

AGORA: PIRACY PROSECUTIONS

COUNTERING PIRACY OFF SOMALIA: INTERNATIONAL LAW AND INTERNATIONAL INSTITUTIONS

*By J. Ashley Roach**

Dealing with pirates off the coast of Somalia in the Gulf of Aden and the western Indian Ocean over the past two-plus years has highlighted the international law applicable to countering piracy at sea and the role of international institutions in that effort. This essay seeks to illuminate related issues with a view to improving counterpiracy action.

The fundamentals of the international legal regime governing piracy set out in the law of the sea, and the necessary components of national criminal law on piracy, need to be well understood if the international community's actions to suppress piracy off Somalia are to be effective. Detailed treatment of the international law of piracy may be found elsewhere and need not be repeated here.¹ Nor does this essay address the fundamental causes of these incidents of piracy, efforts to remedy them, and the situation ashore in Somalia; they, too, are dealt with elsewhere.²

Specific issues in the international law of piracy and related international criminal law instruments as they affect the counterpiracy effort off Somalia are first examined in this essay. The second part deals with the role international institutions have played in that effort. The essay concludes with a brief discussion on the role of national legislation in suppressing piracy.

I. INTERNATIONAL LAW FOR THE SUPPRESSION OF PIRACY

As the international community came to grips with the increase in incidents of piracy off the coast of Somalia, several issues regarding the international law of piracy emerged. They relate to geographic location, the scope of punishable actions, and the rights and duties of states in apprehending and trying suspected pirates.

* Captain, Judge Advocate General's Corps, United States Navy (retired); Office of the Legal Adviser, U.S. Department of State (retired). The views expressed in this essay are those of the author and are not intended to reflect the policies or position of the United States government or any of its constituent parts.

¹ The most comprehensive treatment of the law of piracy is ALFRED P. RUBIN, *THE LAW OF PIRACY* (2d ed. 1998) (originally published as U.S. Naval War College, *International Law Studies*, Vol. 63, 1988, available at <http://www.usnwc.edu/Research-Gaming/International-Law.aspx>); see also Ivan Shearer, *Piracy*, in *THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* (R. Wolfrum ed., online ed. June 2008).

² See, e.g., Report of the Secretary-General on the Situation in Somalia, UN Doc. S/2009/684* (Jan. 8, 2010) (and previous reports of the UN secretary-general on the situation in Somalia); International Expert Group on Piracy off the Somali Coast, *Piracy off the Somali Coast* (Workshop Commissioned by the Special Representative of the Secretary General of the UN to Somalia Ambassador Ahmedou Ould-Abdallah, Nov. 21, 2008), at http://www.imcsnet.org/imcs/docs/somalia_piracy_intl_experts_report_consolidated.pdf. The author participated in the workshop and in drafting its report.

Geographic Area of Application

The customary and conventional international law of piracy provides that piracy as such can occur only on the high seas and not in areas subject to state sovereignty.³ In the long period when international law distinguished only between the waters of the high seas, on the one hand, and the territorial sea and internal waters of a state, on the other, the law of piracy applied only to the former.⁴ The modern law of the sea, reflected in the United Nations Convention on the Law of the Sea of 1982 (LOS Convention),⁵ in addition to accepting the expansion of the maximum breadth of the territorial sea to 12 nautical miles, recognized new maritime zones in the water column, notably archipelagic waters, which substituted a regime of territorial sovereignty for areas that were previously high seas, and the exclusive economic zone (EEZ), which substantially altered the classic high seas regime applicable seaward of the territorial sea, especially with regard to natural resources. The LOS Convention accommodated, in differing ways, the common interests of all states in law and order at sea and in the development of the legal regimes governing the new zones, which were formerly significant parts of the classic high seas but are now subject to the sovereignty or jurisdiction of coastal states.

With regard to piracy, the LOS Convention expressly preserves and incorporates by reference into Part V on the EEZ much of the regime of the high seas set forth in Part VI, including the provisions dealing with piracy.⁶ There can be no question that the Convention applies the international law of piracy in the EEZ.⁷

Article 58(3) of the Convention provides:

In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.

The “due regard” duty is an accommodation-of-use provision that applies to all rights and freedoms of foreign states in the EEZ; it is the complement to the duty of the coastal state in

³ Piracy can also occur “in a place outside the jurisdiction of any State.” The meaning of this phrase is discussed in note 33 *infra*.

⁴ Convention on the High Seas, Art. 15, Apr. 29, 1958, 13 UST 2312, 450 UNTS 82; Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 UST 1606, 516 UNTS 205.

⁵ United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 UNTS 397, available at <http://www.un.org/Depts/los/index.htm> [hereinafter LOS Convention].

⁶ Article 58(2) of the LOS Convention, *supra* note 5, provides that the Convention’s articles on piracy (100–07), among other articles of the high seas regime, “apply to the exclusive economic zone.” This provision is the logical concomitant to Article 58(1), which expressly preserves in the EEZ the high seas freedoms of navigation, overflight, laying of submarine cables and pipelines, and related rights and freedoms set forth in Article 87, the basic provision enumerating the freedoms of the high seas.

⁷ Accordingly, it can be misleading to state that the law of piracy applies only on the high seas without clarifying that, for these purposes, that includes the EEZ. See Eugene Kontorovich, “*A Guantanamo on the Sea*”: *The Difficulty of Prosecuting Pirates and Terrorists*, 98 CAL. L. REV. 243, 253 (2010) (“Because the international law of piracy applies only on the ‘high seas,’ UNCLOS has the unintended effect of reducing the area where piracy can be internationally policed.”) (citing Martin Murphy, *Piracy and UNCLOS: Does International Law Help Regional States Combat Piracy? in VIOLENCE AT SEA: PIRACY IN THE AGE OF GLOBAL TERRORISM* 155, 161–63 (Peter Lehr ed., 2007)). *But see* Murphy, *supra*, at 162 (“Most commentators agree that, in accordance with Article 58(2), the piracy provisions apply fully in the EEZs and that all states are therefore allowed to arrest and arraign any pirate found in them under the provisions of the Convention and their own domestic laws.”).

Article 56(2) to have due regard for those rights and freedoms in the EEZ. These duties derive from the classic duty to have due regard for the rights of other users of the high seas, now set forth in Article 87(2); it has long applied to all activities on the high seas, including the suppression of piracy. The due regard duty does not confer regulatory power on any of its beneficiaries.

The reference to the coastal state's laws and regulations in Article 58(3) relates to Article 56, which enumerates the coastal state's rights in the EEZ. Those laws and regulations, notably with respect to pollution from ships, may apply to foreign ships exercising high seas freedoms in the EEZ.⁸ But nothing in Article 56 grants regulatory power to the coastal state over the enforcement rights of all states in suppressing piracy in the EEZ.

It is not plausible to argue that Article 58(3) restrains the authority of any state to curb piracy in the manner prescribed in Articles 100–07 and 110 of the Convention. What Article 58(3) does do is emphasize that in the EEZ the coastal state has enumerated sovereign rights and jurisdiction, generally economic in nature, that must be respected by states engaged in combating piracy at sea.⁹

The specific geographic limitation of the law of piracy to the high seas, including the EEZ, does not apply to other criminal acts that may be committed at the same time, such as those proscribed in the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation of 1988, known as the SUA Convention, or otherwise fall under the term “armed robbery against ships.”¹⁰ However, unlike piracy, those acts do not give rise to universal enforcement jurisdiction at sea.

The international law of piracy does not apply to archipelagic waters, where the coastal state has sovereignty, just as it does not, and has not, applied in other waters where the coastal state has sovereignty, notably the territorial sea and internal waters.¹¹ The vast dimensions of archipelagic waters place a significant burden on archipelagic states in policing their archipelagic

⁸ Even the pollution provisions in Article 56 do not apply to foreign warships because Article 236 expressly provides that “[t]he provisions of this Convention regarding the protection and preservation of the marine environment do not apply to any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service.” Note in particular that this provision is not limited in its scope to Part XII, as it refers to the “provisions of this Convention” as a whole.

⁹ Murphy correctly makes the point that, while coastal states' claims to restrict the military activities of foreign navies in the EEZ “may not appear to be directly relevant to piracy suppression,” if that trend is extended to other forms of “disorder at sea” such as weapons proliferation, drug and arms smuggling, and terrorism, constraints on navies will simply “encourage [the disorder] to grow,” particularly in the EEZs of “states that lack the will or resources to suppress disorder.” Murphy, *supra* note 7, at 163.

¹⁰ Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, S. TREATY DOC. NO. 101-1 (1989), 1678 UNTS 222 [hereinafter SUA Convention]; see International Maritime Organization [IMO], Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery Against Ships, para. 2.2, IMO Assemb. Res. A.1025(26), annex (Dec. 2, 2009) (defining “armed robbery against ships” as “(1) any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy [as defined in Article 101 of the Law of the Sea Convention], committed for private ends and directed against a ship or against persons or property on board such a ship, within a State's internal waters, archipelagic waters and territorial sea; [and] (2) any act of inciting or of intentionally facilitating an act described above.”). Unless otherwise indicated, links to IMO documents cited below are available at IMO Maritime Knowledge Centre, Information Resources on Piracy and Armed Robbery at Sea Against Ships (Apr. 29, 2010), at http://www.imo.org/includes/BlastDataOnly.asp/data_id%3D28402/Piracy_29April2010_.pdf. IMO Council reports are restricted to persons registered with the IMO, though some are posted online by the U.S. Coast Guard at <http://www.uscg.mil/imo/council>. The *IMO News* is available at <http://www.imo.org/> (follow “Newsroom” hyperlink; then follow “IMO News Magazine” hyperlink).

