

NOTES

YOU'RE A CROOK, CAPTAIN HOOK! NAVIGATING A WAY OUT OF THE SOMALI PIRACY PROBLEM WITH THE RULE OF LAW

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I. INTRODUCTION

In 1718, Robert Maynard sailed into Hampton Roads, Virginia with the severed head of Captain Edward Teach, better known as the legendary Blackbeard, proudly displayed on the bowsprit of his vessel.¹ Almost three hundred years later, six suspected Somali pirates stood for trial in a U.S. district court in Norfolk, Virginia, not far from Hampton Roads.² The USS Ashland found the suspects on April 10, 2010, floating in a small boat in the Gulf of Aden with AK-47 style firearms, apparently lying in wait for passing ships.³ Though these men were clearly not fishing,⁴ the judge dropped the piracy charges on August 17, 2010, finding that “the Government . . . failed to establish that any unauthorized acts of violence or aggression committed on the high seas constitutes piracy” under U.S. or international law.⁵ On one hand, the due process enjoyed by these suspected pirates illustrates the advancements made in criminal justice since the days of Blackbeard.⁶ On the other hand, the case underscores one of the greatest challenges faced in the fight against modern maritime piracy—how to effectively and fairly prosecute a Somali pirate.⁷

With the recent resurgence in piratical activities off the eastern coast of Africa,⁸ finding an answer to this question remains crucial. Despite heightened attention from the international community, efforts to quell the

¹ Keith Johnson, *Who's a Pirate? In Court, A Duel Over Definitions*, WALL ST. J., Aug. 20, 2010, at W1.

² *United States v. Said*, 757 F. Supp. 2d 554, 556 (E.D. Va. 2010), *vacated*, 680 F.3d 374 (4th Cir. 2012) (granting defendants' motion to dismiss the charges of piracy).

³ *Id.* at 556–57.

⁴ Douglas Guilfoyle, *Prosecuting Pirates in National Courts: US v Said and Piracy Under US Law*, EJIL: TALK! (Aug 23, 2010), <http://www.ejiltalk.org/prosecuting-pirates-in-national-courts-us-v-said-and-piracy-under-us-law/> (criticizing the district court's ruling in *Said*).

⁵ *Said*, 757 F. Supp. 2d at 567.

⁶ Eugene Kontorovich, “A *Guantánamo on the Sea*”: *The Difficulty of Prosecuting Pirates and Terrorists*, 98 CALIF. L. REV. 243, 256–57 (2010).

⁷ *See id.* at 256–74 (explaining the difficulties of effectively prosecuting pirates); James Thuo Gathii, *The Use of Force, Freedom of Commerce, and Double Standards in Prosecuting Pirates in Kenya*, 59 AM. U. L. REV. 1321, 1343 (2010) (questioning whether suspected pirates receive adequate rights as defendants in Kenyan prosecutions).

⁸ *See* INT'L MAR. ORG., REPORTS ON ACTS OF PIRACY AND ARMED ROBBERY AGAINST SHIPS, ANNUAL REPORT – 2011, para. 6, (2012) [hereinafter IMO 2011 PIRACY REPORT], available at http://www.imo.org/OurWork/Security/SecDocs/Documents/PiracyReports/180_Annual2011.pdf (citing a worldwide increase of piratical acts from 489 in 2010 to 544 in 2011, while the number of reported piratical acts near East Africa jumped from 172 in 2010 to 233 in 2011, an increase of approximately 23%); Raymond Gilpin, Ctr. for Sustainable Econs., *Counting the Costs of Somali Piracy* (U.S. Inst. of Peace, Working Paper, 2009), available at <http://www.usip.org/publications/counting-the-costs-somali-piracy>.

rise in piracy have achieved only qualified success.⁹ By increasing the multinational naval presence in the region, for example, the rate of successful pirate attacks declined from 63% in 2007, to 21% in 2009.¹⁰ Thus far, however, the world's naval forces have failed to pursue or apprehend those responsible for piratical activities, "which may not be sufficient to deter piracy motivated by outsized financial gains."¹¹ Arguably, by only interrupting the attacks and allowing the criminals to go unpunished, pirates are not deterred from committing acts of piracy; they are merely interrupted and delayed.¹² In fact, the increase in the frequency of attacks in the region continues, in spite of the decrease in successful attacks.¹³ A new approach that includes apprehension, prosecution, and incarceration must be implemented to meaningfully deter acts of piracy while preserving some form of due process.

The difficulties of designing and implementing such a plan, however, continue to frustrate the international community.¹⁴ The United Nations Convention on the Laws of the Sea (UNCLOS) assigns universal jurisdiction to the crime of piracy.¹⁵ Universal jurisdiction "allows States to arrest pirates, seize their ships and cargo, and bring them to trial in the State's domestic judicial system."¹⁶ Despite this broad grant of jurisdictional

⁹ U.N. Secretary-General, *Report of the Secretary-General on Possible Options to Further the Aim of Prosecuting and Imprisoning Persons Responsible for Acts of Piracy and Armed Robbery at Sea off the Coast of Somalia, Including, in Particular, Options for Creating Special Domestic Chambers Possibly with International Components, a Regional Tribunal or an International Tribunal and Corresponding Imprisonment Arrangements, Taking into Account the Work of the Contact Group on Piracy off the Coast of Somalia, the Existing Practice in Establishing International and Mixed Tribunals, and the Time and Resources Necessary to Achieve and Sustain Substantive Results*, para. 8, U.N. Doc S/2010/394 (July 26, 2010) [hereinafter *2010 UN Report*].

¹⁰ *Id.*

¹¹ Eugene Kontorovich, *International Legal Responses to Piracy off the Coast of Somalia*, ASIL INSIGHTS, Feb. 6, 2009, available at <http://www.asil.org/insights090206.cfm>.

¹² See IMO 2011 PIRACY REPORT, *supra* note 8, para. 6 (noting an increase in piratical activity in East Africa and increasing activity in the Arabian Sea resulting from Somali pirates' deployment of motherships).

¹³ According to the statistics quoted above, the success rate of piracy fell 42% between 2007 and 2009. *2010 UN Report*, *supra* note 9, para. 8. According to the IMO 2011 Piracy Report, however, although the success rate continued to decline, the number of piratical attacks in the region actually increased by over 20%. See IMO 2011 PIRACY REPORT, *supra* note 8, para. 6.

¹⁴ See Eugene Kontorovich & Steven Art, *An Empirical Examination of Universal Jurisdiction for Piracy*, 104 AM. J. INT'L L. 436, 449–51 (2010) (examining the extreme difficulty of apprehending, prosecuting, and incarcerating pirates through empirical study).

¹⁵ U.N. Convention on the Law of the Sea arts. 100–107, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

¹⁶ José Luis Jesus, Foreword, *Troubled Waters: Combating Maritime Piracy with the Rule*

authority, UNCLOS does not require any state to actually take judicial action.¹⁷ Therefore, the decision to try piracy is left entirely to the arresting state.¹⁸ As a result of this legal structure and the difficulties involved in trying pirates, which will be discussed in greater detail below, many countries exercise a catch and release policy, where pirates are simply let go rather than apprehended for trial.¹⁹ Even countries that choose to apprehend and prosecute suspected pirates, such as the United States, France, and the Netherlands, face complex legal and administrative challenges that make prosecution difficult, if not impossible.²⁰

The multinational naval forces patrolling near Somalia can now send captured pirates to Somalia's neighbors to stand trial.²¹ Reports of procedural abuse, however, lead observers to question whether these trials are fair and in accordance with international law.²² Further, the expense of prosecuting Somali pirates weighs heavily on neighboring countries.²³

As these problems illustrate, the current state-centric framework is unsustainable. It creates a disjointed approach that fails to provide meaningful deterrence, and therefore fails to solve the problem. To reverse this trend, the international community must better facilitate the apprehension, trial, and incarceration of pirates in accordance with recognized international principles of fairness and criminal justice.²⁴ The

of Law, 59 AM. U. L. REV. 1213, 1216 (2010) (emphasis added).

¹⁷ *Id.*

¹⁸ See *id.* (noting that some countries lack an adequate penal code to successfully prosecute pirates, while others simply choose to avoid the complicated political problems associated with trying foreign nationals in domestic courts).

¹⁹ See Douglas Guilfoyle, *Counter-Piracy Law Enforcement and Human Rights*, 59 INT'L & COMP. L.Q. 141, 141 (2010) (describing catch and release maneuvers used against Somali pirates and the inconsistent effects of the strategy); Kathryn Westcott, *Pirates in the Dock*, BBC NEWS (May 21, 2009), <http://news.bbc.co.uk/2/hi/africa/8059345.stm> (explaining that a Portuguese naval ship released suspected pirates after confiscating their weapons).

²⁰ Westcott, *supra* note 19.

²¹ See Milena Sterio, *The Somali Piracy Problem: A Global Puzzle Necessitating a Global Solution*, 59 AM. U. L. REV. 1449, 1477–80, 1486 (2010) (providing examples of regional agreements among African, Asian, and Western countries for prosecuting pirates, and explaining an attempt by the United Kingdom and Kenya to use a similar system in Somali-piracy trials).

²² See Gathii, *supra* note 7, at 1343–45 (explaining the unlawful waiting period suspected pirates experience between being arrested and charged with a crime in Kenya).

²³ Kevin J. Kelly, *U.S. Seeks to Boost Ties with Breakaway Regions*, DAILY NATION (Sept. 25, 2010), <http://www.nation.co.ke/News/world/US-seeks-to-boost-ties-with-breakaway-Somalia-regions/-/1068/1018158/-/mwdfn5z/-/index.html> (reporting that the United States has requested Japan's assistance in helping East African nations defer piracy related costs).

²⁴ See generally Universal Declaration of Human Rights art. 11, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217A III (Dec. 10, 1948) (“Everyone charged with a penal offence has the right to be presumed innocent . . . in a public trial at which he has had all the guarantees

efforts taken to lower the pirates' rate of success are encouraging. The growing number of attacks, however, will continue to drain resources until the international community takes steps to bring these criminals to justice. Moreover, on the rare occasion when a state actually decides to try a pirate under its own, unique judicial system, problems of cohesion and consistency arise.²⁵ Thus, this approach frustrates the ultimate goal of fairly and effectively handling piracy. Universal jurisdiction should entail some degree of universal rules of process. Therefore, the international approach to piracy must be modified to enable vigorous prosecution of these criminals. To achieve this goal, many scholars argue for including piracy within the jurisdiction of existing international courts, such as the International Tribunal for the Law of the Sea, which currently has no jurisdiction to hear criminal trials.²⁶ While this option is attractive, it may be impracticable in the immediate future since multilateral treaties can take years to enact or amend.²⁷ As a long-term solution, the United Nations should modify one of these international bodies to accommodate piracy. To provide the necessary immediate relief, however, a temporary regional tribunal should be adopted.

Part II of this Note explores the rise of Somali piracy and the legal tools currently in place to apprehend and prosecute pirates. Part III exposes the many flaws inherent in this legal framework in an effort to understand why nations often choose not to prosecute apprehended Somali pirates. Part IV analyzes current state practice once a pirate is actually brought to court. Part IV ultimately concludes that the current legal framework is ineffective, and that an ad hoc criminal tribunal dedicated to piracy is necessary to remedy the situation in Somalia.

necessary for his defence."); International Covenant on Civil and Political Rights art. 9(3), Dec. 19, 1966, 999 U.N.T.S. 171 ("Anyone arrested or detained on a criminal charge shall be brought promptly before a judge . . . and shall be entitled to a trial within a reasonable time or to release.").

