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Yvonne M. Dutton

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Bringing Pirates to Justice: A Case for Including Piracy within the Jurisdiction of the International Criminal Court

Yvonne M. Dutton*

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I. INTRODUCTION

Pirates do not only exist in legends and on rides at Disneyland. Modern pirates are armed with machine guns and rocket launchers and roam the seas in high-speed maneuverable skiffs that are supported by “mother ships,” enabling them to launch attacks from a distance of up to 500 nautical miles.¹ According to the October 2009 Report of the International Maritime Bureau Piracy Reporting Center (IMB), worldwide actual and attempted pirate attacks in the first nine months of 2009 exceeded the total number of attacks in each of the prior four years.² In the first nine months of 2009, pirates boarded vessels in 114

¹ See, for example, Peter Chalk, *The Maritime Dimension of International Security: Terrorism, Piracy, and Challenges for the United States* 5–6 (RAND 2008) (noting that the more violent pirate attacks are committed by organized gangs who operate from a mother ship using sophisticated weaponry); European Security and Defence Assembly, Assembly of the Western European Union, *Report: The Role of the European Union in Combating Piracy*, ¶¶ 11–12, ESDA Doc No A/2037 (June 4, 2009) (explaining that pirates off the Somali coast are equipped with automatic weapons and rocket launchers and use mother ships to place skiffs in the water farther from shore); Roger Middleton, *Chatham House Briefing Paper: Piracy in Somalia: Threatening Global Trade, Feeding Local Wars* 4, AFP BP 08/02 (Oct 2008) (noting that Somali pirates now use mother ships to increase the range from which they can launch attacks). In fact, on November 15, 2008, Somali pirates captured the *Sirius Star*, a supertanker carrying more than two million barrels of oil destined for the US, some 450 nautical miles southwest of Kenya. It was this capture that alerted the world to pirates’ ability to extend their reach well beyond the coastlines by using mother ships from which faster, smaller skiffs loaded with outboard motors can be launched. See Thean Potgieter, *The Lack of Maritime Security in the Horn of Africa Region: Scope and Effect*, 31 Strategic Rev S Afr 65, 73 (May 1, 2009).

² International Chamber of Commerce, International Maritime Bureau, *Piracy and Armed Robbery Against Ships, Report For The Period 1 January–30 September 2009* (“IMB October 2009 Report”) 6–7 (Oct 2009).

cases, hijacked them in thirty-four instances, took 661 crew members hostage, kidnapped twelve, and killed six.³

Not only is piracy alive and well, but its negative effects are felt by the international community as a whole. Although the highest number of pirate attacks in 2009 occurred off the Gulf of Aden and the east coast of Somalia, significant attacks were also reported by Nigeria, Malaysia, Bangladesh, India, and Peru.⁴ Victims of the attacks include flag states, ship owners, crew members, and cargo from all over the globe.⁵ Furthermore, about 80 percent of the world economy's goods—including critical energy supplies like oil—flow through shared sea lanes.⁶ Thus, piracy disrupts international trade. The presence of piracy also threatens to destabilize those states that depend on revenues from international shipping, such as Sudan, Saudi Arabia, Eritrea, Djibouti, Yemen, Oman, and Kenya.⁷ Piracy even impedes the delivery of foreign aid and contributes to instability in already impoverished and unstable nations: the UN World Food Program had to suspend deliveries of food aid to Somalia in 2007 because of the dangers experienced in traveling through pirate-infested waters.⁸ Finally, because many of the ships that do flow through narrow sea lanes are carrying oil or other vulnerable supplies, piracy also creates the risk of a major international environmental disaster.⁹

³ IMB *October 2009 Report* at 27 (cited in note 2). For purposes of gathering its statistics, the IMB reports acts of piracy and armed robbery which it defines as follows: "An act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in the furtherance of that act." Id at 4.

⁴ See id at 8, 10–11, 27–28.

⁵ See Piracy Against U.S. Flagged Vessels: Lessons Learned: Hearing Before the House Subcommittee on Coast Guard & Maritime Transportation of the Committee on Transportation & Infrastructure, 111th Cong, 1st Sess 79 (2009) (statement of Rear Admiral Brian M. Salerno, Assistant Commandant for Marine Safety, Security and Stewardship, Dept of Homeland Security, US Coast Guard) ("Statement of Rear Admiral Brian M. Salerno") ("[A] single piratical attack affects the interests of numerous countries, including the flag State of the vessel, various States of nationality of the seafarers taken hostage, regional coastal States, owners' States, and cargo shipment and transshipment States.").

⁶ See Michael Richardson, *A Time Bomb for Global Trade: Maritime-related Terrorism in an Age of Weapons of Mass Destruction* 3 (ISEAS Pubs 2004) (noting that in 2002, world merchandise exports were worth \$6,270 billion and that approximately 80 percent of international trade by volume is carried by sea). See also *Report: The Role of the European Union in Combating Piracy* at 4 (cited in note 1) (stating that some sixteen thousand ships per year and half of the world's oil supplies pass through the Gulf of Aden, the busy shipping lane used to facilitate trade between Europe and Asia).

⁷ See International Expert Group on Piracy off the Somali Coast, *Final Report: Workshop commissioned by the Special Representative of the Secretary General of the UN to Somalia Ambassador Ahmedou Ould-Abdallah* ("Nairobi Report") 33 (Nov 10–12, 2009).

⁸ See Middleton, *Piracy in Somalia* at 9 (cited in note 1).

⁹ See Chalk, *The Maritime Dimension of International Security* at 17 (cited in note 1).

Yet, despite the presence of piracy and its effects on the security of ships, crews, and cargo passing through international and territorial waters, individual nations and the international community as a whole are doing little to ensure that pirates who succeed in committing their violent attacks are arrested, prosecuted, and punished.¹⁰ Rather, it seems most nations are shunning their judicial responsibility to prosecute the pirates who commit crimes in their territory or against their ships and crews. The apparent reasons for this refusal to accept these judicial burdens are many: for example, inadequate or non-existent national laws criminalizing the acts committed,¹¹ concerns about the safety and impartiality of local judges, the difficulties of obtaining and preserving evidence, and fears that if convicted, the pirates will be able to remain in the country where they are prosecuted.¹² But if pirates are not arrested, prosecuted, and ultimately punished, it is unlikely they will be deterred—particularly given the high rewards available to them in the form of escalating ransom payments.¹³

¹⁰ See, for example, Nairobi Report at 31 (cited in note 7); John Knott, *United Kingdom: Somalia, The Gulf Of Aden, And Piracy: An Overview, And Recent Developments* (Mondaq 2009); Drew H. Pearson, *Can The Somali Pirates Be Stopped?*, 42 *Sea Classics* 14, 20 (2009); Fernando Peinado Alcaraz, *Chasing pirates is all very well—but who is going to lock them up?*, *El Pais* (English), Aug 17, 2009, online at <http://web2.westlaw.com/Find/default.wl?bhcp=1&cite=2009+WLNR+15970667&trs=LAWS2.0&strRecreate=no&sv=Split&vr=1.0> (visited May 3, 2010); Mike Corder, *Nations look to Kenya as venue for piracy trials*, *Bay News* 9, Apr 17, 2009, online at <http://www.baynews9.com/content/36/2009/4/17/461573.html?title=Nations+look+to+Kenya> (visited May, 2010). Consider Eric Ellen, *Bringing Piracy To Account*, 102 *Jane's Navy Intl* 29 (Apr 1997).

¹¹ See, for example, Statement of Rear Admiral Brian M. Salerno (cited in note 5) (stating that many nations lack sufficient legal structures to prosecute piratical acts); Nairobi Report at 25 (cited in note 7) (noting that even as to those states with national legislation to punish acts of piracy, the laws do not permit the exercise of jurisdiction beyond territorial waters); *Report: The Role of the European Union in Combating Piracy* at 13 (cited in note 1) (stating that few states have adapted national laws to apply international treaty provisions regarding the repression of piracy, and indeed, within the EU, only Germany, Finland, the Netherlands, and Sweden can exercise jurisdiction over acts of maritime piracy); Alcaraz, *Chasing pirates is all very well*, *El Pais* (English) (cited in note 10) (noting that Spain's Penal code, for example, does not cover maritime piracy); "Hijacked" ship spotted in the Atlantic: Russian warship is on its way to save the crew, *The Times* (UK), Aug 15, 2009, online at http://web2.westlaw.com/find/default.wl?fn=_top&trs=WLW10.03&rp=/find/default.wl&ifm=NotSet&vr=2.0&sv=Split&cite=2009+WLNR+15912145 (visited May 3, 2010) (noting that Portuguese law does not permit it to prosecute those accused of committing acts of maritime piracy).

¹² See, for example, Corder, *Nations Look to Kenya* (cited in note 10).

¹³ See, for example, Veronique de Rugy, *Paying the pirate's price: do the economics of piracy demand the privatization of the sea?*, *Reason Magazine* (July 2009), online at <http://reason.com/archives/2009/06/15/paying-the-pirates-price> (visited Feb 25, 2010) (estimating between \$30 to \$150 million paid in ransom to Somali pirates in 2008); Marketplace for American Public Media, *The price of piracy on shipping*, Apr 10, 2009, online at http://origin-marketplace.publicradio.org/display/web/2009/04/10/pm_piracy/ (visited May 3, 2010).

This Article is concerned with the present failure of the international community to ensure that pirates are brought to justice and punished for violently attacking the ships and crews of many nationalities that pass through shared public sea lanes. Although nations have implemented a variety of measures aimed at disrupting piratical attacks—for example, by forming naval patrols that roam pirate-infested waters—such measures alone are not sufficient to deter all or most acts of piracy. Instead, pirate attacks are on the rise.¹⁴ Criminal prosecutions of pirates, however, could do much to deter and prevent future piratical attacks.¹⁵ Therefore, this Article argues that piracy is a serious crime affecting the international community and investigates international legal solutions ripe for consideration. This Article further suggests that the International Criminal Court (ICC) is the best international forum to bring an end to the culture of impunity that surrounds piracy offenses.

The reasons for including piracy within the jurisdiction of the ICC are many. As a theoretical matter, piracy would fit well within the ICC's mandate, which provides it with jurisdiction over serious crimes of concern to the international community.¹⁶ Piracy is a serious crime, the quintessential crime of

(estimating that Somali pirates collected some \$80 million in ransoms during 2008); Munich Re Group, *Piracy—The Threat at Sea Takes on a New Dimension* 20 (2009), online at http://www.munichre.com/publications/302-06152_en.pdf (visited May 3, 2010) (estimating ransom payments for 2008 totaled about \$80 million, with another \$40–50 million for negotiation and delivery costs).

¹⁴ See *IMB October 2009 Report* at 7 (cited in note 2).

¹⁵ Deterrence and the prevention of future criminal activity are primary goals of criminal prosecutions—including international criminal prosecutions. For example, the Preamble to the Rome Statute creating the ICC emphasizes the potential deterrent effect of the court, noting that it is being created “to put an end to impunity for the perpetrators of [the covered crimes] and thus to contribute to the prevention of such crimes.” Rome Statute of the International Criminal Court (“Rome Statute”), July 17, 1998, UN Doc A/CONF.183/9 (1998), reprinted in 37 ILM 999, Preamble, ¶ 5. See also M. Cherif Bassiouni, *Combating Impunity for International Crimes*, 71 U Colo L Rev 409, 410 (2000) (“The pursuit of justice and accountability, it is believed, fulfills fundamental human values, helps achieve peace and reconciliation, and contributes to the prevention and deterrence of future conflicts.”); Michael P. Scharf, *The Prosecutor v. Dusko Tadic, An Appraisal of the First International War Crimes Tribunal since Nuremberg*, 60 Alb L Rev 861, 868 (1997) (quoting Richard Goldstone for the idea that international criminal tribunals will provide an enforcement mechanism to punish those who commit atrocities, thereby aiding in deterring future atrocities).

¹⁶ The Preamble to the Rome Statute states that the parties have agreed to create a permanent ICC with jurisdiction over the most serious crimes of concern to the international community as a whole. Rome Statute at Preamble, ¶ 4 (cited in note 15). In addition, Article 1 also emphasizes that the court will have jurisdiction over the “most serious crimes of international concern.” Rome Statute, Art 1 (cited in note 15). At the present time, the crimes over which the ICC does have jurisdiction are genocide, crimes against humanity, and war crimes. The parties to the Rome Statute also have declared that the ICC will have jurisdiction over the crime of aggression once a

customary international law, and the original universal jurisdiction crime.¹⁷ The reality is that modern piracy involves many of the same violent and cruel acts—such as murder, kidnapping, and hostage-taking—that are used to commit genocide, crimes against humanity, and war crimes over which the ICC currently has jurisdiction. Moreover, like the other crimes included within the court’s jurisdiction, piracy is a crime that is well-suited to the complementarity regime utilized by the ICC treaty, whereby the ICC only obtains jurisdiction over a crime if the state which would otherwise have jurisdiction over it is unwilling or unable to prosecute the crime.¹⁸ Nations are not prosecuting acts of piracy with any regularity, either because they are unwilling or unable to do so.¹⁹ Just as the ICC can fill the impunity gap for the crimes already within its jurisdiction, it can also fill the impunity gap for piracy. Finally, as a practical matter, there is infrastructure already in place that can be easily adapted to cover piracy: the ICC exists, it may sit regionally if necessary, and piracy can be added to the ICC’s mandate by an optional protocol.²⁰

Part II of this Article traces the historical legal background of the crime of piracy and the international legal framework that has emerged to govern the

provision is adopted defining that crime and setting out the conditions under which the court can exercise jurisdiction over it. See *id.*, Art 5.

¹⁷ See *United States v Smith*, 18 US (5 Wheat) 153, 161 (1820) (“The common law, too, recognizes and punishes piracy as an offence, not just against its own municipal code, but as an offence against the law of nations (which is part of the common law), as an offence against the universal law of society, a pirate being deemed an enemy of the human race.”); Restatement (Third) of Foreign Relations Law of the United States §§ 404, 423 (1987) (stating that piracy is one of the offenses that the US and other states may define and adjudicate according to the universality principle); Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation*, 45 Harv Intl L J 183, 190 (2004) (noting that international law today continues to consider piracy as universally cognizable and that it would be hard to find any authority suggesting that piracy was not covered by universal jurisdiction); Edwin D. Dickinson, *Is The Crime of Piracy Obsolete?*, 38 Harv L Rev 334, 335–39 (1925) (suggesting pirates as enemies of all mankind were subject to universal jurisdiction since the early seventeenth century).

¹⁸ The Rome Statute provides in the Preamble that the ICC “shall be complementary to national criminal jurisdictions.” Rome Statute at Preamble, ¶ 10 (cited in note 15). Therefore, as explained in detail under Article 17, a case is not admissible to the ICC unless the state which has jurisdiction over it is “unwilling or unable genuinely to carry out the investigation or prosecution.” *Id.*, Art 17, ¶ 1 (cited in note 15).

¹⁹ See sources cited in note 10.