¹¹ Of course, the recognition of archipelagic waters resulted in a significantly larger marine area over which the archipelagic state is required to exercise its control, and prevent and punish criminal acts such as armed robbery occurring within its archipelagic waters and territorial sea.

waters and the adjacent territorial sea, a burden that most, if not all, of them have difficulty meeting without assistance from other states.

As for the authority to conduct counterpiracy operations, the general rule on the high seas is that the flag state has exclusive jurisdiction over ships flying its flag (and over the persons and items on board). Except as otherwise specifically provided or agreed, foreign flag ships on the high seas may not be boarded, searched, or detained without the consent of the flag state.¹²

Nevertheless, on the theory that pirates are the enemies of all mankind,¹³ international law has long maintained an exception to the rule, which authorizes all states to board, search, and detain pirate ships and pirates.¹⁴ Conceptually, it can be said that all flag states have already consented to the boarding of ships flying their flag that are suspected of piracy. This exception extends to the seizure, arrest, and prosecution of pirates and pirate ships.¹⁵

Operations in the Somali Territorial Sea

Prior to June 2008, the inapplicability of the international law of piracy in the territorial sea afforded Somali pirates with a safe haven, to the frustration of the counterpiracy naval forces. Removing that limitation was a major objective of the members of the Security Council in adopting Resolution 1816 on June 2, 2008.¹⁶

Acting under Chapter VII of the UN Charter, the Security Council authorized cooperating states to take the same steps with respect to piracy in the Somali territorial sea as the law of piracy permits on the high seas.¹⁷ However, Indonesia—in view of its experiences dealing with piracy in the Straits of Malacca and Singapore and its focus on preserving its sovereignty and territorial integrity¹⁸—insisted on specifying that the authority granted by the Council could not form the basis of a new rule of customary international law.¹⁹ Further, Resolution 1816 provided that the Council's extension of the high seas piracy regime to the Somali territorial sea applied only to those naval forces that had sought and received permission from the Somali Transitional Federated Government (TFG) and whose permission had been reported to the UN secretary-general.²⁰ This scheme has been twice renewed, in Resolutions 1846 and 1897, and expires on December 1, 2010, unless again renewed.²¹

¹² LOS Convention, *supra* note 5, Arts. 92(1), 110(1). These provisions also apply in the EEZ to the extent compatible with the enforcement rights of the coastal state. *Id.*, Arts. 56(1), 58(2).

¹³ See DANIEL HELLER-ROAZEN, *THE ENEMY OF ALL: PIRACY AND THE LAW OF NATIONS* (2009).

¹⁴ LOS Convention, *supra* note 5, Art. 110(1)(a) & (2).

¹⁵ *Id.*, Art. 105.

¹⁶ Jane G. Dalton, J. Ashley Roach, & John Daley, *Introductory Note to United Nations Security Council: Piracy and Armed Robbery at Sea—Resolutions 1816, 1846 & 1851*, 48 ILM 129 (2009), reprinted in ASIL NEWSLETTER, Jan./Mar. 2009, at 8. See generally UN Doc. S/PV.5902 (June 2, 2008) (statements of Libya and China).

¹⁷ SC Res. 1816, para. 7(a), (b) (June 2, 2008) (authorizing those states to “[e]nter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law” and to “[u]se, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery”).

¹⁸ See J. Ashley Roach, *Enhancing Maritime Security in the Straits of Malacca and Singapore*, 59 J. INT'L AFF. 97 (2005).

¹⁹ SC Res. 1816, *supra* note 17, para. 9; UN Doc. S/PV.5902, *supra* note 16, at 2–3 (statement of Indonesia).

²⁰ SC Res. 1816, *supra* note 17, paras. 7 (chapeau), 9.

²¹ SC Res. 1846, paras. 10–11 (Dec. 2, 2008); SC Res. 1897, paras. 7–8 (Nov. 30, 2009).

Under this authorization, foreign naval forces are allowed to capture suspected pirates while in the Somali territorial sea. It seems clear that this authority includes capturing suspects who had committed acts of piracy seaward of the territorial sea and were seeking safe haven ashore. It is less clear whether Resolutions 1816 and 1846 directly authorized such capture in the case of suspects found on board skiffs in the Somali territorial sea with piracy paraphernalia (though Resolution 1846 called upon states to seize and dispose of boats, weapons, and other equipment used to commit piracy and armed robbery off the coast of Somalia), or in the case of acts committed within Somalia's territorial sea rather than seaward thereof (though there is an argument that such authorization can be implied in light of Somalia's request for international assistance in policing its coast). In any event, the domestic law under which prosecutions might take place may or may not cover such acts.²²

Not every member of the Security Council recognizes the TFG, given the limited territory over which it exercises effective control. In its resolutions the Security Council expressly conditioned its authorization to conduct counterpiracy operations in the Somali territorial sea on the prior consent of the TFG as conveyed to the UN secretary-general. For those members that recognize the TFG, such a condition is understandable. However, for those members that do not recognize the TFG, the authority to conduct counterpiracy operations in the Somali territorial sea is found in the Security Council's invocation in the resolutions of Chapter VII and the conditions imposed in them by the Council.²³ Resolutions 1851 and 1897 went one step further, authorizing counterpiracy operations "in Somalia,"²⁴ a phrase broader in its geographical scope than "in Somali airspace," as the United States had originally proposed (to authorize airborne intelligence operations to locate and observe pirate bases ashore).²⁵

Under the formulations adopted by the Council, naval and other cooperating forces apparently may operate in Somalia and its territorial sea to prevent pirates from using Somalia to launch attacks, as well as to interdict those returning to Somalia who had been prevented from bringing the fruits of their efforts with them.

²² Kenyan authorities advised the author that they could prosecute pirates captured in Somalia's territorial sea only if the acts of piracy for which they had been captured had occurred seaward of the territorial sea.

²³ Dalton, Roach, & Daley, *supra* note 16, at 130.

²⁴ SC Res. 1851, para. 6 (Dec. 16, 2008); SC Res. 1897, *supra* note 21, para. 7. After Resolution 1851 was adopted, several countries spoke to this development in their explanations of vote. The United Kingdom stated that this authorization included "using force if necessary, against pirate activities on land in Somalia." UN Doc. S/PV.6046, at 4 (Dec. 16, 2008) (statement of Foreign Secretary David Miliband). Costa Rica made repeated reference to combating piracy "on the territory of Somalia." *Id.* at 6-7 (statement of Mr. Urbina). The United States noted that the pirates' "dens in Somalia provide[d] refuge from the naval ships in the Gulf of Aden," and that because of the Council's authorization "today, . . . States may pursue pirates into their place of operation on land." *Id.* at 9 (statement of Secretary of State Condoleezza Rice). Subsequently, on February 24, 2010, EU ministers of defense agreed that from the end of March 2010 the objectives of Operation Atalanta will include "control of Somali ports where pirates are based, as well as 'neutralising' mother ships that allow the pirates to operate over 1000km from the coast." Press Release, EU NAVFOR Somalia, Operation Atalanta Expands Its Mission on Piracy (Feb. 26, 2010), at <http://www.eunavfor.eu/>; see also Katharine Houreld, *Warships Take New Strategy Against Somali Pirates*, SEATTLE TIMES, Mar. 18, 2010, at http://seattletimes.nwsources.com/html/nationworld/2011377659_apiracy.html.

²⁵ The letter of December 9, 2008, from the president of Somalia to the UN secretary-general requested "the international community to assist the TFG in taking all necessary measures to interdict those who use Somali territory and airspace." SC Res. 1851, *supra* note 24, pmb.; Louis Cherbonneau, *US Wants Pursuit of Pirates Inside Somalia*, REUTERS, Dec. 10, 2008, available in LEXIS, News Library, Individual Publications File; *UN Security Council Approves Anti-piracy Measure*, VOICE AM. NEWS, Dec. 16, 2008, available in LEXIS, News Library, All News File.

Just what is the breadth of Somalia's territorial sea? In 1972, before the collapse of its national government, Somalia claimed a 200-nautical-mile territorial sea.²⁶ In 1989 Somalia ratified the Law of the Sea Convention,²⁷ which provides for a territorial sea no broader than 12 nautical miles and an EEZ no broader than 200 nautical miles, measured from the baseline from which the breadth of the territorial sea is measured.²⁸ In the case of Somalia, the baseline is the normal baseline, the low-water line along its coast.²⁹

Although Somalia appears to have taken no legislative action to roll back its territorial sea to 12 nautical miles, in practice the TFG, the members of the Security Council, and the counterpiracy naval forces are all acting as if its breadth were 12 nautical miles. Under Somali law, the act of ratification of the Convention in 1989 may have automatically brought the domestic law into conformity with the terms of the Convention, though the present author is not aware of a definitive answer to this question.