²⁵ Jesus, *supra* note 16 (suggesting that the purely jurisdictional framework of international law does not produce a reliable approach).

²⁶ See, e.g., 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, 223–31 (2010); Craig Thedwall, Note, *Choosing the Right Yardarm: Establishing an International Court for Piracy*, 41 GEO. J. INT'L L. 501 (2010) (proposing that jurisdiction to hear piracy cases be given to the International Tribunal for the Law of the Sea).

²⁷ See Fernando Peinado Alcaraz, *Chasing Pirates Is All Very Well—But Who Is Going to Lock Them Up?*, EL PAÍS, Aug. 17, 2009, at 4, available at <http://fernandopeinadoalcaraz.files.wordpress.com/2011/09/somalia1.pdf> (relating the difficulty involved with ratifying the Rome Statute with any potential multilateral treaties regarding piracy).

II. BACKGROUND OF PIRACY AND THE FRAMEWORK OF INTERNATIONAL PIRACY LAW

A. *The Rise of Piracy in Somalia*

Piracy is one of the world's oldest crimes.²⁸ The Romans confronted the unique challenges of piracy by famously calling the ocean's thieves "*hostis humani generis*," or enemy of all mankind, arguably establishing the world's first doctrine of universal jurisdiction.²⁹ Despite incredible evolution in technology, law enforcement, and international legal theory over the last two millennia, groups of individuals continue to exploit the high seas and engage in acts of piracy.³⁰ Moreover, in recent years, the number of attacks appears to have grown.³¹ Between 2000 and 2006, approximately 2,400 reports of piracy were received, roughly doubling the previous six-year total.³² On March 19, 2012, the IMO reported that acts of piracy and armed robbery against ships rose 11% over 2010.³³ Some analysts even believe these statistics underestimate the actual number of pirate attacks, as shipping companies fear reporting incidents will result in increased insurance premiums and drawn-out investigations.³⁴

Most of this growth can be traced to the incredible surge of piratical activity off the coast of Somalia.³⁵ The region accounts for over half of the world's reported acts of piracy and armed robbery at sea.³⁶ Somali pirates operate out of numerous small camps dotting the beaches of the expansive Somali coast.³⁷ They use small, fast skiffs to prey upon slow-traveling cargo ships,³⁸ and are becoming increasingly sophisticated, using larger "mother ships" to extend the range of their operations farther out to sea.³⁹ When

²⁸ Dutton, *supra* note 26, at 203.

²⁹ Douglas R. Burgess, Jr., *Hostis Humani Generi: Piracy, Terrorism and a New International Law*, 13 U. MIAMI INT'L & COMP. L. REV. 293, 301–02 (2006).

³⁰ IMO 2011 PIRACY REPORT, *supra* note 8, at annexes 1–5 (providing a comprehensive compilation of all reported acts of piracy or armed robbery at sea in 2011).

³¹ Michael Gagain, Current Development, *Neglected Waters: Territorial Maritime Piracy and Developing States: Somalia, Nigeria, and Indonesia*, 16 NEW ENG. J. INT'L & COMP. L. 169, 170 (2010).

³² *Id.*

³³ IMO 2011 PIRACY REPORT, *supra* note 8, para. 5.

³⁴ See, e.g., Gagain, *supra* note 31, at 170 (noting that Australian officials believe the actual figure to be 2,000% higher).

³⁵ IMO 2011 PIRACY REPORT, *supra* note 8, para. 6.

³⁶ *Id.* (reporting that East Africa accounted for 223 of the 544 acts of piracy and armed robbery against ships in 2011).

³⁷ 2010 UN Report, *supra* note 9, para. 7.

³⁸ Gilpin, *supra* note 8, at 8.

³⁹ 2010 UN Report, *supra* note 9, para. 7.

successful, Somali pirates hijack a ship, guide her to one of several camps along Somalia's eastern shore, and demand a ransom for the crew and cargo.⁴⁰

Disruption of the global supply chain by Somali pirates causes an economic ripple effect throughout the international community.⁴¹ For example, insurance rates per voyage for ships traveling through the region escalated to around \$20,000 in 2009, forty times the 2008 rate of \$500.⁴² Companies that reroute ships around the southern tip of Africa for fear of attack, avoid the region completely but add an additional 3,500 miles to their shipping routes.⁴³ Although the complex nature of international trade makes the increased costs difficult to quantify, these costs have a negative impact on the regional, if not global, economy.⁴⁴ Of even greater concern is the physical threat posed to those who travel through the region. Though the pirates' primary concerns are economic and not necessarily to harm or kill civilians,⁴⁵ pirates reportedly killed seven of the 569 crew members taken hostage in 2011.⁴⁶ Somali pirates also target and disrupt international relief programs for the millions of people in war-torn Somalia.⁴⁷

Several major factors contribute to the multifaceted and complex problem of Somali piracy and are worth brief mention. First, Somalia's proximity to the Gulf of Aden, a crucial entry point for the Suez Canal, provides easy access to one of the world's busiest shipping lanes.⁴⁸ Over 20,000 ships carrying 12% of the world's oil supply pass through the gulf annually,⁴⁹ providing pirates with a wealth of potential targets. Second, a successful pirate attack can earn millions of dollars for a crew of pirates⁵⁰ and over

⁴⁰ Kontorovich, *supra* note 11.

⁴¹ Ruth Wedgwood, *The Law Adrift*, AM. INT., Mar.–Apr. 2009, at 123, 124.

⁴² Robert R. Frump, *Danger at Sea*, SHIPPING DIG., Jan. 12, 2009, at 6, 7.

⁴³ Gilpin, *supra* note 8, at 12.

⁴⁴ See, e.g., *id.* at 12–13 (noting piracy's negative regional economic impact in the form of declining revenues from tourism, foreign investment and shipping through the Suez Canal); Wedgwood, *supra* note 41, at 123–24 (concluding that the substantial burden caused by piracy upon the European and Israeli oil supply and the delivery of Chinese manufactured goods will result in increased consumer prices in Europe, Israel, and the United States).

⁴⁵ Jeffrey Gettleman, *Pirates Tell Their Side: They Want Only Money*, N.Y. TIMES, Oct. 1, 2008, at A6.

⁴⁶ IMO 2011 PIRACY REPORT, *supra* note 8, para. 8.

⁴⁷ See Mike Mount et al., *Pirates Attack U.S. Cargo Ship but Fail to Get Aboard*, CNN (Apr. 14, 2009), <http://edition.cnn.com/2009/WORLD/africa/04/14/somalia.pirates/index.html#cnnSTCText> (reporting the attempted hijacking of the Liberty Sun, a ship bound for Mombasa, Kenya, with food aid).

⁴⁸ James Kraska & Brian Wilson, *Fighting Pirates: The Pen and the Sword*, 25 WORLD POL'Y J., Winter 2008/09, at 41, 41.

⁴⁹ *Id.*

⁵⁰ See, e.g., Gagain, *supra* note 31, at 169 (citing the February 5, 2009 \$3.2 million ransom

\$150,000 per pirate by one estimate.⁵¹ In a country where around seventy-five percent of households subsist on less than \$2 per day, income of this magnitude is extremely attractive.⁵² Moreover, local financiers and government officials invest in the pirates' ventures and reap windfall gains, helping to entrench the pirate business model in the Somali economy.⁵³ Finally, as a failed state, Somalia's central government has no judicial system or police force, and simply lacks the authority to prevent this type of criminal behavior.⁵⁴ Despite several attempts, Somalia has failed to establish a functioning federal government since the Siad Barre regime fell in 1991.⁵⁵ The Transitional Federal Government (TFG) took power in 2003, but remains largely ineffective.⁵⁶ In fact, many TFG officials reportedly fund and aid piratical activities themselves.⁵⁷ This confluence of geographic, economic, and political factors created the perfect environment for Somali pirates, producing "perhaps the most significant eruption of such criminal activity in nearly two hundred years."⁵⁸

B. The International Legal Framework

Piracy carries with it a unique set of challenges for the modern criminal justice regime. What distinguishes pirates from other, similar criminals is that pirates act on a supra-national level, without a true affiliation to any state.⁵⁹ Further, pirates usually operate on the "high seas," the vast area beginning twelve miles off the world's coasts and belonging both "to all, and to no one."⁶⁰ As the responsibility to police the high seas falls to no particular nation, pirates fall through the cracks as they exploit an international community based largely upon the existence of territorial

payment for the MV Faina, a Ukrainian freighter carrying tanks and small arms).

⁵¹ Kontorovich, *supra* note 11.

⁵² Gilpin, *supra* note 8, at 1.

⁵³ *Id.* at 7 (estimating a financier with just twelve pirates could earn over \$321,000 in yearly profit).

⁵⁴ Sterio, *supra* note 21, at 1454–55.

⁵⁵ Gilpin, *supra* note 8, at 5.

⁵⁶ *Id.*

⁵⁷ *Id.* at 6.

⁵⁸ Kontorovich, *supra* note 11.

⁵⁹ Sterio, *supra* note 21, at 1460.

⁶⁰ Lawrence Azubuike, *International Law Regime Against Piracy*, 15 ANN. SURV. INT'L & COMP. L. 43, 50 (2009).

boundaries.⁶¹ The laws addressing piracy, therefore, attempt to address this jurisdictional challenge.⁶²

In response to this centuries-old challenge, the international community developed the doctrine of universal jurisdiction,⁶³ which justifies state assertion of power over individuals in the broadest possible terms.⁶⁴ Two international treaties authorize countries to apprehend, prosecute, and incarcerate pirates under domestic law.⁶⁵ Excluding the modern limitation discussed below, true universal jurisdiction grants this authority regardless of the pirate's nationality or where the crime was committed.⁶⁶

At present, UNCLOS codifies the application of universal jurisdiction to the crime of piracy.⁶⁷ The first draft, signed into law in 1958, included eight articles concerning piracy.⁶⁸ The 1982 version of UNCLOS, which applies today, also includes these articles.⁶⁹ A number of nations, including the United States, have not ratified UNCLOS.⁷⁰ However, experts consider the treaty a codification of customary international law and therefore binding on all states, even non-parties to the convention.⁷¹

The piracy provisions are in Articles 100 through 107 of UNCLOS.⁷² Article 100 states the general requirement that all states must "cooperate to the fullest possible extent in the repression of piracy on the high seas."⁷³ Article 105 grants states the authority to apply universal jurisdiction in order to carry out their Article 100 commitments.⁷⁴ Article 101 contains the definition of piracy. It reads:

Piracy consists of any of the following acts:

⁶¹ Sterio, *supra* note 21, at 1465–66 (noting how discrepancies in national laws often lead to under-prosecution).

⁶² Kontorovich, *supra* note 6, at 251 (explaining that the international definition of piracy codifies the concept of universal jurisdiction).

⁶³ See Dutton, *supra* note 26, at 203 (noting piracy is the "oldest crime to which universal jurisdiction applies"); Kontorovich, *supra* note 6, at 244 (arguing that for centuries piracy was the only crime to which universal jurisdiction applied).

⁶⁴ Dutton, *supra* note 26, at 203–04.

⁶⁵ *Id.* at 204.

⁶⁶ *Id.* at 203 n.21.

⁶⁷ UNCLOS, *supra* note 15, arts. 101, 105.

