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## Changing Tides: An Adaptable Prosecution Approach to Piracy's Shifting Problem

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## Notes

### Changing Tides: An Adaptable Prosecution Approach to Piracy's Shifting Problem

#### Shearman & Sterling Student Writing Prize in Comparative and International Law, Best Note Award

*Although piracy off the coast of Somalia has captured worldwide attention, attacks in this region are decreasing while other regions are experiencing increases in pirate activity. This Note expands upon prior research into prosecution models for combatting piracy off the coast of Somalia to determine the adaptability and sustainability of these methods as applied to piracy in other regions. In examining the three most common prosecution models currently used and proposed (prosecution by domestic courts in regional states, prosecution by the capturing state or by a state with a significant nexus to the attack, and prosecution by a specialized piracy tribunal), this Note proposes that prosecution by states with a significant connection to the attack must continue to play a vital role in complementing prosecution by more localized sources, and that prosecution by a specialized tribunal lacks the adaptability and sustainability needed to combat piracy across various regions. While prosecution through domestic courts in regional states, such as Kenya, provide significant benefits, they are not by themselves a practical solution to piracy in other regions. Rather than continuing the investigation into a specialized tribunal, as the United Nations (U.N.) has called for in a recent resolution, international support on a more localized basis with*

*continued support from capturing or interested states provides a more realistic and efficient solution that could be applied to nearly any region where piracy may resurge. Adaptability in judicial systems is of particular importance in the piracy context so that the experiences and developments of courts handling the issues today are not lost as the locus of the piracy problem shifts from Somalia to other regions. In order to assess the future for piracy prosecution as piracy attack levels fluctuate, and as the problem shifts to new regions, this Note first discusses modern piracy trends before taking an in-depth examination and comparison of three potential prosecution models: the use of domestic courts in regional states, prosecution by capturing states and other interested international parties, and prosecution by a specialized international tribunal.*

## INTRODUCTION

In recent years, increases in the number of pirate attacks and hostage takings off the coast of Somalia have captured the attention of world leaders, international organizations, legal scholars, the media, and the public alike. While there are many types of measures involved in combating piracy, including the use of military force and stabilization of political and economic factors within a country, prosecution of suspected pirates also plays a key role in deterrence and it is on this particular counter-measure that this Note focuses. The increase in piracy off the coast of Somalia has caused international organizations and legal scholars to frequently debate the best method to ensure prosecution of captured pirates. Of these methods, two main prosecution structures currently play a role in piracy prosecution while a third has commonly been considered as an option for the future: prosecution by regional states with no connection to the crime, prosecution by the state that has captured the pirates or by states which have some other connection to the attack, and prosecution by a specialized international tribunal.

This Note seeks to expand upon prior research into prosecution models for combating piracy off the coast of Somalia to determine the adaptability and sustainability of current and proposed methods of prosecution that may be applied to piracy in other regions. In examining the three most common prosecution models currently used and proposed (prosecution by domestic courts in regional

states, prosecution by the capturing state or by a state with a significant nexus to the attack, and prosecution by a specialized piracy tribunal), this Note proposes that prosecution by states with a significant connection to the attack must continue to play a vital role in complementing prosecution by more localized sources, and that prosecution by a specialized tribunal lacks the adaptability and sustainability needed to combat piracy across various regions. While prosecutions through domestic courts in regional states, such as Kenya, provide significant benefits, they are not by themselves a practical solution to piracy in other regions. Rather than continuing the investigation into a specialized tribunal, as the United Nations (U.N.) has called for in a recent resolution,<sup>1</sup> international support on a more localized basis with continued support from capturing or interested states provides a more realistic and efficient solution that could be applied to nearly any region where piracy may resurge. Adaptability in judicial systems is of particular importance in the piracy context so that the experiences and developments of courts handling the issues today are not lost as the locus of the piracy problem shifts from Somalia to other regions.

In order to assess the future for piracy prosecution as piracy attack levels fluctuate, and as the problem shifts to new regions, this Note will first discuss modern piracy trends before taking an in-depth examination and comparison of three potential prosecution models: the use of regional courts, prosecution by capturing states and other interested international parties, and prosecution by a specialized international tribunal.

## I. MODERN PIRACY TRENDS

Although piracy is not a “new” problem as over 300 instances of piracy occurred between 1961–1986,<sup>2</sup> piracy in Somalia did not begin to garner the attention we see today until 2008, by which time Somalia had already become a “safe haven” for pirates.<sup>3</sup> Unrest and instability in Somalia are two of the main factors associated with the modern spike in pirate attacks, as well as the recent surge in attacks in other areas, including off of the Gulf of Guinea.<sup>4</sup> Now, however,

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1. See S.C. Res. 2077, U.N. Doc. S/RES/2077 (Nov. 21, 2012).

2. Lawrence J. Kahn, *Pirates, Rovers, and Thieves: New Problems with an Old Enemy*, 20 TUL. MAR. L. J. 293, 302–03 (1996).

3. J. Ashley Roach, *Agora: Piracy Prosecutions. Countering Piracy Off Somalia: International Law and International Institutions*, 104 AM. J. INT'L L. 397, 400 (2010).

4. See Michael Gagain, Note, *Neglected Waters: Territorial Maritime Piracy and*

instances of piracy attacks are decreasing in Somalia and increasing in other regions. This section will discuss the difficulties faced in the prosecution of Somali pirates, the past reluctance to pursue such prosecution, the shifting nature of the piracy problem, as well as increased international attention to the detrimental effects that piracy has across various sectors.

### *A. The Importance of Prosecution*

Although prosecution is far from the only method for combating piracy and must necessarily be used in conjunction with other counter-piracy measures (such as bolstering security and solving internal economic and political problems giving rise to piracy), and though the combination of methods needed to combat piracy in each region will vary depending upon that region's unique situation, effective international cooperation for the prosecution of pirates is nonetheless a valuable aspect of counter-piracy efforts regardless of the region involved or the number of other methods used. For example, piracy prosecution may be increasingly important as piracy spreads to areas where states involved have stronger interests in maintaining sovereignty of their coastal regions, such as the Gulf of Guinea. In areas such as these, international naval operations that have been largely successful in disrupting piracy off the coast of Somalia are unlikely to be available.<sup>5</sup> Prosecution strategies for pirates captured by regional forces in such regions may thus play a more important role in deterrence efforts. Indeed, even in the Somali context, the United States has recognized that maintenance of an effective system for prosecuting pirates is "vital" to ensuring that attack levels remain low, that courts are well equipped to handle piracy cases should attack levels rise, and that international and domestic laws continue to develop to govern this truly global problem.<sup>6</sup> Increased rates of in-

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*Developing States: Somalia, Nigeria, and Indonesia*, 16 NEW ENG. J. INT'L & COMP. L. 169, 186-87 (2010).

5. See Rayna Breuer & Dirk Kaufmann, *Emerging Threat: Piracy in the Gulf of Guinea*, DEUTSCHE WELLE (Feb. 8, 2013), available at <http://www.dw.de/emerging-threat-piracy-in-the-gulf-of-guinea/a-16583626> (arguing that an international military force in the region is likely not an option because, according to Pottengal Mukundan, director of the International Maritime Bureau, "Somalia is a failed state, where an international presence is necessary. In the Gulf of Guinea all the countries are sovereign states with functioning governments.").

6. See International Crimes, 2011 DIGEST § B, at 76, available at <http://www.state.gov/documents/organization/194113.pdf> [hereinafter International Crimes]. See also Yvonne M. Dutton, *Bringing Pirates to Justice: A Case for Including Piracy within the Jurisdiction of the International Criminal Court*, 11 CHI. J. INT'L L. 197, 200 (2010) ("[I]f

terference and capture alone will not be enough to deter pirates from engaging in such highly profitable activity—the potential for prosecution must also be increased to make it increasingly risky for pirates to engage in such behavior.<sup>7</sup>

### *B. Piracy Laws and Jurisdiction Over Pirate Attacks*

One significant problem surrounding prosecuting pirates today is that piracy laws are significantly outdated in many countries worldwide. Prior to the surge in piracy attacks off the coast of Somalia, many courts, including in the United States, had not handled a piracy case since the eighteenth century.<sup>8</sup> While the unrest and instability in Somalia has put a burden on judicial systems within the country, the lack of significant piracy cases in modern times puts numerous courts worldwide at a disadvantage when trying to interpret and apply older cases and laws to modern day piracy.

Piracy has historically been considered a crime against all mankind over which countries enjoy universal jurisdiction to prosecute attacks occurring on the high seas, even in situations where they may not have a nexus to the crime.<sup>9</sup> However, due to varying domestic laws on piracy, not every country's legislation contemplates universal jurisdiction, nor do all countries share the political will to carry out these prosecutions, even where they may enjoy the jurisdiction to do so.<sup>10</sup> Recognizing the inherent challenges in prosecuting pirates, the U.N. has called upon all states to prosecute pirates where the states' interests are involved in a particular attack.<sup>11</sup> Likewise, legal scholars have developed creative solutions in an attempt to circumvent existing gaps in piracy laws, including prosecuting suspected pirates through the Alien Tort Statute<sup>12</sup> or as terrorists.<sup>13</sup> Unfortunate-

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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.”).

7. See Sayyid Azim, *Somali Pirates Appear in Kenyan Court*, USA TODAY, Apr. 23, 2009, [http://usatoday30.usatoday.com/news/world/2009-04-23-pirates\\_N.htm](http://usatoday30.usatoday.com/news/world/2009-04-23-pirates_N.htm).

8. See Daniel Pines, *Maritime Piracy: Changes in U.S. Law Needed to Combat This Critical National Security Concern*, 36 SEATTLE U. L. REV. 69, 76 (2012).

9. See International Crimes, *supra* note 6, at 80–81 (describing the United States' support for states to “adopt universal jurisdiction over this grave crime”).

10. Yvonne M. Dutton, *Maritime Piracy and the Impunity Gap: Insufficient National Laws or a Lack of Political Will?*, 86 TUL. L. REV. 1111, 1116 (2012).

11. S.C. Res. 1918, U.N. Doc. S/RES/1918 (Apr. 27, 2010).

12. See generally Eugene Kontorovich, *A Tort Statute, With Aliens and Pirates*, 107 NW. U. L. REV. COLLOQUY 100 (2012). After the *Sosa v. Alvarez-Machain* decision, some

ly, as will be discussed below, capturing or interested states generally remain reluctant to prosecute suspected pirates.