²⁰ Pursuant to Article 3 of the Rome Statute, the ICC is to sit in The Hague in the Netherlands; however, “[t]he Court may sit elsewhere, whenever it considers it desirable.” *Id.*, Art 3 (cited in note 15). According to the working papers prepared in connection with the implementation of the Rome Statute, in determining whether to sit outside The Hague, the ICC should consider the practicality of such an arrangement and whether it would be in the interests of justice to do so. Preparatory Commission for the International Criminal Court Working Group on the Basic Principles of Governing a Headquarters Agreement to be Negotiated Between the Court and the Host Country, UN Doc PCNICC/2001/WGHQA/L.1, *princs* 16–23 (2001).

prosecution of pirates. It further describes certain features of the international legal framework that operate to limit its effectiveness as a tool for combating acts of modern piracy. Part III describes the modern piracy problem in more detail and addresses some of the international community's responses to the problem. Part III also examines the culture of impunity that surrounds piracy and the failure of nations to prosecute acts of piracy with any regularity. In addition, Part III briefly addresses Kenya's agreement to try pirates captured by the naval forces of various countries and the flaws associated with relying on Kenya as a solution to end impunity for piracy. Part IV provides background for the argument that an international tribunal should handle piracy prosecutions by describing the literature that discusses the merits of using international courts—as opposed to national courts—to adjudicate cases involving international crimes like piracy. Finally, Part V explains why including piracy within the jurisdiction of the ICC is the best international solution, desirable on both theoretical and practical grounds.

II. THE INTERNATIONAL LEGAL FRAMEWORK FOR COMBATING PIRACY

A. Universal Jurisdiction

Piracy, under customary international law, is the oldest crime to which universal jurisdiction²¹ applies.²² For centuries, nations have deemed pirates to be *hostis humani generis* (enemies of all mankind), such that any nation may use its own domestic laws to try to punish those committing piracy, regardless of the

²¹ In 2000, a group of scholars and jurists met at Princeton University to examine the doctrine of universal jurisdiction. In the document resulting from that meeting, entitled “The Princeton Principles on Universal Jurisdiction,” universal jurisdiction was defined as “criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.” Stephen Macedo, ed, *Princeton Principles on Universal Jurisdiction* 28 (2001).

²² See note 17. See also William Blackstone, 4 *Commentaries on the Law of England* 71 (9th ed 1783) (stating that piracy is a violation of the law of nations and that “every community” has a right to punish pirates); Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, 40 Vand J Transnatl L 1, 11 (2007) (suggesting that piracy is the oldest offense to which universal jurisdiction applies); M. Cherif Bassiouni, *Universal Jurisdiction For International Crimes: Historical Perspectives And Contemporary Practice*, 42 Va J Intl L 81, 110–11 (2001) (“[U]niversal jurisdiction to prevent and suppress piracy has been widely recognized in customary international law as the international crime par excellence to which universality applies.”); Michael P. Scharf, *Application of Treaty-Based Universal Jurisdiction To Nationals of Non-Party States*, 35 New Eng L Rev 363, 369 (2001) (stating that piracy has been widely accepted as a crime of universal jurisdiction for 500 years).

pirates' nationalities or where the piratical acts took place.²³ It is the general heinousness of piratical acts and the fact that they are directed against ships and persons of many nationalities—disrupting international trade and commerce—that warrants universal jurisdiction.²⁴ Indeed, the US Supreme Court early on recognized the pirate an enemy of mankind over which states could exercise universal jurisdiction because the pirate “commits hostilities upon the subjects and property of any and all nations, without regard to right or duty, or any pretence of public authority.”²⁵

Customary international law provides no agreed-upon definition for what acts constitute the international crime of piracy.²⁶ However, at present there are two international treaties that, at least in part, govern piratical acts and provide the jurisdictional bases for nations to prosecute such acts domestically. The first such treaty is the United Nations Convention on the Law of the Sea (UNCLOS)²⁷—a treaty with some 160 states parties which specifically defines piracy.²⁸ The second is the Convention for the Suppression of Unlawful Acts

²³ See Edward Coke, 3 *Institutes on the Laws of England* 113 (1797); Kenneth C. Randall, *Universal Jurisdiction under International Law*, 66 *Tex L Rev* 785, 791 (1988).

²⁴ See, for example, Jeffrey M. Blum and Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena-Irala*, 22 *Harv Intl L J* 53, 60 (1981) (explaining that piracy was subject to universal jurisdiction because of its heinousness); Randall, 66 *U Tex L Rev* at 793–94 (cited in note 23) (suggesting that the most accurate rationale for providing universal jurisdiction over piracy relies on the wicked and heinous nature of piracy offenses which involve violence and depredation and the fact that piracy is directed against ships of all nations). See also Statement of Rear Admiral Brian M. Salerno (cited in note 5) (“Maritime piracy is a universal crime under international law because it places the lives of seafarers in jeopardy and affects the shared economic interests of all nations.”).

²⁵ See *United States v Brig Malek Adhel*, 43 *US* (2 *How*) 210, 232 (1844) (Story). Justice Story further explained: “If [a pirate] willfully sinks or destroys an innocent merchant ship, without any other object than to gratify his lawless appetite for mischief, it is just as much a piratical aggression, in the sense of the law of nations . . . as if he did it solely and exclusively for the sake of plunder, *lucri causa*. The law looks to it as an act of hostility . . . it treats it as the act of a pirate, and of one who is emphatically *hostis humani generis*.” *Id.* See also *United States v Smith*, 18 *US* (5 *Wheat*) 153, 161 (1820) (cited in note 17) (stating that piracy is an offense against the law of nations and universal law, with the pirate being an enemy of the human race).

²⁶ In fact, in connection with their efforts in the early twentieth century to contribute to the attempts to codify the international law regarding piracy, the drafters of the Harvard Research Draft noted the lack of universal agreement on what exactly constituted the crime of piracy. *Harvard Research in International Law Draft Convention and Comment on Piracy* (“*Harvard Research Draft*”), 26 *Am J Intl L* 739, 749, 769 (Supp 1932).

²⁷ United Nations Convention on the Law of the Sea (“UNCLOS”), Arts 100–08, 110, Dec 10, 1982, 1833 *UNTS* 397.

²⁸ For a list of state ratifications, see UN, *Chronological lists of ratifications of accessions and successions to the Convention and the related Agreements as at 08 January 2010*, online at http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm (visited Apr 3, 2010). Notably, although the US is not a party to UNCLOS, it did ratify an earlier version

Against the Safety of Maritime Navigation (SUA Convention)²⁹—to which 156 nations are parties.³⁰ Drafted in response to the *Achille Lauro* incident when Palestinian terrorists hijacked an Italian cruise liner, the SUA Convention covers ship hijackings that are politically motivated.³¹ The relevant terms of each of these treaties, together with their flaws as tools in combating modern piracy, will be discussed below.

B. UNCLOS and its Flaws as a Tool to Combat Modern Piracy

Article 105 of UNCLOS codifies piracy's status as a crime subject to universal jurisdiction, providing that any state may exercise its right to repress piracy by seizing pirate ships and arresting pirates to bring them to justice.³² Furthermore, according to Article 100, states are required to cooperate in the repression of piracy to the fullest possible extent.³³ As to what acts constitute piracy over which states have universal jurisdiction, UNCLOS provides the following definition in Article 101:

- (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;

of the treaty with identical provisions regarding piracy. See Geneva Convention on the High Seas, Apr 20, 1958, 13 UST 2312, 450 UNTS 82.

²⁹ Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ("SUA Convention") (Mar 10, 1988), 1678 UNTS 221 (1998).

³⁰ See International Maritime Organization, *Status of Conventions—Summary*, online at http://www.imo.org/Conventions/mainframe.asp?topic_id=247 (visited May 3, 2010).

³¹ See, for example, Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 Am J Intl L 269, 270–72 (1988); *Report: The Role of the European Union in Combating Piracy* at 12 (cited in note 1).

³² UNCLOS, Art 105 (cited in note 27).

³³ Id, Art 100. The full text of Article 100 provides, "All states shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State." According to drafters' commentary written in connection with the identical provision contained in the earlier version of the Convention, "any State having an opportunity of taking measures against piracy, and neglecting to do so, would be failing in a duty laid upon it by international law." See International Law Commission, *Articles Concerning the Law of the Sea with Commentaries*, 1956 (II) Yearbook of the International law Commission Art 38, cmt 2, at 282.

(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).³⁴

In addition, under Article 103, a ship is a pirate ship “if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to Article 101.”³⁵

Thus, UNCLOS defines piracy as a criminal act, the vast majority of nations are party to it, and it even contains a provision, which, at least in theory, requires nations to prosecute piratical acts.³⁶ Nevertheless, as a tool for combating piracy, UNCLOS is lacking in several respects. First, even though the Convention requires nations to cooperate in repressing piracy, there is no mechanism to enforce this duty. Rather, nations must incorporate UNCLOS provisions into domestic law before they can prosecute acts of piracy. Yet, apparently few states have taken this essential step, thereby making it impossible for them to cooperate in repressing piracy by using the provisions of UNCLOS.³⁷ Moreover, only one major case has been brought using the piracy provisions of UNCLOS: a Belgian prosecution against Greenpeace.³⁸

Second, UNCLOS’s definition of piracy includes only those acts that occur on the high seas or outside the territory of any state.³⁹ However, most acts of piracy today occur in territorial waters and ports, rather than in international waters, meaning that UNCLOS does not provide a jurisdictional basis to prosecute those acts.⁴⁰ A nation’s territorial waters generally extend twelve miles from its coastline, and only that nation has jurisdiction to prosecute wrongful acts occurring in its sovereign territory.⁴¹ In addition, island states like Indonesia and the Philippines may claim within their territory all waters between the outermost points of their outermost islands.⁴² Therefore, attacks occurring within the straits, gulfs, and archipelagos where international ships must pass

³⁴ UNCLOS, Art 101 (cited in note 27).

³⁵ Id, Art 103.

³⁶ Id, Art 100.

³⁷ See, for example, *Report: The Role of the European Union in combating piracy* at 13 (cited in note 1).

³⁸ Carlo Tiribelli, *Time To Update The 1988 Rome Convention For The Suppression Of Unlawful Acts Against The Safety Of Maritime Navigation*, 8 Or Rev Intl L 133, 136 (2006).

³⁹ UNCLOS, Art 101 (cited in note 27).

⁴⁰ In fact, the International Maritime Bureau has indicated that its reports show that most attacks against ships occur within the sovereign territory of states. See *IMB October 2009 Report* at 4 (cited in note 2).

⁴¹ UNCLOS, Arts 2–3 (cited in note 27).

⁴² Id, Arts 46–48, 52–53.

and at ports where they must dock are not subject to UNCLOS.⁴³ Nevertheless, some commentators estimate that up to 70 percent of recent attacks have occurred in such territorial waters.⁴⁴

Third, at least some language in UNCLOS suggests that for an act to be deemed piracy, two ships must be involved. Article 101(a)(i) defines acts of piracy to include those illegal acts committed by the crew or passengers of a ship “against *another* ship.”⁴⁵ Although Article 101(a)(ii) does not include this same wording to define an act of piracy, commentators differ on whether piracy under the Convention includes internal seizures, violence by the crew, or actions by passengers of one ship against that same ship or its passengers.⁴⁶ If two ships are required, however, then potential pirates need only to pose as passengers or crew and thereafter hold the ship ransom in order to avoid being defined as pirates under UNCLOS.

Finally, under UNCLOS an act is not piracy unless that act is committed for “private ends.”⁴⁷ Accordingly, 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. While commentators

⁴³ Indeed, some commentators have even suggested that acts of piracy within the exclusive economic zones of states—which per Article 57 can extend some 200 miles from the coastline—may not be covered by UNCLOS. Although Article 58 of UNCLOS does preserve universal jurisdiction over piracy in the exclusive economic zones, states seeking to apprehend pirates in such areas would have to do so in a way that would not interfere with the rights of the state claiming that exclusive economic zone. See Samuel Pyeatt Menefee, *The New “Jamaica Discipline”: Problems With Piracy, Maritime Terrorism And the 1982 Convention On The Law Of The Sea*, 6 Conn J Intl L 127, 146–47 (citing T.A. Clingan, Jr, *The Law Of Piracy*, in Eric Ellen, ed, *Piracy At Sea* 168–70 (1989)). See also UNCLOS, Art 58 (cited in note 27) (“In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.”).

⁴⁴ See, for example, Chalk, *The Maritime Dimension of International Security* at 7–8 (cited in note 1) (noting that in 2007, about 20 percent of attacks occurred in waters around the Indonesian archipelago, including the Malacca Straits, while some 50 percent of the attacks occurred in the territorial seas around Nigeria, Somalia, the Gulf of Aden/Red Sea, Tanzania, Peru, Bangladesh, and Malaysia); Robert C. Beckman, *Combating Piracy and Armed Robbery Against Ships in Southeast Asia: The Way Forward*, 33 Ocean Dev & Intl L 317, 328 (2002) (stating that none of the attacks in the Straits of Malacca and Singapore constituted piracy under UNCLOS because they took place in territorial waters); *IMB October 2009 Report* at 11 (cited in note 2) (showing twelve locations where ships were attacked at ports and anchorages three or more times in the first nine months of 2009).

⁴⁵ UNCLOS, Art 101(a)(i) (emphasis added) (cited in note 27).

⁴⁶ See Menefee, 6 Conn J Intl L at 144 (cited in note 43).

⁴⁷ UNCLOS, Art 101 (cited in note 27).

differ on whether this is the case,⁴⁸ the presence of the “private ends” language may make prosecuting certain ship attacks difficult or impossible under UNCLOS. Indeed, perpetrators may seize upon the language as providing an opportunity to claim their acts were politically motivated, thus requiring the prosecution and courts to address this additional evidentiary and legal issue.

C. The SUA Convention and Its Flaws as a Tool to Combat Modern Piracy

The SUA Convention was enacted, at least in part, to ensure that politically motivated attacks on ships could be prosecuted by the international community as acts of piracy.⁴⁹ Pursuant to Article 3, a prohibited offense is committed by anyone who: (1) “seizes or exercises control over a ship by force or threat thereof or any other form of intimidation;”⁵⁰ (2) “performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of the ship;”⁵¹ or (3) attempts to do any of the above.⁵² In contrast to UNCLOS, the SUA Convention applies to offenses committed even in territorial or archipelagic waters or in port, as long as the ship is scheduled for international navigation.⁵³ In terms of jurisdiction, any signatory state may prosecute violations of the SUA Convention provided that: (1) the offense was against a ship flying its flag; (2) the offense occurred in its territory; (3) the offense was committed by a national of the state; or (4) a national of the state was a victim of the offense.⁵⁴

⁴⁸ See, for example, Bahar, 40 Vand J Transnatl L at 27–37 (cited in note 22) (arguing that the “private ends” language in UNCLOS does not preclude treating terrorism on the high seas as piracy inasmuch as the “private ends” language was likely meant to exclude from covered those unrecognized insurgents that were acting solely against a foreign government and ships acting pursuant to public authority). Bahar cites to a number of commentators who he claims mistakenly or without analysis conclude that the “private ends” language in UNCLOS prohibits prosecuting terrorist acts on the high seas using UNCLOS. See, for example, Zou Keyuan, *Implementing the United Nations Convention on the Law of the Sea in East Asia: Issues and Trends*, 9 Sing J Intl & Comp L 37, 44 (2005); Tammy Sittnick, *State Responsibility and Maritime Terrorism In The Strait of Malacca: Persuading Indonesia and Malaysia to Take Additional Steps to Secure the Strait*, 14 Pac Rim L & Poly J 743, 758 (2005); Erik Barrios, *Casting a Wider Net: Addressing the Maritime Piracy Problem in Southeast Asia*, 28 BC Intl & Comp L Rev 149, 156 (2005).