⁶⁸ Milena Sterio, *Fighting Piracy in Somalia (and Elsewhere): Why More is Needed*, 33 *FORDHAM INT'L L.J.* 372, 385 (2010).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Azubuike, *supra* note 60, at 49.

⁷² UNCLOS, *supra* note 15, arts. 100–107.

⁷³ *Id.* art. 100.

⁷⁴ *Id.* art. 105.

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).⁷⁵

This definition triggers the universal jurisdiction provision in Article 105.⁷⁶ Article 101 imposes three requirements for an act to be considered piracy in accordance with international law.⁷⁷ First, the act must be one “committed for private ends.”⁷⁸ This requirement is likely a relic of the days when nations would employ pirates under letters of marque.⁷⁹ UNCLOS does not define the term “for private ends”⁸⁰ and commentators differ as to what it means.⁸¹ Somali pirates, however, seem to meet this criterion, as they appear to be motivated only by the profits from ransom payments.⁸² The “private ends” requirement may become a greater issue if Somali pirate regimes become affiliated with terrorist organizations that are ostensibly motivated by public, social and political change rather than private financial gain.⁸³ Regardless, it is likely that clever defense attorneys will claim their

⁷⁵ *Id.* art. 101.

⁷⁶ Azubuike, *supra* note 60, at 54.

⁷⁷ *Id.* at 51.

⁷⁸ UNCLOS, *supra* note 15, art. 101.

⁷⁹ Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, 40 VAND. J. TRANSNAT'L L. 1, 12 (2007).

⁸⁰ Azubuike, *supra* note 60, at 52.

⁸¹ Douglas Guilfoyle, *Piracy off Somalia: UN Security Council Resolution 1816 and IMO Regional Counter-Piracy Efforts*, 57 INT'L & COMP. L.Q. 690, 693 (2008) (explaining the differences between a narrow interpretation of this requirement, which excludes politically motivated violence at sea such as acts of terrorism, and a broad interpretation, which holds that the term excludes only public acts of violence at sea, such as those committed by civil war insurgents).

⁸² Guilfoyle, *supra* note 19, at 143 (noting that depicting themselves as purely after financial gain is in the pirate's best interest, as ransoms may not be payable to a terrorist or other politically motivated organization).

⁸³ U.N. SCOR, 65th Sess., 6390th mtg. at 13, U.N. Doc. S/PV.6390 (Sept. 27, 2010) [hereinafter SCOR Report].

clients acted for public or political ends, creating a further obstacle for the application of UNCLOS' definition to suspected pirates.⁸⁴

The second requirement is the geographic limitation that piracy must take place "on the high seas."⁸⁵ The geographic limitation in Article 101 applies to both the definition of the offense (proscriptive jurisdiction) and the parameters of a state's enforcement authority (enforcement jurisdiction).⁸⁶ According to UNCLOS, piracy can only be committed, and therefore suppressed, outside of the realm of any other nation's jurisdiction.⁸⁷ This requirement upholds notions of state sovereignty by allowing states to monitor their own territorial waters without international interference.⁸⁸ For failed states such as Somalia, however, where authorities are either unable or unwilling to police their own territorial seas, a crack develops in the international regime to prevent piracy.⁸⁹ As Somalia illustrates, a national piracy problem can quickly become an international piracy problem.⁹⁰

Finally, for an act of violence at sea to fall under the Article 101 definition of piracy, it must be committed by the passengers of one ship "against another ship."⁹¹ Suspected cases of piracy in the Gulf of Aden usually meet this requirement, as the attacks involve two ships far off-shore.⁹²

Arguably, UNCLOS's biggest drawback is that it neither requires nor regulates state participation in the enforcement of its piracy provisions.⁹³ It merely provides a definition of piracy.⁹⁴ Though Article 100 of UNCLOS calls for states to "cooperate to the fullest possible extent in the repression of piracy on the high seas,"⁹⁵ no mechanism compels states to meet this duty.⁹⁶ Even though UNCLOS represents international custom with regard to piracy, states must first incorporate its provisions into their domestic criminal law to successfully prosecute a pirate in their domestic judicial systems.⁹⁷

⁸⁴ Dutton, *supra* note 26, at 207–08.

⁸⁵ UNCLOS, *supra* note 15, art. 101.

⁸⁶ Guilfoyle, *supra* note 19, at 144.

⁸⁷ *Id.*

⁸⁸ Azubuike, *supra* note 60, at 51.

⁸⁹ *Id.*

⁹⁰ Sterio, *supra* note 21 (suggesting that Somali piracy has become a global problem).

⁹¹ UNCLOS, *supra* note 15, art. 101.

⁹² Dutton, *supra* note 26, at 207.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ UNCLOS, *supra* note 15, art. 100.

⁹⁶ Dutton, *supra* note 26, at 206.

⁹⁷ EUROPEAN SEC. & DEF. ASSEMBLY, ASSEMBLY OF THE WESTERN EUROPEAN UNION, REPORT: THE ROLE OF THE EUROPEAN UNION IN COMBATING PIRACY, paras. 51–55, WEU Doc. A/2037 (June 4, 2009) [hereinafter THE ROLE OF THE EUROPEAN UNION].

However, few states have taken this crucial step since UNCLOS came into force.⁹⁸ Accordingly, piracy laws vary greatly between countries, creating a confusing lack of cohesion that undermines Article 100's mandate to repress piracy.⁹⁹ The specific problems that arise, and how they affect the criminal justice process will be discussed in more detail in part III.

Some nations also rely on the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention) to justify detention and prosecution of suspected pirates.¹⁰⁰ Unlike UNCLOS, the SUA Convention only binds member parties, as it is not considered customary international law.¹⁰¹ The purpose of the SUA Convention is to address the perceived gaps in UNCLOS.¹⁰² For example, the SUA Convention covers politically motivated acts of violence against ships, a crime not addressed by UNCLOS.¹⁰³ Further, the SUA Convention requires a state to either extradite or prosecute an offender, using stronger, more specific language than UNCLOS.¹⁰⁴ Despite these differences, most nations remain reluctant to rely on the SUA Convention to justify detention and prosecution of pirates.¹⁰⁵ Some experts suggest that confusion regarding the Convention's applicability leads countries to believe the Convention is only applicable to acts committed by terrorists.¹⁰⁶ In other words, the SUA Convention covers ship hijackings that are politically, not financially, motivated.¹⁰⁷

Finally, to combat the recent rise in Somali piracy the United Nations issued a series of ad hoc measures in the form of Security Council

⁹⁸ *Id.*

⁹⁹ Dutton, *supra* note 26, at 206.

¹⁰⁰ Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221 [hereinafter SUA Convention].

¹⁰¹ Azubuike, *supra* note 60, at 56.

¹⁰² SCOR Report, *supra* note 83.

¹⁰³ THE ROLE OF THE EUROPEAN UNION, *supra* note 97, para. 61.

¹⁰⁴ Compare SUA Convention, *supra* note 100, art. 7 ("Upon being satisfied that the circumstances so warrant, any State Party in the territory . . . shall, in accordance with its law, take him into custody . . ."), and *id.* art. 10 ("The State Party in the territory of which the offender or the alleged offender is found shall . . . if it does not extradite him, be obliged, without exception whatsoever . . . , to submit the case without delay to its competent authorities for the purpose of prosecution . . ."), with UNCLOS, *supra* note 15, art. 100 (requiring states to cooperate to the "fullest possible extent in the repression of piracy").

¹⁰⁵ Dutton, *supra* note 26, at 209 (finding only one instance in which the SUA Convention was used).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 205, 207 ("[T]he SUA Convention covers ship hijackings that are politically motivated" while "politically motivated acts of terrorism committed against ships and their crew members on the high seas may not be included within the definition of piracy under UNCLOS.").

resolutions.¹⁰⁸ In June 2008, the Security Council called for states to “cooperate in determining jurisdiction, and in the investigation and prosecution of persons responsible for acts of piracy and armed robbery off the coast of Somalia.”¹⁰⁹ The same resolution further authorized certain nations that attained consent from the Transitional Federal Government of Somalia to enter Somalia’s territorial waters and use “all necessary means to repress acts of piracy and armed robbery.”¹¹⁰ Resolution 1851, passed unanimously in December of 2008, calls for increased international coordination and even broader military action to fight piracy, authorizing land-based operations in Somalia.¹¹¹ Thus far, the international response to these resolutions has been positive.¹¹² The United States created an international Contact Group on Piracy off the Coast of Somalia, which now consists of over fifty member states and international organizations.¹¹³ Moreover, in December 2008, the European Union established operation ATALANTA, an ongoing military operation designed to contribute to the “deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast.”¹¹⁴ These cooperative missions reduced the percentage of successful pirate attacks in the region.¹¹⁵

III. PROBLEMS PROSECUTING PIRACY UNDER THE CURRENT INTERNATIONAL FRAMEWORK

Despite the overwhelming amount of international attention and resources aimed at fixing the Somali piracy problem, remarkably few pirates ever see the inside of a courtroom.¹¹⁶ A recent empirical study performed by respected international maritime law scholar Eugene Kontorovich found “that of all clear cases of piracy punishable under universal jurisdiction, international prosecution occurred in no more than 1.47 percent” of those

¹⁰⁸ 2010 UN Report, *supra* note 9, paras. 14–15.

¹⁰⁹ S.C. Res. 1816, U.N. Doc. S/RES/1816 (June 2, 2008). Note that the Security Council extended this resolution, which was originally intended to last only six months, for an additional year in December of 2008. S.C. Res. 1846, pmbl., U.N. Doc. S/RES/1846 (Dec. 2, 2008). The resolution was extended once more in November of 2009 for an additional year. S.C. Res. 1897, pmbl., U.N. Doc. S/RES/1897 (Nov. 30, 2009).

¹¹⁰ S.C. Res. 1816, *supra* note 109, para. 7(b).

¹¹¹ S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008).

¹¹² Dutton, *supra* note 26, at 213–15.

¹¹³ *Id.* at 214 (noting the cooperation of international organizations including the African Union, the League of Arab States, INTERPOL, NATO, and the EU).

¹¹⁴ EUNAVFOR Somalia, COUNCIL OF THE EUROPEAN UNION, <http://www.consilium.europa.eu/showpage.aspx?id=1518&lang=EN> (last visited Apr. 19, 2012).

¹¹⁵ 2010 UN Report, *supra* note 9, para. 8.

¹¹⁶ Dutton, *supra* note 26, at 216.

cases.¹¹⁷ Further, as demonstrated by the *Said* case in the United States, the difficulties continue even after suspects are brought to court.¹¹⁸ The very few Somalis who are detained and prosecuted face a complex, disjointed legal framework, where their rights and protections vary dramatically depending on which country makes the arrest.¹¹⁹ This section explores the practical and legal obstacles that contribute to these trends.

A. *The Cost of Prosecuting Piracy*

Perhaps the most obvious explanation as to why so many states are reluctant to prosecute piracy revolves around economics.¹²⁰ From a cost-benefit perspective, prosecuting piracy is hard to justify on a national level.¹²¹ First, a state faces the expense of policing the world's oceans, a costly venture in terms of both labor and equipment.¹²² Second, after assuming this initial cost, states that capture suspected pirates must begin the process of preparing for trial.¹²³ This process usually entails collecting evidence, transporting witnesses, and providing translation services.¹²⁴ For Western nations thousands of miles from the crime scene, these obstacles are particularly expensive.¹²⁵ Finally, prosecuting nations must be prepared to incarcerate suspected pirates in domestic prisons.¹²⁶ States are typically reluctant to assume the weight of these enormous costs if they have no compelling interest to do so.¹²⁷ For example, a ship traveling the Gulf of Aden may be registered under a Danish flag, owned by a British company, insured by an American corporation, and staffed with a predominantly Filipino crew, all while transporting Saudi oil.¹²⁸ If attacked by Somali pirates in international waters, the loss is spread between these state

¹¹⁷ Kontorovich & Art, *supra* note 14, at 436 (explaining that this low figure exists in spite of the international surge following the 2008 Security Council resolutions).

