ladders, dollar counting machines, rocket-propelled grenades (RPGs), heavy machine guns, or inadequate provisions (suggesting that the boat operates from a “mothership”). In addition to creating a presumption of guilt for the captured individuals, using piratical equipment to prove a case will lower the bar on the amount of

82 Captain Staff, supra note 17.
83 FOREIGN AFFAIRS COMMITTEE, TENTH REPORT: PIRACY OFF THE COAST OF SOMALIA, 2010-12, 12, (U.K.).
84 Kontorovich, supra note 74, at 1.
85 Id.
86 Id.
evidence needed, will permit alternative sources of evidence, and will provide for a method of proof based on circumstantial evidence. Investigators will have more sources of evidence to examine, and prosecutors will have an alternative viable theory of prosecution. Furthermore, these trials are “relatively low cost”, and “would encourage a broader range of countries … to prosecute pirates.”

Consequently, it is likely that this decision may lead to a greater number of prosecutions brought to trial, as there is no doubt that these considerations will factor significantly into a decision about releasing captured suspects.

B. Developments Regarding the Collection/Preservation of Evidence:

Physical evidence creates complex issues throughout an investigation and trial. Investigators often lack the training and resources to properly collect and maintain evidence, and prosecutors face difficulties navigating evidentiary rules and transporting evidence from afar. In order to combat these challenges, there have been efforts to increase training and enhance international cooperation. Additionally, some nations are using “Shiprider Agreements” to avoid many evidentiary challenges. An overview of these methods is provided below.

1. Training Efforts:

Training is offered to a variety of individuals on a range of different subjects. One group targeted for training programs are investigators and court personnel that are involved in piracy prosecutions, and these programs generally focus on investigatory techniques and legal education. For example, UNODC has issued handover guidance to help international navies ensure that evidence packages meet the requirements of regional legal systems. Additionally, the UK Crown Prosecution Service (CPS) provides training to officers on EUNAVFOR vessels

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87 Id.
88 INTERNATIONAL AFFAIRS AND DEFENCE SECTION, supra note 22, at 16.
regarding the evidential rules and requirements of Seychelles law and the local practices of Seychellois courts.\textsuperscript{89} It has also provided training on “best practice” in prosecution and investigation of piracy offenses to members of the judiciary in Mauritius, Mauritian police, and to anti-piracy police officers from Kenya, Tanzania, Madagascar and Mauritius.\textsuperscript{90} INTERPOL has also engaged in training efforts, and its primary aims are to encourage uniformity in evidence gathering for investigations carried out over multiple locations.\textsuperscript{91} The training provided by INTERPOL is offered to member countries worldwide, and it focuses on improving the quantity and quality of data collected and to make sure that it is properly preserved and analyzed. In 2011, INTERPOL began a 36-month, EU funded, training program for law enforcement in the Somali Basin region, with classes taught in the Seychelles. The focus of the project is “to ensure that police professionals have the forensic tools and training they need to carry out investigations into maritime piracy and other crimes as effectively as possible” and the training is centered on core investigative skills.\textsuperscript{92}

A second group targeted for training is individuals involved in the commercial shipping industry. INTERPOL has taken the lead on this aspect of training, and it has worked with the commercial shipping industry to ensure that evidence is preserved on ships following incidents of piracy. Additionally, INTERPOL produced guidelines on evidence collection and preservation, and it contributed to a new subsection titled “Prosecution of Pirates – Assisting Law Enforcement Authorities,” which was included in the 4th version of the shipping industry’s Best Management Practices. This new section includes reference to a 24-hour helpline and to

\textsuperscript{89} FOREIGN AFFAIRS COMMITTEE (U.K.), \textit{supra} note 75, at 13.

\textsuperscript{90} Id.

\textsuperscript{91} Media Release, Interpol, Maritime Piracy Investigations boosted by INTERPOL and NATO Framework on Information Sharing (May 9, 2012) (on Interpol website).

INTERPOL’s Maritime Task Force Website, and it provides guidance to seafarers on the proper techniques of post-incident evidence preservation and recovery.  