⁴⁹ See, for example, *Report: The Role of the European Union in Combating Piracy* at 12 (cited in note 1); Halberstam, 82 Am J Intl L at 270–72 (cited in note 31).

⁵⁰ SUA Convention, Art 3(1)(a) (cited in note 29).

⁵¹ Id., Art 3(1)(b).

⁵² Id., Art 3(2)(a).

⁵³ Id., Art 4.

⁵⁴ SUA Convention, Art 6 (cited in note 29).

Nevertheless, although the SUA Convention does appear to broadly prohibit offenses that are consistent with modern piracy, like UNCLOS, the SUA Convention is flawed. First, notwithstanding that the Convention requires the signatory state to either extradite or prosecute an offender found in its territory,⁵⁵ the SUA Convention has apparently only been used in one instance.⁵⁶ Thus, whatever the Convention's merits as a tool to combat piracy, nations do not appear to be using it. One commentator has suggested there is some confusion about the treaty's applicability, in that some believe it can only be used to prosecute acts committed by terrorists.⁵⁷

Second, even though the SUA Convention, unlike UNCLOS, theoretically covers attacks while ships are docked or in territorial waters, the statute also typically requires that the attack "is likely to endanger the safe navigation of the ship."⁵⁸ Based on this language, using the SUA Convention to prosecute attacks—even violent attacks—while a ship is docked may be difficult.

Finally, although the SUA Convention does apply broadly to offenses on ships regardless of location as long as they are engaged in international navigation, offenses can still go unpunished because only signatory states with a nexus to the offense are entitled to prosecute.⁵⁹ For example, SUA signatory states may prosecute if the offense is committed against or on board a ship flying a flag of that state, the offense occurs within the state's territory or is committed by one of its nationals, or where a state's national is seized, threatened, injured, or killed in connection with the offense.⁶⁰ This is in contrast to UNCLOS, which at least permits—and possibly requires—all signatory nations to prosecute, whether or not they have a nexus to the offense.⁶¹ Therefore, if a signatory state with the required nexus to the offense does not prosecute, or if the states with a nexus to the offense are not signatories to the SUA Convention, pirates and maritime terrorists will go unpunished.⁶² Under

⁵⁵ See *id.*, Arts 7, 10.

⁵⁶ See Eugene Kontorovich, "A Guantanamo on the Sea": *The Difficulties of Prosecuting Pirates and Terrorists* 18, online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1371122 (visited May 3, 2010) (stating that the SUA Convention has only been used once—in a case the US originally brought in the US District Court for the District of Hawaii against a cook who commandeered a fishing trawler). For a record of the facts of that case, consider *United States v Shi*, 525 F3d 709 (9th Cir 2008).

⁵⁷ See Beckman, 33 Ocean Dev & Intl L at 330 (cited in note 44).

⁵⁸ See SUA Convention, Art 3 (cited in note 29).

⁵⁹ See *id.*, Art 6.

⁶⁰ *Id.*

⁶¹ See UNCLOS, Art 100 (cited in note 27).

⁶² See George D. Gabel, Jr., *Smoother Seas Ahead: The Draft Guidelines As An International Solution To Modern-Day Piracy*, 81 Tul L Rev 1433, 1445 (2007) (citing Tina Garmon, *Comment, International Law*

the SUA Convention, other nations would not have the jurisdictional basis to prosecute.⁶³

III. MODERN PIRACY AND RESPONSES OF THE INTERNATIONAL COMMUNITY

A. The Nature of Modern Piracy

Over the last decade, pirate attacks on ships and crews have become an increasingly common occurrence.⁶⁴ The IMB reports that the 306 pirate attacks in the first nine months of 2009 already exceeded the total number of attacks in 2008.⁶⁵ Furthermore, it is important to note that the IMB tracks only those incidents that are reported. The true number of actual and attempted pirate attacks could be much higher, as it is generally believed that many ship owners do not report attacks for fear their ships will be delayed during an investigation or that their insurance premiums may rise as a result.⁶⁶ Moreover, the IMB reports that Somali pirates, in particular, are extending their territorial reach and now threaten the southern part of the Red Sea, the Bab el-Mandab Straits, and the east coast of Oman, as well as the Gulf of Aden and the east coast of Somalia.⁶⁷

Most commentators suggest that money and opportunity explain this increase in piratical attacks. Modern pirates are primarily motivated by the wealth they can obtain by holding the cargo and crew of merchant ships for

of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11th, 27 Tul Mar L J 257, 273 (2002)).

⁶³ Id.

⁶⁴ Between January 2005 and September 2009, the IMB reports some 1,377 pirate attacks worldwide. *IMB October 2009 Report* at 6–7 (cited in note 2). This amounts to almost one attack every day some place in the world.

⁶⁵ Id (cited in note 2). In the waters off the coast of Somalia, forty-seven pirate attacks were reported in the first nine months of 2009 as compared to twelve for the same period of the prior year. In the Gulf of Aden, 100 attacks were reported in the first nine months of 2009, as compared to fifty-one for the previous year. See ICC Commercial Crime Services, *Unprecedented increase in Somali pirate activity* (Oct 21, 2009), online at http://www.icc-ccs.org/index.php?option=com_content&view=Article&id=376 (May 3, 2010).

⁶⁶ See *IMB October 2009 Report* at 27 (cited in note 2) (noting that a Denmark-based Risk Intelligence organization estimates that some 50 percent of pirate attacks on vessels related to the oil industry go unreported). See also, Chalk, *The Maritime Dimension of International Security* at 7 (cited in note 1); John S. Burnett, *Dangerous Waters: Modern Piracy And Terror On The High Seas* 181 (Penguin Books 2003).

⁶⁷ *IMB October 2009 Report* at 27 (cited in note 2).

ransom.⁶⁸ Some authorities estimate that ransom payments made to pirates for the safe return of crew totaled more than \$80 million for the year 2008.⁶⁹ Estimates further put the average ransom at about \$2 million, with “mere gunmen” in Somalia earning up to \$20,000 for participating in an attack—this in a country where the average income is \$500 per year and many are at risk of starvation.⁷⁰ These lucrative potential payoffs have also had the effect of increasing the stakes of piracy, which also likely explains the increasingly violent nature of the attacks. For example, the use of guns more than doubled in the first nine months of 2009 compared to the first nine months of 2008.⁷¹

In terms of opportunity, the huge amount of commercial maritime traffic provides pirates with plenty of targets. Seaborne trade increased some 300 percent from 1970 to 2006, from about 2.5 billion tons to about 7.5 billion tons per year.⁷² About 80 percent of all global freight is shipped by sea, and some twelve to fifteen million containers are on the world’s oceans at any given time.⁷³ Much of that freight travels through narrow and congested maritime chokepoints, such as the Malacca Straits, the Strait of Bab el-Mandab, the Hormuz Straits, the Suez Canal, and the Panama Canal.⁷⁴ Ships must significantly reduce their speed to ensure safe passage through these narrow sea lanes, making the large and slow-moving merchant vessels easy targets for pirates who can quickly overtake them using small, fast, and maneuverable skiffs.⁷⁵ While the slow-moving merchant vessels are often large, they are also often manned with small crews who are unable to sufficiently guard the ship

⁶⁸ See, for example, *Report: The Role of the European Union in combating piracy* at 4 (cited in note 1) (suggesting that pirate attacks in waters off the Somali coast have become a regular source of income for inhabitants of Somalia because the ransoms paid are huge and the risks to the pirates are minimal); Potgieter, 31 *Strategic Rev S Afr* at 70 (cited in note 1) (suggesting that pirates are after money, cargo, and ransom from ship owners, either for themselves or to finance militias on shore).

⁶⁹ See note 13. Regarding individual ransom payments, the Ukrainian ship *Faina*, which was carrying thirty-three T-72 tanks, air defense systems, and rocket launchers, was held for five months until the pirates were paid a ransom of \$3.2 million dollars. The Saudi ship, *Sirius Star*, carrying two million barrels of oil, was released after about two months when pirates received a \$3 million ransom. See *Report: The Role of the European Union in Combating Piracy* at 4 (cited in note 1).

⁷⁰ See Scott Baldauf, *Pirates, Inc.: Inside the Booming Somali Business*, *Christian Science Monitor* 6, May 31, 2009. See also *Nairobi Report* at 17 (cited in note 7) (stating that an armed pirate can earn between \$6,000 and \$10,000 for a single hijacking yielding a ransom of about \$1 million).

⁷¹ See *IMB October 2009 Report* at 27 (cited in note 2).

⁷² See Matthew Gianni, *Real and Present Danger: Flag State Failure and Maritime Security and Safety* 3 (June 2008), online at http://assets.panda.org/downloads/flag_state_performance.pdf (visited May 3, 2010).

⁷³ Chalk, *The Maritime Dimension of International Security* at 10 (cited in note 1).

⁷⁴ *Id.* at 11.

⁷⁵ See *id.* See also *Report: The Role of the European Union in Combating Piracy* at 5–6 (cited in note 1).

from attack.⁷⁶ In fact, in many cases, pirates are able to board the ship and take hostages within fifteen to thirty minutes of being sighted.⁷⁷ Nor can crewmembers typically defend themselves against those pirates since in most cases, ships do not carry weapons. They do not carry weapons because such weapons would ordinarily be impounded ashore by customs officers until the ship sails out of territorial waters.⁷⁸

Money and opportunity may also explain why much of modern piracy is now purportedly being carried out by well-organized pirate gangs—some of which are funded by investors who can share in the profitable rewards of this violent and disruptive activity.⁷⁹ Some pirates have done so well that they are now wealthy enough to hire others to mount the attacks: they invest in the weapons, boats, and communications equipment, but they do not perform any attacks, thereby permitting them to profit with little risk of arrest or prosecution.⁸⁰

B. Responses of the International Community

The international community appears to understand the severity of the problem of modern piracy and also that it will not go away unless the international community takes aggressive action to combat it. For example, because of concerns about the consequences of acts of piracy on world trade

⁷⁶ See Chalk, *The Maritime Dimension of International Security* at 11 (cited in note 1).

⁷⁷ See Lauren Ploch, et al, *Piracy off the Horn of Africa* 10, Congressional Research Service Report No R40528 (Sept 28, 2009), online at http://assets.opencrs.com/rpts/R40528_20090928.pdf (visited May 3, 2010).

⁷⁸ See, for example, Burnett, *Dangerous Waters* at 88 (cited in note 66); *Report: The Role of the European Union in Combating Piracy* at 15 (cited in note 1).

⁷⁹ See, for example, Baldauf, *Pirates, Inc.* (cited in note 70) (reporting that modern pirates are backed by a network of investors and corrupt officials who purchase speedboats, sophisticated weaponry and machinery, such as GPS devices, and choose targets based on the Lloyd's of London list of insured ships, and thereafter pay themselves by underground money transfers); James Kraska, *Coalition Strategy and the Pirates of the Gulf of Aden and the Red Sea*, 28 Comp Strategy 197, 199 (2009) (stating that most of the ransom money collected by Somali pirates is siphoned off to organized crime kingpins who live in Puntland, and more recently, have moved to luxury compounds in Mombassa, Kenya); Potgieter, 31 Strategic Rev S Afr 65 at 70 (cited in note 1) (stating that modern pirates are often organized along military lines, and that one of the most prominent groups is the Somali Marines which boasts between seventy-five and one hundred members and possess arms which include AK-47s, heavy machine guns, and rocket launchers); *Report: The Role of the European Union in Combating Piracy* at 6 (cited in note 1) (noting that piracy today is more like organized crime with many competing pirate gangs, and with profits shared according to fixed rules whereby 30 percent goes to investors, 50 percent to the attackers, and 5 percent to families of deceased or captured pirates).

⁸⁰ See *Report: The Role of the European Union in Combating Piracy* at 6 (cited in note 1).

and humanitarian food aid deliveries,⁸¹ in November 2007, some countries—including France, Denmark, the Netherlands, and Canada—began providing naval escorts for World Food Program ships.⁸² More generally, beginning in late 2008, a multinational naval force (CTF-150) started conducting counter-piracy operations around the Gulf of Aden, the Arabian Sea, and the Indian Ocean.⁸³ The multinational naval force, which operated under a rotating command by the US, Germany, and Denmark, included naval vessels from some fifteen states.⁸⁴ In January 2009, CTF-150 was replaced by CTF-151, which is also a multinational naval force that combines military force, intelligence sharing and coordinated patrols with the specific goal of countering and suppressing acts of piracy.⁸⁵ The EU has also launched its own counter-piracy operation off the coast of Somalia using frigates and naval patrol aircraft.⁸⁶ Non-western nations are also participating in these counter-piracy operations. Pakistan, Japan, and Turkey are among the nations that have contributed to CTF-151.⁸⁷ China, Russia, and India have not formally joined a particular task force, but they have coordinated their actions with other forces.⁸⁸

The UN Security Council has backed these coordinated efforts to combat piracy with a number of resolutions authorizing military action against Somali pirates at sea and on Somali territory.⁸⁹ In a resolution dated June 2, 2008, the Security Council authorized coalition navies for an initial period of six months to enter the territorial waters of Somalia and use “all necessary means to repress acts of piracy and armed robbery.”⁹⁰ By Resolution 1851, on December 16,

⁸¹ Ninety-five percent of all humanitarian aid provided by the World Food Programme is transported by sea. See Secretary-General, *Report of the Secretary-General pursuant to Security Council Resolution 1846* (2008), ¶ 35, UN Doc S/2009/146 (Mar 16, 2009).

⁸² See, for example, *Report: The Role of the European Union in Combating Piracy* at 8 (cited in note 1); Middleton, *Piracy in Somalia* at 7 (cited in note 1).

⁸³ See Secretary-General, *Report of the Secretary-General pursuant to Security Council resolution 1846* (2008), ¶ 30, UN Doc S/2009/146 (Mar 16, 2009).

⁸⁴ See, for example, *id.*; Nairobi Report at 36 (cited in note 7).

⁸⁵ See Nairobi Report at 36 (cited in note 7) (describing CTF-150 as a force of some sixteen nations that patrol from the straits of Hormuz to the south of the Indian Ocean for terrorist activity). See also United States Navy, New Counter-Piracy Task Force Established (Jan 8, 2009), online at http://www.navy.mil/search/display.asp?story_id=41687 (visited Apr 5, 2010) (describing the creation of CTF-151 to combat the piracy threat off the coast of Somalia).