¹¹⁸ *United States v. Said*, 757 F. Supp. 2d 554, 556 (E.D. Va. 2010), *vacated*, 680 F.3d 374 (4th Cir. 2012) (granting defendant's motion to dismiss piracy charges).

¹¹⁹ Sterio, *supra* note 21, at 1465–66.

¹²⁰ Dutton, *supra* note 26, at 219.

¹²¹ *Id.*

¹²² Kontorovich & Art, *supra* note 14, at 449 (explaining that until the recent focus on Somali piracy, no nation was willing to police the high seas for piracy).

¹²³ Dutton, *supra* note 26, at 219.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Kontorovich & Art, *supra* note 14, at 450.

¹²⁷ Kraska & Wilson, *supra* note 48, at 45–46 (suggesting the daunting “expense and logistical and legal burdens of transporting the pirates to a Western country for prosecution” explains why so few Western countries are willing to prosecute).

¹²⁸ Dutton, *supra* note 26, at 219 (explaining the vast number of countries involved in international trade, particularly in the Gulf of Aden).

parties.¹²⁹ Although several nations are victims of the pirate attack, no state suffers compelling enough losses to take on the expensive task of independently prosecuting pirates.¹³⁰ Simply put, the costs associated with a difficult international prosecution can sometimes outweigh the marginal loss absorbed by each one of these separately affected nations.¹³¹ As the international legal framework provides neither a rule of priority nor a rule of obligation between these nations, which country shoulders the burden of prosecution is often a “political, not a legal issue.”¹³²

Consequently, Western nations are often reluctant to carry the heavy burden of prosecution absent compelling national motives.¹³³ The chief prosecutor in Hamburg, Germany, recently stated, “the German judicial system cannot, and should not, act as World Police. Active prosecution measures will only be initiated if the German State has a particular, well-defined interest”¹³⁴ Similarly, in May 2009, Spain released seven suspected Somali pirates because officials believed the crime had too little relation to Spain to warrant prosecution.¹³⁵ Even states that are direct victims of an attack often seek to avoid the expensive burden of prosecuting pirates, as demonstrated by the common practice of simply paying a ransom in return for hijacked ships, cargo, and crew.¹³⁶ From the perspective of Western nations currently policing the Gulf of Aden, it is far more cost-effective to simply release suspected pirates on the beaches of Somalia than to make an arrest.¹³⁷ Any effective change in the legal framework of piracy, therefore, must address the costs that accompany piracy prosecutions.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Guilfoyle, *supra* note 19, at 145.

¹³³ Kraska & Wilson, *supra* note 48, at 45–46.

¹³⁴ Edwald Brandt, Prosecution of Acts of Piracy off Somalia by German Prosecution Authorities, Presentation at International Foundation for Law of the Sea Conference, Piracy—Scourge of Humanity (Apr. 24, 2009), available at <http://www.iflos.org/media/34039/brandt%20statement%20piracy%20maritime%20talks%202009.pdf> (explaining such “well-defined interests” as the death or injury of German nationals, the attack of a German flagship vessel, the blackmail of a German shipping company, or detention by the German Navy).

¹³⁵ Daniel Woolls, *Spain: About Face on Piracy Suspects*, ASSOCIATED PRESS, May 8, 2009, available at <http://www.highbeam.com/doc/1A1-D9825P782.html> (reporting that the suspects had allegedly attempted to attack a Panamanian-flagged freighter).

¹³⁶ Maxim Tkachenko, *Pirates Release Ship Carrying Tanks, Other Arms*, CNN (Feb. 5, 2009), <http://www.cnn.com/2009/WORLD/Africa/02/05/Somalia.piracy.ukraine/index.html?ref=allsearch> (reporting on \$3.2 million exchange between a group of Somali pirates and Ukraine for the MV Faina, a ship carrying a crew, tanks, guns, arms, and ammunition).

¹³⁷ Alcaraz, *supra* note 27.

B. Confusion over a Pirate's Legal Status

Historically, a pirate's legal status was somewhere between combatant and criminal, carrying the "disabilities of both" but the "privileges and immunities" of neither.¹³⁸ Countries could capture pirates and prosecute them, although they could not do the same to regular combatants.¹³⁹ Alternatively, countries could attack and kill pirates without a trial, whereas they would have to provide a trial to a criminal.¹⁴⁰ For better or worse, modern nations no longer have the same choices.¹⁴¹ As Eugene Kontorovich notes, the advent and development of human rights law now "precludes the classic and most obvious antipiracy measure: killing them."¹⁴² Moreover, UNCLOS requires pirates to be prosecuted under a nation's civilian criminal justice system, as opposed to a specialized judicial body.¹⁴³

Beyond merely prohibiting the killing of pirates without a trial, the modern body of international humanitarian law presents obstacles that further dissuade countries from prosecuting acts of piracy.¹⁴⁴ Perhaps chief among these concerns is whether a detained Somali pirate can be classified as a refugee, and therefore privileged to asylum under a number of human rights conventions.¹⁴⁵ Asylum may be required if a pirate shows he would face an unfair trial, torture, or extrajudicial killing if repatriated to Somalia, a predominantly lawless nation lacking a strong federal government.¹⁴⁶ In responding to Somali piracy, Britain encouraged its ships not to arrest pirates for fear of this exact possibility.¹⁴⁷ Britain's concern is that, if successful in claiming refugee status under European Union human rights law, a Somali pirate may be authorized to stay in Britain indefinitely.¹⁴⁸ As Britain apparently realized, this possibility increases the cost of arresting pirates, while providing a reward to the pirates themselves.¹⁴⁹ For the captured

¹³⁸ Kontorovich, *supra* note 6, at 257.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ UNCLOS, *supra* note 15, art. 105 ("The courts of the State which carried out the seizure may decide upon the penalties to be imposed.").

¹⁴⁴ Kontorovich, *supra* note 6, at 256–70 (discussing various human rights treaties in relation to Somali piracy).

¹⁴⁵ *Id.* at 267 (explaining pirates could possibly use the European Convention on Human Rights, or any similar convention with comparable asylum requirements).

¹⁴⁶ *Id.*

¹⁴⁷ Marie Woolf, *Pirates Can Claim UK Asylum*, SUNDAY TIMES (LONDON), Apr. 13, 2008, at 1.

¹⁴⁸ Kontorovich, *supra* note 6, at 267.

¹⁴⁹ *Id.*

pirate, remaining in a Western nation, such as Britain, could be viewed as a reward.¹⁵⁰ Britain, however, would be stuck with the question of what to do with the refuge pirates.¹⁵¹

Another concern stemming from an ambiguous legal status is whether pirates classify as enemy combatants, and therefore deserve prisoner of war (POW) status under the Third Geneva Convention.¹⁵² Though the treaty was designed with large, well-organized armies in mind, pirates may be able to successfully claim POW status under Article 4(a)(2) of the convention, which recognizes “other militias,” “volunteer corps,” and “organized resistance movements” as enemy combatants provided they meet certain conditions.¹⁵³ If entitled to POW status under Article 4(a)(2), pirates would enjoy Geneva Convention protections until their final repatriation¹⁵⁴ at the termination of the armed conflict, an occurrence that could be difficult to define in the case of Somali piracy.¹⁵⁵ While a pirate’s status as a POW would not prevent prosecution under municipal law, Article 4(a)(2) articulates a specific set of rules affecting his treatment by the detaining power¹⁵⁶ and would invite international input into the domestic procedure.¹⁵⁷ These added burdens could delay prosecution and increase the costs of detention, further deterring states from apprehending the pirates at all.¹⁵⁸

Although scholars disagree over the applicability of the Third Geneva Convention to Somali piracy¹⁵⁹ and no nation currently recognizes Somali

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 259.

¹⁵³ Geneva Convention Relative to the Treatment of Prisoners of War art. 4(a)(2), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention] (explaining the conditions as: “(a) That of being commanded by a person responsible for his subordinates; (b) That of having a fixed distinctive sign recognizable at a distance; (c) That of carrying arms openly; (d) That of conducting their operations in accordance with the laws and customs of war.”).

¹⁵⁴ *Id.* art. 5 (“The present Convention shall apply to the persons referred to in Article 4 . . . until their final release and repatriation.”).

¹⁵⁵ *Id.* art. 118 (“Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”).

¹⁵⁶ Michael H. Passman, *Protections Afforded to Captured Pirates Under the Law of War and International Law*, 33 TUL. MAR. L.J. 1, 20–21 (2008).

¹⁵⁷ Bahar, *supra* note 79, at 36 (noting that outside the protections of the Third Geneva Convention, “[r]ecourse may be at the criminal, not national level, and deterrence can be achieved without disrupting the international order”).

¹⁵⁸ Kontorovich, *supra* note 6, at 259.

¹⁵⁹ *Compare id.* at 260 (suggesting that because pirates have a “local command structure,” openly carry weapons, and “treat captured crews reasonably” and in accordance with the “rules of reciprocity,” they meet enough of the Article 4(a)(2) conditions to at least raise a good case), *with* Bahar, *supra* note 79, at 36, 42 (arguing that Somali pirates are merely criminals because they “attack indiscriminately” in their hijacking of ships, their only motive

piracy as an “organized resistance movement,”¹⁶⁰ the ambiguity surrounding a pirate’s POW status presents another potentially expensive legal question for capturing states.¹⁶¹ In situations of uncertainty, Article 5 stipulates that a person shall enjoy POW status “until such time as their status has been determined by a competent tribunal.”¹⁶² At the very least, therefore, a pirate may be entitled to a hearing in front of a competent tribunal regardless of whether he perfectly fits into one of the Third Geneva Convention’s categories.¹⁶³ If a captured pirate invokes this right and thus halts civilian criminal proceedings, the prosecuting state will incur further drains on judicial resources as it litigates this question.¹⁶⁴

A pirate’s ambiguous legal status presents a controversial political question as well. After declaring that Article 4(a)(2) did not apply to al Qaeda, the second Bush Administration faced severe international criticism.¹⁶⁵ Arguably, Somali pirates meet the Article 4(a)(2) requirements even better than al Qaeda, as the pirates treat captured crew reasonably, thereby satisfying Article 4(a)(2)’s requirement that the militia abide by the laws and customs of war.¹⁶⁶ In fear of international backlash, therefore, nations may be reluctant to declare Somali pirates beyond the scope of the Third Geneva Convention.¹⁶⁷

Further confusing the matter, a suspected Somali pirate’s ambiguous legal status poses yet another complicated question: what rights *should* a captured pirate have?¹⁶⁸ Even those who argue that pirates are “not enemy prisoners of war” acknowledge that they should receive some “Geneva Conventions treatment” while remaining eligible for domestic, civilian prosecution.¹⁶⁹ Under the international legal framework, however, states often have different

is financial gain, and they are not “state actors”), and Passman, *supra* note 156, at 20 (arguing that pirates might fall under the Third Geneva Convention in only three narrow circumstances: (1) if they are members of an armed force of a state but are pursuing piracy for private ends, (2) if they are classified as an “organized resistance movement,” and (3) if they are members of a legitimate “*naval levée en masse*, rising up to repel invasions”).