### *C. State Reluctance to Pursue Prosecution*

Even though many legal scholars see piracy as a crime of universal jurisdiction,<sup>14</sup> states engaged in military operations in the region remain unwilling to prosecute suspected pirates even when they capture them, unless they also have a significant nexus to the attack.<sup>15</sup> There are many reasons why such reluctance may be prevalent. To begin with, uncertainty in whether the capturing state, another interested state (such as a flag ship or a state whose citizens were victims in the attack), or a regional court will ultimately prosecute pirates leads to uncertainty “in knowing how best to gather, document and preserve evidence” at the site of the attack.<sup>16</sup> Furthermore, the cost of prosecuting pirates provides an additional burden on prosecuting states, including the costs of transporting suspects, evidence, and witnesses,<sup>17</sup> as well as logistical concerns and costs in finding Somali interpreters both initially upon capturing the pirates and at trial.<sup>18</sup> Finally, fear that unconvicted pirates or pirates who have served their sentences will claim asylum and remain in the prosecuting state provides an additional deterrent to prosecuting pirates.<sup>19</sup>

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commentators believe that the Supreme Court “would seem to treat piracy as a paradigmatic case for the ATS.” Kenneth Anderson, *Ninth Circuit Calls Sea Shepherd Actions “Piracy”*, LAWFARE (Feb. 27, 2013 2:24 PM), <http://www.lawfareblog.com/2013/02/ninth-circuit-calls-sea-shepherd-actions-piracy/>.

13. See Douglas R. Burgess, Jr., *Hostis Humani Generi: Piracy, Terrorism and a New International Law*, 13 U. MIAMI INT’L & COMP. L. REV. 293, 297–98 (2006).

14. See Helmut Tuerk, *The Resurgence of Piracy: A Phenomenon of Modern Times*, 17 U. MIAMI INT’L & COMP. L. REV. 1, 15 (2009).

15. See generally Dutton, *supra* note 10 (noting that states lack the political will to prosecute pirates even where their laws would allow for universal jurisdiction). However, under some states’ law, no grounds for universal jurisdiction over piracy exist in domestic law at all. See Dutton, *supra* note 6, at 216–17.

16. Douglas Guilfoyle, *Prosecuting Somali Pirates*, 10(4) J. INT’L CRIM. JUST. 767, 792 (2012).

17. See Dutton, *supra* note 6, at 219.

18. A lack of sufficient interpreters has caused a bottleneck in the recent Indian prosecution of 120 suspected Somali pirates captured by the Indian Navy. See Sukanya Shantha, *Trial Against Somali Pirates May Get Stuck*, THE INDIAN EXPRESS, Jan. 30, 2013.

19. See Tom Syring, *A Pirate and a Refugee: Reservations and Responses in the Fight Against Piracy*, 17 ILSA J. INT’L & COMP. L. 437, 438 (2011) (noting fears that released pirates will allow “criminal gangs, or sleeper cells, with even more serious agendas

Because states that have captured pirates or have a significant nexus to the attack are often unwilling to take on the burden of prosecuting pirates themselves, regional states in the Gulf of Aden, such as Kenya, Seychelles, Mauritius, Tanzania, Maldives, and Somalia, have begun filling this prosecution gap. These states are assisted by the U.N. Office on Drugs and Crime's Counter-Piracy Programme (UNODC CPP) to provide logistical and financial support to handle increases in prosecutions.<sup>20</sup> Some of these countries, such as Kenya (which has thus far played the greatest role in prosecuting pirates in regional courts), have signed agreements with nations whose navies patrol heavily pirated waters to accept responsibility for and prosecute pirates that these navies capture in nearby waters.<sup>21</sup> However, despite international assistance, domestic courts have faced significant burdens on their capacity to prosecute pirates.

Even with increased assistance from domestic courts within the region, however, the costs and logistical difficulties in prosecuting pirates has led many vessels involved in military operations in the Gulf of Aden to adopt a catch and release policy,<sup>22</sup> citing "evidentiary difficulties, the cost of prolonged incarceration, and other factors" as reasons for doing so.<sup>23</sup> Although some scholars doubt whether such policies truly make a difference in deterring piracy, questioning whether "it is even possible to more than modestly increase current prosecution rates,"<sup>24</sup> others see the avoidance of catch and release as crucial to efforts in deterrence in the fight to suppress

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into the country"). *But see* Yvonne M. Dutton, *Pirates and Impunity: Is the Threat of Asylum Claims a Reason to Allow Pirates to Escape Justice?*, 34 *FORDHAM INT'L L.J.* 236, 253–54, 292–93 (2011) (arguing that language in current treaties clearly establish that pirates are criminals and not eligible for asylum, but that risks of asylum claims are "outweighed by the duty to ensure that violent criminals are brought to justice and that future violent attacks are deterred").

20. *UNODC and Piracy*, UNITED NATIONS OFFICE OF DRUGS AND CRIME (Dec. 2012), available at <http://www.unodc.org/easternafrika/en/piracy/index.html>.

21. *See* James Thuo Gathii, *Jurisdiction to Prosecute Non-National Pirates Captured by Third Party States Under Kenyan and International Law*, 31 *LOY. L.A. INT'L & COMP. L. REV.* 363, 363 (2009) (describing Memoranda of Understanding signed between Kenya and the United States and the EU).

22. Whereby suspected pirates are either taken back to shore, or, in one case involving Russia, are released at sea in a small vessel. *See* Dutton, *supra* note 6, at 216–17 (discussing catch and release policies of Canada and the U.K.); Syring, *supra* note 19, at 449 (discussing a Russian ship setting pirates afloat "far at sea in a small rubber boat, rendering their chances of survival uncertain").

23. Eugene Kontorovich & Steven Art, *Piracy Prosecution: An Empirical Examination of Universal Jurisdiction for Piracy*, 104 *AM. J. INT'L L.* 436, 450 (2010).

24. *See* Guilfoyle, *supra* note 16, at 768.



piracy.<sup>25</sup> However, even at the “height of the Somali piracy epidemic,” capturing states were unwilling to prosecute without a significant nexus to the attack, and so this policy is likely to continue as states perceive the threat from Somali piracy to be diminishing.<sup>26</sup> As a result, it is necessary to establish a sustainable system that shares the costs and burdens for prosecuting pirates regardless of what region they are captured in to promote deterrence.

#### *D. Piracy’s Shifting Problem*

Given the difficulties with both prosecution models currently used, legal scholars have consistently sought to find a suitable prosecution model to deal with the increase in pirate attacks off the coast of Somalia. Now, however, the tides are changing. Recently, the number of pirate attacks off the coast of Somalia has fallen. In 2012, only seventy-one total incidents of piracy were reported in Somalia, including thirteen successful hijackings, as compared to 278 incidents worldwide.<sup>27</sup> This number is down from forty-six successful hijackings in 2009, forty-seven in 2010, and twenty-five in 2011.<sup>28</sup> This decrease in attacks off the coast of Somalia has been attributed to a combination of counter-piracy measures, including international cooperation in information sharing, best practices for merchant vessels traveling on shipping routes, private security teams, and, perhaps most importantly, international military cooperation in the region to disrupt and deter attacks.<sup>29</sup> While some commentators have suggested as an alternative explanation that pirate gangs are merely taking a temporary break to regroup,<sup>30</sup> for at least some pirates holding ves-

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25. See Roach, *supra* note 3, at 416.

26. Kontorovich & Art, *supra* note 23, at 451.

27. *Piracy & Armed Robbery News & Figures*, INTERNATIONAL CHAMBER OF COMMERCE COMMERCIAL CRIME SERVICES (Dec. 3, 2012), <http://www.icc-ccs.org/piracy-reporting-centre/piracynewsfigures>. As of the end of February 2013, only two attacks on vessels by Somali pirates have been reported, both of which were unsuccessful. See James Bridger, *African Piracy’s Next Front*, U.S. NAVAL INSTITUTE NEWS, Mar. 4, 2013, [http://news.usni.org/2013/03/04/african-piracys-nextfront?utm\\_source=rss&utm\\_medium=rss&utm\\_campaign=african-piracys-next-front](http://news.usni.org/2013/03/04/african-piracys-nextfront?utm_source=rss&utm_medium=rss&utm_campaign=african-piracys-next-front).

28. *Party Appears to be Ending for Somali Pirates*, FOX NEWS (Sept. 25, 2012), <http://www.foxnews.com/world/2012/09/25/party-appears-to-be-ending-for-somali-pirates/>.

29. See *id.*; S.C. Res. 2077, *supra* note 1; ICC INTERNATIONAL MARITIME BUREAU, PIRACY AND ARMED ROBBERY AGAINST SHIPS (June 21, 2010), *available upon request at* <http://icc-ccs.org/piracy-reporting-centre/request-piracy-report>.

30. D.H., *Just Taking a Break*, ECONOMIST (Oct. 23, 2012, 12:40 PM), <http://www.economist.com/blogs/baobab/2012/10/somali-piracy>.

sels for ransom is no longer “a relatively risk-free affair.”<sup>31</sup>

Piracy off the coast of Somalia has enjoyed much of the attention in discussions involving piracy. Unfortunately, as piracy off the coast of Somalia has decreased, piracy levels in other areas of the world including the Gulf of Guinea and Southeast Asia have increased.<sup>32</sup> For example, in 2012, there were fifty-one reported pirate attacks in the Gulf of Guinea, up 42% from the previous year.<sup>33</sup> This trend appears to be continuing in 2013, as ten attacks have been reported in February alone.<sup>34</sup> While in the most recent meeting on piracy in November 2012 the U.N. recognized that the number of pirate attacks off the coast of Somalia will revert to previous levels if current counter-piracy efforts in the area are abandoned, relatively little attention has been devoted to how best to approach increasing levels of piracy in other regions.<sup>35</sup> Indeed, while members of the Security Council recognized the need to “rely on lessons learned from Somalia” in combating this new wave of piracy, as well as to “focus on legal reforms to criminalize piracy and build capacity for prosecutions and trials, effective law enforcement and improved prison infrastructure,” and although the U.N. has recognized the danger that piracy in other regions poses, the profound differences in piracy off the coast of Somalia and elsewhere have not been sufficiently explored.<sup>36</sup>

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31. Adjoa Anyimadu, *Notorious Somali Pirate Quits: Now Is Shipping Safe?*, CNN (Jan. 11, 2013 1:37 PM), <http://www.cnn.com/2013/01/11/opinion/somalia-pirate-retires>.

32. See John R. Crook, *Continuing U.S. Efforts to Combat Piracy; Piracy Now Spreading to Gulf of Guinea*, 106 AM. J. INT'L L. 160, 162–63 (2012) (indicating that reported instances of piracy in the Gulf of Guinea “ha[ve] increased alarmingly,” particularly off the coast of Benin); Pines, *supra* note 8 at 76–77 (noting an increase in pirate attacks in Indonesia, Malaysia, Benin, and Nigeria as well as attacks in Bangladesh and Sweden); Erik Barrios, Note, *Casting a Wider Net: Addressing the Maritime Piracy Problem in Southeast Asia*, 28 B.C. INT'L & COMP. L. REV. 149, 150 (2005) (noting that instances of piracy have increased in Southeast Asia since the Asian economic crisis in the 1990s).