⁸⁶ See *Report: The Role of the European Union in Combating Piracy* at 9 (cited in note 1).

⁸⁷ See *id.*

⁸⁸ See *id.*

⁸⁹ See *Resolution 1816*, UN Security Council (June 2, 2008); *Resolution 1838*, UN Security Council (Oct 7, 2008); *Resolution 1844*, UN Security Council (Nov 20, 2008); *Resolution 1851*, UN Security Council (Dec 16, 2008).

⁹⁰ See *Resolution 1816*, UN Security Council, ¶7 (June 2, 2008).

2008, the Security Council authorized even broader military action to combat piracy, allowing states to use land-based operations in Somalia to fight piracy.⁹¹ By that resolution, for a period of one year, “[s]tates and regional organizations cooperating in the fight against piracy and armed robbery at sea off Somalia’s coast” were permitted to take “all necessary measures ‘appropriate in Somalia,’ to interdict those using Somali territory to plan, facilitate or undertake such acts.”⁹² That resolution received unanimous support from member nations, with nations stressing the many negative consequences resulting from the acts of piracy off of Somalia’s coast.⁹³ For example, the representative from Norway emphasized the threat to his country from piracy, noting that about a thousand Norwegian ships pass through the Bay of Aden each year.⁹⁴ The representative from Turkey pointed out that two Turkish commercial vessels had already been attacked and were still being held hostage.⁹⁵ Yemen’s representative noted that due to regional proximity, Yemen was suffering the ill effects of the surge in piratical activity, including a proliferation of acts of piracy and human trafficking, as well as an uninterrupted flow of refugees towards its territory.⁹⁶

International cooperation aimed at repressing piracy is not only limited to the acts described above. To strengthen the international coordination called for by Security Council Resolution 1851, the US created an international Contact Group on Piracy off the Coast of Somalia (Contact Group).⁹⁷ Participants in the Contact Group formed four working groups to address counter-piracy efforts, focusing on: (1) military coordination and information sharing, (2) judicial aspects of piracy, (3) shipping self-awareness, and (4) improvement of diplomatic and public information aspects of piracy.⁹⁸ Some fifty nations are now members of the Contact Group, together with international organizations such as the African Union, the League of Arab States, INTERPOL, NATO, and

⁹¹ *Resolution 1851*, UN Security Council, ¶6 (Dec 16, 2008).

⁹² *Id.*

⁹³ See Security Council Department of Public Information, *Security Council Authorizes States to Use Land-Based Operations in Somalia, As Part of Fight Against Piracy Off Coast, Unanimously Adopting 1851*, UN Doc SC/9541 (Dec 16, 2008) (reporting that the Security Council adopted Resolution 1851 unanimously, urging countries to participate actively in defeating piracy); *Resolution 1851*, UN Security Council, ¶ 12 (encouraging member states to cooperate in combating piracy). Consider UN SCOR 63rd Sess, 6046th mtg, UN Doc S/PV.6046 (2008) (recording several countries’ experiences with piracy).

⁹⁴ See *id.* at 25 (statement of Morten Wetland, on behalf of the Minister for Foreign Affairs of Norway).

⁹⁵ See *id.* at 26 (statement of Baki Ilkin of Turkey).

⁹⁶ See *id.* at 29–30 (statement of Abdullah M. Alsaidi of Yemen).

⁹⁷ See Statement of Rear Admiral Brian M. Salerno at 4 (cited in note 5).

⁹⁸ See *id.* at 84.

the EU.⁹⁹ In addition, nations in the areas closest to important shipping lanes have also been coordinating separately to address the problem of piracy. In January 2009, seventeen states from the areas surrounding the Western Indian Ocean, the Gulf of Aden, and the Red Sea met in Djibouti, and at the conclusion of the meeting adopted a Code of Conduct concerning the repression of piracy (the “Djibouti Code”).¹⁰⁰ The Djibouti Code covers, among other things, the possibilities of shared patrol operations by ship and by air, as well as the use of piracy information exchange centers in Kenya, Tanzania, and Yemen. Nine states—Djibouti, Ethiopia, Kenya, Madagascar, Maldives, Seychelles, Somalia, Tanzania, and Yemen—signed the code at the conclusion of the meeting.

In short, the international community and individual nations are apparently willing to expend time, resources, and money to combat piracy and the threat it poses to the safety and security of ships and crews from around the globe, as well as to international trade, humanitarian aid deliveries, the stability of nations, and the environment. However, even though the international community seems to be uniquely focused on the problem of modern piracy and ways to prevent or combat it, pirate attacks have only become more common and more violent after these protective measures began in 2007.¹⁰¹ Despite the presence of these multinational naval forces, in the last week of 2009, Somali pirates seized a British-flagged chemical tanker and a Greek bulk carrier.¹⁰² Furthermore, as discussed in more detail below, the successful pirates—whose attacks occur notwithstanding the coordinated efforts of the international community to prevent them—face little threat of prosecution and punishment.

⁹⁹ See, for example, *Contact Group on Piracy Off Somalia Marks First Anniversary*, US Fed News (Jan 28, 2010), online at www.state.gov/t/pm/ppa/piracy/index.htm (visited May 3, 2010).

¹⁰⁰ See, for example, International Maritime Organization, *High-level meeting in Djibouti adopts a Code of Conduct to repress acts of piracy and armed robbery against ships* (Jan 30, 2009), online at http://www.imo.org/newsroom/mainframe.asp?topic_id=1773&doc_id=10933 (visited May 3, 2010); *IMO Djibouti meeting agrees antipiracy measures*, Marine Log (Jan 30, 2009), online at www.marinelog.com/DOCS/NEWSMMIX/2009jan00302.html (visited May 3, 2010); *Nine countries sign deal to fight Somali piracy*, Al Arabiya (Jan 29, 2009), online at <http://www.alarabiya.net/articles/2009/01/29/65299.html> (visited Apr 3, 2010). See also *The Code of Conduct Concerning the Repression Of Piracy And Armed Robbery Against Ships In the Western Indian Ocean And The Gulf Of Aden (“Djibouti Code”)*, IMO Council Doc C 102/14, Annex (2009) (visited Apr 3, 2010).

¹⁰¹ See *IMB October 2009 Report* at 6–7, 27 (cited in note 2).

¹⁰² See Jay Bandahur, *Piracy at Sea*, NY Times A21 (Jan 4, 2010), online at <http://www.nytimes.com/2010/01/04/opinion/04bahadur.html> (visited May 3, 2010).

C. The Culture of Impunity: The Reluctance to Prosecute Pirates

Although some attacks may have been thwarted due to the cooperative efforts of the international community to combat piracy, few of the pirates are being prosecuted despite the existence of universal jurisdiction and the international treaties discussed above.¹⁰³ Apparently, states have used universal jurisdiction as a basis for prosecuting acts of piracy only in very few instances—even though such jurisdiction has existed for hundreds of years.¹⁰⁴ States have used UNCLOS and the SUA Convention provisions even more rarely as a basis on which to prosecute acts of piracy.¹⁰⁵ Furthermore, it is unlikely that many states have even incorporated those treaty provisions into their national laws.¹⁰⁶ Failing to incorporate treaty provisions aside, some states do not even have national laws that criminalize piracy, and where states have such laws, they are not uniform in how they operate or the conduct they prohibit.¹⁰⁷

Instead of bringing pirates to justice, a culture of impunity reigns, with captured pirates being released and permitted to continue their illegal activities. For example, in September 2008, a Danish warship captured ten Somali pirates, but then later released them on a Somali beach, even though the pirates were found with assault weapons and notes stating how they would split their piracy

¹⁰³ Some nations have undertaken to prosecute piracy, but the prosecutions are few when compared to the number of pirates (including those who finance and plan the attacks) who must have participated in several hundred attacks that have occurred in each of the last several years. For example, the Netherlands is prosecuting five Somali pirates who attacked a Dutch Antilles-flagged ship for sea robbery. France is prosecuting several more piracy suspects. See Corder, *Nations look to Kenya* (cited in note 10). The US is trying its first pirate in more than a century—a Somali who allegedly participated in hijacking the *Maersk Alabama* and holding its American captain hostage off the coast of Somalia ship during April 2009. See Ed Pilkington, *Somali teen faces first US piracy charges in over a century*, guardian.co.uk (Apr 22, 2009), online at <http://guardian.co.uk/world/2009/apr/21/somali-pirate-trial-new-york> (visited Apr 3, 2010). Furthermore, as discussed in more detail below, the EU and the US have entered into agreements to have Kenya try pirates they capture.

¹⁰⁴ See Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 Harv Int'l L J 183, 192 (2004), citing Alfred Rubin, *The Law of Piracy* 302, 348 n 50 (2d ed 1998).

¹⁰⁵ See notes 38 (noting that UNCLOS apparently has only been used once in a case against Greenpeace) and 56 (noting that the SUA Convention apparently has only been used once—in *United States v Shi*, 525 F3d 709 (9th Cir 2008)).

¹⁰⁶ See *Report: The Role of the European Union in Combating Piracy* at 13 (cited in note 1) (stating that few states have incorporated the UNCLOS piracy provisions into their national laws).

¹⁰⁷ See note 11. See also Munich Re Group, *Piracy—Threat at Sea: A Risk Analysis* 29 (2009) (stating that national laws regarding piracy are very diverse: some do not even mention piracy, while some require many conditions be met before an offense can qualify as an act of piracy); *Report: The Role of the European Union in combating piracy* at 13 (cited in note 1) (indicating that some states do not define the crime of piracy in their criminal law).

proceeds with warlords on land.¹⁰⁸ Britain's Royal Navy has been accused of releasing suspected pirates even though hostages were found on board their vessels.¹⁰⁹ In September 2009, the Seychelles released twenty-three suspected Somali pirates.¹¹⁰ Furthermore, Canadian naval forces have been disarming and releasing pirates because the Canadian government has stated it lacks jurisdiction under international law to prosecute them.¹¹¹ Rear Admiral Baumgartner of the Coast Guard described the impunity problem for the US Congress:

Most of the pirates literally "get away" with their illegal conduct. Cases in which pirates have been apprehended and actually brought to justice for their crimes are the exception rather than the rule—the decision to try Abdul Wali-i-Musi¹¹² notwithstanding. Most often, even in cases in which pirate attacks have been thwarted or the pirates apprehended, the pirates escape prosecution and eventually return to their criminal, but successful business model: pirating vessels and demanding huge ransoms.¹¹³

It was this culture of impunity that US Secretary of State Condoleezza Rice mentioned in stating her support for Security Council Resolution 1851, which authorized military action into Somalia in order to catch suspected pirates.¹¹⁴

Yet, despite this recognition that pirates are not being brought to justice and punished for their crimes, few nations are stepping up to prosecute suspected pirates. According to one report, between August 2008 and September 2009, some 343 suspected pirates were caught by naval forces and

¹⁰⁸ See Paulo Prada and Alex Roth, *On the Lawless Seas, It's Not Easy Putting Somali Pirates in the Dock*, Wall St J A16 (Dec 12, 2008), online at <http://online.wsj.com/article/SB122903542171799663.html> (visited May 3, 2010). See also Jeffrey Gettleman, *Pirates Outmaneuver Warships Off Somalia*, NY Times A6 (Dec 16, 2008), online at <http://www.nytimes.com/2008/12/16/world/africa/16pirate.html> (visited Apr 3, 2010) (reporting that both Danish and American navies had been releasing suspected pirates).

¹⁰⁹ See Jason Groves, *Navy gives Somali pirates food and water . . . then lets them sail off scot free*, MailOnline (Jan 28, 2010), online at <http://www.dailymail.co.uk/news/article-1246300/Navy-gives-pirates-food-water--lets-sail-scot-free.html> (visited May 3, 2010).

¹¹⁰ See Mohamed Olad Hassan, *Dispute between Somalia, neighbouring Seychelles over freeing of pirates in apparent trade*, Guelph Mercury (Sept 7, 2009), online at <http://news.guelphmercury.com/article/530235> (visited May 3, 2010).

¹¹¹ See *Canadian warship helps U.S.-flagged vessel evade pirates off Somali coast*, Guelph Mercury (May 22, 2009), online at <http://news.guelphmercury.com/article/484861> (visited May 3, 2010).

¹¹² Abdul Wali-i-Musi is the alleged pirate who attacked the *Maesk Alabama* who is being held for trial in the US.

¹¹³ See International Efforts to Combat Maritime Piracy, Hearing Before the House Subcommittee on International Organizations, Human Rights, and Oversight of the House Committee of Foreign Affairs, 111th Cong, 1st Sess 22 (Apr 30, 2009) (statement of Rear Admiral William Baumgartner) ("Statement of Rear Admiral William Baumgartner").

¹¹⁴ See UN SCOR 63rd Sess, 6046th mtg at 9 (statement of US Secretary of State Condoleezza Rice) (noting that the current reality of impunity also limits the effectiveness of the response to piracy and armed robbery).

disarmed and released, while only 212 were sent somewhere to be prosecuted.¹¹⁵ If nations are not willing and able to prosecute the pirates they capture, however, then the culture of impunity cannot end. Pirates will understand that even if captured in the act, they stand a good chance of being released and allowed to continue with their disruptive and violent behavior. Notably, however, the lack of sufficient laws alone cannot explain the reluctance of nations to help end impunity for piracy because many nations have neither tried to use the laws that exist nor adopted domestic legislation criminalizing the conduct that comprises modern piracy.

For example, even with sufficient laws, the lack of domestic law enforcement capabilities in certain interested states may make it virtually impossible for them to prosecute many acts of piracy. Some territorial states or states whose nationals are committing pirate attacks are either failed states or otherwise lack the institutional capacity to bring pirates to justice, making it unrealistic to expect that these states could alone manage the burden of prosecutions.¹¹⁶ In his Congressional testimony, Rear Admiral Baumgartner made just this point when explaining the situation in Somalia. He noted that in contrast to Indonesia, Malaysia, and Singapore—which border the Malacca Straits—the states surrounding the Gulf of Aden and the Horn of Africa generally lack the maritime capabilities to respond to acts of piracy in their waters, and that Somalia in particular lacks judicial and law enforcement capacity to address piracy.¹¹⁷ Moreover, where the acts of piracy occur within territorial waters—and most do¹¹⁸—UNCLOS would give only the coastal state the jurisdiction to try the pirates according to its domestic laws.¹¹⁹ However, if domestic laws or domestic law enforcement capabilities are lacking, then absent the willingness of other nations to invoke universal jurisdiction or the provisions

¹¹⁵ See Jon Ungood-Thomas and Marie Woolf, *Navy releases pirates caught red-handed: A legal loophole has helped scores of Somali gunmen escape justice*, Sunday Times (UK), Nov 29, 2009, online at <http://www.timesonline.co.uk/tol/news/world/africa/article6936318.ece> (visited Apr 3, 2010).

¹¹⁶ See, for example, James Kraska and Brian Wilson, *Combating pirates of the Gulf of Aden: The Djibouti Code and the Somali Coast Guard*, 52 Ocean & Coastal Mgmt 516, 518 (2009) (noting that captured pirates cannot be turned over to local authorities in Somalia because the failed state generally has no responsible authorities); Munich Re Group, *Piracy—Threat at Sea: A risk analysis* at 29 (cited in note 107) (suggesting that many nations with territorial jurisdiction over acts of piracy do not have the security, enforcement, and financial resources to catch and prosecute pirates).