Nevertheless, whatever the effect of the Law of the Sea Convention in Somali internal law, neither the Convention itself nor international law permits Somalia to impose a territorial sea broader than 12 nautical miles on other states and their ships and aircraft. Consequently, Somalia is obliged to respect the high seas freedoms of navigation and overflight, and the rights of all states seaward of 12 nautical miles, including those with respect to piracy.

In summary, naval counterpiracy forces operating off the coast of Somalia enjoy clear authority under the Law of the Sea Convention and international law to board, search, detain, and arrest suspected pirates on the high seas and in EEZ waters of the Gulf of Aden and the Indian Ocean, and clear authority under the Security Council resolutions to do so as well in the territorial sea and internal waters of Somalia.

Punishable Actions Under International Law

Article 101 of the LOS Convention, which defines piracy, does not mention attempts, conspiracy to commit piracy, aiding and abetting the commission of acts of piracy, or accessory after the fact. Nevertheless, Article 101(c)³⁰ includes within the definition of piracy "any act of inciting or of intentionally facilitating an act described" as piracy in the preceding provisions of the article, and Article 103 states that a "ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101." The *travaux préparatoires* reveal little about the meaning of these provisions. A British effort specifically to include attempts in the definition of piracy at the first UN Conference on the Law of the Sea (1958) was unsuccessful, although why this amendment was defeated remains unclear.³¹ In any event, domestic criminal legislation

²⁶ Law on the Territorial Sea and Ports, No. 37 of September 10, 1972, at <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/index.htm>.

²⁷ UN Division for Ocean Affairs and the Law of the Sea, Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements as of 01 March 2010, *at id.*

²⁸ LOS Convention, *supra* note 5, Arts. 3, 57, respectively.

²⁹ *Id.*, Art. 5.

³⁰ Article 15(3) of the Convention on the High Seas, *supra* note 4, is the antecedent provision.

³¹ UN Doc. A/CONF.13/C.2/L.83, Art. 39(1) (Apr. 1, 1958), *in* 4 UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, OFFICIAL RECORDS [hereinafter UNCLOS OR]: SECOND COMMITTEE, Annexes at 137, UN Doc. A/CONF.13/40, UN Sales No. 58.V.4, Vol. IV (1958). The UK proposal for draft Article 39 ("or any attempt to commit such acts") was defeated in the Second Committee by a vote of 13-22, with 17 abstentions.

can address the matter. Other crimes, such as larceny, assault, battery, murder, extortion, SUA violations, hostage taking, crimes involving transnational organized crime, ransom payments, and terrorist financing, when committed in connection with piracy, are, of course, subject to their own specific regimes.³²

Rights and Duties of States Under International Instruments

Apprehension and trial of pirates. Article 105 of the LOS Convention reflects the traditional situation in which the seizing state also prosecutes the suspects:

On the high seas, or in any other place outside the jurisdiction of any State,³³ every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.³⁴

This article, like all of the piracy provisions save Article 100, is discretionary—“may”—and does not expressly limit the set of states that may cooperate in suppressing a particular act of piracy; nor does it expressly set forth any priority among the affected states, such as the flag state of the pirated vessel, the state(s) of nationality of the crew of the pirated vessel, the state of nationality of the pirates, the state(s) of nationality of the cargo interests, or the flag state of the warship that seized the pirate ship.

In the context of piracy off the coast of Somalia, the substantial coalition of counterpiracy naval forces involves upwards of thirty flag states. The dominant practice in 2009 and so far in 2010, by those naval forces that did not “catch and release” suspected pirates,³⁵ has been to turn them over to Kenya for trial pursuant to separate arrangements between Kenya and the

4 UNCLOS OR, *supra*, at 84, available at http://untreaty.un.org/cod/diplomaticconferences/lawofthesea-1958/vol/english/2nd_Cttee_vol_IV_e.pdf.

³² See *infra* text at notes 52–70.

³³ The phrase “or in any other place outside the jurisdiction of any State” was drafted to ensure that there was international authority to seize and try pirates in territory that was not under the sovereignty or jurisdiction of a state, i.e., *terra nullius*, and thus did not have a territorial sovereign to suppress the pirates. Commentary on draft Article 39, cmt. (4), in Report of the International Law Commission on the Work of Its Eighth Session, [1956] 2 Y.B. Int’l L. Comm’n 253, 282, UN GAOR, 11th Sess., Supp. No. 9, UN Doc. A/3159 (1956) [hereinafter 1956 ILC Report] (“[T]he Commission had chiefly in mind acts committed by a ship or aircraft on an island constituting *terra nullius* or on the shores of an unoccupied territory. But the Commission did not wish to exclude acts committed by aircraft within a larger unoccupied territory, since it wished to prevent such acts committed on ownerless territories from escaping all penal jurisdiction.”). Sir Gerald Fitzmaurice, the UK member, previously had given an example of “territory which was *res nullius*—for example, on certain Pacific islets and rocks where guano was collected.” Régime of the High Seas, para. 12, in [1955] 1 Y.B. Int’l L. Comm’n 51, 52, UN Doc. A/CN.4/SER.A/1955. Today, one author asserts that this phrase can only refer to waters adjacent to Antarctica, if anything. 2 D. P. O’CONNELL, THE INTERNATIONAL LAW OF THE SEA 971 (I. A. Shearer ed., 1984). States that do not make or recognize territorial claims in Antarctica may believe that the phrase “any other place outside the jurisdiction of any State” applies to that continent.

³⁴ LOS Convention, *supra* note 5, Art. 105. The corresponding article of the Convention on the High Seas, *supra* note 4, Article 19, is worded identically.

³⁵ On “catch and release,” see, for example, Nick Britten, *Navy Regularly Releases Somali Pirates, Even When Caught in the Act*, TELEGRAPH.CO.UK, Nov. 29, 2009, at <http://www.telegraph.co.uk/news/worldnews/>.

European Union, the United Kingdom, and the United States.³⁶ While this practice does not find explicit authority in Article 105, neither does Article 105 expressly restrain such cooperation, which is required by Article 100: “All States shall cooperate to the fullest possible extent in the repression of piracy”³⁷ The argument that only the state of the capturing force has international jurisdiction to try the pirates³⁸ is inconsistent with the strong duty of cooperation in the international law of piracy articulated by Article 100. The practice of states reflected in their arrangements with Kenya indicates that they believe cooperation includes transfers ashore to third states for trial and that they are permitted under international law. In addition, the UN Security Council resolutions continue to call for such cooperation.³⁹

The argument against the current cooperative practice off Somalia is based in part on the following italicized comment by the International Law Commission (ILC) on Article 43 of its draft articles on the law of the sea, the text of which is identical in wording to Article 19 of the Convention on the High Seas and Article 105 of the LOS Convention: “This article gives any State the right to seize pirate ships (and ships seized by pirates) and to have them adjudicated upon by its courts. *This right cannot be exercised at a place under the jurisdiction of another State*”⁴⁰ In this author’s opinion, the view that the italicized sentence precludes the exercise of judicial jurisdiction by any state other than the capturing state⁴¹ misreads the ILC commentary and its context, which relate to enforcement jurisdiction.

Professors McDougal and Burke cogently explain this very comment:

It may be assumed that the object of this phraseology [“On the high seas, or in any other place outside the jurisdiction of any State”], adopted as it was without comment or discussion from the Commission draft, was to exclude *seizure* elsewhere since the Commission declared in its Commentary to Article 43 that the right of seizure “cannot be exercised at a place under the jurisdiction of another State.”⁴²

³⁶ Exchange of Letters on the Conditions and Modalities for the Transfer of Persons Suspected of Having Committed Acts of Piracy and Detained by the European Union–Led Naval Force (EUNAVFOR), and Seized Property in the Possession of EUNAVFOR, from EUNAVFOR to Kenya for Their Treatment After Such Transfer, EU-Kenya, Mar. 6, 2009, 2009 O.J. (L 79) 49, *reprinted in* 48 ILM 751 (2009); Memorandum of Understanding [MOU] on the Conditions of Transfer of Suspected Pirates and Armed Robbers and Seized Property to the Republic of Kenya, Kenya-UK, Dec. 11, 2008 (on file with author); Memorandum of Understanding Concerning the Conditions of Transfer of Suspected Pirates and Armed Robbers and Seized Property in the Western Indian Ocean, the Gulf of Aden, and the Red Sea, U.S.-Kenya, Jan. 16, 2009 (on file with author). Kenya is reported to have invoked, on March 30, 2010, the six-month notice of termination of the Canadian, Chinese, Danish, EU, UK, and U.S. MOUs. Katharine Houreld, *Warships Fill up with Pirates After Kenya Balks*, STATESMAN.COM, Apr. 15, 2010, at <http://www.statesman.com/news/world/warships-fill-up-with-pirates-after-kenya-balks-578447.html>. Later, Kenya reportedly agreed to “resume taking on new piracy cases.” Tom Maliti, *UN: Donors to Spend \$3.9 Million to Prosecute Somali Piracy Suspects in Kenya, Seychelles*, CANADIAN PRESS, June 15, 2010, at <http://ca.news.yahoo.com/s/capress/100615/world/piracy>.

³⁷ LOS Convention, *supra* note 5, Art. 100.