¹⁶⁰ Kontorovich, *supra* note 6, at 259–60.

¹⁶¹ *Id.* at 262.

¹⁶² Third Geneva Convention, *supra* note 153, art. 5.

¹⁶³ Passman, *supra* note 156, at 16 (suggesting that whether or not pirates are prisoners of war in the final analysis, they may be entitled to status hearings).

¹⁶⁴ Kontorovich, *supra* note 6, at 262 (noting the U.S. experience with Guantánamo Bay detainees, where the issue of enemy combatant was debated extensively).

¹⁶⁵ *Id.* at 259–60.

¹⁶⁶ *Id.* at 260.

¹⁶⁷ *Id.* at 259–60.

¹⁶⁸ See Bahar, *supra* note 79, at 44–51 (discussing a Somali pirate’s Fourth Amendment rights).

¹⁶⁹ *Id.* at 42.

answers to this question, assuming they have answered it at all.¹⁷⁰ If not protected by the Third Geneva Convention, for example, pirates arrested by the United States may not even have basic criminal protections against illegal searches and seizures, warrantless arrests, and indefinite detentions.¹⁷¹ In *United States v. Verdugo-Urquidez*, the Supreme Court of the United States found no indication that the Framers intended the Fourth Amendment “to apply to activities of the United States directed against aliens in foreign territory or in international waters.”¹⁷² Accordingly, in January 2006, the United States detained ten suspected Somali pirates for eight days without probable cause determinations, charges, or a trial,¹⁷³ long past the forty-eight hour limit required for arrests without a warrant.¹⁷⁴

Similar procedural complications exist for other countries involved in the fight against Somali piracy. For parties to the European Convention on Human Rights (ECHR), Article 5(3) ensures a right to a prompt hearing in front of a judicial authority.¹⁷⁵ While the ECHR jurisprudence on this Article indicates that materially unavoidable delays do not violate the convention, states must comply with a complex set of legal requirements to justify detaining and prosecuting a suspected criminal.¹⁷⁶ Notably, both the European Union and NATO, two of the international organizations that command and coordinate anti-piracy operations, are not parties to the ECHR.¹⁷⁷ Thus, if an ECHR signatory captures a pirate while under the command and strategic control of these international bodies, the ECHR may not apply.¹⁷⁸ In this event, prosecuting nations must rely on other sources, such as international custom or domestic criminal process to determine how to treat detainees.¹⁷⁹

Ultimately, this international confusion marginalizes the rights of suspected Somali pirates. If a country is not dissuaded from arresting a

¹⁷⁰ See generally Guilfoyle, *supra* note 19 (discussing the possible meanings and applications of various human rights treaties in relation to the treatment of a captured pirate).

¹⁷¹ Bahar, *supra* note 79, at 47–48 (noting, however, that if the pirates were arrested under the SUA Convention the United States would be obliged to provide “the full complement of Fourth Amendment protections”).

¹⁷² *United States v. Verdugo-Urquidez*, 494 U.S. 259, 267 (1990).

¹⁷³ Bahar, *supra* note 79, at 45 (explaining that the pirates were being held while the U.S. government determined whether to prosecute).

¹⁷⁴ *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) (holding that “a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of” the Fourth Amendment).

¹⁷⁵ Guilfoyle, *supra* note 19, at 159.

¹⁷⁶ *Id.* (citing *Medvedyev v. France*, App. No. 3394/03, 51 Eur. H.R. Rep. 39 (2010)).

¹⁷⁷ *Id.* at 157.

¹⁷⁸ *Id.* at 157–58.

¹⁷⁹ *Id.* at 158–59.

suspected pirate altogether, the suspected pirate faces a murky and disjointed set of procedural protections after capture, which vary depending on the arresting nation or organization.¹⁸⁰ Even those countries making the arrests are unsure exactly what protections should be granted to their detainees.¹⁸¹ Further, with little or no conception of modern criminal justice, suspected pirates usually fail to understand even the most basic procedural protections.¹⁸²

Any legitimate and effective reform of the regime to fight and prosecute piracy must therefore include a comprehensive definition of a pirate's legal status and criminal rights. In May 2009, for example, the Russian Navy held twenty-nine suspected pirates aboard one of its warships for three weeks while determining whether to prosecute.¹⁸³ A clearly articulated legal status would be advantageous to both the pirate and the arresting state. A concrete definition would help prevent excessively long detention periods and mitigate apprehensions on whether to prosecute for arresting nations.

C. The Intersection of Domestic and International Law

As discussed above, UNCLOS provides states with broad international authority to capture and prosecute pirates.¹⁸⁴ A pirate's arrest and prosecution, however, must also be carried out in accordance with the arresting state's domestic laws.¹⁸⁵ The resulting relationship between national and international law is not always seamless.¹⁸⁶

Since UNCLOS came into existence, few states have incorporated its full effect into their domestic criminal statutes.¹⁸⁷ Many nations, for example,

¹⁸⁰ See Joseph M. Isanga, *Countering Persistent Contemporary Sea Piracy: Expanding Jurisdictional Regimes*, 59 AM. U. L. REV. 1267, 1306 (2010) (noting that some countries incorporate the international definition of piracy, some countries have piracy provisions depending on their own national needs or interests, and some countries do not define piracy in their law at all, creating inconsistencies in the definition of piracy worldwide).

¹⁸¹ See Kontorovich, *supra* note 6, at 258 (noting the complexity of this issue and commenting that "national forces have been accused of violating humanitarian law for not successfully distinguishing between combatants and civilians in environments where the former freely commingle with the latter").

¹⁸² See, e.g., Bahar, *supra* note 79, at 41 (recounting the Kenyan trial of ten suspected pirates, none of whom knew how to read, and that when the youngest was asked if he had questions, he responded, "I don't want to be shot").

¹⁸³ Guilfoyle, *supra* note 19, at 159.

¹⁸⁴ Dutton, *supra* note 26, at 203–04.

¹⁸⁵ *Id.*

¹⁸⁶ See Isanga, *supra* note 180, at 1304–07 (discussing attempts by various nations to implement international definitions of piracy on a national level).

¹⁸⁷ THE ROLE OF THE EUROPEAN UNION, *supra* note 97, at 13.

have no law against maritime piracy at all.¹⁸⁸ Where nations do outlaw maritime piracy, the statutes are not uniform and contain limitations not included in UNCLOS.¹⁸⁹ Rather than codify true universal jurisdiction, for instance, some nations criminalize piracy only when a sufficient connection exists between the arresting state and the crime,¹⁹⁰ such as an attack on nationals¹⁹¹ or an attack perpetrated within territorial waters.¹⁹² Moreover, domestic laws rarely define acts of piracy as broadly as international law, excluding preparatory acts such as incitement, support, or voluntary participation, which are included in UNCLOS.¹⁹³ As many domestic laws are not coextensive with UNCLOS, circumstances often arise where a nation may have the international jurisdiction to prosecute yet lack the domestic authority to do so.¹⁹⁴

Further complicating the matter, some states have not taken the basic steps necessary to implement their UNCLOS responsibilities. Implicit in the international framework is the notion that states will arrest suspected pirates.¹⁹⁵ However, some countries, such as Germany, refuse to grant their navies the authority to make criminal arrests.¹⁹⁶ In the Gulf of Aden, where military ships are engaged in massive patrolling efforts, this type of domestic law leaves Germany incapable of arresting and fully repressing piracy according to its UNCLOS responsibilities.¹⁹⁷ These discrepancies between international and national law help explain why so few states prosecute Somali piracy.¹⁹⁸ Without domestic authority, any grant of international

¹⁸⁸ Isanga, *supra* note 180, at 1306.

¹⁸⁹ See generally THE ROLE OF THE EUROPEAN UNION, *supra* note 97, at 13.

¹⁹⁰ Isanga, *supra* note 180, at 1306 (explaining the former Japanese piracy law, which only allowed prosecution for attacks within Japanese territory).

¹⁹¹ Sterio, *supra* note 21, at 1465 (noting the Malaysian High Court restricted the nation's piracy statute to offenses committed "within its own jurisdiction, onboard a Malaysia-flagged vessel on the high seas, or by any Malaysia citizen or resident on the high seas").

¹⁹² *Id.* (noting the Philippine piracy statute only defines piracy as occurring within Philippine waters).

¹⁹³ THE ROLE OF THE EUROPEAN UNION, *supra* note 97, at 13 (noting that UNCLOS includes these activities in its broad definition of piracy).

¹⁹⁴ Sterio, *supra* note 21, at 1465–66 (explaining what counts as a "prosecutable act of piracy" under different jurisdictions).

¹⁹⁵ Dutton, *supra* note 26, at 206.

¹⁹⁶ THE ROLE OF THE EUROPEAN UNION, *supra* note 97, at 13 ("Countries that allow their navies to carry out this type of action are exceptions . . . in particular within the EU.").

¹⁹⁷ *Id.*

¹⁹⁸ See generally Sterio, *supra* note 68, at 392 ("Despite states' international legal obligations stemming from UNCLOS and the SUA Convention, domestic statutes do not always allow for jurisdiction."); Jesus, *supra* note 16, at 1216 ("As it stands now, there is no international court or tribunal that includes in its jurisdiction a mandate to try pirates. . . . [I]f the arresting State does not have penal legislation allowing for the punishment of pirates, or if the arresting State does not want to try them in its own territory for political or other

jurisdiction to arrest and prosecute suspected piracy, no matter how broad, is essentially a dead letter.

D. Evidentiary Issues

One of the most basic impediments to achieving successful prosecution is finding and presenting evidence sufficient to convict a suspected pirate.¹⁹⁹ Once captured, pirates often profess to be innocent fishermen, a plausible claim considering many pirates are fishermen by trade.²⁰⁰ Further, the possession of weapons does not distinguish pirates from innocent seafarers in the region who also frequently carry weapons.²⁰¹ To convict a pirate, therefore, prosecutors must present persuasive evidence beyond merely where a suspect was found and what weapons he carried. However, this can be a difficult task considering the nature of the alleged offense.²⁰² Pirate attacks often occur 1,000 nautical miles off the coast of Somalia.²⁰³ If the pirates do not throw any incriminating evidence into the sea when a naval ship approaches,²⁰⁴ the military personnel making the arrest are usually untrained in preserving and collecting evidence and do not always follow proper procedure required by civilian courts.²⁰⁵ Therefore, gathering and transporting the defendants, witnesses, weapons, and other evidence necessary for a judicial procedure is often prohibitively difficult.²⁰⁶

This problem presents yet another dilemma. On the one hand, the difficulty of meeting evidentiary burdens dissuades countries from prosecuting pirates.²⁰⁷ Rear Admiral William D. Baumgartner, Commander of the Seventh Coast Guard District, recently suggested that one of the main deterrents to states is the “significant legal and logistical challenges” in transporting pirates, evidence and witnesses to appear in criminal courts thousands of miles away.²⁰⁸ Returning to the historical summary justice

convenience, then the legal regime as codified in UNCLOS is of little use.”).

¹⁹⁹ See Kontorovich, *supra* note 6, at 263–66 (discussing the burdens of proving a pirate is in fact a pirate given the great distance between a court and the crime scene).