2.  *International Cooperation:*

Law enforcement agencies from around the world have come together in recent years and have been coordinating efforts to combat maritime piracy. One method of coordination has been to implement information sharing agreements. In November 2011, the United Nations Security Council unanimously endorsed Resolution 2020 urging all of its member states to share information with INTERPOL. Additionally, information sharing agreements with EUROPOL were announced in 2009 and 2011, and in June 2012, INTERPOL partnered with RAPPICC to provide for the collection of physical and digital evidence, fingerprints and DNA of suspects, and testimony from the ship’s crew.

In addition to these agreements, there also have been a number of international projects focused on facilitating the exchange of information. Project Evexi, “aims to establish and promulgate procedures for building the capacity of six East African countries in maritime piracy intelligence gathering and forensic evidence collection.” Another, Operation ATALANTA, authorizes its members to arrest, detain, transfer persons, seize vessels of pirates or vessels caught following an act of piracy, and seize goods on board. Recently, it was decided that the data collected by members of Operation ATALANTA will be shared with INTERPOL and checked against INTERPOL’s databases. Furthermore, in May 2012, it was announced that

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93 *Id.*  
94 Media Release, *supra* note 82.  
97 Interpol, *supra* note 86.
“piracy related information collected by NATO naval forces operating off the Horn of Africa as part of Operation Ocean Shield will be shared with INTERPOL National Central Bureaus to the fullest extent possible, taking into account national restrictions which might apply.”\(^9\) The information will be correctly preserved and will help determine the links within the evidence in relation to suspected pirates and associated criminal networks.\(^9\) Another recent INTERPOL project worked on the provision of an Automatic Fingerprint Identification System (AFIS) to the Scientific Support and Criminal Records Bureau (SSCRB) of the Seychelles Police. It is believed that this will “significantly enhance the digitalization of the fingerprint identification process, and enable swifter sharing of this information on an international level via INTERPOL to help identify suspected pirates.”\(^1\) Additionally, INTERPOL developed the West African Police Information System, which allows West African Police to access and manage police data related to organized crime by “facilitating the collection, centralization, management, sharing and analysis of police information among countries belonging to the Economic Community of West African States (WCOAS).”\(^2\)

Significant progress has also been made by INTERPOL with the creation of a number of centralized international databases. One is the Global Database on Maritime Piracy. This database stores information pertaining to maritime piracy investigations and it includes more than 4,000 records of: personal details of pirates and financiers, pirates’ telephone numbers and phone records, hijacking incidents, vessels, and currency and bank accounts used in ransom

\(^9\) Id.
\(^9\) Media Release, supra note 82.
\(^1\) Media Release, supra note 83.
The hope is that database will help member countries “identify and arrest high-value individuals involved in Somali maritime piracy – such as piracy leaders and financiers – and to identify their assets.” A second database is the Digital Photo Album, which contains photos of more than 300 suspected pirates. The photos are shared with international partners and are used to assist hostages in identifying their captors.

Law enforcement agencies have also shown a willingness to work together which brings many benefits, including increased resources, experts, and specialized techniques. As Pierre St. Hilaire, Head of INTERPOL’s Maritime Piracy Taskforce stated, “A collective approach pooling intelligence and resources through strategic partnerships is essential to fight maritime piracy.”

One example of a collective approach is INTERPOL’s Incident Response Teams (IRTs). These teams of experts are deployed when a captured vessel is released by pirates for the purpose of assisting national police with crime scene investigation and evidence collection. In April 2011, the first ever piracy IRT was sent to Durban, South Africa to assist national police with the investigation. The team collected physical evidence, recovered digital evidence from the ship’s satellite phone, collected fingerprints and DNA, and gathered testimony from the crew. The evidence was then forwarded to South African authorities. Another piracy IRT was deployed to Salalah, Oman, in June 2012. Another example is the use of U.S. Naval Criminal Investigative Service (NCIS), who regularly partners with law enforcement agencies throughout the world. NCIS Special Agents have developed expertise in applying forensic capabilities to maritime

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102 Intelligence, INTERPOL.COM (last accessed Nov. 30, 2012).
103 Id.
104 Id.
105 Media Release, supra note 82.
106 Operational Support, INTERPOL.COM (last accessed Nov. 30, 2012).
piracy investigations by using “biometrics collection capabilities.” NCIS agents have collected biometric information by manual means (i.e. fingerprint cards or DNA swabs), or with digital biometric devices. Data is then added to the Department of Defense Automated Biometric Identification System and searched against the FBI’s Integrated Automated Fingerprint Identification System.