¹¹⁷ Statement of Rear Admiral William Baumgartner (cited in note 113). The lack of judicial capacity in Somalia was in fact a reason the Danish naval commander cited for simply releasing the ten captured pirates on the beach. Commander Dan B. Termansen of Danish Fleet Headquarters said, “It is an illusion to think that these 10 would be brought to trial by the Somali authorities.” Nick Blenkey, *Time for on Board Security Teams?*, 13 Marine Log 4 (Oct 1, 2008).

¹¹⁸ See *IMB October 2009 Report* at 6–7 (cited in note 2).

¹¹⁹ See UNCLOS, Art 101 (cited in note 27).

of the SUA Convention, those pirates necessarily go unpunished. Even so, other nations wishing to prosecute would likely have to rely on local authorities to provide them with custody over the suspected pirates located within sovereign territory—something that will be difficult if the state is a failed one or otherwise lacking in institutional capacity.

Even for states with significant institutional capacity, prosecuting pirates may prove difficult from both an evidentiary and a cost-benefit perspective, particularly because the prosecuting state usually has to jail and possibly take responsibility for the pirate if convicted. Ships may be attacked by nationals of one state, registered under the flag of a different state, owned by nationals of another state, insured by a company in yet another state, operated by a crew comprised of nationals from a number of other states, and transporting cargo from a number of other nations.¹²⁰ As a result, most interested nations would have to collect evidence from a location thousands of miles away from home, the pirates and witnesses would have to be transported to the interested country for trial, and the pirates would then likely have to be provided translation services.¹²¹ Therefore, although many nations may be the direct victims of a piracy incident and have a special interest in seeing the pirates brought to justice, that interest may not be enough to compel them to take on the burden and costs of such an international prosecution. Given that these difficulties discourage even directly victimized nations from prosecuting pirates, one can understand why nations with a less direct interest may not want to prosecute.

Beyond the difficulties and costs associated with prosecution, there is evidence that nations—particularly Western nations—are avoiding their duty to prosecute pirates because of fears that, if convicted, those pirates will then seek political asylum for themselves and their families. Roger Middleton, a researcher for Chatham House, the London-based think tank, explains, “These countries

¹²⁰ See, for example, Kraska, 28 *Comp Strategy* at 207 (cited in note 79) (emphasizing the logistical difficulties associated with prosecuting pirates because the cases involve suspects from one country, witnesses and victims from other countries, and vessels that are registered in or carrying cargo from other countries). In fact, data collected by InterCargo News indicates that twenty-eight countries were affected by just nine acts of piracy against nine bulk carriers between July 2008 and December 2008 in Somali waters. Intercargo, *Piracy Briefing* (Mar 15, 2010), <http://www.intercargo.org/piracy/68-piracy-briefing.html> (visited Mar 17, 2010).

¹²¹ See, for example, Alcaraz, *Chasing pirates is all very well*, *El Pais* (English) (cited in note 10) (quoting Roger Middleton of the London-based think tank, Chatham House, as stating that one of the reasons pirates are not prosecuted is because it is expensive to gather evidence and witnesses and move them from the site of the crime); Statement of Rear Admiral William Baumgartner at 24 (cited in note 113) (“ . . . [A]ll too frequently the navies that apprehended the pirates have faced significant legal and logistical challenges in transporting pirates, evidence and witnesses to appear in their courts.”); Kraska and Wilson, 52 *Ocean & Coastal Mgmt* at 7 (cited in note 116) (suggesting that the great expense and burden of transporting pirates explain why few western countries are willing to prosecute).

don't want to be bombarded by claims of asylum from the pirates, who would ask not to be deported to Somalia, a country at war."¹²² In fact, in April 2008, the British Foreign Office warned the Royal Navy that detaining pirates at sea could be a violation of their human rights and could also lead to asylum claims by pirates seeking to relocate to Europe.¹²³ Moreover, fears about asylum claims may not be completely unfounded. Reports indicate that at least two of the pirates on trial for attacking a Dutch vessel have declared their intention to try to stay on as residents.¹²⁴

D. Kenya: The Current Solution For States Not Wishing To Prosecute Captured Pirates

Although states have generally refused to prosecute captured pirates in their own domestic courts with any regularity, they have not totally given up on the idea of bringing pirates to justice. Many nations instead have recently turned to Kenya and its courts as a venue for prosecuting pirates captured off the coast of Africa. Beginning in late 2008 and throughout 2009, Kenya signed agreements with the US, Britain, the EU, Denmark, Canada, and China whereby it will detain and try suspected pirates in its courts in Mombasa.¹²⁵ These agreements provide for Kenya to receive financial support for the prosecution of pirates. Although the present amount of support is estimated to be in the range of \$2.4 million, Kenya has requested additional funds.¹²⁶ As of October 2009, Kenya was host to about 123 piracy suspects, ten of whom have been tried and sentenced.¹²⁷

¹²² See Alcaraz, *Chasing pirates is all very well*, El Pais (English) (cited in note 10).

¹²³ See Economist Intelligence Unit, *Africa politics: Combating Piracy*, EIU ViewsWire (Feb 13, 2009), online at http://web2.westlaw.com/find/default.wl?fn=_top&crs=WLW10.03&rp=/find/default.wl&ifm=NotSet&vr=2.0&sv=Split&cite=2009+WLNR+2884026 (visited Apr 3, 2010).

¹²⁴ See Bruno Waterfield, *Somali pirates embrace capture as route to Europe*, Telegraph.co.uk, May 19, 2009, online at <http://www.telegraph.co.uk/news/worldnews/piracy/5350183/Somali-pirates-embrace-capture-as-route-to-Europe.html> (visited Apr 3, 2010).

¹²⁵ See, for example, *Paris-based Group Says Accused Somali Pirates Denied Rights*, VOANews.com (Aug 27, 2009), <http://www1.voanews.com/english/news/a-13-2009-08-27-voa36-68754822.html> (visited Apr 3, 2010); Bernard Sanga, *Country Declines to Host Detention Camp for Pirates*, East African (Oct 12, 2009), online at <http://allafrica.com/stories/200910120124> (visited May 3, 2010). The agreement between the US and the Government of Kenya was memorialized in a Memorandum of Understanding dated January 16, 2009, and describes the conditions of transfer of suspected pirates and property captured in the western Indian Ocean, the Gulf of Aden, and the Red Sea. See Statement of Read Admiral Brian M. Salerno at 80 (cited in note 5).

¹²⁶ See Sanga, *Country Declines to Host Detention Camp* (cited in note 125).

¹²⁷ See id.

Nevertheless, while relying on Kenya is a convenient solution for nations wishing to avoid the difficulties and costs associated with prosecuting pirates in their own domestic courts, it offers only a partial solution to the impunity problem for piracy. Kenya only has so much capacity and likely will not be able or willing to shoulder the entire burden of bringing pirates to justice. Recent statistics indicate that even without the addition of the suspected pirates, the Kenyan judiciary system is significantly overburdened. Kenya has approximately 53,000 prisoners, yet its national capacity allows it to house about 16,000.¹²⁸ Its current backlog of cases is over 870,000.¹²⁹ Furthermore, there are only three prosecutors in the Mombasa office of the Department of Public Prosecutions, and they have indicated they will be unable to take on the extra burden of piracy prosecutions without additional help from prosecutors who would have to travel from Nairobi—and countries other than Kenya would have to provide travel expenses.¹³⁰ But even with a few additional prosecutors, Kenya still would not have the capacity to handle a significantly greater number of piracy cases. Kenyan prosecutors report that they are facing complex legal challenges that require additional specialized assistance—such as paralegal case management support and assistance with legal research.¹³¹ Indeed, Kenya's capacity to expeditiously adjudicate piracy cases is hindered by what its own authorities admit are outdated and formal rules of evidence which render inadmissible many modern forms of evidence or make other forms of evidence admissible only through onerous procedures.¹³²

Beyond the problems relating to capacity, some have raised concerns that Kenya is denying suspected pirates basic human rights as well as access to the fair trial processes the international community expects defendants to receive.

¹²⁸ See *id.*

¹²⁹ See *id.*

¹³⁰ See Report of the Joint European Commission/United Nations Office on Drugs and Crime ("UNODC") Programme, *EU Support To The Trial And Related Treatment Of Piracy Suspects 7* ("UNODC Report") (May 2009), online at <http://www.asil.org/files/AnnexE-ECAssistance.pdf> (visited May 3, 2010).

¹³¹ See *id.*

¹³² See *id.* at 6. In fact, a Navy Judge Advocate General who participated in an early Kenya trial of Somali pirates during 2006 described some of the issues with the rules of evidence used in Kenya. For example, although US naval personnel photographed the pirate skiff and the weapons contained on it after capture, none of those photos was admissible at trial because Kenya requires the actual photographer to testify concerning the photos, and flying the photographer to Kenya would have been prohibitively expensive. By contrast, in federal courts in the US, such photographs would be admissible upon the testimony of anyone who could authenticate the accuracy of the photograph. In addition, under evidentiary rules in Kenya only originals, as opposed to photocopies, are admissible. See Bahar, *Attaining Optimal Deterrence at Sea* at 82 (cited in note 22).

According to Lawyers of the World, a Paris-based legal aid network, Kenyan prisons are overcrowded and at least some accused pirates were held for months without adequate access to medical care or basic amenities, such as soap.¹³³ That same organization also points out that under Kenyan domestic law, defendants are not entitled to legal aid except in capital cases.¹³⁴ Although some groups like Lawyers of the World have agreed to represent suspected pirates in Kenya, under Kenyan law the government does not provide them with defense attorneys because convicted pirates in Kenya face a maximum of life in prison, not death.¹³⁵

Indeed, one may question whether relying on Kenya to bring pirates to justice is the best solution to the impunity problem given accusations that the Kenyan government does not respect human rights. According to Amnesty International's 2009 Report on Human Rights in Kenya, the government has failed to investigate and prosecute the allegations of torture and unlawful killings committed by Kenyan police during and after the disputed presidential and parliamentary elections of December 2007.¹³⁶ A Special Rapporteur for the UN pointed to the "terrible" Kenyan criminal justice system, at least in part, to explain why police could murder with impunity. He noted that the investigation, prosecution, and judicial processes in Kenya are slow and corrupt.¹³⁷ In fact, the ICC prosecutor has asked the court to open an investigation into Kenya's post-election violence, arguing that there is a reasonable basis to believe that crimes against humanity were committed in connection with the December 2007 elections and thereafter.¹³⁸

In sum, it is unlikely that Kenya will have sufficient capacity or ability to deliver the type of efficient and fair trial processes that would allow it to serve as the solution to ending the culture of impunity that surrounds piracy. Only recently, Kenya's Internal Security Minister complained that the piracy cases it already has to deal with have overstretched the capacity of Kenya's security

¹³³ See *Paris-based Group Says Accused Somali Pirates Denied Rights*, VOANews.com (cited in note 125).

¹³⁴ See *id.*

¹³⁵ See *id.*

¹³⁶ See Amnesty International, *Human Rights In Republic Of Kenya 2009*, online at <http://www.amnesty.org/en/region/kenya/report-2009> (visited May 3, 2010).

¹³⁷ See Philip Alston, Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mission to Kenya*, UN Doc A/HRC/11/2/Add.6 at 13–17, ¶ 23 (2009).

¹³⁸ See *Inquiry into Kenya Violence Sought*, Boston Globe (Nov 27, 2009), online at http://www.boston.com/news/world/africa/articles/2009/11/27/inquiry_into_kenyas_2007_postelection_violence_is_sought/ (visited May 3, 2010).

agencies and courts.¹³⁹ As argued below, having an international court with authority to adjudicate piracy cases should help address the many legal, practical, and political obstacles that prevent nations from prosecuting acts of piracy and bring an end to impunity for this serious international crime.

IV. THE CASE FOR AN INTERNATIONAL CRIMINAL COURT WITH AUTHORITY TO ADJUDICATE PIRACY CASES

A. The National Versus International Debate

Historically, states have enforced violations of international criminal law using two approaches: (1) domestication and adjudication of international law at the national level and (2) adjudication of international law using supranational courts or tribunals, such as the ICC. According to Professor Antonio Cassese, however, many legal scholars argue that the best judicial forum for prosecution of criminal offenses is national courts, rather than supranational courts.¹⁴⁰ There are two main reasons for this conclusion. First, national courts usually are physically closest to the location where the criminal offense was committed. Therefore, they should also be closest to the evidence necessary to prosecute the offense: namely, the defendant, the victims, the witnesses, and the physical evidence.¹⁴¹ In addition, the proximity to the offense means that the trial will occur in the language of the defendant and his counsel, and allow the defendant—if convicted—to serve his sentence in his own country, close to his family.¹⁴² National courts should also be closest to the community whose values and rules were breached as a result of the crime. A local trial may be better able to heal and provide justice to the community that has suffered from the crimes committed.¹⁴³ Second, proceeding through national courts is often considered less expensive than adjudicating criminal offenses in supranational tribunals for many of the same reasons cited above: proximity to the offense, the witnesses, and the evidence.¹⁴⁴

¹³⁹ *Kenya Govt Decries Lack of Global Support Over Piracy*, Nation (Kenya, Oct 12, 2009), online at http://web2.westlaw.com/find/default.wl?fn=_top&rs=WLW10.03&rp=/find/default.wl&ifm=NotSet&vr=2.0&sv=Split&cite=2009+WLNR+20138907 (visited Apr 3, 2010).

¹⁴⁰ See Antonio Cassese, *The Rationale for International Criminal Justice*, in Cassese, ed., *The Oxford Companion To International Criminal Justice* 123 (Oxford 2009).

¹⁴¹ See, for example, id.; William W. Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 Tex Intl L J 729, 734 (2003).

¹⁴² See, for example, Cassese, *Rationale for International Criminal Justice* at 123 (cited in note 140).

¹⁴³ See, for example, id. at 123; Burke-White, 38 Tex Intl L J at 735 (cited in note 141).

¹⁴⁴ See Burke-White, 38 Tex Intl L J at 734 (cited in note 141).

Nevertheless, there are problems with relying on national courts to prosecute particularly serious offenses that concern or cause harm to the international community more generally. First, national courts may not have sufficient legal capacity or expertise to adjudicate serious crimes of international concern.¹⁴⁵ For example, some states may not have the proper legislative provisions to cover the type of criminality at issue.¹⁴⁶ Even if they do, the matters at issue may be too complicated for national courts—their police, prosecutors, and judges—either because of the type of crime committed or because, for example, the crime involves persons and evidence from more than one state.¹⁴⁷ Second, it may be difficult for national courts to administer justice in an unbiased and fair manner.¹⁴⁸ Nations have a significant stake in the outcome of any prosecution concerning their own nationals, and their courts may be subject to influence. Also, even beyond concerns about influence, national courts may not have the procedural rules in place to adequately protect the accused. Furthermore, proceeding through national courts allow for uniformity in the provisions for punishment of those committing international crimes.