33. See Breuer & Kaufmann, *supra* note 5.

34. See Bridger, *supra* note 27.

35. See S.C. Pres. Statement 2012/24, U.N. Doc. S/PRST/2012/24 (Nov. 19, 2012), available at <http://www.un.org/News/Press/docs/2012/sc10820.doc.htm> (while many speakers “emphasized the need to avoid complacency” in Somalia and the increase in piracy in other areas was recognized, relatively few commented on the best way to reduce piracy in these areas). *But see* S.C. Res. 2039, U.N. Doc. S/RES/2039 (Feb. 29, 2012), available at <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/UNOCA%20SRES%202039.pdf> (discussing in general and expressing concern for increased instances of piracy off the Gulf of Guinea).

36. S.C. Pres. Statement 2012/24, *supra* note 35; *see also* S.C. Res. 2039, *supra* note 35 (discussing piracy off the Gulf of Guinea).

Increases in piracy in other regions differ from piracy in Somalia in a number of ways. For example, unlike in Somalia, pirates in the Gulf of Guinea appear to be after commodities on the ships themselves rather than seeking to take hostages to obtain ransoms.<sup>37</sup> Because of this lack of interest in hostage taking, pirates off the Gulf of Guinea are also typically more violent than Somali pirates.<sup>38</sup> Meanwhile, piracy in Southeast Asia is complicated by the fact that it is more frequently politically driven (and therefore, unlikely to be covered by the U.N. Convention on the Law of the Sea (UNCLOS) definition of piracy which only covers attacks for private ends), and that states in the region are more protective of their sovereignty than in Somalia.<sup>39</sup> Yet despite these differences, such increases signify an escalating problem that needs to be urgently addressed because piracy, no matter where it is located, has the potential to impact local economies,<sup>40</sup> support for terrorist organizations,<sup>41</sup> and international trade.<sup>42</sup>

Although the number of successful pirate attacks near Somali

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37. See S.C. Pres. Statement 2012/24, *supra* note 35; S.C. Res. 2039, *supra* note 35; Breuer & Kaufmann, *supra* note 5.

38. See S.C. Pres. Statement 2012/24, *supra* note 35; S.C. Res. 2039, *supra* note 35; Breuer & Kaufmann, *supra* note 5.

39. Barrios, *supra* note 32, at 151, 159–62. However, a recent case in the Ninth Circuit that labeled whale conservationists pirates may broaden the interpretation of what constitutes private ends to encapsulate politically driven attacks. See *Institute of Cetacean Research v. Sea Shepherd Conservation Society*, No. 12-35266, 708 F.3d 1099 (9th Cir. 2013).

40. See Crook, *supra* note 32, at 163 (noting that pirate attacks near “off-shore oil facilities result in the estimated loss of \$2 billion annually to the broader regional economy, including the fishing industry and commercial shipping”); see also Dutton, *supra* note 6, at 199 (noting that piracy impacts the delivery of aid and poses environmental risks of oil spills); *Ban deploys UN team to assess Gulf of Guinea piracy threat*, UN NEWS CENTRE (Nov. 10, 2011), <http://www.un.org/apps/news/story.asp?NewsID=40352&Cr=Gulf#.UsjdFqWmiAh> (noting that U.N. Secretary-General Ban Ki-moon expressed concern that piracy off the Gulf of Guinea will “hinder economic development and undermine security in the region”).

41. See International Crimes, *supra* note 6, at 79 (noting that piracy in Somalia may provide support for al-Shabaab); see also Pines, *supra* note 8, at 71 (noting that piracy poses a national security concern to the United States because it “enhances political instability in significant regions of the world” and “offers an easy and tempting conduit for terrorism”).

42. See Gagain, *supra* note 4, at 175 (noting that “[p]iracy costs world trade an estimated 13 to 16 billion dollars every year”); Brad Plumer, *The Economics of Somali Piracy*, WASH. POST WONKBLOG (Mar. 3, 2013, 9:00 AM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/03/03/the-economics-of-somali-piracy/> (noting that piracy costs the shipping industry between \$900 million and \$3.3 billion per year in armed security, ransoms, safer ships, and taxes).

waters has decreased, piracy remains a pressing problem both because of its potential for reemergence in Somalia and because of the increase in piracy in other areas. Even within Somalia, although the number of successful attacks has gone down, the length of captivity for hostages has increased.<sup>43</sup> Additionally, despite military efforts in the region, pirates have adapted to new circumstances and have become more sophisticated in their planning and thus harder to disrupt as the use of international military forces in the area have increased.<sup>44</sup> Concerted and continued action in these regions is essential to preventing an upsurge in the piracy cycle and to remain prepared should attack levels increase.<sup>45</sup>

The inability of Kenya and other third party states to handle large amounts of piracy prosecutions within their own regions demonstrates the need to maintain a flexible and internationally supportive prosecution system across all regions where piracy is prominent.<sup>46</sup> Even in more stable regions that are more capable of prosecuting piracy themselves, increasing piracy rates demand an adaptable international system to prosecute piracy.<sup>47</sup>

### *E. Increased International Awareness and Action*

Acknowledging the harmful effects that piracy has not just in the regions in which it occurs, but around the world, the international community has come together to fight this problem via multiple U.N. Resolutions authorizing counter-piracy measures.<sup>48</sup> Countries have

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43. ICC International Maritime Bureau [IMB] & Oceans Beyond Piracy [OBP], *The Human Cost of Somali Piracy 2011*, at 3 (June 22, 2012), available at [http://www.icccs.org/images/stories/pdfs/hcop\\_2011\\_version1.4.pdf](http://www.icccs.org/images/stories/pdfs/hcop_2011_version1.4.pdf).

44. See International Crimes, *supra* note 6, at 75.

45. Rebecca Fantauzzi, Note, *Rascals, Scoundrels, Villains, and Knaves: The Evolution of Piracy from Ancient Times to the Present*, 39 INT'L J. LEGAL INFO. 346, 374–75 (2011).

46. See *Kenya Ends Co-Operation in Hosting Somali Pirate Trials*, BBC NEWS (Oct. 1, 2010), <http://www.bbc.co.uk/news/world-africa-11454762> (reporting that Kenya briefly refused to accept more pirates for prosecution in 2010, citing concerns that the international community was not doing enough to support the prosecutions and security concerns).

47. See Tuerk, *supra* note 14, at 38 (noting that “[i]deally, suspects should be tried in the country where they originated”).

48. Including, in particular, S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008) and S.C. Res. 1897, U.N. Doc. S/RES/1897 (Nov. 30, 2009) which use broad language to authorize counter-piracy efforts in Somali territory, and possibly land-based operations. Counter-piracy measures in regions other than Somalia have also been addressed in S.C. Res. 2039, *supra* note 35 (calling on the Secretary-General to “support efforts towards

also cooperated to engage in military efforts off the coast of Somalia to disrupt attacks, and about ten warships from various countries patrol the area at any given time.<sup>49</sup> Various international organizations have dedicated resources to studying and sharing information on this threat as well, including the International Maritime Organization (IMO), the U.N. Office of Drugs and Crime (UNODC), the EU, NATO, the U.N. Security Council, the Contact Group on Piracy off the Coast of Somalia, and individual states.<sup>50</sup>

Despite these attempts however, and despite language in the International Law Commission (ILC) stating that a state failing to take measures against piracy “would be failing in a duty laid upon it by international law,” no treaties are in place expressly requiring prosecution of pirates or even requiring that all states uniformly criminalize piracy.<sup>51</sup> Without such burden sharing, military forces in the area alone are also “unlikely to be sustainable and effective in the long run.”<sup>52</sup> Prosecution of pirates remains a collective action problem, and the lack of uniformity in piracy laws and in the very definition of piracy across various legal systems leads to very different results in prosecution, even where the facts of these cases may be similar.<sup>53</sup> The very definition of piracy is “[t]he single most controversial aspect of customary international law on piracy”<sup>54</sup> and many courts remain unsure as to what the true interpretation of the UNCLOS definition of piracy should be.<sup>55</sup>

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mobilizing resources following the creation of the regional strategy to assist in building national and regional capacities in close consultation with States and regional and extraregional organizations”) and S.C. Res. 2018, U.N. Doc. S/RES/2018 (Oct. 31, 2011) (condemning acts of piracy in the Gulf of Guinea).

49. Lucas Bento, *Toward an International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish*, 29 BERKELEY J. INT’L L. 399, 409–10 (2011).

50. See Roach, *supra* note 3, at 409.

51. See *id.* at 405, 414.

52. Bento, *supra* note 49, at 410.

53. See generally Maggie Gardner, *Piracy Prosecutions in National Courts*, 10 J. INT’L CRIM. JUST. 797 (2012) (evaluating five different cases with similar facts from 2010 in Kenya, the Netherlands, Seychelles, and the United States to determine whether piracy “is defined with adequate specificity to satisfy the principle of legality”).

54. Lawrence Azubuike, *International Law Regime Against Piracy*, 15 ANN. SURV. INT’L & COMP. L. 43, 46 (2009).

55. See Dutton, *supra* note 10, at 1116.

### *F. The Future of Piracy Prosecution*

In light of decreases in piracy off the coast of Somalia and the growth of piracy in other areas, international organizations like the U.N. and states whose interests are harmed by piracy (whether through trade, national security, or because pirates are emerging from within their borders) should focus on fostering an adaptable and sustainable approach to piracy prosecution. An adaptable system of prosecution is one that is well-equipped to deal with piracy in different regions, as well as with different volumes of cases as piracy levels rise and fall. As will be discussed later in this Note, significant international resources are devoted each year to bolstering infrastructure to handle increased prosecution levels and to develop legal systems challenged by outdated piracy laws. The goal of an adaptable system is to ensure that when circumstances change, these resources and experiences will not be wasted and can instead shift to promote prosecution in the new region. For example, when piracy attacks decrease in Somalia but increase elsewhere, international organizations should be able to shift these resources from regional states currently assisting Somalia in prosecution efforts to support those in the new region.

Piracy is an international problem and it carries significant risk of free riding by states that have demonstrated their unwillingness to share the burden of prosecution. The international community has tried to share this burden by creating more formalized structures in specific regions. However, this is not necessarily the most efficient means of dealing with piracy because piracy is a constantly shifting problem and levels of piracy attacks within each region will not remain constant. While this Note recognizes that there is no “one-size fits all” solution to piracy across different regions, it emphasizes that the more readily adaptable methods for prosecuting piracy are across regions, the more efficient, and thus more sustainable, these methods will be.

## II. ASSESSING THE ADAPTABILITY AND SUSTAINABILITY OF DOMESTIC COURTS IN REGIONAL STATES

In recent years, the use of domestic courts in regional states with little connection to the pirates that have been captured or to the vessels that have been attacked has been adopted to combat piracy off the coast of Somalia. Although one of the reasons for this was

that Somalia lacks the capacity to prosecute pirates itself,<sup>56</sup> studying the use of domestic courts for regional prosecution is pertinent to the increase in piracy attacks in other regions because, as the use of Kenyan courts have demonstrated, one country taking primary responsibility for prosecuting pirates can quickly overburden a judicial system. Therefore, even in regions where a country may have the capability to prosecute acts of piracy occurring off its shores, that country may not have the capacity to do so continually should piracy attacks increase within the area. In assessing the viability of using such techniques in other areas, this Note looks primarily to Kenya as an example since it has had the most significant experience as a third party prosecuting court for piracy to date.