These collaborative efforts have been successful as seen by the following examples. In February 2011, by using INTERPOL’s Digital Photo Album when debriefing the Filipino crew of the Irene SL, an oil tanker that had been hijacked, police were able to identify four of the pirates involved. Additionally, in May 2012, a Somali man was suspected of piracy, and Belgium’s Federal Police ran a cross-check of his fingerprints against INTERPOL’s databases. After running the search, they were able to link the suspect with the hijack of Belgian vessel MV Pompei in waters off the Seychelles in April 2009, because immediately after the hijacking, Belgian Federal Police had conducted an extensive forensic crime scene investigation and its results were added to INTERPOL’s maritime piracy and fingerprints databases. As a result of this match, the man was extradited from the Seychelles to Belgium in May 2012.

3. **Shiprider Agreements:**

In addition to efforts aimed at improving training and enhancing international cooperation, the use of shiprider agreements provides another method to overcome evidentiary challenges involving the collection and retention of evidence. The classical purpose of shipriders

108 Id.
109 *Intelligence*, supra note 93.
111 Id.
was to overcome jurisdictional hurdles, but there is a growing desire to use shipriders for a different purpose: “to increase the policing skills on board military ships.”\textsuperscript{112} Generally, crews of military vessels are members of the armed forces, and their primary training is for combat and other military operations. Thus, these crews typically are unprepared to engage in traditional police or forensic work.\textsuperscript{113} The initial on scene investigation is crucial for evidence gathering, but flawed procedures or ill-equipped “investigators” are likely to lead to defective evidence or a deficiency of evidence. Using law enforcement officials as shipriders might solve this problem by bringing the necessary police skills on board military vessels. The United States Model Maritime Agreement Concerning Cooperation to Suppress Illicit Traffic by Sea “foresees that shipriders take law enforcement measures, such as search and seizure of property …. under their own state.”\textsuperscript{114} Moreover, these shipriders would be knowledgeable about the criminal procedure rules and evidentiary standards of the jurisdiction where the criminal proceedings would later be brought and they could serve as an on-board legal resource.

However, the use of shipriders also raises a number of legal issues. For one, a general rule on the high seas is that “one ship, one law” governs, and the use of shipriders challenges this assumption.\textsuperscript{115} The rationale behind the “one flag” policy arises from concerns that the use of more than one flag would create problems, because “[d]ouble nationality may give raise to serious abuse by a ship using one or another flag during the same voyage, according to its convenience.”\textsuperscript{116} Shipriders potentially violate this rule, because they would carry out law enforcement actions pursuant to a legal order of the shiprider’s home state which is different

\footnotesize{\textsuperscript{112}Geiss, supra note 7, at 89.\\ \textsuperscript{113}Id.\\ \textsuperscript{114}Id. at 88\\ \textsuperscript{115}Id.\\ \textsuperscript{116}Id.}
from that of the ship’s flag state.\textsuperscript{117} Additionally, if a shiprider is used in order to bring an offender under a jurisdiction other than that of the flag State, “this practice comes close, in effect, to a prohibited change of flag during a voyage.”\textsuperscript{118} Some argue that both of these situations would “defy the UNCLOS’ objective of legal certainty in the exercise of enforcement powers at sea.”\textsuperscript{119}