²⁰⁰ *Id.* at 263–64.

²⁰¹ *Id.* at 263.

²⁰² *Id.*

²⁰³ Anita Snow, *UN: Somali Piracy Outpaces Efforts to Stop It*, ASSOCIATED PRESS, Nov. 9, 2010, available at http://seattletimes.nwsourc.com/html/nationworld/2013389203_apunonso_maliapiracy.html (explaining how pirates have expanded their operation using “mother ships” that increase their range).

²⁰⁴ Paul Raffaele, *The Pirate Hunters*, SMITHSONIAN, Aug. 2007, at 38.

²⁰⁵ Kontorovich, *supra* note 6, at 263–65.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 264–65.

²⁰⁸ *International Piracy on the High Seas: Hearing Before the H. Subcomm. on Coast Guard*

approach to piracy, however, is simply no longer a feasible option.²⁰⁹ Pirates must receive a set of basic evidentiary and due process protections.²¹⁰ Any solution to piracy must therefore walk the fine line between these competing interests, reducing the evidentiary burden to prosecute and convict a pirate while maintaining basic criminal rights.

IV. SOLUTIONS

This global failure to prosecute piracy calls attention to a systematic problem. The chosen means of enforcing the law matches neither the nature of the crime nor the criminal who commits it. Certainly, a legal system is broken when it effectively deters states from enforcing the law and simultaneously rewards criminals that break it. States seem to be adapting, however, and demonstrate an increasing willingness to stretch the legal framework. Though encouraging, current state practice is ultimately insufficient. Further steps are necessary to install a successful anti-piracy regime.

A. *Current State Practice*

Despite the setbacks described above, nations throughout the world recently increased their efforts to prosecute Somali piracy.²¹¹ Currently, piracy trials occur in one of three ways. Usually, pirates apprehended by Western nations are transferred to a regional state, such as Kenya, for prosecution.²¹² Alternatively, in 2010, Western nations such as the United States, the Netherlands, and France, commenced domestic piracy trials.²¹³ Finally, the TFG and the United Nations Development Program (UNDP) recently began efforts to prosecute pirates in the Puntland and Somaliland regions of Somalia.²¹⁴ Though encouraging, these approaches do not alone provide a sustainable and complete solution to the Somali piracy problem.²¹⁵

& *Mar. Transp.*, 111th Cong. 6 (2009) (statement of Rear Admiral William D. Baumgartner).

²⁰⁹ Kontorovich, *supra* note 6, at 264.

²¹⁰ International Covenant on Civil and Political Rights, *supra* note 24, arts. 9–14.

²¹¹ Guilfoyle, *supra* note 19, at 142 (noting trials in France, Kenya, the Netherlands, Somalia, the United States, and Yemen).

²¹² Kontorovich & Art, *supra* note 14, at 449 (describing Kenya as the central venue for universal jurisdiction).

²¹³ Guilfoyle, *supra* note 19, at 142.

²¹⁴ 2010 UN Report, *supra* note 9, para. 19.

²¹⁵ Statistics show that piratical activity increased 11.3% from 2010 to 2011. See IMO 2011 PIRACY REPORT, *supra* note 8, para. 5.

Transferring suspected pirates to a regional state, usually Kenya, remains the most common practice for prosecuting Somali pirates under the theory of universal jurisdiction.²¹⁶ Indeed, between 1998 and 2009 over 76% of universal jurisdiction piracy trials occurred in Kenya, “all but four of them.”²¹⁷ For nations struggling to justify the financial, political, and legal risks of prosecuting pirates at home, Kenyan courts offer a convenient solution.²¹⁸ In 2008 and 2009, Kenya signed a Memorandum of Understandings (MOUs) with the United States, and similar agreements with Britain, the European Union, Denmark, Canada, and China, agreeing to prosecute suspected pirates in exchange for financial support.²¹⁹ Pursuant to these agreements, Kenya tried at least ten pirates of the more than 100 alleged pirates the country was host to.²²⁰

Despite preliminary success, this arrangement has placed a significant burden on Kenya’s already overburdened criminal justice systems.²²¹ Kenya has a 870,000 case backlog, with only three prosecutors in the Mombasa office of the Department of Public Prosecutors.²²² Further, Kenya currently incarcerates around 53,000 prisoners, despite a national capacity to incarcerate of only 16,000.²²³ As a result of this overburdened criminal justice system, reports accuse Kenya of holding suspected pirates for months without trial or access to adequate healthcare.²²⁴ Reports also indicate that the Kenyan government “does not provide [pirates] with defense attorneys” in certain situations.²²⁵ If true, these conditions violate many of the basic protections guaranteed by the International Convention on Civil and Political Rights.²²⁶ Convention violations aside, in September 2010 the weight of the world’s piracy problem became too much for Kenya to bear.²²⁷ Facing a

²¹⁶ Guilfoyle, *supra* note 19, at 142.

²¹⁷ Kontorovich & Art, *supra* note 14, at 445.

²¹⁸ Dutton, *supra* note 26, at 220–23.

²¹⁹ *Id.* at 220 n.125.

²²⁰ *Id.* at 220.

²²¹ *Id.* at 221.

²²² *Id.*

²²³ *Id.*

²²⁴ See *Paris-Based Group Says Accused Somali Pirates Denied Rights*, VOICE OF AM. (Nov. 2, 2009), <http://www.voanews.com/english/news/a-13-2009-08-27-voa36-68754822.html> (reporting the 2009 findings of a Paris-based legal aid program).

²²⁵ Dutton, *supra* note 26, at 222.

²²⁶ International Covenant on Civil and Political Rights, *supra* note 210, arts. 9–14, (such as guaranteeing a “prompt” hearing before a judge (art. 9(3)), humane treatment “with respect for the inherent dignity of the human person” (art. 10(1)), and the opportunity to prepare a defense and communicate with counsel (art. 14(3)(b))).

²²⁷ Jeff Davis, *Kenya Cancels Piracy Trial Deals*, DAILY NATION (KENYA) (Sept. 30, 2010), <http://www.nation.co.ke/News/Kenya-cancels-piracy-trial-deals/-/1056/1021740/-/tr151vz/-/index.html>.

staggering lack of judicial resources, Kenya canceled the MOUs despite significant pressure from the international community.²²⁸ Thus capturing nations may no longer rely on Kenya as a forum for prosecuting Somali pirates.

During 2010, perhaps the most encouraging development yet occurred in the fight against Somali piracy. Several Western nations using the power of universal jurisdiction began piracy trials in their own domestic courts.²²⁹ To date, the United States, the Netherlands, Germany and France have even convicted Somali pirates.²³⁰ While this unprecedented willingness to prosecute pirates suggests progress, a reminder of the infrequency of these domestic prosecutions must accompany any discussion of this trend. Although over thirty nations deploy ships to the Somali region,²³¹ only a handful of these countries attempted a domestic prosecution.²³² In the rare instance an apprehending nation does try a pirate in their domestic court rather than simply letting the pirate go or outsource prosecution to a regional country, obstacles inherent in the legal framework make prosecution legally difficult, controversial, and “potentially embarrassing for the forum state.”²³³ For several reasons, these domestic prosecutions do not appear to be an ultimate solution.

First, some question whether detention and conviction in a Western nation actually deters the pirates.²³⁴ One suspected (now convicted) pirate held in the Netherlands reportedly enjoyed “the comfort of a TV and a toilet in his cell,” novel amenities to a Somali pirate.²³⁵ The pirate preferred the relative luxury and safety of imprisonment in the Netherlands to his life in Somalia and planned to have his family join him after serving his

²²⁸ *Id.* (citing cost and safety concerns behind Kenya’s decision).

²²⁹ Guilfoyle, *supra* note 19, at 142.

²³⁰ See *German Court Convicts 10 Somalis of Piracy*, REUTERS (Oct. 19, 2012), <http://www.reuters.com/article/2012/10/19/germany-somalia-pirates-idUSL5E8LJPRS20121019> (describing Germany’s first modern-day piracy trial); Saskya Vandoorne, *Accused Somali Pirates on Trial in France*, CNN (Nov. 15, 2011), http://articles.cnn.com/2011-11-15/world/world_europe_france-somali-pirates_1_somali-pirates-somali-men-international-maritime-bureau?_s=PM:EUROPE; *Trial of Alleged Somali Pirates Opens in Netherlands*, BBC NEWS (May 25, 2010), <http://www.bbc.co.uk/news/10151792>; *5 Somalis Guilty of Attack on U.S. Ship*, N.Y. TIMES, Nov. 25, 2010, at A26.

²³¹ *2010 UN Report*, *supra* note 9, para. 8.

²³² *Id.* paras. 19–20 (estimating that between January and June of 2010 over 700 apprehended suspects were released).

²³³ Kontorovich, *supra* note 6, at 262.

²³⁴ *Id.* at 267 (“Obtaining residency in a Western nation would undoubtedly be seen as a benefit for most Somalis.”).

²³⁵ Editorial, *Piracy Requires a Universal Approach*, NRC HANDELSBLAD (May 19, 2009), http://www.nrc.nl/international/opinion/article2246675.ece/Piracy_requires_a_universal_approach.

sentence.²³⁶ Holding pirates in Western prisons, therefore, may inadvertently reward rather than punish their piratical conduct.²³⁷

Second, for Western, democratic nations, the decision to prosecute Somali pirates is often political rather than legal. For example, many Dutch politicians have argued against further piracy prosecutions, fearing an expensive and unpopular legal battle over repatriation of the Somali nationals.²³⁸ If citizens consider such prosecutions expensive or controversial, democratic nations may be less likely to prosecute Somali pirates on the level necessary to eradicate the problem.

Third, these domestic prosecutions present basic legal difficulties as domestic judges strive to interpret and apply international law.²³⁹ Many states outlaw piracy according to “the law of nations,” apparently incorporating the international definition of piracy into domestic criminal law.²⁴⁰ Criminal prosecution under such language, however, can be difficult.²⁴¹ The U.S. piracy statute provides an example. Originally enacted in 1819, this statute does not specifically identify what constitutes “piracy as defined by the law of nations.”²⁴² Rather, the statute leaves it to the court to surmise the international definition of piracy and apply it, a task that domestic judges may be ill-suited to perform without expertise in the field of international law.²⁴³

Confusion surrounding the application of this statute led to an interesting legal conflict in the United States. In the summer of 2010, two Somali piracy cases began before different judges in the Federal Court for the Eastern District of Virginia, situated in Norfolk.²⁴⁴ In August 2010, Judge Raymond A. Jackson dismissed the piracy charges in the first case.²⁴⁵ Judge Jackson held that the United States piracy statute must be limited to the definition of piracy at the time of the law’s enactment.²⁴⁶ Citing the statute’s only judicial interpretation, an 1820 Supreme Court decision by Justice

²³⁶ *Id.*

²³⁷ Kontorovich, *supra* note 6, at 267.

²³⁸ Editorial, *supra* note 235.

²³⁹ Sterio, *supra* note 21, at 1464–66 (describing the inadequacies of British, Kenyan, Malaysian, and U.S. laws in the fight against modern maritime piracy).

²⁴⁰ *Id.* (noting that the “United States, Kenya, and Malaysia define piracy by referring to the law of nations”).

²⁴¹ See Johnson, *supra* note 1.

²⁴² *United States v. Said*, 757 F. Supp. 2d 554, 557 (E.D. Va. 2010), *vacated*, 680 F.3d 374 (4th Cir. 2012) (quoting 18 U.S.C. § 1651 (2006)).