These failings at the national level explain the international community's increasing reliance on international courts as a forum to prosecute serious international crimes.¹⁴⁹ International courts can be established with the legal capacity (legislation, judges, and personnel) to adjudicate the crimes in question.¹⁵⁰ In addition, international courts should be able to provide justice that is fairer and more impartial than justice in national courts, given that the judges will not be linked to the state where the crime was committed or the

¹⁴⁵ See, for example, Cassese, *Rationale for International Criminal Justice* at 124 (cited in note 140); Burke-White, *Regionalization* at 734 (cited in note 141).

¹⁴⁶ See Cassese, *Rationale for International Criminal Justice* at 125 (cited in note 140).

¹⁴⁷ See *id.* at 124.

¹⁴⁸ See, for example, *id.*; Burke-White, *Regionalization* at 734 (cited in note 141).

¹⁴⁹ For example, in 1993, the UN established the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 ("ICTY") to preside over trials against those who had committed atrocities and crimes against humanity during armed conflict in the Balkans. Consider Paul R. Williams and Michael P. Scharf, *The Role of Justice in Peace Building: War Crimes and Accountability in the Former Yugoslavia* (Rowman and Littlefield 2002). The UN thereafter established the International Criminal Tribunal for Rwanda ("ICTR") to preside over crimes committed during the civil war in Rwanda. Consider Virginia Morris and Michael P. Scharf, *The International Criminal Tribunal for Rwanda* (Transnatl Pubs 1998). Finally, in 2002, after the required sixty states had ratified the Rome Statute, states created the ICC—the first permanent, treaty-based international criminal court established to help end impunity for perpetrators of the most serious crimes such as genocide, crimes against humanity, and war crimes. Consider William Schabas, *An Introduction to the International Criminal Court* (Cambridge 3d ed 2007).

¹⁵⁰ See Schabas, *An Introduction to the International Criminal Court* at 23 (cited in note 149).

defendants that committed the crime.¹⁵¹ Finally, international courts can apply international laws and rules, and thereby ensure not only that fair procedures are followed, but also that there is uniformity in the application of laws and the sentencing of offenders.¹⁵²

As discussed below, an analysis of the aforementioned factors supports international adjudication of piracy cases. Although there may be no reason to abandon efforts to encourage national and regional prosecutions of piracy offenses,¹⁵³ a supranational enforcement mechanism can solve many of the problems associated with such prosecutions, including those problems that are currently leading to an impunity gap for piracy offenses.

B. Balancing The Above Factors Shows The Appeal Of An International Criminal Court With Authority To Adjudicate Piracy Cases

1. Physical proximity of the court to the piracy offense.

In the case of piracy, it is unlikely that even a national court would be located close to the offense and the evidence necessary to prosecute it. Pirate attacks usually involve perpetrators, victims, and witnesses of many nationalities. Furthermore, the crime usually occurs in waters located thousands of miles from the states that have been most directly harmed by the attack—for example, those states with nationals who were victims of the attack either because they owned the ship or some of its cargo, or because they were crewmembers.¹⁵⁴ In the one piracy case the US is prosecuting in New York, the attack occurred against the US-flagged commercial ship, the *MV Maersk Alabama*, in waters located near Somalia by Somali pirates, including the defendant, Abdul Wali-i-

¹⁵¹ See, for example, Cassese, *Rationale for International Criminal Justice* at 127 (cited in note 140).

¹⁵² See *id.*

¹⁵³ In his article entitled *Regionalization Of International Criminal Law Enforcement: A Preliminary Exploration*, Professor William Burke-White argues that balancing the various factors described above leads to the conclusion that the “effectiveness, cost, and legitimacy of international criminal justice appear to be maximized through enforcement at the regional level” as opposed to the supranational level or national level. See Burke-White, 38 *Tex Int'l L J* at 742–43 (cited in note 141). His argument, however, is about international criminal justice generally, rather than about any specific international crime, such as piracy. In the piracy context, regional enforcement mechanisms—such as relying on Kenya to try piracy cases—have some of the same failings as national enforcement mechanisms. For example, many nations and regions may lack the legal capacity and expertise required to fairly adjudicate piracy cases. Thus, although we may not wish to abandon regional enforcement mechanisms for piracy, in the case of Kenya, it requires funds and training to improve the legal capacity of its police, prosecutors, and courts. See generally UNODC Report (cited in note 130).

¹⁵⁴ See note 120.

Musi.¹⁵⁵ Thus, the case is proceeding far from the defendant's home; evidence and witnesses will have to be brought to New York; and if convicted, the defendant will serve his sentence in the US. Furthermore, although Somalia is located close to this offense and many other recent pirate attacks, piracy trials in the courts of Somalia are not presently a viable means to bring pirates to justice. Somalia is essentially a failed state in the midst of internal conflict that has been ongoing for almost two decades.¹⁵⁶ Moreover, there are problems with relying on Kenya to fill the impunity gap for piracy. Among other things, Kenya does not appear to have the legal expertise and capacity to try large numbers of piracy cases, and its ability to ensure fair trials and respect the human rights of defendants has been criticized.¹⁵⁷

Piracy is unique in that it may be less important for a piracy trial to occur in a national court than for other international crimes. Unlike other international crimes—such as genocide, which is directed against one particular ethnicity or community—piracy attacks are directed against many different nations and victims. It is because the pirate attacks the persons and property of all nations that in 1844 the United States Supreme Court recognized the pirate as an enemy of all mankind over which states could exercise universal jurisdiction.¹⁵⁸ Thus, piracy affects not just one nation, but rather the international community—not only because the victims are from many nations, but also because piracy threatens the safety and security of international trade, humanitarian aid deliveries, the stability of nations, and the environment. Therefore, it is the kind of crime over which an international criminal court could properly pass judgment on behalf of the world community.

In sum, although an international criminal court with authority to adjudicate piracy cases may not be located close to the offense, this is a shortcoming also shared by most national courts that could prosecute piracy offenses. In fact, one of the reasons why states almost always refuse to prosecute suspected pirates in their national courts is precisely because the offenses involve so many different nationalities and occur so far away.¹⁵⁹ An international court could fill that impunity gap and properly pass judgment on the suspected pirates whose victims include the entire world community.

¹⁵⁵ See Pilkington, *Somali teen*, guardian.co.uk (cited in note 103).

¹⁵⁶ See Security Council Res 1851, UN Doc S/RES/1851 at 1 (Dec 16, 2008) (cited in note 91).

¹⁵⁷ See Part III.D.

¹⁵⁸ See, for example, *United States v Brig Malek Adhel*, 43 US (2 How) at 232 (1844) (Story); *United States v Smith*, 18 US (5 Wheat) 153, 161 (1820).

¹⁵⁹ See notes 120 and 121.

2. The financial costs of adjudicating piracy offenses.

Although prosecuting piracy offenses in an international court may be costly, national prosecutions—and even the prosecutions in Kenya—are also costly due to the international nature of piracy offenses. One of the main reasons states are not prosecuting piracy offenses domestically even when their nationals are directly affected by the attacks is because of the perceived financial costs of prosecution.¹⁶⁰ After all, in most instances, the affected states would have to transport the defendants long distances, jail them while they await trial, pay for lawyers and translators, and pay to bring witnesses to the site of the trial.

Kenya is an excellent case in point. Victims and witnesses from around the world still need to be transported there to appear at trial, and translators need to be provided. In addition, organizations have stepped up to provide lawyers to defendants who are not otherwise entitled to state-provided defense attorneys.¹⁶¹ According to some reports, Kenya has already received about \$2.4 million in funding to try piracy cases.¹⁶² Others estimate that Kenya and other countries in the region have already received close to \$7 million for piracy trials.¹⁶³ Nevertheless, Kenyan authorities have stated that they need millions in additional funds to help them build the capacity to prosecute the approximately one hundred pirates that they are currently hosting.¹⁶⁴ Yet, as of October 2009, only ten of the suspected pirates brought to Kenya had been tried and sentenced.¹⁶⁵ In any event, even if having Kenya try piracy cases is a relatively cost-effective solution to the problem of impunity for piracy, cost savings may come at the price of sacrificing defendants' human rights and rights to fair judicial processes.

Finally, although supporting an international criminal court with authority to adjudicate piracy cases would be costly, the costs are likely commensurate with those necessarily required to try cases of attacks committed at sea involving perpetrators, victims, and witnesses from around the world. In fact, a comparison of the ICC's 2010 budget with the amounts already spent to support

¹⁶⁰ See note 121.

¹⁶¹ See *Paris-based Group Says Accused Somali Pirates Denied Rights*, VOAnews.com (cited in note 125).

¹⁶² See Sanga, *Country Declines to Host Detention Camp*, East African (cited in note 125).

¹⁶³ See Tristan McConnell, *Efforts to keep international shipping safe are hanging on the need to win cases in the creaking Kenyan court system*, The Times (UK), Dec 10, 2009, online at http://web2.westlaw.com/find/default.wl?fn=_top&rs=WLW10.03&rp=/find/default.wl&cfm=NotSet&vr=2.0&sv=Split&cite=2009+WLNR+24881133 (visited Apr 3, 2010).

¹⁶⁴ See Sanga, *Country Declines to Host Detention Camp* (cited in note 125). See UNODC Report at 6–16 (cited in note 130) (discussing that more than \$2 million in funds would be needed to help Kenya improve its legal capacity to adjudicate piracy cases).

¹⁶⁵ See Sanga, *Country Declines to Host Detention Camp* (cited in note 125).

trials in Kenya provides some evidence that pirates could be brought to justice by an international court at a cost that is not prohibitive. The ICC's budget for 2010 is approximately \$140 million; however, though the amount may sound large, it supports an administrative, prosecutorial, and judicial staff of more than 700.¹⁶⁶ Furthermore, with those funds, ICC prosecutors travel all over the world to investigate difficult and significant cases involving genocides, crimes against humanity, and war crimes, and the court hires translators and provides funds for witness travel.¹⁶⁷ If \$140 million is a guide to what it costs to operate a court with 700 people dedicated to handling investigations and prosecutions of a variety of international crimes, it may be possible to fund a special piracy chamber comprised of only twenty staff members for a small portion of that budget. If one considers that twenty staff members is only 1/35 of the staff currently used to operate the ICC on a budget of \$140 million per year, even a generous estimate suggests that it may be possible to operate a dedicated piracy court on less than \$10 million per annum. Given the amounts already spent on trials in Kenya, and the additional amounts needed to provide Kenya with the capacity to try those cases—especially as it only has three prosecutors in its Mombasa office¹⁶⁸—spending \$10 million (or even \$20 million) on a dedicated and specialized piracy team of experienced administrative, prosecutorial, and judicial staff would not seem extraordinary.

3. Legal capacity and expertise of the court.

In the case of international crimes, supranational enforcement mechanisms tend to have greater legal capacity, judicial resources, and expertise than would many national courts—especially those located in the territory where the international crimes occurred. For example, an international court may have more precise legal definitions of piracy at its disposal, since any grant of authority to an international criminal court to adjudicate piracy cases would necessarily have to include definitions of piracy offenses falling under its jurisdiction. In addition, administrative personnel, prosecutors, and judges could be chosen based on their competence and expertise in international criminal law generally, as well as their competence and expertise in handling the types of offenses that constitute piracy more specifically.

¹⁶⁶ Consider *Proposed Programme Budget for 2010 of the International Criminal Court*, International Criminal Court (“2010 ICC Proposed Budget”), Assembly of States Parties, ICC-ASP 8/10 (July 17, 2009). According to Annex V(a) of the 2010 ICC Proposed Budget, the court expects a total staff of approximately 781.

¹⁶⁷ Consider *id.*

¹⁶⁸ See UNODC Report at 7 (cited in note 130).

By contrast, many national courts that would have jurisdiction over piracy cases are significantly lacking in legal capacity, judicial resources, and expertise. Many states do not have laws that would permit them to prosecute piracy offenses, either because they have not incorporated the provisions of UNCLOS¹⁶⁹ or the SUA Convention, or because they do not have domestic laws that criminalize piracy.¹⁷⁰ In addition, many nations—like Somalia—that are located in piracy-prone territories would be unequipped to prosecute piracy cases even if they had sufficient laws on their books. They simply do not have the stability, institutions, or personnel to allow them to investigate and fairly adjudicate such matters.¹⁷¹

Furthermore, even with the help of the international community, states in the African region will have difficulty providing the legal capacity and expertise to adjudicate piracy cases that an international court could offer. The Kenyan experience is telling. Despite the significant sums already provided to Kenya by Europe and the US to try piracy cases, Kenyan authorities indicate they do not have the legal capacity or resources to expeditiously prosecute the approximately one hundred pirates that are in their custody.¹⁷² Furthermore, although Tanzania, another country in the region, has apparently indicated it would be willing to have its courts handle piracy cases with funding assistance from the international community, its laws would have to be amended for it to have jurisdiction over piracy offenses occurring outside of Tanzanian waters.¹⁷³ Moreover, legislative amendments may be necessary to ensure that evidentiary and procedural rules promote efficient trials.¹⁷⁴ In short, these regional courts are lacking in legal capacity and expertise—qualities that should necessarily be present in any international criminal court with authority to adjudicate piracy cases.

4. Ability of the court to ensure the unbiased and fair administration of justice.

The general consensus is that international courts are less subject to political manipulation and bias, and should be able to administer justice more fairly not only because of that lack of bias, but also because such courts can be established with rules and procedures that ensure the defendant a fair trial. Even

¹⁶⁹ See *Report: The Role of the European Union in Combating Piracy* at 13 (cited in note 1) (stating that few states have incorporated the UNCLOS piracy provisions into their national laws).

¹⁷⁰ See note 10.

¹⁷¹ See notes 116 and 117.

¹⁷² See Sanga, *Country Declines to Host Detention Camp* (cited in note 125). See generally UNODC Report at 6-16 (cited in note 130).

¹⁷³ See UNODC Report at 13 (cited in note 130).

¹⁷⁴ See *id.*

though piracy offenses may not be committed by governments or government forces, some governments may benefit from it, either because they receive bribes or payoffs or because they recognize that piracy is a viable way for people in the community to earn a living that they may not otherwise be able to earn.¹⁷⁵ Thus, some governments may have little incentive to initiate proceedings against citizens who are committing the attacks. An international criminal court with authority to adjudicate piracy cases would not face similar incentives to forgo piracy prosecutions.

In addition, even if states are not making political decisions to forgo piracy prosecutions, their laws and practices may be such that they cannot deliver the kind of humanitarian treatment and fair trials the international community expects all defendants will receive. As noted above, commentators have criticized Kenya for failing to treat suspect pirates humanely and for denying them the kind of rights associated with fair trial processes.¹⁷⁶ An international criminal court can apply international principles, rules, and procedures that would meet the humanitarian and fair trial standards required by the international community. Furthermore, an international court would have the benefit of ensuring greater uniformity in adjudicating piracy offenses. At present, states have very diverse laws and sentencing possibilities as they relate to piracy offenses.¹⁷⁷ While uniformity in trial and sentencing standards are not required, certainly such uniformity can add to the overall fairness of the criminal processes as they relate to piracy.