A second legal issue arising from the use of shipriders is that both the Convention on the High Seas and UNCLOS grant enforcement powers over pirate ships to only a certain category of vessels, such as warships, military aircraft, or those clearly marked and identified as being government service. The reasons cited for this limitation are that it serves to indicate the “official character of these units and their personnel”, it increases transparency, and in the case of a wrongful seizure, it can help determine responsibility and liability. Generally, ships fighting piracy off the coast of Somalia meet these requirements as they are clearly marked and identifiable. However, using a shiprider belonging to a State different from the nationality displayed by the vessel undermines the rationale behind this limitation, and thus, the use of shipriders “could potentially constitute a circumvention of Article 107 of UNCLOS.”\textsuperscript{120}

A third concern about the use of shipriders is that legal obligations might be circumvented. This would occur in a human rights context if, by use of a shiprider, a pirate is brought under the jurisdiction of a State to which a transfer or extradition would not be possible without violating the prohibition of refoulement. In order to comply with the non-refoulement principle, states that have abolished the death penalty must refrain from transferring persons to

\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} Id.
\textsuperscript{120} Id. at 93
countries where they face the possible imposition of the death penalty. Therefore, the use of shipriders from retentionist\textsuperscript{121} countries would be especially problematic.\textsuperscript{122} Furthermore, in anticipation of potential abuses of shiprider agreements, the Security Council introduced a safeguard clause in Resolution 1851, that such agreements should “not prejudice the effective implementation of the SUA Convention.”\textsuperscript{123} However, the meaning of this clause is unclear, and there are concerns that the very rationale of the obligation to prosecute or extradite under the SUA Convention could be bypassed by the use of shipriders, as it is unclear how the patrolling State could ensure that the home state does instigate criminal proceedings.\textsuperscript{124}

However, many of the concerns listed above have been addressed. Concerns about the “one flag” policy were addressed by the United States Model Maritime Agreement, which anticipates the possibility that crew members of the host vessel assist the shiprider in carrying out enforcement actions if the shiprider expressly requests assistance. These requests may only be made, agreed, and acted upon in accordance with applicable laws of both parties.\textsuperscript{125} Additionally, under the Djibouti Code of Conduct, shipriders may assist the law enforcement officials of a host vessel or conduct operations “in a manner that is not prohibited by the laws and policies of both participants.”\textsuperscript{126} Although these documents are not perfect (the Code gives no indication about how to handle a conflict of law), the fact remains that these two authorities both contemplate an application of two legal regimes coextensively. Concerns about human

\textsuperscript{121}“Retentionist” countries are defined as “countries and territories that retain the death penalty for ordinary crimes.” See Abolitionist and Retentionist Countries, AMNESTY.ORG (last accessed Nov. 30, 2012).
\textsuperscript{122}Geiss, supra note 7, at 94.
\textsuperscript{123}Id. at 95.
\textsuperscript{124}Id.
\textsuperscript{125}Id. at 91
\textsuperscript{126}Id.
rights violations could be solved simply by not using shipriders from retentionist\textsuperscript{127} countries, and there are a number of options within the region. Although Somalia and Yemen remain among retentionist countries, Kenya and Tanzania retain the death penalty for ordinary crime but are considered abolitionist in practice, and Seychelles and Mauritius have abolished the death penalty for all crimes.\textsuperscript{128}

Proponents of shipriders argue that they bring many advantages. This includes: the power and authority to take law enforcement measures (such as arrest and seizure); specialized expertise (such as forensic skills); avoiding causalities within one’s own rank; and “realization of seamless borders.”\textsuperscript{129} Opponents of shipriders argue that their use might have detrimental results. Those arguments assert that shipriders will lower human rights protections, run counter to legal certainty, and enable forum shopping.\textsuperscript{130} Perhaps shipriders are best for the short term— as a placeholder, until the investigatory skills of local investigators are able to meet best international practices.

C. Developments Regarding Witnesses:

Witness testimony can be among the most difficult evidence to secure, because witnesses are difficult to track down, are often away at sea, and may be unwilling to testify. Furthermore, assuming a witness can be located and is willing to participate in the proceedings, it can be extremely expensive to transport witnesses to the physical location of the trial. As courts are becoming more technologically proficient, one solution to these problems would be to allow for witness testimony in piracy cases to be given via videolink.