### A. History and Evolution of Kenyan Piracy Law

Kenya tries suspected pirates as a domestic court, not as an international tribunal; however, as will be discussed later in this Note, the U.N. has also considered establishing a specialized tribunal in the region to handle piracy prosecutions.<sup>57</sup> Despite the fact that Kenya's judicial system lagged behind the "long-established judiciaries" of the United States and the EU,<sup>58</sup> Kenya officially signed Memoranda of Understanding (MOUs) with these states in January and March 2009 respectively,<sup>59</sup> nearly three years after the first Somali pirates were tried in Kenya in 2006 in *Republic v. Hassan Mohamud Ahmed*.<sup>60</sup> Kenya may have had political motivations signing these MOUs, in that "it is advantageous to the government of Kenya to be viewed as the international tribunal for piracy."<sup>61</sup> This may suggest potential problems in the future for Kenya's willingness to participate in this system—as piracy attacks decrease, international attention may decrease as well, and the burdens of carrying out prosecutions on behalf of other more interested states may outweigh the political benefits.

Kenya has significantly altered its piracy laws in order to bet-

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56. See Fantauzzi, *supra* note 45, at 379.

57. See *id.* at 381.

58. James Thuo Gathii, *Piracy Prosecution: Kenya's Piracy Prosecutions*, 104 AM. J. INT'L L. 416, 426 (2010).

59. See Gathii, *supra* note 21, at 363.

60. See Gathii, *supra* note 58, at 417.

61. See Fantauzzi, *supra* note 45, at 381. See also Azim, *supra* note 7 (Kenya may in part have signed such agreements in order to raise its international reputation amongst "criticism over corruption and political violence.").

ter prosecute pirates, and Kenyan piracy law differs from American piracy law in that Kenya has adopted the UNCLOS definition of piracy into its domestic law, whereas the United States defines piracy simply by referring to piracy as defined by “the law of nations.”<sup>62</sup> However, even the UNCLOS definition of piracy remains in dispute among the courts of various nations, and whether third party states such as Kenya have jurisdiction to accept and prosecute pirates from capturing states where they have no nationality or territorial links is still a volatile question under Article 105 of UNCLOS.<sup>63</sup> Human rights groups have also criticized use of the Kenyan legal system for this reason.<sup>64</sup> Despite a Kenyan court ruling that Kenya had jurisdiction over non-nationals in *Hassan Mohamud Ahmed*,<sup>65</sup> the jurisdiction question faced significant upheaval in *In re Hashi*, in which Kenyan courts overruled *Ahmed* and determined that Kenyan courts did not have universal jurisdiction over pirate attacks occurring in international waters.<sup>66</sup> This decision was again overturned in October, 2012,<sup>67</sup> although some scholars also argue that the jurisdiction question was “definitively establish[ed]” by the Merchant Shipping Act of June 1, 2009.<sup>68</sup>

The revision of Kenya’s piracy laws, while providing some upheaval and some clarity within the legal system regarding Kenya’s jurisdiction on piracy, also had additional impacts on Kenyan and international law. As a result of the revised laws and the incorporation of the UNCLOS definition of piracy under the law of nations into these laws, international law was incorporated into Kenyan law without the approval of Parliament for the first time.<sup>69</sup> Additionally, the complete overhaul of Kenya’s piracy laws to better handle piracy prosecution has demonstrated the benefits of revision and modernization of domestic laws and has been seen by some commentators as useful for “opening a conversation about alternatives to national piracy prosecutions in general.”<sup>70</sup>

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62. Daniel A. Lavrisha, Note, *Pirates, Ye Be Warned: A Comparative Analysis of National Piracy Laws*, 42 U. TOL. L. REV. 255, 261 (2010).

63. See Tuerk, *supra* note 14, at 17 (noting that dispute remains over whether Article 105 precludes the transfer of captured pirates to third parties).

64. See Fantauzzi, *supra* note 45, at 380.

65. Gathii, *supra* note 58, at 417.

66. Rebecca DeLeonardo, *Kenya appeals court allows jurisdiction over international piracy cases*, JURIST (Oct. 18, 2012).

67. See *Kenya Rules Courts Can Try Somali Pirates*, BBC NEWS (Oct. 18, 2012).

68. Gathii, *supra* note 58, at 429.

69. See *id.* at 418.

70. *Id.* at 435–36.



### B. Advantages and Disadvantages of Regional Courts

Although Kenya has been praised as an alternative to an international court or tribunal, the system has faced a fair share of difficulties. The court requires significant international support and oversight to function, puts strain on the country's judicial system, creates a situation in which the international community is largely dependent upon such states for prosecution, and gives rise to various human rights concerns. However, there are benefits to the use of regional states as well in that, to date, such courts have been relatively successful in prosecuting piracy.

One significant difficulty of using Kenya as a regional court is that it requires substantial international coordination and oversight to function. The UNODC has provided the majority of this support, and it takes an average of \$2.3 million to provide eighteen months of funding for piracy prosecutions in Kenya and Seychelles.<sup>71</sup> The UNODC now works with six countries in the region (Kenya, Seychelles, Mauritius, Tanzania, Maldives, and Somalia) to provide training, equipment, and logistical assistance.<sup>72</sup> Kenya has also received significant support in improving its own infrastructure, including building the Shimo la Tewa prison in Mombasa,<sup>73</sup> as well as funding to transport convicted pirates back to Somali prisons.<sup>74</sup>

This support also involves legal support. State counsel who handle piracy prosecutions in Kenya often receive legal support from the UNODC.<sup>75</sup> Without such logistical support, a country can quickly become overburdened by the number of potential piracy cases. For example, Kenya and Seychelles have both refused taking additional cases at various times because it put undue strain on the countries' justice systems, though the countries generally have resumed prosecution efforts after more funds are pledged to support the endeavor or after other states have exerted pressure on the countries.<sup>76</sup>

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71. Sandra L. Hodgkinson, *International Law in Crisis: Seeking the Best Prosecution Model for Somali Pirates*, 44 CASE W. RES. J. INT'L L. 303, 306–07 (2011).

72. See UNODC and Piracy, *supra* note 20.

73. See Gathii, *supra* note 58, at 434.

74. See UNODC and Piracy, *supra* note 20.

75. See Gathii, *supra* note 58, at 432.

76. See *id.* (describing a brief period of refusal in 2010 among concerns that Kenya was shouldering “the burden of prosecuting pirates alone” and giving rise to consideration of Tanzania and Seychelles to provide additional support for prosecution efforts); Mike Pflanz, *Royal Navy May Have to Set Pirates Free*, THE TELEGRAPH (Jan. 18, 2012), <http://www.telegraph.co.uk/news/uknews/defence/9023768/Royal-Navy-may-have-to-set-pirates-free.html> (describing a brief period in 2012 where both Kenya and Seychelles

Additionally, “Kenya’s fragile politics” and “troubled judicial system” lend instability to the regional court system.<sup>77</sup>

Such dependence on the regional court system can have harmful effects on the prosecution of piracy at the international level. It may prevent capturing states or states whose vessels or citizens have been attacked from taking responsibility for prosecuting pirates even where they may have a significant interest in seeing those pirates prosecuted and provide disincentives for serious reform and development of domestic piracy laws. This is most clearly demonstrated by the increased indictments by the United States and Germany in periods during which Kenya had refused to accept more pirates.<sup>78</sup> Even in periods where Kenyan courts may technically be open to accepting pirates, capturing and interested states may still need to be prepared to prosecute attackers themselves. Korea faced this situation in a recent case when cooperation with Kenya and Yemen in prosecuting the pirates “became difficult.”<sup>79</sup> Relying upon only a few states in prosecuting pirates prevents capturing states from developing their own laws in this area and gives a significant amount of leverage to regional tribunals in negotiating these arrangements.<sup>80</sup>

Another significant concern with the use of Kenyan courts involves human rights. While prisoners are guaranteed basic protections under Kenya’s international law obligations, prolonged detention has in some cases led to ill treatment of suspects including “lack of medical attention and food.”<sup>81</sup> Some scholars argue that such concerns should be given less attention and should not stand in the way of prosecution because pirates are entitled to a less expansive view of human rights.<sup>82</sup> However, this issue nonetheless raises addi-

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refused to take captives for prosecution because their justice systems were “swamped” and unwilling to try captives in Britain “because of the cost and the fear that pirates would later seek asylum”).

77. See Fantauzzi, *supra* note 45, at 382.

78. See Syring, *supra* note 19, at 449.

79. Seokwoo Lee & Young Kil Park, “*Republic of Korea v. Araye*,” No. 2011 Do 12927. *Supreme Court of Republic of Korea*, December 22, 2011, 106 AM. J. INT’L L. 630, 631 (2012).

80. See Guilfoyle, *supra* note 16, at 796.

81. See Gathii, *supra* note 58, at 432–33; see also Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mission to Kenya*, ¶¶ 22–32, U.N. Doc. A/HRC/11/2/Add.6 (May 26, 2009) (by Phillip Alson), available at <http://www.refworld.org/docid/4a3f56432.html> (describing reports of abuse in Kenyan courts).

82. In particular, concerns over a lack of evidence should not bar prosecutions as pirates often throw most evidence overboard upon capture. See Amitai Etzioni, *Somali*

tional concerns for international obligations for capturing states who transfer pirates to Kenya, “where torture in prisons is well-documented.”<sup>83</sup> As such, capturing states must still remain aware and supervise conditions in Kenya to avoid violating their international obligations against torture when transferring pirates to third parties.

There are also benefits to such a system; however, and to date, Kenya has been relatively successful in prosecuting pirates that other states with an interest in the attack are unwilling to prosecute themselves. The UNODC CPP reports success in accomplishing some of its main goals through the use of regional courts: fair and efficient trials in regional prosecuting states and humane and secure imprisonment in Somalia.<sup>84</sup> As of May 2012, Kenya had held 147 pirates, convicted sixty-seven, and acquitted seventeen as compared to capturing states such as the United States, which held twenty-eight and convicted eighteen.<sup>85</sup> Kenya also provides vital support to Somalia, which held 332 pirates and convicted 264.<sup>86</sup> Part of this success in transferring a large number of pirates to Kenya is geographical: Kenya’s proximity to Somalia not only “simplifies” the process of transporting evidence, witnesses, and the pirates themselves, but also allows for easier transfer back to Somali prisons should the pirates be convicted.<sup>87</sup> However, while such proximity is beneficial, it does not resolve all problems with extraterritorial prosecution of pirates as these pirates have faced significant delay in their prosecutions due to the distance of witnesses and Kenya’s “crowded court calendar,” which has led to prolonged pretrial detention.<sup>88</sup>

### C. Application to Piracy in Other Regions

As demonstrated above, while there are certainly benefits to using a regional tribunal system, there are also significant costs that

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*Pirates: An Expansive Interpretation of Human Rights*, 15 TEX. REV. L. & POL. 39, 40–41, 53 (2010) (describing an interpretation of human rights balancing rights and public safety).