³⁸ See, e.g., Eugene Kontorovich, Case Report: United States v. Shi, *in* 103 AJIL 734, 739 (2009).

³⁹ SC Res. 1897, *supra* note 21, paras. 12, 14; SC Res. 1846, *supra* note 21, para. 14; SC Res. 1816, *supra* note 17, para. 11. Security Council Resolution 1918 (Apr. 27, 2010) reinforces this conclusion by calling for increased efforts to prosecute the Somali pirates.

⁴⁰ Commentary on draft Article 43, *in* 1956 ILC Report, *supra* note 33, at 283.

⁴¹ E.g., Kontorovich, *supra* note 38, at 739 n.37.

⁴² MYRES S. MCDUGAL & WILLIAM T. BURKE, THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA 877 (1962) (emphasis added).

Moreover, the italicized sentence in the ILC commentary was a useful addition, as no provision in the piracy articles expressly states that a foreign state cannot seize a pirate ship in the territorial sea, but it does not mean that Article 105 permits only the seizing state to try pirates. Consequently, the McDougal and Burke analysis fully supports the view that cooperation in the suppression of piracy by transferring captured pirates to another state for prosecution is entirely consistent with the international law of piracy.

This conclusion is buttressed by the implication in the ILC commentary on what is not a “seizure” under the provision that is now Article 107 of the Law of the Sea Convention, which limits seizures on account of piracy to warships (and like craft):

(2) Clearly this article [45] does not apply in the case of a merchant ship which has repulsed an attack by a pirate ship and, in exercising its right of self-defence, overpowers the pirate ship and subsequently hands it over to a warship or to the authorities of a coastal State. This is not a “seizure” within the meaning of this article.⁴³

The ILC must have believed that in such a case the authorities of the flag state of the warship or the coastal state, which did not seize the pirate ship, would nevertheless have jurisdiction to prosecute under Article 105, because all states have jurisdiction to try pirates.⁴⁴

Duties of states under the international law of piracy. The LOS Convention imposes one duty alone on states regarding piracy—cooperation; all else is voluntary. Only what is now Article 100 contains any specific obligation to act to repress piracy; the remaining articles simply authorize states to act. Only Article 100, and its predecessors, Article 14 (of the 1958 Convention on the High Seas) and Article 38 (of the ILC’s 1956 draft articles), use the verb “shall.” Articles 104, 105, 107, and 110 use the verb “may.” But Article 100 offers no details on the nature of such cooperation.

The ILC had sought to put some teeth into the article on the duty to cooperate in its commentary on draft Article 38: “Any State having an opportunity of taking measures against piracy, and neglecting to do so, would be failing in a duty laid upon it by international law”⁴⁵

On its face this sentence is not without ambiguity. It should be read in the context of the wording of the obligation: “shall cooperate to the fullest possible extent.” In view of the flexibility states are given by those words, the ILC’s use of “neglecting” to take measures against piracy when the state has the opportunity to act makes clear that the duty to act is not absolute. The ILC specifically endorsed the Harvard Draft Convention on Piracy,⁴⁶ and has been said to have gone “so far as to state that legal claims could be brought against any nation that does

⁴³ Commentary on draft Article 45, *in* 1956 ILC Report, *supra* note 33, at 283, cmt. (2).

⁴⁴ Bernard H. Oxman first made this point in his remarks on October 16, 2009, at the 38th annual conference of the Canadian Council on International Law, and on October 17, 2009, at the Maritime Piracy Workshop of the American Society of International Law. *See also* ELIZABETH ANDERSEN, BENJAMIN BROCKMAN-HAWE, & PATRICIA GOFF, SUPPRESSING MARITIME PIRACY: EXPLORING THE OPTIONS IN INTERNATIONAL LAW 7 (report on workshop sponsored by the American Society of International Law, the Academic Council on the United Nations System, and the One Earth Future Foundation, 2009), *available at* <http://www.asil.org/files/suppressing-maritime-piracy.pdf> (“Participants agreed that universal jurisdiction exists for piracy, grounded in international customary law and the Law of the Sea Convention. As such, any state is authorized to prosecute the crime of maritime piracy.”) (also on file with the ASIL library).

⁴⁵ Commentary on draft Article 38, *in* 1956 ILC Report, *supra* note 33, at 282, cmt. (2).

⁴⁶ *Id.*, cmt. (1).

not take sufficient steps to bring pirates to justice.”⁴⁷ A joint Albanian–Czech proposal to require states to initiate proceedings regarding acts of piracy and to punish them was not adopted.⁴⁸ Indeed, none of the articles adopted by the ILC or the first and Third Conferences on the Law of the Sea contain any provision imposing liability for failure to act to repress piracy.⁴⁹ Moreover, the international law of piracy does not expressly require that states enact laws against piracy and apply them. Indeed, a provision to that effect in the Albanian–Czech proposal mentioned above was defeated in the Second Committee at the first UN Conference on the Law of the Sea.⁵⁰

Notwithstanding these *travaux préparatoires*, it would seem better to urge all states to ensure that they fulfill their duty to cooperate, and to point out that an obvious way to do so is to enact or modernize national laws criminalizing piracy. Otherwise, it will continue to be difficult to bring “consequences” to Somali pirates and suppress piracy off the coast of Somalia. As noted above, the UN Security Council agrees.⁵¹

Criminal law treaties that support counterpiracy operations. As previously noted, the special authority accorded naval counterpiracy forces to board suspected pirate ships without having to seek flag state consent is exceptional. However, as also noted above, there are limitations on what suspected acts justify such actions.

Some widely ratified criminal law treaties provide additional means of inflicting consequences on Somali pirates and their support structure by addressing certain gaps in the law of piracy while adhering to the exclusivity of flag state jurisdiction.⁵² They are the SUA Convention, mentioned above; the International Convention Against the Taking of Hostages of 1979 (Hostages Convention); the International Convention for the Suppression of the Financing of Terrorism of 1999 (Terrorism Financing Convention); and the United Nations Convention Against Transnational Organized Crime of 2000 (TOC Convention).⁵³

⁴⁷ Kontorovich, *supra* note 7, at 253 (citing Commentary on draft Article 38, *supra* note 45). Kontorovich correctly notes that Article 105 “makes clear that prosecution itself is not obligatory.” *Id.* (citing Tullio Treves, *Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia*, 30 EUR. J. INT’L L. 399, 408 (2009)).

⁴⁸ UN Doc. A/CONF.13/C.2/L.46 (Mar. 21, 1958), in 4 UNCLOS OR, *supra* note 31, Annexes, at 128. The proposal in the Second Committee was rejected by 11–37, with 1 abstention. 4 UNCLOS OR, *supra*, at 84. The summary records do not reflect the delegations’ views on this proposal.

⁴⁹ Other provisions of the LOS Convention, *supra* note 5, do address other aspects of responsibility and liability, including Articles 106 and 110(3) on liability for boarding and seizure with unfounded suspicions or on inadequate grounds. *See also, e.g., id.*, Arts. 31, 42(5), 139, 232, 235, 263, 304. Some modern international criminal law treaties that impose an explicit duty to act on parties do not contain any provision imposing state responsibility for failure to act. *See text infra* at notes 52–70.

⁵⁰ 4 UNCLOS OR, *supra* note 31, at 84.

⁵¹ SC Res. 1918, *supra* note 39, para. 2, “Calls on all States, including States in the region, to criminalize piracy under their domestic law and favourably consider the prosecution of suspected, and imprisonment of convicted, pirates apprehended off the coast of Somalia, consistent with applicable international human rights law.”

⁵² These treaties are examined in some detail in Douglas Guilfoyle, *International Treaties, in CHATHAM HOUSE, PIRACY AND LEGAL ISSUES: RECONCILING PUBLIC AND PRIVATE INTERESTS*, Annex I, at 26 (Oct. 1, 2009), at <http://chathamhouse.org.uk/research/africa/papers/view/-/id/799/>.

⁵³ SUA Convention, *supra* note 10; International Convention Against the Taking of Hostages, Dec. 17, 1979, TIAS No. 11,081, 1316 UNTS 205 [hereinafter Hostages Convention]; International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, TIAS No. 13,075, 39 ILM 270 (2000) [hereinafter Terrorism Financing Convention]; United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, TIAS No. 13,127, 2225 UNTS 209 [TOC Convention]. As of May 31, 2010, the SUA Convention had 156 parties. As of June 3, 2010, the Hostages Convention had 167 parties, the Terrorism Financing Convention had 173 parties, and the TOC Convention had 155 parties. For ratifications and accessions to the SUA Convention, see <http://www.imo.org/>; and for those to the latter three conventions, see <http://treaties.un.org/>.