\textsuperscript{127} See Abolitionist and Retentionist Countries, supra note 119.
\textsuperscript{128} Id.
\textsuperscript{129} Id. at 94
\textsuperscript{130} Id. at 94-95.
This development is already in motion in courts in Kenya, as the High Court in Kenya recently authorized the taking of evidence in a criminal trial by video conference in a case in which two witnesses from the United States expressed reluctance to travel to the nation.\textsuperscript{131} The Court ruled that a prior decision declining an application by the prosecution to have the evidence given by video conference was wrong, and the Court gave approval for the witnesses to testify over videoconferencing terminals in the Kenyan embassy in the USA and the Nairobi Law Courts.\textsuperscript{132} A judicial officer would be present in Washington to administer the witnesses’ oath and to ensure that they were not coached or harassed. In reaching this decision, Justice Fred Ocheing observed that if the prosecution was forced to close its case without taking the evidence of the two witnesses by video, a procedure that would not prejudice the respondent, this would “imperil the public interest in having all the evidence laid before the court in order to arrive at a just decision.”\textsuperscript{133} This decision follows Republic v. Kipsigei Cosmas Sigei & another, in which the High Court of Kenya held that evidence contained in a video recording is admissible. In that decision, the Court astutely commented that it “must respond to and keep pace with advancements in science and technology and societal changes.”\textsuperscript{134}

The Seychelles also permits the use of video link testimony, and Article 11(B)(a) of the Evidence Act makes provisions for vulnerable witnesses to give evidence from a closed circuit television.\textsuperscript{135} However, in both Kenya and Seychelles, this practice is of limited use for several reasons. The first is that common law tradition is that evidence should normally be offered in person, because it allows for cross-examination before the judge, and it is a matter of discretion.

\textsuperscript{131} M.M. Murungi, \textit{High Court Authorizes Taking of Evidence by Video Conference}, KENYALAW.ORG, July 28, 2011.
\textsuperscript{132} \textit{Id.}
\textsuperscript{133} \textit{Id.}
\textsuperscript{134} \textit{Id.}
\textsuperscript{135} \textit{Id.}
for the judge whether to allow video evidence into the trial. A second is that video evidence is subject to a number of technical challenges, including a lack of suitable wide bandwidth infrastructure in many regional states, and the need to ensure that compatible equipment is available at the witness’s location. Furthermore, there is often confusion about the rules surrounding its use, as well as objections to legality. Although there will be initial challenges involved with building the infrastructure to support videolink, with some technical assistance and training, this method could prove to be very useful in piracy trials.

D. Developments Regarding Classified Information:

Although the challenges of using classified or sensitive information at trial have not yet been reported in the piracy context, courts have been struggling with these problems for decades. Most frequently, these issues are discussed in the context of prosecuting war crimes or terrorism. Because evidence involved in these prosecutions may involve information obtained by advances in intelligence technology, it is often the case that “states must be convinced to provide it and often want assurances that valuable sources and methods will not be compromised.” States providing the evidence may demand that it is only used by the prosecutor, is not disclosed to the defense, and is subject to in camera hearings if it is used as evidence. However, this presents dilemmas for courts who want to preserve transparency, protect defendant’s rights to know the evidence against him and allow the defendant to challenge its authenticity.

137 Id.
138 Murungi, supra note 20.
140 Id.
141 Id. at 498.
It is useful to look to other courts for guidance on this subject. One of the best resources is the International Criminal Tribunal for the former Yugoslavia (ICTY), one scholar argued the Court was “the best and only real laboratory for learning about the implications of using and protecting national security evidence in international criminal trials.”\textsuperscript{142} She argues that the ICTY’s experience demonstrates the importance of developing clear rules of procedure “to prevent a slide toward protecting state secrets at all cost” as well as the importance of developing a flexible framework that allows for compromise measures. Her recommendations include: redacting and summarizing evidence as alternatives to full disclosure, considering alternatives to fully-closed sessions (such as selective redacting of testimony or unclassified summaries of testimony or evidence that could be released to the public).\textsuperscript{143} Additionally, she suggests that if a state insists on holding a hearing in camera to protect its evidence, then the court should articulate a high bar as to when such measures are appropriate.\textsuperscript{144}