83. Scott A. Vignos, *Pirate Trials: An Examination of the United States’ Non-Refoulement Duties Pursuant to the United Nations Convention Against Torture*, 17 U.C. DAVIS J. INT’L L. & POL’Y 193, 195 (2010).

84. See IMO Capacity-Building Conference to Counter Piracy off the Coast of Somalia, *Counter-Piracy Programme* (May 15, 2012), available at <http://www.imo.org/mediacentre/hottopics/piracy/documents/unodc.pdf>.

85. *Id.*

86. *Id.*

87. See Guilfoyle, *supra* note 16, at 790–91.

88. See Gathii, *supra* note 58, at 430–32.

make this system less attractive not only for use in prosecutions for piracy off the coast of Somalia, but also in the use of a regional tribunal system to support prosecution in other regions. Among these, the most significant factors are that these courts are geographically localized to provide only regional support, making it doubtful whether such courts could be used should the piracy problem shift elsewhere. They have a fixed capacity, and there is a continual need for international support and oversight in ensuring that prosecutions are properly carried out.

One of the major benefits of using Kenya as a regional court, as outlined above, is its close proximity to Somalia and the ease with which it can transfer witnesses, evidence, and convicted pirates between states, as compared to capturing or interested states, which are typically located farther from Somalia. However, once the piracy problem shifts, the geographic advantages of using such courts are outweighed by the significant disadvantages of their use (including human rights abuses). This means that efforts to improve and increase infrastructure, to develop new laws, and to gain significant experience in prosecuting pirates are likely to be non-transferrable to other regions as the problem shifts. While these courts may certainly continue to prosecute Somali pirates, and while the lessons learned in establishing the regional court can be applied to other regions, it is unlikely that pirates would be sent to Kenya or a similar court from another region, or even that Kenya would accept such prosecutions, as they have an even more limited nexus to the country than currently exists and in light of capacity concerns.<sup>89</sup>

In considering the use of regional courts in other areas as a support mechanism for piracy prosecution, the international community must consider the increased cost not only in time for such countries to develop their piracy laws to provide such assistance, but also in continued support for these countries in infrastructure and prosecution costs.<sup>90</sup> If piracy were to spread to other regions, multiple regional courts may need to be established and sustained at once to fully deal with the problem. As seen with piracy off the coast of Somalia, multiple regional courts have been established to deal with the problem in that region,<sup>91</sup> and if piracy in other regions rises to the levels seen in Somalia, the same might need to be done there. Thus,

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89. Kenya already faces significant burdens in prosecuting pirates and has a fixed capacity to do so. Given that Kenya has refused to take some cases even where it may have the capacity to do so (*see Lee & Park, supra* note 79), it is unlikely that the country would be willing to shoulder the burden put to it by other regions.

90. *Supra* Part I.B.

91. *See UNODC and Piracy, supra* note 20.

funding of such courts in every region where piracy occurs, including sunk costs of providing infrastructure and developing laws where piracy attacks are subsiding, is not likely to be sustainable for the international community if it wishes to effectively keep piracy levels low. While states in a region may be able to coordinate to handle these problems without substantial international financial support, the burden of prosecution without assistance from the international community may result in fewer cases being prosecuted overall if agreements with other countries are not signed.

Finally, it should not be assumed that because Kenya and other countries in the region of Somalia are willing to sign MOUs with capturing states that countries in other regions will be willing to enter similar agreements as well. There are significant political and cultural differences in regions where piracy attacks occur that could prevent such a regional court from being established at all.<sup>92</sup> Thus, while the prosecution model of using regional courts has shown some success in combating piracy off the coast of Somalia, it is not necessarily an available, or even desirable, solution to piracy in other regions.

### III. ASSESSING THE ADAPTABILITY AND SUSTAINABILITY OF PROSECUTION BY CAPTURING OR INTERESTED STATES

Domestic courts prosecuting on a regional basis are far from the only players in piracy prosecution, and today over 1,000 pirates remain in custody in twenty countries worldwide.<sup>93</sup> In addition to domestic courts such as Kenya, capturing states and interested states also play a role in prosecuting piracy. Capturing states are those that intercept pirates in the course of an attack and choose to prosecute the suspects rather than release them, while interested states are states that have some nexus to the assets that have been attacked (for example, the vessel may be a flagship of that country or the victims may be nationals of that country). Although the incentives for prosecution by a capturing or interested state may be quite different, and though they may face different jurisdictional issues, the advantages and disadvantages of using such states are largely the same in that they will

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92. See Barrios, *supra* note 32, at 151, 159–60 (noting that states in Southeast Asia may be too protective of their sovereignty to allow such involvement by a regional court).

93. See Thomas Kelly, Principal Deputy Assistant Sec'y, Bureau of Political-Military Affairs, Dep't of State, The U.S. Government's Approach to Countering Somali Piracy, Remarks at Combating Piracy Week (Oct. 25, 2012), available at <http://www.state.gov/t/pm/rls/rm/199929.htm>.

face similar costs in transporting suspects, similar issues should the suspects be found innocent, and similar uncertainties in interpreting outdated and seldom-used domestic laws.

Although in the past scholars have found that prosecution by the capturing state was typically “reserved for cases when the state is a victim,”<sup>94</sup> some states, including the United States, have recently become more active in this area.<sup>95</sup> Because of the recent increase in U.S. activity in piracy prosecution, this Note will take the United States as an example to examine the impact of prosecution by a capturing or interested state.

The U.S. approach to piracy has been multilateral in nature, supporting the establishment of the Contact Group on Piracy off the Coast of Somalia, prosecuting some pirates itself, and considering the establishment of a specialized piracy court.<sup>96</sup> As of May 2012, the United States held twenty-eight Somali pirates,<sup>97</sup> and has even begun prosecutions where little U.S. nexus to the attack exists.<sup>98</sup> This trend has shown an increase in responsibility of capturing states in bringing pirates to justice,<sup>99</sup> but has also demonstrated the difficulty in doing so. Additionally, despite these increased prosecutions, the United States still “refrains” from prosecuting many of the pirates that it captures because of “cost, time delays, court congestion, and lack of proximity of witnesses,”<sup>100</sup> and continues to view the support of re-

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94. See Hodgkinson, *supra* note 71, at 319.

95. See Lee & Park, *supra* note 79 (discussing Korea’s recent experience with piracy trials in *Republic of Korea v. Araye*); Chris Cottrell, *Germany: 10 Somali Pirates Convicted*, N.Y. TIMES (Oct. 19, 2012), available at [http://www.nytimes.com/2012/10/20/world/europe/germany-10-somali-pirates-convicted.html?\\_r=0](http://www.nytimes.com/2012/10/20/world/europe/germany-10-somali-pirates-convicted.html?_r=0) (discussing Germany’s recent conviction of ten Somali men in its first recent piracy trial); *Piracy Trial of Six Somalis Opens in Paris*, BBC NEWS (May 22, 2012), available at <http://www.bbc.co.uk/news/world-europe-18162503> (discussing the trial of Somali men accused of taking a French yacht hostage).

96. Andrew J. Shapiro, Assistant Sec’y, Bureau of Political-Military Affairs, Dep’t of State, U.S. Approaches to Counter-Piracy, Remarks to International Institute on Strategic Studies (Mar. 30, 2011), available at <http://www.state.gov/t/pm/rls/rm/159419.htm>.

97. See IMO, *supra* note 84. As of May 2012, the United States held twenty-eight pirates and had convicted seventeen with none released. This number is comparable to countries such as the Netherlands, which held twenty-nine and convicted ten.

98. See *United States v. Ali*, 885 F.Supp.2d 55, 59–60 (D.D.C. 2012), *overruled on other grounds by U.S. v. Ali*, 718 F.3d 929 (D.C. Cir. 2013).

99. The United States has recognized that “[g]oing forward . . . we can’t expect Somalia’s neighbors to host trial after trial and continue to absorb large numbers of imprisoned pirates.” See Kelly, *supra* note 93.

100. See Pines, *supra* note 32, at 114.

gional nations as crucial to piracy prosecution.<sup>101</sup>

### A. History and Evolution of U.S. Piracy Law

Although the first case of piracy was decided by U.S. courts in 1820 in *United States v. Smith*,<sup>102</sup> courts are still struggling with the issue of how to define piracy under U.S. law, which refers to piracy “as defined by the law of nations.”<sup>103</sup> This has led to significant controversy within U.S. courts as to what crimes suspected pirates may be prosecuted for with the reemergence of piracy off the coast of Somalia. Unlike Kenya, which has significantly revised its piracy laws to include the definition of piracy provided by UNCLOS,<sup>104</sup> it remains unclear to U.S. courts what exactly this definition is.

This has led to disputes in the Fourth Circuit over whether piracy contains a robbery requirement, with judges torn between looking to antiquated case law or more recent international treaties to try to determine what acts constitute piracy. In *United States v. Said*, the court interpreted the Supreme Court’s ruling in *United States v. Smith* to require robbery as a part of the definition of piracy, and dismissed the count because the pirates involved did not actually board or attempt to board the U.S.S. *Ashland*.<sup>105</sup> In a strikingly similar case involving an attack on the U.S.S. *Nicholas* just a few days before the attack on the U.S.S. *Ashland*, the court looked not only to prior U.S. cases involving piracy, but also to foreign law and treaties to find the defendants guilty under a more expansive definition of piracy.<sup>106</sup> While the Fourth Circuit resolved these cases in favor of the more expansive view,<sup>107</sup> the definition of piracy remains a problem in other

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101. See Kelly, *supra* note 93.

102. *United States v. Smith*, 18 U.S. 153 (1820); see also Fantauzzi, *supra* note 45, at 364–65.

103. 18 U.S.C. § 1651 (2006).

104. See *supra* Part I.A.

105. See *United States v. Said*, 757 F. Supp. 2d 554, 557, 559–60 (E.D. Va. 2010). The *Said* decision was heavily criticized by scholars, some calling it a “myopic view of the treatment of maritime piracy by U.S. law and policy.” Tara Helfman, *Marauders in the Courts, Why the Federal Courts Have Got the Problem of Maritime Piracy (Partly) Wrong*, 62 SYRACUSE L. REV. 53, 55 (2012).