While none of these treaties address the boarding of suspect ships, and thus maintain the traditional rule of the exclusivity of flag state jurisdiction, the 2005 Protocol to the 1988 SUA Convention contains a comprehensive regime for seeking and obtaining the flag state's confirmation that the suspect vessel is registered, and authorization to board, search, and detain the vessel.⁵⁴

The SUA Convention proscribes acts that include one of the basic elements of the crime of piracy: seizing or exercising control over a ship by force or threat of force or any other form of intimidation, and injuring or killing any person in connection with the commission or attempted commission of that offense, but does not require that the acts involve two ships.⁵⁵ Other proscriptions include performing an act of violence against a person on board a ship if the act is likely to endanger the safe navigation of that ship, a requirement not found in piracy law. Still other proscribed acts are similarly conditioned.⁵⁶ But the geographic scope of application of the SUA Convention, unlike that of the law of piracy, is not limited to the high seas and the EEZ. It applies "if the ship is navigating, or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States."⁵⁷

To the extent that the offenses committed by suspected pirates meet the requirements of the SUA Convention, it is a particularly useful instrument because it creates a framework under its Articles 7, 8, and 10 that authorizes masters of ships to deliver suspected SUA offenders to a coastal state party. That party, in turn, is obliged both to accept custody unless it can articulate why the Convention is not applicable, and to extradite the offenders to an interested state or submit the case to its own authorities for prosecution.

By now the Somali pirates' successful "business model" is widely known: to capture ships and hold them and their crews hostage for ransom.⁵⁸ The 1979 Hostages Convention defines a person who has committed the crime of "hostage-taking" as

[a]ny person who seizes or detains and threatens to kill, to injure or to continue to detain another person (. . . the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage⁵⁹

The definition also includes persons who attempt to commit an act of hostage taking or who participate as an accomplice of anyone who commits or attempts to commit an act of hostage taking.⁶⁰

⁵⁴ Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Art. 8 *bis*, Oct. 14, 2005, S. TREATY DOC. NO. 110-8 (2007) (entered into force July 28, 2010). See <http://www.imo.org/>. The United States gave its advice and consent to ratification of the protocol on September 25, 2008, see 103 AJIL 137 (2009), but Congress has not yet enacted the necessary implementing legislation to permit the United States to ratify the protocol. Article 8 *bis* reflects the experiences of the United States over the past twenty years in maritime law enforcement.

⁵⁵ SUA Convention, *supra* note 10, Art. 3(1)(a).

⁵⁶ *Id.*, Art. 3(1)(b)-(f).

⁵⁷ *Id.*, Art. 4.

⁵⁸ See CHATHAM HOUSE, *supra* note 52, at 3.

⁵⁹ Hostages Convention, *supra* note 53, Art. 1(1).

⁶⁰ *Id.*, Art. 1(2); see D. D. Winters, Letter to the Editor, FED. LAW., Feb. 2010, at 14.

The acts of the pirates operating off the coast of Somalia, and those supporting them, seem to fit squarely within this definition, whether or not the pirates are successful in any given situation in pirating the vessel and holding the ship and crew for ransom.

The 1999 Terrorism Financing Convention defines the offense of financing terrorism as the provision or collection of funds “by any means, directly or indirectly, unlawfully and wilfully . . . with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out . . . [a]n act which constitutes an offence within the scope of and as defined in,” *inter alia*, the SUA Convention and the Hostages Convention.⁶¹ Participating as an accomplice, organizing or directing others to commit the offense, and contributing to the commission of the offense by a group of persons acting with a common purpose are also offenses under this Convention.⁶²

The methods and processes by which ransoms are paid to the pirates operating off the coast of Somalia seem to fit squarely within these definitions.⁶³

The persons who set out to commit acts of piracy off the coast of Somalia are for the most part young Somalis attracted by the “easy money.” These Somalis are supported by the persons and organizations that import the firearms, ammunition, boarding ladders, and grappling hooks for their use; procure the engines, fuel, and skiffs used to transport them; negotiate for and arrange delivery of the ransom payments; distribute the ransom money after it is dropped on the pirated vessel; and use the proceeds in Somalia, Kenya, and perhaps elsewhere.⁶⁴

The TOC Convention applies to three or more persons falling under the definition of an “organized criminal group”⁶⁵ and acting within its geographic scope of application (which covers crimes that were committed in one state but have substantial effects in another state).⁶⁶ Crimes under this Convention include “serious crimes” punishable by imprisonment for four or more years, money laundering, corruption, and obstruction of justice.⁶⁷

All of these treaties require states parties to criminalize these offenses and make them punishable by appropriate penalties that take into account the grave nature of such offenses.⁶⁸ The treaties also include provisions on extradition in the event prosecution is not undertaken.⁶⁹

The provisions of these four treaties, if properly implemented under domestic law, can be powerful tools in the suppression of piracy. Yet, to this author’s knowledge, no state party

⁶¹ Terrorism Financing Convention, *supra* note 53, Art. 2(1) & annex.

⁶² *Id.*, Art. 2(5).

⁶³ See Mohamed Olad Hassan, *Pirate Payoffs Feed Big-Money Lifestyle in Somalia*, AP, Dec. 6, 2009, available in LEXIS, News Library, Wire Service Stories File.

⁶⁴ See LAUREN PLOCH ET AL., *PIRACY OFF THE HORN OF AFRICA* 9–11 (Congressional Research Service, Report No. R40528, updated Apr. 19, 2010), available at <http://opencrs.com/document/R40528/>; CHATHAM HOUSE, *supra* note 52, at 4; U.S. Dep’t of Transportation, Maritime Administration, *Somali Pirate Tactics* (May 8, 2009), at http://www.marad.dot.gov/documents/Somali_Pirate_Tactics_8May2009.pdf.

⁶⁵ TOC Convention, *supra* note 53, Art. 2(a).

⁶⁶ *Id.*, Art. 3(2)(d).

⁶⁷ *Id.*, Arts. 2(b), 6, 8, 23, respectively.

⁶⁸ SUA Convention, *supra* note 10, Art. 5; Hostages Convention, *supra* note 53, Art. 2; Terrorist Financing Convention, *supra* note 53, Art. 4; TOC Convention, *supra* note 53, Arts. 5–11.

⁶⁹ SUA Convention, *supra* note 10, Arts. 10–11; Hostages Convention, *supra* note 53, Arts. 8–10; Terrorism Financing Convention, *supra* note 53, Arts. 10–11; TOC Convention, *supra* note 53, Arts. 6–10, 16.

has employed these widely ratified tools in combating the scourge of piracy off the coast of Somalia.⁷⁰

II. INTERNATIONAL INSTITUTIONS AND SUPPRESSING PIRACY OFF THE SOMALI COAST

Three international institutions, the International Maritime Organization (IMO), the UN Office on Drugs and Crime (UNODC), and the Security Council; two intergovernmental organizations, NATO and the European Union; and one ad hoc collaboration, the Contact Group on Piracy off the Coast of Somalia (Contact Group); both individually and collectively, have played major roles so far in efforts to suppress piracy off the coast of Somalia.

The International Maritime Organization

As the international organization covering the international shipping industry, the IMO has long been concerned with countering the adverse effects of crime against merchant ships and their crews. The IMO Assembly has adopted a series of resolutions, beginning in 1983, that provide guidance on measures to prevent piracy and armed robbery against ships,⁷¹ set forth a code of practice for the investigation of these crimes, and offer specific guidance on the situation in the waters off Somalia.⁷² Since at least 1984, the IMO has regularly collected and published data on acts of piracy and armed robbery against ships,⁷³ and has tailored counter-piracy guidance for governments, and for shipowners and masters.⁷⁴ In 1998 the IMO began a long-term antipiracy project.

When the number of incidents of piracy spiked in the Straits of Malacca and Singapore in 2003–2004, the IMO Council, acting on the initiative of the IMO secretary-general, approved his program for protecting vital shipping lanes.⁷⁵ That initiative resulted in increased assistance to the littoral states of Indonesia, Malaysia, and Singapore, increased cooperation by them and

⁷⁰ See, in this Agora, James Thuo Gathii, *Kenya's Piracy Prosecutions*, 104 AJIL 416, 429–30 (2010) (discussing incorporation of international conventions in Kenya's Merchant Shipping Act of 2009).

⁷¹ IMO Assemb. Res. A.545(13) (Nov. 17, 1983); A.683(17) (Nov. 6, 1991); A.738(18) (Nov. 4, 1993).

⁷² IMO Assemb. Res. A.922(22) (Nov. 29, 2001) (adopting the first version of the Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships); A.1025(26), *supra* note 10 (revised code of practice); A.979(24) (Nov. 23, 2005) (initial guidance on piracy and armed robbery against ships in waters off the coast of Somalia); A.1002(25) (Nov. 29, 2007) (revised guidance); Piracy and Armed Robbery Against Ships in Waters off the Coast of Somalia, A.1026(26) (Dec. 2, 2009) (third guidance).

⁷³ See, in this Agora, Eugene Kontorovich & Steven Art, *An Empirical Examination of Universal Jurisdiction for Piracy*, 104 AJIL 436, 438–40 (2010).

⁷⁴ Recommendations to Governments for Preventing and Suppressing Piracy and Armed Robbery Against Ships, IMO Doc. MSC.1/Circ. 1333 (June 26, 2009); Guidance to Shipowners and Ship Operators, Shipmasters and Crews on Preventing and Suppressing Acts of Piracy and Armed Robbery Against Ships, IMO Doc. MSC.1/Circ. 1334 (June 23, 2009); Piracy and Armed Robbery Against Ships in Waters off the Coast of Somalia, IMO Doc. MSC.1/Circ.1332 (June 16, 2009); Best Management Practices to Deter Piracy in the Gulf of Aden and off the Coast of Somalia Developed by the Industry, IMO Doc. MSC.1/Circ. 1335 (Sept. 29, 2009); Information on Internationally Recommended Transit Corridor (IRTC) for Ships Transiting the Gulf of Aden, IMO Doc. SN.1/Circ. 281 (Aug. 3, 2009).