5. Conclusion.

In sum, piracy is an international problem, and an international criminal court with authority to adjudicate piracy can bring pirates to justice and end the culture of impunity that currently reigns. In many cases, states are unwilling to shoulder the burden of prosecuting pirates because of the evidentiary difficulties and costs associated with hosting piracy trials. In other cases, states are unable to shoulder the burden of trying pirates because they do not have the legal capacity and judicial expertise required to investigate and prosecute such offenses. In both instances, an international criminal court could fill the impunity gap

¹⁷⁵ See, for example, Nairobi Report at 15 (cited in note 7) (noting that pirates in Somalia can earn much more from attacking ships than they can through the scarce legal employment available in Somalia); Ploch, et al, *Piracy off the Horn of Africa* at 7 (cited in note 77) (stating that some have alleged that regional and local officials in the Puntland region of Somalia are alleged to have facilitated and profited from piracy).

¹⁷⁶ See notes 133 and 137.

¹⁷⁷ See, for example, *Piracy—Threat at Sea: A Risk Analysis* at 29 (cited in note 107) (stating that national laws regarding piracy are very diverse: some do not even mention piracy, while some require many conditions be met before an offense can qualify as an act of piracy).

because the costs of prosecution could be shared by the international community as a whole, and the court could be established with the legal capacity and expertise to efficiently and fairly adjudicate piracy cases. Indeed, these concerns have recently led many states and their representatives to call for a special international court to deal with cases of sea piracy.¹⁷⁸

V. PIRACY SHOULD BE INCLUDED WITHIN THE JURISDICTION OF THE ICC

A. The Proposal

To help close the impunity gap for piracy offenses, this Article proposes including piracy within the jurisdiction of the ICC. The ICC came into existence in 2002, when the required number of states ratified the Rome Statute, thereby creating the court.¹⁷⁹ As of January 2010, 110 countries are states parties to the ICC.¹⁸⁰ The crimes over which the court presently has jurisdiction are genocide,

¹⁷⁸ See, for example, UN SCOR 63rd Sess, 6046th mtg at 28 (statement of Representative Jølle, from Denmark) (cited in note 91) (suggesting that in the long term states might need to examine the possibility of bringing pirates before an international tribunal for prosecution); Frank Gardner, *How Do You Tackle Piracy?*, BBC News (Dec 13, 2009), online at <http://news.bbc.co.uk/2/hi/africa/7782016.stm> (visited May 3, 2010) (reporting that senior naval officers from the US, France, and other nations agreed on the need to establish an international court to adjudicate piracy cases because there was presently nowhere to take arrested pirates to stand trial); *Germany Calls for International Court to Prosecute Pirates*, FoxNews.com (Dec 23, 2008), online at <http://www.foxnews.com/story/0,2933,471804,00.html> (visited May 3, 2010) (reporting the German Defense Minister's call for an international court to prosecute pirates); *Netherlands proposes international anti-piracy tribunal*, Expatica.com (May 30, 2009), online at http://www.expatica.com/nl/news/local_news/Netherlands-proposes-international-anti-piracy-tribunal_53106.html (visited May 3, 2010) (reporting that the Netherlands' call for an international tribunal to try pirates because of the failings in the current legal framework); *Russia, Italy want to cooperate in forming intl court on sea piracy*, Russia & CIS Military Information Weekly (Oct 30, 2009), online at <http://web2.westlaw.com/Find/default.wl?bhcp=1&cite=2009+WLN+22822513+&rs=LAWS2.0&strRecreate=no&sv=Split&vr=1.0> (visited Apr 3, 2010) (reporting that Russia and Italy agree on the urgent need to cooperate to form an international court to prosecute piracy offenses); *PACE president wants to discuss proposed European security treaty in Russia*, Russia & CIS Military Information Weekly (Dec 4, 2009), online at http://web2.westlaw.com/find/default.wl?rs=WLN10.03&sv=Split&vr=2.0&fn=_top&cite=2009+WLN+25508342+&ifm=NotSet&rp=/find/default.wl (visited Apr 3, 2010) (reporting that the President of the Parliamentary Assembly of the Council of Europe wants to meet with the Russian leadership to discuss the Russian initiative for an international anti-piracy court); Security Council Res No 1918, UN Doc S/RES/1918 (2010) (expressing support for the establishment of specialized piracy courts).

¹⁷⁹ See Schabas, *An Introduction to the International Criminal Court* at 23 (cited in note 149).

¹⁸⁰ See International Criminal Court, *The States Parties to the Rome Statute* (July 21, 2009), online at <http://www.icc-cpi.int/Menus/ASP/states+parties/The+States+Parties+to+the+Rome+Statute.htm> (visited Apr 3, 2010).

crimes against humanity, and war crimes.¹⁸¹ According to the Preamble of the Rome Statute, the ICC was created with the aim of ending impunity for the perpetrators of “the most serious crimes of concern to the international community as a whole.”¹⁸² In addition, because it is the duty of each state to exercise jurisdiction over those responsible for international crimes, the jurisdiction of the ICC was created to be complementary to national criminal jurisdiction: it will only investigate and prosecute where a national state with jurisdiction over a case is “unwilling or unable genuinely to carry out the investigation or prosecution.”¹⁸³

One reason I propose adding piracy to the jurisdiction of the ICC is because the ICC already exists. As a result, including piracy within the ICC’s jurisdiction would be less costly than establishing an entirely new international tribunal to adjudicate piracy cases. The ICC has been in operation for more than seven years, and it has operating procedures, facilities, and a large staff. Furthermore, if states wish the ICC to adjudicate piracy cases in those regions where piracy offenses most frequently occur, the court is permitted to sit regionally.¹⁸⁴ Having the ICC sit regionally could potentially produce additional cost-savings because at least some defendants or witnesses may not have to be transported to the ICC’s current headquarters in The Hague. If the court does sit regionally, another benefit may result: the ICC may be able to share its expertise and resources with local judges and lawyers, thereby building local capacity to prosecute piracy cases.

Although piracy could be added to the crimes included within the court’s jurisdiction by amendment to the Rome Statute, proceeding by way of an optional protocol would arguably be more efficient and expeditious.¹⁸⁵ Amendments to the Rome Statute may only occur upon adoption by two-thirds of the states parties, which must then be ratified by seven-eighths of the states parties in order to take effect. Even so, states that have not accepted the amendment have certain rights to withdraw as states parties to the Rome Statute.¹⁸⁶ By contrast, an optional protocol will come into effect for those states

¹⁸¹ See Rome Statute, Arts 6–8 (cited in note 15).

¹⁸² See *id.*, Preamble ¶ 4.

¹⁸³ See *id.*, Preamble ¶ 10, Art 17(1)(a).

¹⁸⁴ See *id.*, Art 3(3).

¹⁸⁵ The idea of potentially proceeding by a protocol, rather than by amendment, was raised during an Expert Workshop on Piracy hosted by the One Earth Future Foundation and the American Society of International Law on October 16–17, 2009 entitled *Suppressing Maritime Piracy: Exploring the Options in International Law*.

¹⁸⁶ See Rome Statute at Art 121 (cited in note 15).

that sign it.¹⁸⁷ Any such protocol should create a separate chamber within the ICC to handle piracy cases specifically.¹⁸⁸ Having a separate chamber could ensure that piracy cases would be investigated, prosecuted, and adjudicated by those with the necessary expertise. Such a focus on expertise should also produce benefits in terms of fairness, speed, and efficiency. In addition, having a special chamber for piracy cases should make decisions about whether to have such a chamber sit regionally easier because only personnel specifically assigned to that chamber would be involved in and affected by the decision.

The theoretical and practical reasons for including piracy within the jurisdiction of the ICC by optional protocol and for using a separate chamber to adjudicate piracy cases are discussed below.

B. The Theoretical and Practical Reasons to Include Piracy Within the ICC's Jurisdiction

1. Piracy is a serious crime of concern to the international community.

There are many theoretical and practical reasons to include piracy within the jurisdiction of the ICC. Piracy, like the other crimes already covered by the ICC treaty, is a serious crime of concern to the international community as a whole. Piracy is the first crime over which states decided the exercise of universal jurisdiction was appropriate, both because of the heinousness of piratical attacks and also because piracy by its very nature harms the world community as a whole.¹⁸⁹ Indeed, pirate attacks occur all over the world,¹⁹⁰ and the victims of attacks are similarly diverse.¹⁹¹ Furthermore, piracy disrupts international trade, most of which passes through the world's shared sea lanes,¹⁹²

¹⁸⁷ According to the UN Treaty Collections Definition of Key Terms, an optional protocol is an instrument that contains additional rights and obligations to a treaty. However, an optional protocol is independent of the main treaty and subject to independent ratification, meaning that not all parties of the main treaty need consent to it. See UN, Definitions (2010), online at http://treaties.un.org/Pages/Overview.aspx?path=overview/definition/page1_en.xml#protocols (visited Apr 3, 2010).

¹⁸⁸ The idea of potentially creating a separate chamber to handle piracy cases was also raised and discussed at the October 16–17, 2009 Workshop entitled “Suppressing Maritime Piracy: Exploring the Options in International Law.”

¹⁸⁹ See sources cited in notes 17 and 22.

¹⁹⁰ See *IMB October 2009 Report* at 8, 10–11, 27–28 (cited in note 2).

¹⁹¹ See note 5.

¹⁹² See Richardson, *Time Bomb* at 3 (cited in note 6); *Report: The Role of the European Union in Combating Piracy*, at 4 (cited in note 1).

and even creates the risk of a major international environmental disaster.¹⁹³ Piracy also disrupts foreign aid, contributing to instability in already impoverished and unstable nations.¹⁹⁴

In addition, even though a pirate attack cannot be compared to a genocide that involves the mass murder of hundreds or thousands of people, its inclusion within the ICC will not trivialize the court or its mission in ending impunity for the most serious crimes of concern to the international community. Pirate attacks are characterized by increasing cruelty and violence which will certainly not cease until pirates are brought to justice.¹⁹⁵ In fact, pirates are committing some of the very acts that are included within the definition of acts that can constitute crimes against humanity when committed as part of an attack against a civilian population: namely, murder, torture, and rape.¹⁹⁶

Nor should it matter that with respect to the present crimes covered by the Rome Statute, the ICC Prosecutor has stated that his investigatory focus is on “those who bear most responsibility” or are the masterminds of the criminal activity.¹⁹⁷ Even if the masterminds behind the piracy remain hidden on shore, bringing so-called “low-level” pirates to trial should still be a priority, since they have committed serious crimes of international concern. Indeed, the so-called “low-level” pirates are those who threaten innocent civilians and hold them hostage at gunpoint in exchange for a portion of a ransom payment. In any event, the prosecution of lower-level pirates is a promising avenue towards obtaining the evidence necessary to prosecute the masterminds of the criminal activity. Notably, *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda have both prosecuted lower-level perpetrators for precisely these reasons. Richard Goldstone, the former chief prosecutor for both the International Criminal Tribunals for both Yugoslavia and Rwanda, explained that his prosecutorial strategy necessarily required indicting non-leader perpetrators, especially because evidence against leaders was often more difficult to obtain and because indicting those at the lower levels could provide the building blocks necessary to indict those at the top.¹⁹⁸

¹⁹³ See Chalk, *The Maritime Dimension of International Security* at 17 (cited in note 1).

¹⁹⁴ See Middleton, *Piracy in Somalia* at 9 (cited in note 1).

¹⁹⁵ *IMB October 2009 Report* at 27 (cited in note 2).

¹⁹⁶ See Rome Statute, Art 7(1) (cited in note 15).

¹⁹⁷ See Office of the Prosecutor, International Criminal Court, *Paper on some policy issues before the Office of the Prosecutor* 3 (Sept 2003), online at http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf (visited Feb 25, 2010).

¹⁹⁸ See *Living History Interview, Judge Richard Goldstone*, 5 Trans L & Contemp Probs 373, 380–81 (1995).

2. Employing a complementarity regime like that used by the ICC can help to end impunity for piracy offenses.

The complementarity regime used by the ICC is also well-suited to piracy offenses. Under that regime, the ICC may exercise jurisdiction where the nation having jurisdiction over the offense is “unwilling or unable genuinely to carry out the investigation or prosecution.”¹⁹⁹ Under the Rome Statute, “unwillingness” includes instances where national proceedings are a sham or are inconsistent with an intention to bring the person to justice, either because such proceedings are unjustifiably delayed or are not being conducted independently or impartially. The idea behind including the “unwillingness” provision was to preclude the possibility of sham prosecutions aimed at shielding perpetrators through government participation in, or complicity with, the offense.²⁰⁰ A nation’s “inability” to prosecute includes instances where, because of the collapse or unavailability of its national judicial system, the nation cannot obtain the accused or the necessary evidence, or is otherwise unable to carry out the proceedings.²⁰¹ Thus, nations may, and are encouraged to, prosecute offenses nationally, but the ICC’s complementarity regime provides another forum in which perpetrators can be brought to justice where national jurisdictions are either unwilling or unable to fight impunity.

Even if it is not based on the criteria for admissibility presently employed, a complementarity regime allowing the ICC to exercise jurisdiction over piracy cases can do much to end the culture of impunity that presently exists with respect to piracy offenses. The ICC could accept jurisdiction over cases that states are refusing to prosecute for a variety of reasons: some because they prefer not to bear the costs and risks associated with prosecuting pirates and others because they simply do not have the stability or judicial resources to do so.²⁰² Admittedly, a state’s preference not to bear the costs of transporting witnesses or a state’s fears concerning asylum claims may not constitute “unwillingness” in the same way currently envisioned by the ICC’s complementarity regime because the concern is not with potential government involvement in the crime or other bias. However, “unwillingness” in the context of piracy cases may simply be a form of “inability” because nations—even wealthy nations—may not have sufficient resources to bear the burden of such costly prosecutions, particularly given that in many cases, the nation is only one

¹⁹⁹ See Rome Statute, Preamble ¶ 10 and Art 17(1)(a) (cited in note 15).

²⁰⁰ See John T. Holmes, *The Principle of Complementarity*, in Roy S. Lee, ed, *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* 50 (“*Making of the Rome Statute*”) (Kluwer Law International 1999).

²⁰¹ See Rome Statute, Art 17(3) (cited in note 15).

²⁰² See Part III.C.

of many victim nations. In any event, unwillingness should be judged by a standard that recognizes the precise difficulties associated with having any single nation shoulder the unique burden of adjudicating piracy cases.