106. See *United States v. Hasan*, 747 F. Supp. 2d 599, 616–20 (E.D. Va. 2010).

107. See *United States v. Dire*, 680 F.3d 446 (2012). Five pirates involved in the attack on the U.S.S. *Ashland* were ultimately found guilty of engaging in piracy and committing other offenses. Press Release, U.S. Att’y’s Office for Eastern Dist. of Va., *Somali Pirates Convicted for Attack on the U.S.S. Ashland* (Feb. 27, 2013), available at

circuits as the Supreme Court has recently declined to rule on this issue.<sup>108</sup>

The United States has also taken the opportunity to use prosecutions to hold negotiators accountable for their role in attacks. In August 2012, Mohammad Saaili Shibin was given twelve life sentences by U.S. courts for his role in negotiating ransom payments for four Americans aboard the *SV Quest* who were captured and killed in 2011.<sup>109</sup> In an interesting move due to the scant nexus to the United States in the case (apart from some American cargo on board), U.S. prosecutors are also seeking to hold Ali Mohamed Ali accountable for his role as a negotiator in the hostage taking of *CEC Future*, a Danish ship.<sup>110</sup> Again, unresolved issues in U.S. piracy law are posing an obstacle to prosecution in U.S. courts because it appears that Ali was only on the high seas for a short period of time before the ship was taken into territorial waters.<sup>111</sup> Again, the seemingly opposite conclusions reached by the Fourth Circuit in the *Shibin* case and by the D.C. Circuit in the *Ali* case may provide the Supreme Court with another opportunity to clarify the law in this area.

These cases demonstrate some of the difficulties of prosecuting through a capturing or interested state as opposed to a regional or specialized court where, as in the U.S. example, the law “is too antiquated to prosecute acts of pirates off the Somali coast adequately.”<sup>112</sup>

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<http://www.fbi.gov/newyork/press-releases/2013/somali-pirates-convicted-for-attack-of-the-uss-ashland>.

108. See Julia Zebley, *Supreme Court Rejects Maritime Piracy Petitions*, THE JURIST (Jan. 23, 2013, 9:42 AM), <http://jurist.org/paperchase/2013/01/supreme-court-rejects-maritime-piracy-petitions.php>. A recent case in the Ninth Circuit that labeled whale conservationists pirates may bring the issue before the Supreme Court again regarding the meaning of “private ends” in the definition of piracy. See *Sea Shepherd Conservation Society*, 708 F.3d 1099, 1101 (9th Cir. 2013).

109. *Somali Pirate Negotiator Given 12 Life Sentences in U.S.*, BBC NEWS (Aug. 13, 2012, 9:53 PM), <http://www.bbc.co.uk/news/world-us-canada-19251753>.

110. Press Release, U.S. Dept. of Justice, *Somali Hostage Negotiator Arrested and Charged with Piracy in Attack on Merchant Ship* (Apr. 21, 2011), available at <http://www.justice.gov/usao/dc/news/2011/apr/11-156.pdf>.

111. See *United States v. Ali*, 885 F.Supp.2d 55, 59–60 (D.D.C. 2012), *overruled on other grounds by U.S. v. Ali*, 718 F.3d 929 (D.C. Cir. 2013).

112. Lavrisha, *supra* note 62, at 281.



*B. Advantages and Disadvantages of Prosecution by the Capturing or Interested States*

Although prosecution by capturing and interested states has been heralded by scholars as a major deterrent to the piracy problem,<sup>113</sup> such systems also have their downfalls, the most significant of which may be the reluctance of such states to actually prosecute pirates and the lack of international measures holding such states accountable for taking on this responsibility. As discussed above, it is very difficult for a state to successfully prosecute pirates where that state does not have clear, updated piracy laws. Uncertainty in the status of the law lends additional costs when considering the use of catch and release policies by capturing states—particularly where it is unclear which state would ultimately be responsible for prosecution. Because the cost of transporting suspects and witnesses is very high and states fear that released pirates will claim asylum,<sup>114</sup> it is difficult for states to justify prosecuting pirates where they are unsure of what chance of success they will have. Differing legal structures may mean that states are not equipped with the laws they need to successfully prosecute pirates, and the U.N. has continued to stress the importance of developing national laws to combat piracy effectively.<sup>115</sup>

As with the uncertainty surrounding Kenya's jurisdiction over captured pirates, jurisdiction over pirates is also an obstacle for capturing states. The *Ali* case in the United States demonstrates the continued uncertainty in whether the United States can prosecute crimes, which primarily occurred in territorial waters.<sup>116</sup> However, because naval forces "enjoy clear authority" through UNCLOS and international law, as well as through Security Council resolutions authoriz-

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113. See Dutton, *supra* note 10, at 1133–39.

114. See *supra* Part I.

115. See S.C. Res. 2077, *supra* note 1, at 3 ("Noting with concern that the continuing limited capacity and domestic legislation to facilitate the custody and prosecution of suspected pirates after their capture has hindered more robust international action against the pirates off the coast of Somalia, too often has led to pirates being released without facing justice, regardless of whether there is sufficient evidence to support prosecution and reiterating that, consistent with the provisions of the Convention concerning the repression of piracy, the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ("SUA Convention") provides for parties to create criminal offences, establish jurisdiction, and accept delivery of persons responsible for or suspected of seizing or exercising control over a ship by force or threat thereof or any other form of intimidation.") (emphasis in original).

116. See *Ali*, 885 F.Supp.2d 55.

ing entry into Somalia's territorial waters,<sup>117</sup> it can be argued that the universal jurisdiction attributed by some definitions of piracy may also apply to Somalia's territorial waters. This is a difficult argument to make however because the UNCLOS definition of piracy includes a "high seas" requirement,<sup>118</sup> although whether piracy facilitators are included under this requirement is also disputed.<sup>119</sup>

While there are numerous difficulties with the system, prosecution by the capturing or interested state provides numerous benefits over other systems. First, for capturing states, the state may pick and choose which cases to prosecute, which pirates to release, and which pirates to attempt to bring to a third party state. This allows capturing states to have the flexibility to use new or creative prosecution strategies to prosecute pirates or even higher-up members assisting piracy—which could ultimately be key to eliminating piracy within other regions.<sup>120</sup> Though these cases often lead to a back and forth over how U.S. piracy laws should be interpreted and how piracy under the law of nations should be defined, as demonstrated by the *Said* and *Hasan* cases and in the ongoing *Ali* case, development of these definitions makes piracy law clearer, even if it is done through cases that may have little nexus to the United States. Development of these definitions and clarification of the law is an important step towards ensuring that the United States can establish its capability to effectively prosecute pirates now and in the future.

Another consideration for the use of capturing or interested state courts is the cost of such courts. While transporting suspects, witnesses, and evidence further away may come with additional costs, the infrastructure of a more spread out system is burdened less than that of Kenya. As discussed previously, the use of third party states requires substantial international assistance and oversight. Capturing and interested states, by contrast, are more self-sustaining

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117. Roach, *supra* note 3, at 402.

118. United Nations Convention on the Law of the Sea art. 101(a), Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]; see Robert S. Jeffrey, *An Efficient Solution in a Time of Economic Hardship: The Right to Keep and Bear Arms in Self-Defense Against Pirates*, 41 J. MAR. L. & COM. 507, 521 (2010) (describing the high seas requirement as "the most problematic in the battle against contemporary piracy").

119. See Jon Bellish, *A High Seas Requirement for Pirate Facilitators Under UNCLOS?*, COMMUNIS HOSTIS OMNIUM (Aug. 18, 2012), <http://piracy-law.com/2012/08/18/a-high-seas-requirement-for-pirate-facilitators-under-unclos/>.

120. Damien McElroy, *'Al Capone' Strategy to Defeat Piracy*, THE TELEGRAPH (Oct. 25, 2012), <http://www.telegraph.co.uk/news/worldnews/piracy/9633408/Al-Capone-strategy-to-defeat-piracy.html> (describing a State Department strategy to target "a small group of very wealthy men" who "were instrumental in the growth and spread of Somalian piracy").

and typically will not require this oversight. One potential solution to overcome the direct cost to capturing states would be to establish international support for transporting suspects.

### C. Application to Piracy in Other Regions

One of the greatest benefits of the use of capturing or interested states to prosecute pirates is that this system is readily adaptable to prosecuting piracy in other regions. Although many capturing or interested states see themselves in a more supportive role to prevent overburdening of regional states in the Somalia context,<sup>121</sup> it is possible for these states to step into a greater role in preventing the increase of piracy in other areas while attack levels remain low. Additionally, because capturing or interested states played a greater role in pursuing prosecutions at times when regional courts were unavailable (as occurred when Kenya temporarily stopped accepting captured pirates and in the *Araye* case where Kenya refused to take suspected pirates of taking a Korean ship hostage) the use of capturing states for prosecution has the potential to increase where no alternative regional court is available.<sup>122</sup>

On the opposite side, however, a lack of regional courts in other areas combating piracy may also have the potential to increase the use of catch and release tactics in instances where the capturing state has no direct nexus to the crime, or where the capturing states' laws do not permit prosecution.<sup>123</sup> If a state captures pirates engaged in an attack against a vessel or citizens of another state, the capturing state would likely need to make a rapid determination of whether the interested state would ultimately pursue prosecution. Under a system with a regional court, the capturing state could later transfer the suspected pirates to the regional court should an interested state refuse to

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121. See Kelly, *supra* note 93.

122. See Syring, *supra* note 19, at 449 (discussing increased U.S. and German prosecution of pirates where Kenya refused to accept more suspects); Lee & Park, *supra* note 79, at 633–34 (indicating that the Korean Government recognized the downsides of catch and release practices “and the passive attitude of the Kenyan government regarding the trials of pirates captured by foreign states”).

123. For example, Danish law requires that piracy be against Danish vessels. This forced the Danish military to release ten pirates in 2008 rather than pursuing prosecution because no other nation was willing to prosecute the pirates and the attacked ship was not a Danish vessel. See Amber Ramsey, *Barriers to Prosecution: The Problem of Piracy*, CIVIL-MILITARY FUSION CENTER (Sept. 2011), available at [https://www.cimicweb.org/Documents/CFC%20Anti-Piracy%20Thematic%20Papers/CFC\\_Anti-Piracy\\_Report\\_Prosecution\\_Aug\\_2011\\_FINAL.pdf](https://www.cimicweb.org/Documents/CFC%20Anti-Piracy%20Thematic%20Papers/CFC_Anti-Piracy_Report_Prosecution_Aug_2011_FINAL.pdf).

take custody of the perpetrators. Without a regional court, however, the capturing state may find itself held accountable for the pirates it has captured and may thus be more likely to allow the pirates to go free. This would have a detrimental effect on combating piracy overall, as prosecution is recognized as a necessary tool for deterring piracy.<sup>124</sup> Although the costs for containing and deterring piracy are high,<sup>125</sup> the U.N. has recognized that areas in which the problem is not being addressed will face a surge in attacks.<sup>126</sup>

Although, as the American example demonstrates, deciphering and reforming a state's piracy law can pose major challenges to prosecution by the capturing state, the development of these laws has a flexible and lasting impact on piracy prosecution regardless of geographic location. Therefore, unlike in the use of regional courts where the experience gained by courts may be lost if the piracy problem shifts, the experience of capturing or interested states in prosecuting piracy will move with the problem to ensure that each state can adequately protect its interests.