⁷⁵ IMO Press Briefing 25/2004, IMO Council Supports Initiative on Keeping Strategic Shipping Lanes Open (June 28, 2004); IMO Press Briefing 36/2004, IMO to Take Straits Initiative (Nov. 22, 2004); IMO Council Docs. C 92/D, para. 5.3 (July 12, 2004); C 93/D, para. 15.2 (Nov. 22, 2004); C 93/15 (Oct. 7, 2004) (IMO Council documents cited herein on file with author).

other regional states, and in 2006 the first implementation of Article 43 of the Law of the Sea Convention.⁷⁶

For many years, the IMO has been active in attempting to protect the safety of shipping and mariners transiting the waters off the coast of Somalia. In November 2005, the IMO Assembly took strong steps toward dealing with piracy off Somalia by passing Resolution A.979(24).⁷⁷ Thereafter, the IMO secretary-general wrote to the UN secretary-general requesting that the matter be brought to the attention of the Security Council.⁷⁸ As piracy off the coast of Somalia surged in 2006, and the numbers of seafarers held hostage and the amounts of ransom skyrocketed, again at the recommendation of the IMO secretary-general, the IMO Council authorized him to communicate its concerns to the UN secretary-general and to seek the Security Council's assistance.⁷⁹ On July 11, 2007, the UN secretary-general stated that he intended to raise the matter with the Security Council.⁸⁰ The IMO Assembly, in November 2007, adopted a resolution urging many actions to prevent and suppress piracy off the coast of Somalia.⁸¹

These actions resulted, in June 2008, in the adoption by the Security Council of its first resolution, No. 1816, addressing piracy off the coast of Somalia.⁸² After the hijacking of the arms carrier MV *Faina* and the supertanker MT *Sirius Star* in the fall of 2008, the IMO secretary-general urged the UN secretary-general to seek an extension of the mandate in Resolution 1816.⁸³ He also addressed the Security Council during its consideration of the UN secretary-general's November 2008 report on the situation in Somalia.⁸⁴ The Council responded by adopting Resolution 1846 on December 2, 2008, which extended the mandate in Resolution 1816.

The regional code of conduct to counter piracy, entitled Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden, adopted in late January 2009, is another result of the IMO's efforts to energize and enable regional and international cooperative efforts to combat piracy and armed robbery

⁷⁶ IMO Press Briefing 29/2007, Milestone Agreement Reached on Co-operation over the Straits of Malacca and Singapore (Sept. 18, 2007).

⁷⁷ IMO Assemb. Res. A.979(24), *supra* note 72.

⁷⁸ See IMO Press Briefing 48/2005, IMO Assembly Calls for Action on Piracy off Somalia (Nov. 24, 2005); IMO Press Briefing 08/2006, Security Council Urges Action over Piracy off the Coast of Somalia in Line with IMO Assembly Resolution (Mar. 17, 2006).

⁷⁹ IMO Press Briefing 17/2007, IMO Council Agrees Secretary-General's Proposal for Action on Piracy off Somalia (June 28, 2007).

⁸⁰ IMO Press Briefing 24/2007, UN Secretary-General Confirms Support for IMO Initiative on Somalia (July 11, 2007).

⁸¹ IMO Assemb. Res. A.1002(25), *supra* note 72; *IMO Assembly Issues Renewed Call for Action on Piracy off Somalia*, IMO NEWS, No. 1, 2008, at 9; IMO Press Briefing 47/2007, *IMO Assembly Issues Renewed Call for Action on Piracy off Somalia* (Nov. 29, 2007). In paragraph 6 of Resolution 1838 (Oct. 7, 2008), the UN Security Council urged states to take the actions set out in Resolution A.1002(25).

⁸² SC Res. 1816, *supra* note 17; see IMO Press Briefing 24/2008, *IMO Welcomes Security Council Moves on Somali Piracy* (June 3, 2008).

⁸³ IMO Press Release 49/2008, *United Nations Secretary General Supports Anti-piracy Mandate Extension* (Oct. 20, 2008).

⁸⁴ Report of the Secretary-General on the Situation in Somalia, UN Doc. S/2008/709 (Nov. 17, 2008); UN Doc. S/PV.6020, at 6–8 (Nov. 20, 2008) (statement of Efthimios Mitropoulos, IMO secretary-general); *IMO Chief Makes Direct Appeal to Security Council for Somalia Piracy Action*, IMO NEWS, No. 4, 2008, at 7; IMO Press Briefing No. 54, *IMO Chief Makes Direct Appeal to Security Council for Somalia Piracy Action* (Nov. 21, 2009).

off the coast of Somalia.⁸⁵ The first draft of the regional code of conduct was formulated as a memorandum of understanding in Dar es Salaam in April 2008, following the IMO Assembly's call in November 2007 for an agreement to facilitate the fight against piracy off Somalia.⁸⁶ Work on the draft code began well before the Security Council and the naval forces began their concerted efforts regarding the Somali pirates. Accordingly, the form and content of the regional code of conduct were significantly sharpened to take these later—and favorable—developments into account. They include the establishment, pursuant to Security Council Resolution 1851, of the Contact Group on Piracy off the Coast of Somalia and its four working groups, and the progress made by these groups. The code of conduct was designed to facilitate cooperation between the regional forces and regional countries, particularly in the exchange of information and the imposition of consequences on the pirates. The code was adopted in Djibouti (and for that reason is often referred to as the Djibouti code of conduct) on January 29, 2009, and signed on that date by nine of the twenty-one eligible regional countries: Djibouti, Ethiopia, Kenya, Madagascar, the Maldives, the Seychelles, Somalia, the United Republic of Tanzania, and Yemen, and became effective as of that date. It has subsequently been signed by five more states: the Comoros, Egypt, Mauritius, Saudi Arabia, and Sudan.⁸⁷

Among its other objectives, the code of conduct seeks to further the capacity of the regional states to accept and prosecute suspected pirates. Ensuring that the states concerned implement the various international conventions in their domestic criminal law is imperative. The IMO and the UNODC are leading the efforts in this regard.⁸⁸ The U.S. Department of Justice's attorney at the U.S. Embassy in Nairobi has worked closely on the piracy cases with Kenyan authorities.⁸⁹

The UN Office on Drugs and Crime

Reacting to the surge in incidents of piracy off the coast of Somalia in 2007 and early 2008, the UN secretary-general's special representative for Somalia requested the UNODC's assistance. Pursuant to its mandate to assist member states in combating illicit drugs, crime, and terrorism,⁹⁰ the agency responded by making an on-site study of the situation and preparing a detailed report setting out the causes and possible responses.⁹¹

The deployment of counterpiracy naval forces off Somalia in 2008 and Kenya's agreement to receive and prosecute captured Somali suspects prompted the UNODC and the European Union to set up a small office in Nairobi to manage an EU program to assist Kenya and the

⁸⁵ IMO Council Doc. C 102/14/Annex, annex to attachment 1 (Apr. 3, 2009).

⁸⁶ IMO Council Doc. C 100/7/Annex (Apr. 23, 2008).

⁸⁷ Data from IMO e-mails to author as of March 23, 2010 (on file with author).

⁸⁸ See Contact Group on Piracy off the Coast of Somalia, Chairman's Conclusions, 4th Meeting of Working Group 2 on Legal Issues 3 (Nov. 26–27, 2009) [hereinafter Contact Group WG 2] (on file with author).

⁸⁹ PLOCH ET AL., *supra* note 64, at 29.

⁹⁰ UN Office on Drugs and Crime [UNODC], About UNODC (2010), at <http://www.unodc.org/unodc/en/about-unodc/>.

⁹¹ International Expert Group on Piracy off the Somali Coast, *supra* note 2. This report was used extensively in the preparation of the U.S. National Security Council's counterpiracy policy guidance, Countering Piracy off the Horn of Africa: Partnership & Action Plan (Dec. 2008), at http://www.marad.dot.gov/documents/Countering_Piracy_Off_The_Horn_of_Africa_-_Partnership_Action_Plan.pdf.

Seychelles in carrying out these tasks.⁹² Because of the considerable success of the initial program, it has expanded in scope to include Somalia (Somaliland and Puntland), Tanzania, Mauritius, and Yemen.⁹³

The European Union

In addition to providing substantial initial funding to enhance the prosecution ability of Kenya and others, the European Union authorized the establishment of Operation Atalanta and the deployment of EU naval forces to protect the shipments by the World Food Programme to Mogadishu and shipping through the Gulf of Aden.⁹⁴

The North Atlantic Treaty Organization and Individual States

In parallel with the EU efforts, NATO authorized the deployment of its Standing Naval Force Mediterranean to provide similar protections.⁹⁵ Both the EU and the NATO authorizations have been renewed, as the incidents of piracy have continued.⁹⁶

In addition, other nations, including China, India, Japan, and Russia, have deployed their own counterpiracy naval forces to the region. These forces are now cooperating in their efforts with the Combined Maritime Forces Command in Bahrain.⁹⁷

The UN Security Council

Since the Security Council became involved in the efforts to suppress piracy off the coast of Somalia in mid-2008, as part of its longstanding engagement in the restoration of peace and security to that state, the Council has played a major role in authorizing and supporting those efforts.⁹⁸ The Council's most important initial actions were its decisions under Chapter VII

⁹² UNODC/EC, Joint European Commission/UNODC Programme: EU Support to the Trial and Related Treatment of Piracy Suspects (May 2009) (on file with author); *see also* UNODC, Combating Maritime Piracy in the Horn of Africa and the Indian Ocean. Increasing Regional Capacities to Deter, Detain and Prosecute Pirates, at <http://www.unodc.org/easternafrica/en/about-unodc-eastern-africa/ongoing-projects.html>.