In short, using the ICC's complementarity regime would allow states to continue to prosecute piracy cases when they determine they have a sufficient interest in the particular offense to justify the costs and difficulties associated with prosecution—such as the decision of the US to prosecute the pirate accused of hijacking the *MV Maersk Alabama*. In addition, employing such a regime could also ensure that nations do not simply release suspected pirates and allow them to return to their criminal activities. Those criminal activities pirates return to not only threaten and harm innocent lives, but also interfere with international trade, humanitarian aid, and the right of the world community to generally enjoy shared sea resources.²⁰³

3. That piracy was not included in the original ICC treaty is no bar to including it within the ICC's jurisdiction now.

The historical record indicates that the drafters of what later formed the basis of the Rome Statute considered piracy—to the extent it is defined by Article 3 of the SUA Convention—for inclusion within the ICC's jurisdiction along with a host of other crimes which were termed “treaty-based” crimes.²⁰⁴ Specifically, the 1994 draft of the Rome Statute prepared by the International Law Commission (ILC) at the request of the UN referenced crimes that were established under about nine different treaty-based regimes and which constituted exceptionally serious crimes of international concern.²⁰⁵ In addition to Article 3 of the SUA Convention,²⁰⁶ the 1994 ILC draft statute included various treaties that were established to suppress crimes such as terrorism,

²⁰³ See Part III.C.

²⁰⁴ See International Law Commission, *Report of the International Law Commission on the work of its forty-sixth session* (“1994 ILC Draft Statute”), 2 May–22 July 1994, Ch II.B.I.5.1, UN GAOR 49th Sess, Supp No 10, UN Doc A/49/10, Art 20(a)–(e), Cmt 18 and Annex (1994).

²⁰⁵ See *id.* In Article 20(a)–(e), the 1994 ILC Draft Statute included the following within the jurisdiction of the proposed court: genocide, aggression, serious violations of the laws and customs applicable in armed conflict, crimes against humanity, and “[c]rimes, established under or pursuant to the treaty provisions listed in the Annex, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern.”

²⁰⁶ The 1994 ILC Draft Statute did not include piracy within the meaning of UNCLOS for consideration as a treaty crime within the jurisdiction of the proposed international criminal court. The ILC's stated reasons for declining to include piracy under Art 101 of UNCLOS were as follows: the provisions of UNCLOS require states to cooperate in repressing piracy, the treaty confers jurisdiction on the state seizing the pirate vessel, and the treaty covers a very wide range of acts. Therefore, “on balance,” the ILC decided not to include piracy under UNCLOS as a crime over which the proposed international criminal court might exercise jurisdiction. See 1994 ILC Draft Statute at Commentary to Annex, Cmt 1 (cited in note 204).

hijacking, hostage-taking, and narcotics trafficking.²⁰⁷ The reference to narcotics trafficking is of particular note, given that it was Trinidad and Tobago in 1989 which called for an international criminal court—after the idea had languished for many years—with the express purpose of establishing a court that could adjudicate illicit narcotics trafficking crimes of a transnational nature.²⁰⁸

However, some state delegations firmly believed that the ICC's jurisdiction should be limited to the “core” crimes of aggression, genocide, crimes against humanity, and war crimes. Thus, during reviews of the 1994 ILC Draft Statute, treaty crimes were removed to bracketed form in the draft statute submitted for review at the Rome Conference in 1998.²⁰⁹ In the end, the final Rome Statute

²⁰⁷ See ILC Draft Statute at Annex (cited in note 204).

²⁰⁸ See Roy S. Lee, *Introduction: The Rome Conference and Its Contributions to International Law*, in Lee, *Making of the Rome Statute* 2 (cited in note 200). In response to this call, the UN instructed the ILC to examine the possibility of creating such a court and direct its attention to preparing a draft Code of Crimes against the Peace and Security of Mankind. See *id.* at 3. The ILC presented a draft statute for an International Criminal Court to the General Assembly in 1993. See Lawyers Committee for Human Rights, *Establishing an International Criminal Court: Major Unresolved Issues in the Draft Statute* 4 (May 1998), online at <http://coalitionfortheicc.org/documents/LCHRUNresolvedIssues.pdf> (visited May 3, 2010). It thereafter presented a revised draft Statute in 1994, with a recommendation to “convene an international conference of plenipotentiaries to study the draft Statute and to conclude a convention on the establishment of an International Criminal Court.” *Id.* In 1995, the UN established an Ad Hoc Committee to review the 1994 ILC Draft Statute and to prepare the text of a convention creating the court. See Lee, *The Rome Conference* at 3–4 (cited in note 208). The work of the Ad Hoc Committee is contained in the Report of the Ad Hoc committee on the Establishment of an International Criminal Court (“1995 Ad Hoc Committee Report”), UN GAOR, 50th Sess, Supp No 22, UN Doc A/50/22 (1995). In 1996 and 1997, a Preparatory Committee took over the task of drafting the statute based on the 1994 ILC Draft Statute and also based on proposals and amendments submitted by states. See Lee, *The Rome Conference* at 4 (cited in note 206). The work of the Preparatory Committee is contained in Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol I (Proceedings of the Preparatory Committee during March–April and August 1996), Vol II (Compilation of Proposals), UN GAOR, 51st Sess, Supp No 22 and 22A, UN Doc A/51/22 (1996) and Report of the Preparatory Committee on the Establishment of an International Criminal Court (“1998 PrepComm Report”), UN Doc A/CONF.183/2 (1998). In December 1997, the UN called to convene a United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, to be held in Rome, Italy, from June 15 to July 17, 1998, to finalize and consider the adoption of a convention (the “Rome Conference”). See General Assembly Res No 52/160, UN GAOR, 52d Sess, UN Doc A/RES/52/160 (1998). The addendum to the 1998 PrepComm Report contains the text of the draft statute that was initially considered during the Rome Conference. Consider United Nations, *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court* (“1998 PrepComm Report Addendum”), UN Doc A/CONF.183/2/Add.1 (1998).

²⁰⁹ See 1998 PrepComm Report Addendum at 27 n 28 (cited in note 208). In footnote 28, the Preparatory Committee stated that it considered these crimes without prejudice to their final inclusion in the statute. Furthermore, it discussed them only in a general manner and did not have time to examine them as thoroughly as the other crimes.

confined the court's jurisdiction to the "core" crimes.²¹⁰ Nevertheless, since a significant number of states continued to insist that the court's jurisdiction should include terrorism and narcotics trafficking, Resolution E was adopted, recommending that a future Review Conference "consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court."²¹¹ Therefore, even though the ICC's jurisdiction is currently limited to the "core" crimes, at least some member states believe its jurisdiction should be expanded.

The historical record demonstrates that state delegations generally raised several objections to the inclusion of treaty-based crimes within the jurisdiction of the ICC. For example, some argued that limiting the number of crimes over which the court had jurisdiction would simplify negotiations and likely ensure more broad-based support for the court.²¹² Some states also suggested that including treaty crimes would create issues regarding individual criminal responsibility of nationals of states not parties to particular treaties and possibly make it more difficult for states not parties to those treaties to join the court.²¹³ They further expressed concern that including additional crimes could overburden the court, especially because they believed many of the treaty-based crimes could be better handled nationally.²¹⁴ Finally, with regard to terrorism in particular, states suggested the crime could be difficult to define.²¹⁵

None of these reasons for excluding treaty-based crimes from the ICC's jurisdiction, however, should now serve as a basis for refusing to include piracy crimes within the court's jurisdiction by optional protocol. First, the process of negotiating the Rome Statute is over. Therefore, raising the possibility of including piracy within the jurisdiction of the court will not impinge on negotiations or detract from support for the court.²¹⁶ In addition, because this

²¹⁰ See Rome Statute, Art 5 (cited in note 15).

²¹¹ See Final Act of the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN Doc A/CONF.183/10 at Annex I, Resolution E (1998).

²¹² See, for example, 1995 Ad Hoc Committee Report ¶¶ 54, 81 (cited in note 208); Preparatory Committee on the Establishment of an International Criminal Court, Summary of the Proceedings of the Preparatory Committee during the period 25 March–12 April 1996 ("1996 PrepComm Report"), UN Doc A/AC.249/1, ¶ 63.

²¹³ See 1996 PrepComm Report ¶ 63 (cited in note 212).

²¹⁴ See, for example, 1995 Ad Hoc Committee Report ¶¶ 54, 81 (cited in note 208); 1996 PrepComm Report ¶ 67 (cited in note 212).

²¹⁵ See 1996 PrepComm Report ¶ 63 (cited in note 212).

²¹⁶ It is noteworthy that although the Lawyers Committee for Human Rights stated in its position paper its preference for limiting the jurisdiction of the ICC at least initially in order to facilitate adoption of the Rome Statute, it nevertheless stated that its "acceptance of a narrower jurisdiction for the court should not be taken as a reflection on the desirability of including treaty-based crimes, if consensus on such treaties is reached." Moreover, the Committee emphasized that it

proposal suggests proceeding by protocol, negotiations concerning piracy can proceed separate and apart from any negotiations presently underway with regard amending to the Rome Statute. Furthermore, proceeding by optional protocol and by a separate chamber for piracy cases can help separate piracy offenses from the crimes currently included within the Rome Statute. This would address any fears that including piracy within the jurisdiction of the ICC would somehow detract from the ICC's mission to end impunity for the most atrocious crimes and punish those most responsible for them. In any event, as argued above, piracy is a serious crime of concern to the international community as a whole.

In addition, questions of which states had or had not ratified certain treaties are now irrelevant. Piracy would be defined in connection with the optional protocol to the Rome Statute. And, one might expect that states would be very willing to ratify a protocol giving the ICC authority to prosecute piracy offenses. States are already turning pirates over to Kenya for prosecution, making it unlikely they would raise sovereignty concerns in connection with relinquishing suspected pirates to an international tribunal. Also, as noted above, many state representatives have already expressed support for an international tribunal to try piracy cases.²¹⁷

Furthermore, although including piracy offenses within the jurisdiction of the ICC will certainly impose some burden on the ICC, it is well-equipped with significant resources and personnel at its disposal to handle that burden.²¹⁸ Indeed, if one creates a separate chamber to adjudicate piracy offenses, adding piracy to the jurisdiction of the ICC should not be overly burdensome or distract the court from its other duties. Moreover, this is not a situation where national courts have the resources and expertise to inexpensively and expeditiously try piracy cases.²¹⁹ One of the reasons that some states are still pushing to include terrorism and narcotics trafficking within the ICC's jurisdiction is because those offenses cause a great amount of harm to some states which are without the ability and resources to bring those criminals to justice.²²⁰ Although larger

"strongly believes that the Statute should provide for a mechanism of periodic review that would enable states parties to consider the addition of other crimes to the court's jurisdiction at a later stage." Lawyers Committee for Human Rights, *Establishing an International Criminal Court: Major Unresolved Issues in the Draft Statute* 18 (1996).

²¹⁷ See note 178.

²¹⁸ See 2010 ICC Proposed Budget (cited in note 166).

²¹⁹ See Part III.B.

²²⁰ For example, in responding to arguments that the ICC's jurisdiction should be confined to several "core" crimes, some states noted that the new court would not replace national courts, but would provide an option for adjudication of cases like terrorism and narcotics trafficking, which require large-scale intelligence gathering and other significant resources to prosecute—resources which

countries like the US regularly prosecute narcotics trafficking crimes, even it has brought only one piracy case in the last century. Including piracy within the jurisdiction of the ICC could do much to close the impunity gap for piracy offenses.

Finally, unlike the crime of terrorism—which some states object to including within the ICC’s jurisdiction because of the difficulty of defining the crime so as to clearly distinguish between international terrorists and freedom fighters²²¹—the crime of piracy can be defined. Nor should defining the crime be overwhelmingly difficult. The texts of UNCLOS and the SUA Convention already exist. There have also been some efforts by groups like the Comité Maritime International (CMI) to draft a model piracy act to address the perceived flaws in UNCLOS and the SUA Convention regarding their ability to capture the variety of acts that constitute modern piracy within their purview.²²² In addition, defining the crime of piracy anew can have additional benefits beyond addressing flaws under the current international legal framework: drafters could include provisions regarding evidentiary and other standards necessary to make piracy prosecutions both efficient and fair, avoiding some of the problems associated with trials in Kenya. In any event, definitional difficulties should be no reason to allow pirates to escape justice. The other crimes included within the ICC had to be defined in order to be included in the Rome Statute, and states included aggression within the jurisdiction of the court, subject to it being defined.²²³ Moreover, despite the difficulties of defining terrorism, there are states that support including it within the ICC’s jurisdiction as evidenced by Resolution E.

VI. CONCLUSION

There is a large and growing impunity gap for piracy that can only be closed if the international community decides to act to bring pirates to justice. Piracy is a serious crime of international concern that is only increasing in frequency and severity despite the unique ways in which the international community has been working together recently in an effort to repress and

some states do not have. See 1995 Ad Hoc Committee Report, ¶¶ 55, 82 (cited in note 208) (reporting some nations’ push for expanding ICC jurisdiction to terrorism and drug crimes, in paragraph 55, and giving some reasons for including such crimes under the ICC, in ¶ 82).

²²¹ See note 215.

²²² See International Maritime Organization, Legal Committee, *Maritime criminal acts—draft guidelines for national legislation, submitted by the Comité Maritime*, 93rd Sess (Aug 15, 2007).

²²³ See Rome Statute, Art 5(2) (cited in note 15) (providing that the ICC will only exercise jurisdiction over aggression when a suitable definition is adopted).

combat piracy.²²⁴ Although the international community may be thwarting some pirate attacks, what it is not doing is sending pirates a message that piracy will not be tolerated and that those who commit acts of piracy will be prosecuted and punished. Instead of prosecuting the pirates captured by naval forces patrolling pirate-infested waters, in many instances, nations are simply releasing pirates—even those who are “caught in the act.”²²⁵ Some pirates fare even better: they receive food and water before they are released to continue their criminal activities.²²⁶ Thus, not only do pirates see that “crime pays” when they receive a portion of the significant ransoms that are now being paid for the safe release of ships and their crews, but they also see that “crime pays” even when they are captured by naval patrols. Until the international community commits to bring pirates to justice regularly, it is unlikely pirates will conclude otherwise and change their behavior as a result.

This Article suggests that pirates should be brought to justice using the already extant ICC by way of an optional protocol to include piracy within the ICC’s jurisdiction. Modern piracy is directed against victims from around the world, creates harms that are felt by the entire international community, and involves many of the same violent and cruel acts, such as murder, kidnapping, and hostage-taking, that are used to commit the crimes already within the ICC’s jurisdiction.²²⁷ Also, like the other crimes included within the court’s jurisdiction, piracy is a crime well-suited to the complementarity regime designed to help end impunity for serious crimes of concern to the international community. Nations are not prosecuting piracy suspects with any regularity, either because they do not have the laws, capacity, or resources to handle such prosecutions, or because they do not want to bear by themselves the various burdens associated with an expensive and difficult prosecution that affects numerous nations.²²⁸ The ICC could help end this culture of impunity regarding piracy offenses, and the burden of supporting the court’s adjudication of piracy cases could be shared by the international community. It is true that acts of piracy will not entirely cease just because countries show pirates that they are willing to prosecute. However, closing the impunity gap is at least likely to deter some pirates who will learn that they will be punished in return for their crimes, rather than rewarded.

²²⁴ See notes 101 and 102 and accompanying text.

²²⁵ See notes 108–113 and accompanying text.

²²⁶ See note 109.

²²⁷ See Part III.A.

²²⁸ See Part III.C.



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