²⁴³ See Johnson, *supra* note 1 (calling the law a “legal punt”).

²⁴⁴ See *generally Said*, 757 F. Supp. 2d at 554; *United States v. Hasan*, 747 F. Supp. 2d 599 (E.D. Va. 2010) (denying defendants’ motion to dismiss the charges of piracy).

²⁴⁵ *Said*, 757 F. Supp. 2d at 556.

²⁴⁶ *Id.* at 557–58.

Joseph Story, Judge Jackson found that an attack must be successful to constitute piracy under 18 U.S.C. § 1651.²⁴⁷ Since the attack in question was unsuccessful, the men could not be held liable for piracy under U.S. law.²⁴⁸

Jackson received strong criticism from the international legal community for refusing to adopt the modern UNCLOS definition of piracy.²⁴⁹ Citing the “fair warning requirement,” which bars punishment for conduct a defendant “could not reasonably understand to be proscribed,”²⁵⁰ Jackson defined piracy according to the statute’s original 1819 interpretation.²⁵¹ Scholars contend, however, that this approach demonstrates a “deep hesitancy to weave the ephemeral strands of customary international law — state practice, international organization pronouncements, professorial writings — into something as solid as handcuffs.”²⁵² Judge Jackson gives only secondary weight to two widely ratified treaties that contain modern definitions of piracy, including the 1958 High Seas Convention that the Senate ratified.²⁵³

Less than three months later, Virginia Judge Mark S. Davis took a different approach. The case in front of Judge Davis involved an unsuccessful piracy attempt on the frigate USS Nicholas.²⁵⁴ In defining piracy, Davis turned to *Sosa v. Alvarez Machain*, in which the Supreme Court confirmed federal judicial authority to “recognize (but not create) new causes of action based on the ‘present day law of nations.’”²⁵⁵ Thus, whereas Judge Jackson applied the static law of 1819, Davis decided that the “‘law of nations’ connotes a changing body of law, and that the definition of piracy in 18 U.S.C. § 1651 must therefore be assessed according to the international consensus of the definition at the time of the alleged

²⁴⁷ *Id.* at 559–60.

²⁴⁸ *Id.*

²⁴⁹ See Julian Ku, *How to Define Piracy (Cont’d): U.S. Judge Dismisses Piracy Charges*, OPINIO JURIS (Aug. 17, 2010), <http://opiniojuris.org/2010/08/17/how-to-define-piracy-contd-u-s-judge-dismisses-piracy-charges/> (arguing that while the court’s approach may be defensible, the “frozen in 1819” approach ignores developments in international law embraced by the international community, Congress, and the executive branch); Eugene Volokh, *Piracy Charges Dismissed by Federal Judge*, VOLOKH CONSPIRACY (Aug. 17, 2010), <http://volokh.com/2010/08/17/piracy-charges-dismissed-by-federal-judge/> (quoting Eugene Kontorovich, noting that while the United States has not ratified the current UNCLOS treaty, it ratified the 1958 version, containing the same piracy language).

²⁵⁰ *Said*, 757 F. Supp. at 558 (internal citations omitted) (citing *United States v. Lanier*, 520 U.S. 259, 266 (1997), and *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964)).

²⁵¹ David Glazier, *How to Define Piracy (Cont’d): A Critique of U.S. v. Said*, OPINIO JURIS (Aug. 18, 2010), <http://opiniojuris.org/2010/08/18/how-to-define-piracy-contd-a-critique-of-us-v-said/> (critiquing the “syllogism” used by Judge Jackson).

²⁵² Volokh, *supra* note 249 (quoting Eugene Kontorovich).

²⁵³ Glazier, *supra* note 251.

²⁵⁴ *United States v. Hasan*, 747 F. Supp. 2d 599, 601 (E.D. Va. 2010).

²⁵⁵ *Id.* at 626 (citing *Sosa v. Alvarez Machain*, 542 U.S. 692, 723 (2004)).

offense.”²⁵⁶ Judge Davis found such consensus in the 1982 UNCLOS definition, which includes attempted piracy.²⁵⁷ Unlike the *Said* case, the unsuccessful attack on the USS Nicholas could therefore proceed to trial.²⁵⁸

This example illustrates how administering international law on a domestic scale can produce incongruous results. That two judges in the same country, let alone the same courthouse, may reach opposite conclusions reveals the difficulty of interpreting and applying international anti-piracy laws on a domestic level. As courts around the world take on this difficult task, wildly different results could occur as states apply various doctrines of statutory and constitutional interpretation.²⁵⁹ Accordingly, discrepancies in enforcement will likely persist, further frustrating international attempts to uniformly deter piracy through domestic prosecution.

Finally, the most recent development in the fight against Somali piracy involves prosecutions in the Puntland and Somaliland regions of Somalia.²⁶⁰ With the help of various United Nations programs and other regional partners, Somalia has arrested and convicted a number of pirates within its own borders.²⁶¹ Though encouraging, reports indicate these prosecutions require “significant further assistance” to meet “international standards.”²⁶² Necessary funding for this project, however, has been difficult to secure.²⁶³ Donors lack confidence due to the “fractured nature of the law on piracy within Somalia” and the “issues concerning Somali judicial and prosecutorial capacity.”²⁶⁴ Without adequate funding or judicial resources, Somalia is not an immediate or sustainable venue for piracy prosecutions.

Ultimately, deterring Somali piracy using the current legal framework presents an insurmountable challenge for the international community.²⁶⁵ Even after the substantial efforts to prosecute pirates both in Western and regional nations, studies show no impact on the rate of pirate attacks.²⁶⁶ In November 2010, Under-Secretary-General for Political Affairs B. Lynn Pascoe reported that “[t]he menace of piracy off the coast of Somalia was

²⁵⁶ *Id.* at 625.

²⁵⁷ *Id.* at 632–33.

²⁵⁸ *Id.* at 601.

²⁵⁹ See Sterio, *supra* note 21, at 1464–66 (arguing that the differences between legal systems is “an additional hurdle”).

²⁶⁰ 2010 UN Report, *supra* note 9, para. 19.

²⁶¹ *Id.*

²⁶² *Id.* para. 28.

²⁶³ *Id.* para. 60.

²⁶⁴ *Id.*

²⁶⁵ U.N. Secretary-General, *Report of the Secretary-General Pursuant to Security Council Resolution 1897 (2009)*, para. 44, U.N. Doc S/2010/556 (Oct. 27, 2010) [hereinafter *Report Pursuant to Resolution 1897*].

²⁶⁶ *Id.* paras. 79–87.

outpacing international efforts to stem it.”²⁶⁷ As this statement seems to acknowledge, recent efforts to deter Somali piracy have fallen short of providing the urgent, sustainable, and effective solution necessary for its eradication.²⁶⁸ Hampered by inherent financial, logistical, and legal problems, the current legal framework should be replaced.

B. Navigating a Way Forward

To escape the current legal quagmire, nations must address this international problem on an international level. To that end, advocates of a global solution propose including piracy in a new or currently existing international tribunal.²⁶⁹ Immediate implementation of such a solution, though, seems unlikely.²⁷⁰ In a July 2010 report, the United Nations found including piracy within the jurisdiction of the International Criminal Court or the International Tribunal on the Laws of the Sea not to be “feasible.”²⁷¹ Hope for an international solution, however, need not be lost. Instead, the United Nations should establish a temporary, regional piracy tribunal under its Chapter VII authority. This approach would provide immediate relief and create momentum toward a more permanent solution.

Historically, the Security Council uses ad hoc criminal tribunals to address unique problems with the administration of criminal justice.²⁷² Of course, the Security Council may only exercise Chapter VII authority in the event of a “threat to the peace, breach of the peace, or act of aggression.”²⁷³ Once this threshold is met, the Security Council may take certain measures to “restore international peace and security,” including the establishment of an ad hoc criminal tribunal.²⁷⁴ The situation here appears to meet this

²⁶⁷ Press Release, Sec. Council, Piracy off Coast of Somalia Outpacing International Efforts to Defeat It, Under-Secretary General Says in Briefing to Security Council, U.N. Press Release SC/10079 (Nov. 9, 2010).

²⁶⁸ *Report Pursuant to Resolution 1897*, *supra* note 265, para. 12.

²⁶⁹ See generally Dutton, *supra* note 26 (arguing for inclusion of piracy into the International Criminal Court); Sterio, *supra* note 21 (arguing for global cooperation to establish a single forum for piracy prosecution); Thedwall, *supra* note 26 (arguing for incorporating piracy into the jurisdiction of the International Tribunal on the Laws of the Sea).

²⁷⁰ Alcaraz, *supra* note 27 (comparing the difficulty of including piracy in a permanent international criminal tribunal to the difficulty encountered when creating the Rome statute, which governs the International Criminal Court).

²⁷¹ *2010 UN Report*, *supra* note 9, paras. 105–107 (citing a reluctance to amend the governing statutes of these bodies).

²⁷² Sterio, *supra* note 68, at 395 (citing as examples the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda).

²⁷³ U.N. Charter art. 39.

²⁷⁴ *Id.* arts. 39, 41; *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, paras. 34–36 (Int’l Crim. Trib. for the Former

preliminary requirement,²⁷⁵ as existing Security Council resolutions find Somalia to constitute such a threat and piracy to exacerbate the problem.²⁷⁶ The Security Council, in other words, seems to possess the necessary authority to immediately create such an ad hoc tribunal.

Equipped with the proper authority, the Security Council could begin the actual process of creating a piracy tribunal. In May 1993, the Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY) by passing resolution 827.²⁷⁷ This resolution approved the ICTY's constitutive statute and addressed several logistical matters, such as location, competence, and organization.²⁷⁸ Creation of the piracy tribunal would likely occur in much the same way, with a draft statute addressing these logistical matters presented to the Security Council for a vote.

Perhaps the greatest logistical question surrounding the proposed piracy tribunal involves its location. For several reasons, the most advantageous location for the piracy tribunal is within or near Somali territory. Proximity to Somalia and the Gulf of Aden would ease efforts to transfer apprehended suspects, collect evidence, and sequester witnesses in preparation for trial.²⁷⁹ Apprehending nations would no longer suffer the burden of conducting trial in a courtroom several thousand miles from the scene of the crime, and defendants would no longer be hauled across the globe, away from their families, to stand trial. An ad hoc criminal tribunal in the region would also eliminate concerns regarding a pirate's legal status, as countries would not bear the risk of captured pirates claiming combatant or refugee privileges.

Further, the presence of an international judicial body within Somalia will help the TFG rebuild their broken and ineffective criminal justice system.²⁸⁰ One of the great accomplishments of the ICTY was to strengthen the rule and power of law within a war-torn Yugoslavia.²⁸¹ To this end, the international piracy tribunal will provide jobs for citizens and resources for lawmakers and jurists.²⁸² A functioning judiciary could also engender societal respect for

Yugoslavia Oct. 2, 1995) (“[T]he establishment of the International Tribunal falls squarely within the powers of the Security Council under Article 41.”).

²⁷⁵ 2010 UN Report, *supra* note 9, para. 97.

²⁷⁶ S.C. Res. 1897, *supra* note 109.

²⁷⁷ S.C. Res. 827, para. 2, U.N. Doc. S/RES/827 (May 25, 1993).

²⁷⁸ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993).

²⁷⁹ See generally 2010 UN Report, *supra* note 9, para. 98.