⁹³ UNODC, Counter Piracy Programme (Nov. 2009), at http://www.unodc.org/documents/easternafrica/piracy/UNODC_Counter_Piracy_Programme.pdf; Eric van der Linden, Op-Ed, *Piracy: Why Kenya Should Care*, DAILY NATION (Kenya), Apr. 7, 2010, at <http://www.nation.co.ke/oped/Opinion/Why%20Kenya%20should%20care%20about%20piracy/-/440808/894724/-/6ucaw8z/-/> (written by the head of the EU delegation to Kenya); *see also* UNODC, Seychelles to Establish Centre for Piracy Trials (May 5, 2010), at <http://www.unodc.org/unodc/en/frontpage/2010/May/seychelles-to-establish-centre-for-piracy-trials.html>; UN News Centre, Seychelles to Launch UN-Backed Courts to Combat Piracy (May 5, 2010), at <http://www.un.org/news/>.

⁹⁴ Council Joint Action 2008/851/CFSP, 2008 O.J. (L 301) 33; Corrigenda to *id.*, 2009 O.J. (L 253) 18; *see also* EUROPEAN UNION COMMITTEE, COMBATING SOMALI PIRACY: THE EU'S NAVAL OPERATION ATALANTA; REPORT WITH EVIDENCE, 2009–10, H.L. 103, available at <http://www.publications.parliament.uk/pa/ld200910/ldselect/ldcom/103/103.pdf>; PLOCH ET AL., *supra* note 64, at 21.

⁹⁵ The initial deployment, Operation Allied Provider, commenced on October 15, 2008. PLOCH ET AL., *supra* note 64, at 20–21; NATO, Counter-piracy Operations (Apr. 30, 2010), at http://www.nato.int/cps/en/natolive/topics_48815.htm#provider.

⁹⁶ The Council of the European Union extended Operation Atalanta until December 12, 2010. Council Decision 2009/907/CFSP, 2009 O.J. (L 322) 27. NATO has extended Operation Ocean Shield until 2012. NATO, *supra* note 95.

⁹⁷ Combined Maritime Forces Press Release CMF032-10, Counter-piracy Task Force Efforts Reduce Numbers of Successful Attacks (Apr. 29, 2010), at <http://www.cusnc.navy.mil/articles/2010/CMF032.html>.

⁹⁸ Dalton, Roach, & Daley, *supra* note 16.

in the first three piracy resolutions that authorized cooperating states to act to suppress piracy in Somalia's territorial waters (Nos. 1816 and 1846) and in Somalia (No. 1851).⁹⁹ The various kinds of authority granted by these resolutions were renewed for a year in Resolution 1897 (2009). Each of these resolutions, followed by Resolution 1918 (2010),¹⁰⁰ contained provisions encouraging and praising a wide range of cooperative actions to enhance capabilities to suppress these acts of piracy. Resolution 1918 (not adopted under Chapter VII) focused on holding suspected pirates accountable for their acts.

The Contact Group on Piracy off the Coast of Somalia

Paragraph 4 of Security Council Resolution 1851, a U.S. initiative whose adoption was attended by several foreign ministers,¹⁰¹ encouraged "all States and regional organizations fighting piracy and armed robbery at sea off the coast of Somalia to establish an international cooperation mechanism to act as a common point of contact between and among states, regional and international organizations on all aspects of combating piracy and armed robbery" in the area concerned.¹⁰² After the resolution was adopted unanimously (15–0, with no abstentions), the U.S. secretary of state announced that

the United States intends to work with partners to create a contact group on Somali piracy. We envision the contact group serving as a mechanism to share intelligence, coordinate activities and reach out to other partners, including those in the shipping and insurance industries. We look forward to working quickly on this initiative.¹⁰³

The Contact Group on Piracy off the Coast of Somalia held its inaugural meeting at UN headquarters in New York City on January 14, 2009, and has held quarterly meetings since then. Through its four working groups it has facilitated military coordination off the coast of Somalia; supported best management practices for self-protection of the maritime industry; and established the International Trust Fund to Support Initiatives of States Countering Piracy off the Coast of Somalia.¹⁰⁴ The Contact Group approved the establishment of the trust fund at its meeting on January 28, 2010. On April 23, 2010, the United Nations announced that the trust fund had approved five projects totaling \$2.1 million, which would focus primarily on support for the prosecution of piracy suspects.¹⁰⁵ Security Council Resolution 1918 commended these and other actions taken by the Contact Group.¹⁰⁶

⁹⁹ See *supra* text at notes 16–25.

¹⁰⁰ See *supra* note 39.

¹⁰¹ UN Doc. S/PV.6046, *supra* note 24, at 4 (statement of UK foreign secretary Miliband).

¹⁰² SC Res. 1851, *supra* note 24, para. 4.

¹⁰³ UN Doc. S/PV.6046, *supra* note 24, at 9 (statement of U.S. secretary of state Rice).

¹⁰⁴ For a useful compilation of these and other counterpiracy initiatives, with links, see U.S. Dep't of Transportation, Maritime Administration, Horn of Africa Piracy, at http://www.marad.dot.gov/news_room_landing_page/horn_of_africa_piracy/horn_of_africa_piracy.htm [hereinafter Horn of Africa Policy].

¹⁰⁵ UN Press Release AFR/1966, PA/6, United Nations Approves Funding to Help Somalia, Neighbouring Countries Prosecute Piracy Suspects (Apr. 23, 2010), at <http://www.un.org/News/Press/docs/2010/af1966.doc.htm>.

¹⁰⁶ SC Res. 1918, *supra* note 39, pmb1.

III. THE ROLE OF NATIONAL LEGISLATION

Traditionally, pirates have been held accountable through prosecution in national courts.¹⁰⁷ At present, no treaty expressly requires states to criminalize piracy, no agreement has been reached on what such laws should contain, and no international court has jurisdiction to try pirates.¹⁰⁸

Accordingly, some states have enacted laws against pirates wherever located and of whatever nationality, not requiring a nexus between piracy and any state.¹⁰⁹ Other states have enacted laws against piracy but require some connection to the state, often a nationality connection of the victim, perpetrator, or victim ship.¹¹⁰ Others have extended their piracy laws to acts committed in their territorial sea or on their territory, even though the international law of piracy does not.¹¹¹ Some have even extended their piracy laws to include “found-in jurisdiction,” covering suspected pirates located in their territory even though the relevant crimes were committed outside their land territory or territorial sea.¹¹²

Unfortunately, no up-to-date comprehensive collection—much less analysis—of national laws against piracy now exists. The most comprehensive collection, contained in the Harvard

¹⁰⁷ There were three cases involving a total of twelve Somali pirates in U.S. federal district courts in early 2010. Press Release, U.S. Attorney, Eastern District of Virginia, Alleged Somali Pirates Indicted for Attacks on Navy Ships (Apr. 23, 2010) (attacks on USS *Nicholas*, Mar. 31, 2010, and USS *Ashland*, Apr. 10, 2010), at <http://www.justice.gov/usao/vae/>; Press Release, U.S. Attorney, Southern District of New York, Manhattan U.S. Attorney Files Superseding Indictment Against Alleged Somali Pirate Charging Involvement in Two Additional Hijackings (Jan. 12, 2010) (attack on M/V *Maersk Alabama*, Apr. 8, 2009, and on two other ships); *id.*, Somali Pirate Pleads Guilty in Manhattan Federal Court to Maritime Hijackings, Kidnappings, and Hostage Takings (May 18, 2010), both at <http://www.justice.gov/usao/nys/pressreleases/> (accused Musé avoiding mandatory life sentences for several offenses charged in the superseding indictment by pleading only to the lesser offenses).

¹⁰⁸ The International Tribunal for the Law of the Sea issued a press release clearly stating that it had no authority to try pirates, notwithstanding press reports to the contrary. ITLOS/Press 135, Clarification (Apr. 24, 2009), at <http://www.itlos.org/>. The government of Turkey has suggested that such a court be established. Note Verbale from the Permanent Mission of Turkey to the United Nations, UN Doc. S/2010/3, annex (Jan. 4, 2010). The Russian Federation, the Netherlands, and Portugal had earlier made similar proposals in the context of meetings of the Contact Group on Piracy off the Coast of Somalia, and its Working Group 2. Contact Group WG 2, *supra* note 88; Contact Group, Communique of the 5th Plenary Meeting (Jan. 28, 2010), at Horn of Africa Policy, *supra* note 104 (hyperlink). Until the adoption of Security Council Resolution 1918, there appeared to be little support for these proposals. See CHATHAM HOUSE, *supra* note 52, at 8. The U.S. government has opposed the creation of a new international tribunal, while supporting the efforts of the European Union, the UNODC, and the IMO to enhance local capabilities. The U.S. vote in favor of Resolution 1918, which requests that the secretary-general report on options for possible proceedings in international or mixed tribunals, may reflect a change in appreciation of the circumstances in the region. See text at note 118 *infra*.