Furthermore, guidance might be found in certain national legislation, such as the Classified Procedures Act (CIPA) in the U.S. When there is potential for classified information to be disclosed in a criminal case, CIPA establishes pre-trial, trial, and appellate procedures intended to protect national security from improper or unnecessary disclosure, while at the same time protecting a defendant’s right to a fair trial.\textsuperscript{145} This statute, which one author said gives “the defendant a sword in his battle to avoid a conviction and the government a shield to protect its national security interests”, has been used in a large number of terrorism cases. Classified information is considered one of the most difficult challenges presented by international

\textsuperscript{142} Id. at 497.
\textsuperscript{143} Id. at 498.
\textsuperscript{144} Id. at 499.
\textsuperscript{145} RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS 97 (Human Rights First 2008).
terrorism cases, and evaluations of CIPA have found it “effective not only in espionage prosecution but in terrorism prosecutions as well.”\textsuperscript{146} CIPA has also been very helpful in dealing with foreign intelligence sources, and as a result, foreign intelligence agencies have become more willing to share information with the U.S.\textsuperscript{147}

Overall, if prosecuting States face difficulties with utilizing classified information in trial, there are a few authorities to rely on. Courts might consider developing clear rules of procedure and using compromising measures that strike a balance between protecting state’s interests and defendant’s rights. Additionally, states might consider adopting legislation that specifically addresses sensitive information, looking to CIPA and other similar statutes as a model.

E. Developments Regarding Human Rights Concerns:

Although officials must be concerned about the right to privacy of a suspected pirate for fear that this will lead later to the exclusion of this evidence in court, there is an argument to be made that “the right to privacy may be surrendered” in appropriate situations.\textsuperscript{148} The argument is that an individual’s right to privacy may be limited in the interest in the prevention of crime, and thus, the taking of evidence may be lawful for this purpose.\textsuperscript{149} Similarly, surveillance of citizens is tolerated under the ECHR if it is for legitimate aims and subject to proper oversight. Thus, if a legitimate purpose and minimum safeguards can be demonstrated, surveillance of pirates may also be permitted. For a general discussion of these issues, refer to Paper Topic C submitted with this memorandum.\textsuperscript{150}

\textsuperscript{146} \textit{Id.} at 103
\textsuperscript{147} \textit{Id.}
\textsuperscript{148} For more on this subject, See Morgan, supra note 44, at 11 (Topic C, included with this paper).
\textsuperscript{149} \textit{Id.}
\textsuperscript{150} \textit{Id.} at 12.
VI. CONCLUSIONS:

To most effectively address challenges related to adequacy of the evidence, forum states should consider legislation that criminalizes possession of piratical equipment. In its absence, judges and prosecutors in Kenya, Tanzania, and Mauritius should consider utilizing the concept of “piratical equipment,” looking to Judge Gaswaga’s 2012 opinion for guidance. To best address challenges related to the collection of evidence, states should look to international organizations and databases for assistance. Additionally, they should continue to develop the skills of local investigators and crewmen, as this is the most sustainable long term solution. However, in the interim, these states might consider employing shipriders to ensure that evidence is collected in accordance with domestic law. To effectively address challenges related to witnesses, forum states should work to enhance technological equipment in the courtrooms, in order to increase its access to modern technology, such as video testimony. In order to best address challenges related to the use of classified information, states should consider adopting legislation that specifically addresses sensitive information, perhaps modeled after the United States Classified Information Procedures Act. Additionally, courts should develop methods for admitting evidence that still preserves the balance between defendants’ rights and the state’s interests, such as redacting evidence or holding in camera hearings.

Piracy prosecutions are complex and pose challenges for investigators and prosecutors throughout the entire process. However, these issues have largely been identified, and a global effort is in place to combat these difficulties. Investigators are working to improve their skills and increase their toolboxes. The international community is working to enhance cooperation and improve information sharing. Governments are working to standardize rules and procedures.
Courts are working to adopt new technology, and judges are working to find creative solutions. Change won’t come overnight – but in the past few years, there has been significant progress.