²⁸⁰ See Gilpin, *supra* note 8, at 11 (noting the deterioration of law and order in Somalia).

²⁸¹ *Assessing the Legacy of the ICTY – Background Paper*, INT'L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA (Feb. 23–24, 2010), available at <http://www.icty.org/sid/10292>.

²⁸² See generally *About the ICTY*, INT'L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://>

the law, demonstrating to criminals the legal consequences of their actions.²⁸³ Placing the piracy tribunal in Somalia, therefore, serves two strategic ends—an effective and immediate stride to eradicate piracy, and much needed international support for the Somali government.

Also in this initial stage, the jurisdictional competency of the piracy tribunal must be considered. To define what acts the tribunal may punish, the Security Council should start by adopting the definition of piracy codified in UNCLOS article 101.²⁸⁴ This article, however, pertains only to attacks on the high seas.²⁸⁵ Therefore, to create the most effective tribunal possible, the Security Council must expand the body's jurisdiction beyond the substantive and geographic limitations of UNCLOS. For example, the tribunal should have jurisdiction over the organization and financing of piracy. With jurisdiction over these activities, the tribunal could reach the financiers behind Somali piracy and substantially disrupt their business model. To that same end, the tribunal should extend jurisdiction to cover acts occurring within Somali territory. With this authority, the piracy tribunal could prosecute all participants of piracy, no matter where they seek refuge.

The Security Council must also address the related issue of concurrent jurisdiction. Pursuant to UNCLOS, all nations have authority to prosecute the pirates they capture on the high seas.²⁸⁶ If a piracy tribunal is created, both the tribunal and the apprehending nation could conceivably claim jurisdiction over the same captured Somali pirate. The Security Council must therefore create a mechanism for determining which entity has primacy. In these circumstances, nations should retain the authority to prosecute suspected pirates only when they are given the consent of the piracy tribunal. Further, the tribunal should grant consent if a state demonstrates a compelling interest to try the pirate in domestic court. Such compelling interests should be decided by the court on a case-by-case basis, with decisions subject to review by the Security Council. Giving priority to the piracy tribunal encourages nations to take advantage of the tribunal. In turn, regular use could help ensure steady financial support from the international community. This system is also flexible, providing states a conditional

www.icty.org/sections/AbouttheICTY/EmploymentandInternships (last visited Apr. 28, 2012) (noting that the ICTY employs around 900 staff members); *Assessing the Legacy of the ICTY – Background Paper*, *supra* note 281 (discussing the ICTY's legacy of building judicial capacity in Yugoslavia).

²⁸³ *Assessing the Legacy of the ICTY – Background Paper*, *supra* note 281 (discussing the broader societal impact of the ICTY).

²⁸⁴ *2010 UN Report*, *supra* note 9, para. 99.

²⁸⁵ UNCLOS, *supra* note 15, art. 101.

²⁸⁶ *Id.* art. 105.

ability to domestically prosecute suspected pirates in special circumstances. Moreover, such a strategy ensures that the majority of captured pirates face the same internationally regulated and monitored judicial and detention system.

During this planning stage, the Security Council must also determine exactly how to structure the judicial body. The piracy tribunal should consist of at least two separate judicial bodies; a trial court and an appellate court. The tribunal would also require a prosecutor's office. To ensure judicial competency, these bodies should be staffed with judges and lawyers who are highly specialized in matters of international maritime law. The judges should be nominated and then elected by the members of the General Assembly. This process would ensure that all nations have an input, as all nations are in some way affected by the crime of piracy. Prosecuting attorneys, however, should be appointed by the Security Council. This separate process for selecting and appointing judges and lawyers would help maintain an independent bench. Moreover, exclusive control over prosecutors would allow the Security Council to retain a degree of input over how aggressively suspected pirates are prosecuted. Requiring the prosecutor's office to submit an annual report for the Security Council's review could further enhance this control. Finally, the Security Council may also wish to establish some type of legal aid office for defendants who cannot afford legal representation. Most importantly, these positions should be heavily weighted with individuals from the region. Preference for East African judges and counselors would create a tribunal familiar with the area and sympathetic to its unique problems.

Notably, the ad hoc piracy tribunal must be temporary, as Chapter VII powers may be invoked only to "maintain or restore international peace."²⁸⁷ Accordingly, the tribunal would eventually require a completion and residual strategy.²⁸⁸ As demonstrated by precedent, however, a detailed strategy might not be a prerequisite to bringing the piracy tribunal to life.²⁸⁹ When establishing the ICTY in 1993, the Security Council stipulated no exact completion date or strategy.²⁹⁰ Ten years later, the tribunal's judges compiled a plan to complete their work, which was later endorsed by

²⁸⁷ Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, para. 39 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (justifying ad hoc tribunals as a measure contributing to "the restoration and maintenance of peace in the former Yugoslavia").

²⁸⁸ 2010 UN Report, *supra* note 9, para. 104.

²⁸⁹ Completion Strategy, INT'L CRIM. TRIBUNAL OF THE FORMER YUGOSLAVIA, <http://www.icty.org/sid/10016> (last visited Apr. 28, 2012) (noting that the ICTY had no completion strategy when founded).

²⁹⁰ S.C. Res. 827, *supra* note 277, para. 2.

Security Council resolutions.²⁹¹ Taking a similar stance with regard to the piracy tribunal would allow the Security Council to consider many different influences and contingencies for ending the piracy tribunal, a topic that is beyond the scope of this Note.

Those who oppose the creation of a piracy tribunal often cite the anticipated cost of such a body as support for their argument.²⁹² Indeed, a new judicial mechanism would require substantial resources such as new facilities, judges, lawyers, and other staff.²⁹³ Even the United Nations recognizes an ad hoc tribunal as an expensive option, noting that other judicial mechanisms “have ranged from around \$14.3 million (the East Timor Special Panels for a biennium) to \$376.2 million (ICTY for a biennium).”²⁹⁴

However, certain unique characteristics of the piracy problem could help facilitate financing for the tribunal. First, piracy burdens maritime security on a global scale, and not just for those nations located within the Somali region. A piracy tribunal, therefore, benefits all nations, distinguishing it from other ad hoc tribunals that provide judicial relief only to specific geographic areas. This fact could lead to reliable financial participation because nations will expect to directly profit from their investment in the form of maritime security. Second, under the current system nations that choose to prosecute Somali pirates must shoulder the entire cost alone. Thus, while costly to the United Nations as a collective entity, an ad hoc tribunal would be cost-efficient to each of its separate members, who would share the cost equitably. The collective result, reliable piracy deterrence, would be far greater than the individual cost to any one nation. Finally, the Security Council could also solicit funding from the shipping industry. As the group most directly victimized by piracy, shipping companies could be willing to contribute to the costs of prosecuting and imprisoning those responsible. As these factors indicate, the tribunal's cost could be spread amongst a number of international entities, producing a more efficient and effective means of piracy deterrence than the current system.

Finally, implementation of an ad hoc piracy tribunal would have important consequences for the future of piracy law. The current state-centered legal framework relies on mutual participation, cooperation, and coordination by all states to suppress maritime piracy. Like a chain that is only as strong as its weakest link, however, the system unravels when a failed state such as Somalia has neither the resources nor the will to prevent

²⁹¹ *Completion Strategy*, *supra* note 289.

²⁹² Sterio, *supra* note 68, at 396.

²⁹³ *Id.*

²⁹⁴ 2010 UN Report, *supra* note 9, paras. 48, 101.

pirates from seeking refuge within its territory. Despite massive international attention, for example, piracy reached record levels in 2010 for the fourth straight year.²⁹⁵ To say the least, the current legal framework is broken.

An ad hoc piracy tribunal, however, could be an important first step toward fixing the framework. The temporary criminal courts in Rwanda and Yugoslavia, for instance, played crucial roles in catalyzing support for the International Criminal Court.²⁹⁶ A temporary piracy tribunal could have a similar effect on the international community, exposing both the positive and negative aspects of an international forum for trying suspected pirates. Further, a temporary piracy tribunal under the Security Council will allow for a degree of judicial experimentation. Noting the evidentiary difficulties of proving “that armed men in a boat on the high seas are pirates,” Eugene Kontorovich recently suggested adopting “equipment articles” that “create a judicial presumption of guilt on piracy charges for the crews of civilian vessels possessing certain specified equipment within a certain defined area of the high seas.”²⁹⁷ Though the merits of such a strategy are debatable, a piracy tribunal provides the United Nations with the latitude to develop these types of creative approaches.

To remedy this situation, the Security Council should chart a new legal course for combating Somali pirates and convene an ad hoc criminal tribunal. This action could finally restore peace to the Gulf of Aden and prevent the number of pirate attacks from increasing yet again in 2012.

V. CONCLUSION

Despite pouring unprecedented amounts of global attention and resources into the Gulf of Aden, pirates continue to defy their captors by increasing the frequency and range of their attacks. With minimal resources and training, these modern buccaneers disrupt global shipping lanes, block international aid deliveries, and frustrate the world's foremost naval powers. The international community can no longer afford to watch the shipping industry suffer while money is funneled into the lawless society of Somalia, possibly

²⁹⁵ See J. David Goodman, *Piracy Reached Record Level in 2010, Monitors Say*, N.Y. TIMES, Jan. 19, 2011, at A7.

²⁹⁶ JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW: NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH 658 (2d ed. 2006) (explaining that many nations preferred consent based participation to unilateral action of the Security Council).

²⁹⁷ EUGENE KONTOROVICH, EQUIPMENT ARTICLES FOR THE PROSECUTION OF MARITIME PIRACY 1–2 (2010), available at http://www.oneearthfuture.org/index.php?id=121&pid=37&page=Equipment_Laws_for_the_Prosecution_of_Piracy.

even filling the pockets of terrorists. Piracy is a global menace that must be stopped with strong and effective legal action.

As it stands today, however, the international community confronts Somali piracy with a broken system. The regime, predicated on universal jurisdiction, gives authority to those states willing to prosecute but leaves the decisions of whether and how to prosecute entirely to the apprehending nation. This structure ignores the unique nature of piracy, which distinguishes it from other international crimes. Pirates are supra-national actors with nebulous legal standing that injure the entire global community, rather than individual national actors. Accordingly, prosecution is legally complex and expensive. Transporting evidence and witnesses to a courtroom thousands of miles away can be financially and logistically impossible. Absent strong compulsion, therefore, nations typically elect not to shoulder the entire legal, fiscal, and political cost of trying a Somali pirate in a court of law.

Despite the inadequacy of the current system, encouraging signs of change have begun to emerge over the past few years. Regional countries and apprehending nations have shown a growing interest in bringing pirates to justice and deterring piratical activity. Looking beyond the auspicious beginnings of domestic prosecution, however, the eventual limitations of domestic piracy trials are clear. Prosecutions in Kenya and other regional nations raise potential legal and humanitarian problems, as apprehending nations transfer suspected pirates to countries without the legal or judicial capacity to handle the criminals. Meanwhile, trials in Western nations may lack a true deterrent quality under the circumstances. Further, African and Western nations alike must confront a confusing integration of domestic and international law.

To fix the Somali piracy problem, the international community must abandon this limited, state-centric approach. While a long-term solution may be the establishment of some type of permanent international tribunal, an ad hoc judicial mechanism could prove to be the perfect short-term option. Given a flexible, immediate option, the Security Council could reduce the Somali piracy problem now and begin to restore order to one of the world's most important shipping lanes.