Additionally, use of prosecution by capturing states can more readily be applied to differing political climates. As noted, some regions may be less accepting of international interference with prosecuting pirates caught near their territorial waters.<sup>127</sup> Use of prosecution by the capturing state is a flexible support measure that can be used when a region needs more assistance in keeping piracy levels low and diminished when a region can contain the problem on its own and has the resources to support prosecution. Also, unlike with the resources that would need to be expended to increase infrastructure and capacity in a regional or international tribunal system, prosecution by capturing states can more flexibly handle changes in attack levels. These states will gain the experience of prosecuting piracy while spreading the burden of such prosecutions among many states, with little funds needed to sustain tribunal programs in periods of low attack numbers.

Finally, it should be noted that interested states will most like-

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124. See International Crimes, *supra* note 6, at 76 (noting that “[e]ffective legal prosecution is vital” to deterring piracy and that the United States urges “all states to share the burden of prosecuting suspected pirates in their national courts, and incarcerating those convicted”).

125. Ben West, *The Expensive, Diminishing Threat of Somali Piracy*, STRATFOR (Nov. 8, 2012, 4:00 AM), <http://www.stratfor.com/weekly/expensive-diminishing-threat-somali-piracy>.

126. See S.C. Res 2039, *supra* note 35.

127. Barrios, *supra* note 32, at 159–62 (noting that states in Southeast Asia may be too protective of their sovereignty to allow such involvement by a regional court).

ly need to play a much greater role in other regions than capturing states. While the U.N. has noted “the need for international assistance as part of a comprehensive strategy to support national and regional efforts” to deal with piracy in other regions, in particular the Gulf of Guinea,<sup>128</sup> the regional differences between new areas where piracy emerges and off the coast of Somalia have different implications for the potential international response to the problem. Where prosecution of attacks occurring off the coast of Somalia sometimes results from prosecution by a capturing state involved in naval operations in the area, this approach will most likely not work in other regions where international naval presence is unwelcome. The International Maritime Bureau (IMB) and the International Crisis Group (ICG) have suggested that countries in this region build their own maritime security strategy to fight piracy, which would result in them capturing pirates themselves.<sup>129</sup> This security effort can be supported by interested states by taking on some of the burdens of prosecution where the capturing state allows it. Thus, while scholars have advocated for capturing states to take prosecution into their own hands in the Somali context,<sup>130</sup> in other regions where such international naval response may not be present, the states with greater nexus to the crime, including “flag States and States of nationality of victims or of perpetrators of acts of piracy or armed robbery at sea,” will need to play a greater role in prosecuting alleged pirates.<sup>131</sup>

#### IV. ASSESSING THE ADAPTABILITY AND SUSTAINABILITY OF A SPECIALIZED PIRACY TRIBUNAL

An assessment of flexible options for prosecuting piracy would not be complete without a brief look at the potential use of a specialized piracy tribunal. While such a method is not currently being used, it has been considered as a possible solution by internation-

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128. See S.C. Res. 2018, U.N. Doc. S/RES/2018 (Oct. 31, 2011).

129. See Breuer & Kaufmann, *supra* note 5 (quoting Thierry Vircoulon from the ICG that “[t]he security response in Gulf of Guinea should be the sole responsibility of the countries themselves. They are trying to improve their capacities, they have to improve their regional cooperation”).

130. See Dutton, *supra* note 10, at 1115.

131. Press Release, Security Council, Condemning Acts of Piracy, Armed Robbery Off Gulf of Guinea States, Security Council Calls on Regional Bodies for Strong Action Against Perpetrators, U.N. Press Release SC/10430 (Oct. 31, 2011), available at <http://www.un.org/News/Press/docs/2011/sc10430.doc.htm>.

al organizations, individual states, and legal scholars.

### *A. International Support for a Specialized Piracy Tribunal*

Support for a specialized piracy tribunal grew as the piracy problem off the coast of Somalia increased. While the U.N. has continued supporting the consideration of an international tribunal despite a decrease in attacks in that area, it is unclear what impact this current decrease in attacks in this region will have on support for such a tribunal.

Initially, calls for a specialized tribunal were met with opposition as piracy was not seen as “a sufficiently serious threat such as to endanger international peace and security” to warrant such formalized international support.<sup>132</sup> Gradually, however, as the cost of piracy grew so did support for a specialized tribunal. The Lang Report, issued to the Security Council in 2011, noted numerous judicial obstacles to countering piracy and recommended, among other economic and security measures, the establishment of specialized courts in Puntland, Somaliland, and Tanzania.<sup>133</sup> The United States also alluded to its potential support for such a measure, stating that in light of increasing attacks, the United States was “willing to consider pursuing some creative and innovative ways to go beyond ordinary national prosecutions and enhance our ability to prosecute and incarcerate pirates in a timely and cost-effective manner.”<sup>134</sup> While these suggestions came at a time when piracy in Somalia was the primary focus of counter-piracy efforts, the U.N. has continued to support the establishment of such a specialized tribunal despite decreases in attacks off the coast of Somalia.<sup>135</sup>

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132. Syring, *supra* note 19, at 448.

133. Special Adviser to the U.N. Secretary-General, *Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia, transmitted by Note of the Secretary-General*, U.N. Doc. S/2011/30, 2–3 (Jan. 24, 2011) (by Jack Lang), available at <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Somalia%20S%202011%2030.pdf>.

134. International Crimes, *supra* note 6, at 78. See also Shapiro, *supra* note 96 (The State Department has “suggested consideration of a specialized piracy court or chamber to be established in one or more regional states . . . [that would] combine international and domestic elements.”).

135. See Press Release, Sec. Council, Unremitting Piracy Off Somalia’s Coast Prompt Security Council to Renew ‘Authorizations’ for International Action for Another Year, U.N. Press Release SC/10824 (Nov. 21, 2012), available at: <http://www.un.orgNews/Press/docs/2012/sc10824.doc.htm> (discussing the unanimous adoption of resolution 2077 (2012) and noting that “the Council reiterated its decision to continue its consideration, as a matter of

### *B. Advantages and Disadvantages of Specialized Tribunals*

Like the prosecution models discussed above, specialized tribunals present their own set of advantages and disadvantages. While such tribunals may provide a more effective method of burden sharing, they are likely to be more costly, less efficient, and less flexible to fluctuating levels of piracy attacks than other models.

One major concern with the implementation of a specialized tribunal is that it would be costly. International lawyers and judges are expensive, and some estimates put the cost of a tribunal at approximately \$25 million for a three-year period.<sup>136</sup> A specialized tribunal system would also face many of the infrastructure problems that regional courts face as they would not have specified prison facilities, causing additional logistical concerns with state cooperation for relocation and housing of convicted criminals.<sup>137</sup> It should be noted however that when comparing the cost of establishing the tribunal to the cost of piracy, a tribunal may end up being a less costly solution.<sup>138</sup> However, given that a tribunal will be only a partial deterrent and is unlikely to completely eliminate piracy, these costs are difficult to compare.

Another downfall of the specialized tribunal system is that it would take “a number of years” to establish.<sup>139</sup> As piracy levels rise and fall, it is difficult to predict what level of support for such a tribunal would be necessary, or even if such a court will be needed by that time—which would significantly impact capacity as demonstrated in the Kenyan example. Thus, regional courts and capturing states may still need to play a supportive role should the number of attacks exceed the court’s capacity. In light of decreasing piracy attacks off the coast of Somalia, continued monetary support over an indefinite period of time could diminish international support for such a tribunal.

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urgency, of the establishment of specialized anti-piracy courts in Somalia and other States in the region with substantial international participation and/or support.”).

136. See Hodgkinson, *supra* note 71, at 311.

137. See Tuerk, *supra* note 14, at 40–41.

138. See Bento, *supra* note 49, at 443–44 (“Given the high cost of piracy, reaching into the billions, including increasing ransom payments, it would be cheaper to ‘pool funds for a common cause once than to continue to suffer huge losses every year.’”) (citation omitted); Timothy Besley, Thimo Fetzer & Hannes Mueller, *The Welfare Cost of Lawlessness: Evidence from Somali Piracy*, UFAE and IAE Working Papers at 2, available at [http://www.dartmouth.edu/~neudc2012/docs/paper\\_121.pdf](http://www.dartmouth.edu/~neudc2012/docs/paper_121.pdf) (finding that it costs \$630 million annually to transfer about \$120 million in ransom payments to pirates).

139. See Tuerk, *supra* note 14, at 40.

The most significant benefit of a specialized tribunal would be in having increased uniformity in piracy law and increased efficiency in one court establishing the law in this area.<sup>140</sup> As noted previously, varying piracy laws and dispute over where international law on piracy currently stands have created significant disruptions in the ability of states to prosecute pirates. Additionally, the uniformity of international cooperation for such a tribunal can assist in absorbing and spreading costs, and gaining additional legal capacity and expertise in piracy law.<sup>141</sup>

### *C. Flexible Application to Piracy in Other Regions*

While a specialized tribunal could be applicable to piracy in other regions, one criticism of the use of specialized tribunals, particularly with the Lang proposal, is that it does not have a “spillover effect for rule of law,” and does not “integrate enough with the mainstream justice system to have the intended benefit.”<sup>142</sup> Thus, although in other systems, this Note has discussed the drawbacks to the systems that no longer are dealing with piracy compared to the cost of restructuring their judicial systems, there is a benefit to those countries in that the increased infrastructure and judicial reforms put into place for piracy can help develop the judicial system more generally.<sup>143</sup> Thus while the establishment of a specialized tribunal may provide “lessons learned” for future tribunals,<sup>144</sup> it will not have lasting effects on the legal system of any particular country.

The cost concerns of using a specialized tribunal are compounded by the fact that the process can often be long and drawn out, indeed such tribunals “never seem to end on time,”<sup>145</sup> and the piracy problem is not one that will come to a definitive end, adding to the cost of maintaining such a system. Unlike with tribunals for trying war criminals, captured pirates or financiers may simply be replaced

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140. See Dutton, *supra* note 6, at 225–30.

141. See *id.*

142. See Hodgkinson, *supra* note 71, at 311–12.

143. For example, after addressing problems resolving piracy disputes, Kenyan courts have a stronger basis for relying on international law as part of Kenyan law in their decisions. See Gathii, *supra* note 58, at 418.

144. Although it should be noted that tribunals are typically reserved for more serious crimes and not for “common criminals like pirates.” Tuerk, *supra* note 14, at 40. *But see* Azubuiké, *supra* note 54, at 55 (noting that the failure of the ICC to deal with piracy is a “gaping omission”).

145. See Hodgkinson, *supra* note 71, at 311.



by other individuals.<sup>146</sup> As the problem of piracy shifts, proposals which contemplate the establishment of such courts within Puntland and Somalia (as described by the Lang Report) are likely to result in additional transportation costs for suspects and witnesses, further deterring prosecution.<sup>147</sup> Previously discussed cultural and political issues may also come into play as piracy expands to other areas.

Thus, a specialized tribunal may actually incur greater costs than other systems because it does not enhance the general legal system of the country in which it is created, is geographically fixed and thus will incur greater costs as the problem of piracy shifts to other regions, will require international support for establishing the court, and will incur costs of maintaining the court over an indeterminate amount of time as the threat of piracy ebbs and flows.

## V. AN ADAPTABLE SOLUTION

Pirates will continue attacking ships as long as piracy remains profitable. As long as pirates continue their attacks, prosecution will be one of many countermeasures used to deter attacks by making piracy a riskier enterprise to engage in. If current prosecution trends continue, the burden of undertaking prosecution will shift with the problem of piracy rather than spreading among the states that are harmed by piracy.

In comparing the flexible application of the three most common models currently used and proposed for piracy prosecutions (by regional courts, by the capturing or interested state, and by specialized piracy tribunal), it is clear that states with a nexus to pirate attacks must still play a vital role in prosecuting piracy. This solution can be used by itself or by complementing prosecution in local courts should those courts wish to be involved. This increased responsibility of interested states will provide a more adaptable and sustainable solution to deterring piracy as the problem shifts away from Somalia and towards other regions because it can be developed in a manner to make prosecution less burdensome on the prosecuting state and share the burden of prosecution among all states impacted by piracy. Prosecution by an international piracy tribunal lacks the flexibility needed to efficiently deal with this problem due to its high maintenance costs regardless of the level of ongoing prosecutions and because it would also incur costs for transportation and incarceration of suspects.

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146. See Guilfoyle, *supra* note 16, at 769 (noting that there is a “seemingly inexhaustible supply of willing entrants to the pirate labour market”) (footnote omitted).

147. See *supra* note 133, at 3.

However, if interested states are unable to be held accountable to this model then this may lend increased support for a specialized tribunal, despite the increased costs involved.

While there are significant benefits to the use of regional courts and specialized tribunals, particularly given the reluctance of capturing states to prosecute, the continued expenses and political concerns with such courts make them a less desirable solution when faced with a piracy threat spread across multiple regions. Therefore, responsibility from states in the region with the capacity to prosecute pirates stemming from their own waters,<sup>148</sup> along with enhanced prosecution support from the state with the greatest nexus to the vessel provides a more adaptable and sustainable solution that could be applied to nearly any region where piracy may resurge without significant maintenance costs in times where piracy decreases. As discussed previously, this will mean that the burden of prosecution will be more evenly spread across states with the greatest interest in deterring piracy and will assist in alleviating this burden from states in the region that may instead focus on other important counter-piracy measures such as security or economic measures.

Piracy is an international problem that requires an international solution—but that solution does not necessarily have to stem from an impractical and inflexible form of institutionalized support such as a specialized tribunal. Prosecution by national and regional courts remains an important factor, not just as “a critical stopgap measure”<sup>149</sup> but rather an essential tool to ensuring a more developed and adaptable system of piracy prosecution. However, while involvement by local courts is certainly an important and necessary part of a viable prosecution strategy, the current model of dependence on regional courts for the majority of attacks is unsustainable for a few reasons. First, when piracy shifts to a new region, that region will have a lag period during which to develop its infrastructure and legal system to handle piracy.<sup>150</sup> This has been demonstrated by Kenya, which is still working to develop its piracy laws and domestic infrastructure to handle increased prosecutions. Increased participa-

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148. Nations in the Gulf of Guinea have begun doing this through coordination of the Economic Community of West African States (ECOWAS), the Economic Community of Central African States (ECCAS), and the Gulf of Guinea Commission (GGC) to develop a comprehensive strategy to develop laws to criminalize piracy, to create operational capabilities, and to implement international agreements concerning piracy. See S.C. Res. 2018, *supra* note 128, ¶ 3.

149. Hodgkinson, *supra* note 71, at 314.

150. See *id.*, Part I (discussing the evolution of Kenya’s piracy laws and support infrastructure).

tion by interested states would ensure that piracy prosecution remains a viable countermeasure during any such “transition period” by providing a support mechanism to ensure that regional states are not overburdened. Second, more participation by interested states in prosecuting piracy would allow regional states to have more freedom to focus on solving the root causes of piracy, such as making sure the conditions fostering piracy are improved and providing effective security in domestic waters.<sup>151</sup> Now that piracy levels have fallen, Somalia has recently developed new tactics in this area by offering partial amnesty and offering alternative careers to young men involved in piracy.<sup>152</sup> Third, as Kenya and Seychelles demonstrated, even when a country may take on prosecution on a voluntary basis it can quickly become overburdened when levels of attacks increase.<sup>153</sup> Continued international participation will ensure the distribution of cases where attack levels increase. The lack of international military presence in other regions will be of particular importance in sharing this burden—if the enforcing regional states are also responsible for the majority of prosecutions, this may lead to an even stronger incentive to adopt the catch and release policies that have been adopted in Somalia. Finally, participation by interested states would be more efficient not only in burden-sharing, but also in avoiding high costs of supporting an international tribunal on the issue.<sup>154</sup>

While the proposed prosecution model reduces burdens on regional states, it also has significant benefits for interested states participating in prosecutions. Recent increases in U.S. prosecution in this area have demonstrated that, particularly where levels of piracy begin to decrease to more manageable levels, prosecution by interested states serves as a vital complement to a more localized court system. This system allows more countries to gain experience in piracy prosecution should the problem outgrow the capacity of regional

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151. Although this aspect of counter-piracy could also potentially be partially shifted to private companies for attacks against individual ships, it is unlikely that security measures such as patrolling the area would be taken on by such private companies. See Spencer Ackerman, *This Tech Entrepreneur Is About to Launch the Blackwater of the High Seas*, WIRED (Jan. 23, 2013), <http://www.wired.com/dangerroom/2013/01/private-navy/>. Such security measures may also not be as efficient as finding a solution that would benefit all traders. See Besley et al., *supra* note 138, at 3.

152. *Somalia's President Wants Partial Amnesty for Boy Pirates*, CNN (Feb. 28, 2013), <http://www.cnn.com/2013/02/28/world/africa/somalia-boy-pirates-amnesty/index.html>.

153. See Pflanz, *supra* note 76.

154. Some estimates put the cost of a tribunal at approximately \$25 million for a three-year period, and the length of such a tribunal would be indeterminate. See Hodgkinson, *supra* note 71, at 311–12.

courts to take more pirates, allowing states to retain the right to prosecute under their own laws when they have a significant nexus to the crime, retaining a certain amount of uncertainty in sentencing as an additional deterrent to pirates, allowing states to have the flexibility to experiment with aggressive prosecution tactics that may reach higher-ups in piracy schemes such as financiers and negotiators, and allowing states to have the flexibility to try pirates from various regions as the problem shifts and as local courts become more or less burdened. The use of prosecution by the country with the greatest nexus to the attack, supplemented by prosecution by the capturing state and by states in the region is a more flexible, efficient, and affordable solution to the problem of piracy than spending resources on formal tribunals for prosecutions. The focus should therefore be on encouraging states to share the burden in enforcing this deterrence measure.

The most significant challenge to prosecution by the state with the greatest nexus or the capturing state is overcoming the reluctance of such states to prosecute piracy. Unfortunately, piracy prosecution has the potential to be a free-rider problem with some states playing a larger role than others. While overcoming this disincentive to prosecute would be difficult, and would require significant coordination between international organizations, there are a few ways to make piracy prosecution less of a burden on states and hopefully encourage such states to take action without formalized international obligations. The first would be to provide a more uniform international framework for piracy laws. Although development of piracy law has the benefit of helping to develop legal systems,<sup>155</sup> antiquated and unclear piracy laws still pose a problem for capturing states in assessing the likelihood of prosecution and whether to prosecute or release pirates they have captured. Therefore, standardized piracy legislation, such as through the creation of a model law, could prove to be a useful tool to increase the flexibility over which countries can prosecute piracy and to resolve disputes over where international law stands on the issue.<sup>156</sup> As seen with both the Kenyan and American experiences, development of clear national laws for the effective prosecution of pirates can take a number of years and significant resources to resolve issues arising from antiquated laws. A modernized model law for piracy could be a good starting point for countries in clarifying major issues in piracy prosecution. Another method of increasing the flexibility of both regional courts and other courts and to

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155. Kenyan courts, for example, have increasingly recognized international law through the use of such law in the piracy context. See Gathii, *supra* note 58, at 418.

156. See Syring, *supra* note 19, at 453–55; Bento, *supra* note 49, at 400.

make such prosecution less burdensome would be to use technology to help reduce costs associated with trying pirates in a distant court. Two-way videoconferencing technology could be used in any courtroom around the world and reduce the need for witnesses to travel to where the trial is being held. Because one of the reasons pirates are released rather than prosecuted includes the expense of transporting witnesses, such technology could assist in alleviating these costs.<sup>157</sup> Alternatively, if interested states remain unwilling to take on the prosecution burden, international organizations can explore other burden-shifting enforcement solutions that would place responsibility for funding such countermeasures on a pro-rata basis for the countries whose vessels or crews are most frequently involved in attacks.<sup>158</sup> If none of these scenarios encourage burden sharing or hold states accountable, then ultimately a specialized tribunal or similar formalized system may need to be reconsidered.

Unfortunately, while prosecution assistance can help states in these new areas bear the burden of piracy in the absence of international naval support, the heart of the problems encouraging and enabling piracy within a country must still be addressed by local governments: unemployment, high costs of living, and corruption of public officials.<sup>159</sup>

## CONCLUSION

While the problem of piracy is shifting, it is not one that is likely to disappear altogether. It is crucial that the international community continue a multifaceted approach to this issue, of which prosecution of pirates and financiers and the development of domestic and international law play vital parts. This Note has presented an examination of the application of three potential prosecution models to deal with the shifting problem of piracy. While all of the prosecution models presented in this Note are costly, and while they spread the burdens on the international community differently, it is important to remember that the benefits of reducing piracy have global impacts and therefore the goal should be to gain these global benefits

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157. See generally Yvonne M. Dutton, *Virtual Witness Confrontation in Criminal Cases: A Proposal to Use Videoconferencing Technology in Maritime Piracy Trials*, 45 VAND. J. TRANSNAT'L L. 1283 (2012).

158. This could be based on U.S. suggestions to have countries that often serve as flagships, such as Panama and the Bahamas, prosecute pirates captured attacking their ships. See McElroy, *supra* note 120.

159. See Breuer & Kaufmann, *supra* note 5.

in the most effective manner possible.

However, any of these prosecution models by themselves or without reform are inefficient in fighting piracy across multiple regions. Increased international involvement is needed to shift responsibility for prosecuting pirates to states that are harmed most by piracy. This allocation of prosecutorial resources to interested states will allow for increased flexibility as piracy shifts from region to region, and as piracy levels rise and fall. By encouraging increased international involvement in prosecutions as attack levels remain low, the United States and other nations can avoid the damaging effects of increased levels of piracy on international trade and national security while also avoiding the consequences of piracy prosecutions rising to unmanageable levels that become an even larger burden on multiple states.

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