¹⁰⁹ See, e.g., Crimes Act 1914, §§51–56 (Austl.), at http://www.austlii.edu.au/au/legis/cth/consol_act/ca191482/; Canada Criminal Code, R.S.C., ch. C-46, §74 (1985), available at <http://laws.justice.gc.ca/PDF/Statute/C/C-46.pdf>; Crimes Act 1961, No. 43, §§92, 95–97 (N.Z.), at <http://www.legislation.govt.nz/default.aspx>. For the relevant laws of Kenya, see *infra* note 111.

¹¹⁰ See, for example, those laws separately defining “piratical acts” with a national nexus: Canada Criminal Code, *supra* note 109, §75; Crimes Act 1961, *supra* note 109, §§93–94 (N.Z.); Merchant Shipping and Maritime Security Act, 1997, c. 28, §26, sched. 5 (UK) (LOS Convention definition), available at <http://www.opsi.gov.uk/acts/>; Piracy Act, 1850, c. 26, 13 & 14 Vict., available at *id.*; Piracy Act, 1837, c. 88, 1 Vict., available at *id.*; 18 U.S.C. §1651 (2006) (piracy under the law of nations).

¹¹¹ An Act to Impose the Death Penalty on Certain Heinous Crimes, Rep. Act No. 7659, §3, Art. 122, *as amended*, REV. PENAL CODE, Book 2, tit. 1, ch. 1 (Dec. 13, 1993) (Phil.), available at http://www.lawphil.net/statutes/repacts/ra1993/ra_7659_1993.html; Merchant Shipping Act, Act No. 4 of 2009, §369(1) (Kenya) (LOS Convention definition of piracy); PENAL CODE, Cap. 63, §69, Penal Code (Amendment) Act, No. 24 of 1967, §6, Kenya Gazette, Supp. No. 67, Acts No. 11, at 150, 153 (1967) (repealed) (“Any person who, in territorial waters or upon the high seas, commits any act of piracy *jure gentium* is guilty of the offence of piracy.”).

¹¹² *E.g.*, 18 U.S.C. §1651 (2006).

Research in International Law of 1932, is many decades old.¹¹³ The UNODC is now compiling information on current national laws on piracy.¹¹⁴

In any event, modern legislation on piracy is badly needed, and should be enacted both in countries that lack piracy laws (Japan has recently done so) and in those whose laws require updating (as Kenya has recently done).¹¹⁵ The IMO may be in a position to help that happen through the funding supplied by Japan for implementation of the Djibouti code of conduct, whose signatories agreed to make such efforts.¹¹⁶ In addition, the UN Security Council, in Resolution 1918, recognized these needs,¹¹⁷ and requested that the secretary-general report to it by the end of July 2010

on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia, including, in particular, options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements, taking into account the work of the [Contact Group], the existing practice in establishing international and mixed tribunals, and the time and resources necessary to achieve and sustain substantive results.¹¹⁸

IV. CONCLUSION

The international law of piracy applies not only on the high seas but also in the exclusive economic zone (where declared). In the case of Somalia, alone and for the time being, by virtue of Security Council Resolutions 1816, 1846, 1851, and 1897, it also applies in the Somali territorial sea (assumed to be 12 nautical miles) and “in Somalia.”

The cooperation between the naval forces operating off the coast of Somalia and the Republic of Kenya in transferring captured suspects ashore for trial is consistent with the command in Article 100 of the Law of the Sea Convention for all states to cooperate in the suppression of piracy. The international law of piracy, however, imposes no specific duties to prosecute or even to enact domestic law criminalizing piracy, though it does provide states with various kinds of authority to assist in the repression of piracy. In Resolution 1918, the Security Council called on all states to take actions in accordance with this authority. Yet the international law of piracy is further limited by being applicable only to acts of piracy as defined in international law. It does not apply to other criminal acts that might be committed during individual acts of piracy.

International institutions have responded to the problems posed by the continuing acts of piracy against shipping off the coast of Somalia in a variety of complementary ways. The International Maritime Organization repeatedly pushed the UN secretary-general to bring the matter to the attention of the Security Council. While doing so, the IMO developed and improved upon a variety of guidance documents to assist governments and the shipping industry in

¹¹³ *A Collection of Piracy Laws of Various Countries* (Stanley Morrison ed.), in 5 HARVARD RESEARCH IN INTERNATIONAL LAW (1932), reprinted in 26 AJIL Supp. 887 (1932).

¹¹⁴ UNODC, International Response and Security Council Resolutions, at <http://www.unodc.org/>.

¹¹⁵ Law on Punishment of and Measures Against Acts of Piracy, 2009 (entered into force July 24, 2009), at http://www.sof.or.jp/en/topics/pdf/09_01.pdf (provisional trans.), <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/index.htm> (trans. of draft). For Kenyan law, see *supra* note 111. See also Gathii, *supra* note 70, at 421 & n.38, 429–30.

¹¹⁶ *Multi-million Dollar TC Programme Approved*, IMO NEWS, No. 3, 2009, at 13.

¹¹⁷ SC Res. 1918, *supra* note 39, paras. 1–3.

¹¹⁸ *Id.*, para. 4.

defending against the Somali piracy. The IMO and the UNODC developed, and have been implementing, several plans and programs to assist the countries in the region in dealing with the consequences of the problem. Several governments and the European Union have donated considerable funding for those programs. Moreover, a considerable armada of warships has been deployed to the region to suppress the piratical acts. These efforts have been coordinated at the tactical level by the Combined Maritime Forces Command, and at the governmental level by the UN Contact Group.

Nevertheless, as is readily acknowledged by all, by themselves these actions will not eliminate piracy off the coast of Somalia. For that to occur, Somalia must be able to meet its responsibilities. While much effort has been, and continues to be, expended to that end, its success remains to be seen.

Finally, from a global perspective, “catch and release” cannot be relied upon as a deterrent. Adequate national legislation criminalizing acts of piracy and armed robbery at sea, and associated crimes, as well as modern criminal procedure laws, are a *sine qua non* for the effective suppression of piracy.

KENYA’S PIRACY PROSECUTIONS

*By James Thuo Gathii**

Kenya became a primary destination for the prosecution of pirates captured off the coast of Somalia from late 2008 to late 2009.¹ Yet none of the pirates being tried in Kenya as of April 2010 were captured by Kenyan armed forces² but, rather, by non-Kenyan forces whose countries had signed agreements with Kenya for it to conduct such trials. In Resolution 1851 of December 16, 2008, the United Nations Security Council had urged states and regional organizations to enter into such agreements.³ Kenya accordingly concluded agreements on prosecuting suspected pirates with the United Kingdom,⁴ the United States,⁵ the European

* Associate Dean for Research and Scholarship and Governor George E. Pataki Professor of International Commercial Law, Albany Law School; and Advocate of the High Court of Kenya. I would like to thank the excellent librarians at Albany Law School, Robert Emery and Mary Wood, as well as the Library Director, Prof. Robert Begg, for their assistance. Thanks, too, to Guinevere Seaward and Joseph Rogers for research assistance.

¹ Jeffrey Gettleman, *Rounding up Suspects, the West Turns to Kenya as Piracy Criminal Court*, N.Y. TIMES, Apr. 24, 2009, at A8.

² See Celestine Achieng, *Kenya Imprisons Seven Somalis for Piracy*, REUTERS, Mar. 10, 2010, available in LEXIS, News Library, Individual Publications File (reporting that “[i]nternational navies trying to counter piracy off Somalia are often reluctant to take suspects to their own countries because they either lack the jurisdiction to put them on trial there, or they fear the pirates may seek asylum”).

³ UN Security Council Resolution 1851 invited “States and regional organizations fighting piracy off the coast of Somalia to conclude special agreements or arrangements with countries willing to take custody of” and prosecute pirates. SC Res. 1851, para. 3 (Dec. 16, 2008).

⁴ Catherine Philp & Rob Crilly, *Allies Seek Power to Pursue Somali Pirates on Land and Sea*, TIMES (London), Dec. 12, 2008, at 54; Agence France-Presse, *Britain and Kenya Sign MOU on Piracy*, KENYA BROADCASTING CORP., Dec. 11, 2008, at <http://www.kbc.co.ke/story.asp?ID=54429>. The memorandum was signed on December 11, 2008, by Foreign Affairs Minister Moses Wetangula of Kenya and Security Minister Lord West of the United Kingdom. It formalized an ad hoc arrangement that the Kenyan government had entered into with the British in November 2008, which led to the prosecution of eight pirate suspects arrested by the British while they were allegedly trying to hijack a Danish cargo ship.

⁵ U.S. Dep’t of State, Fact Sheet: United States Actions to Counter Piracy off the Horn of Africa (Sept. 1, 2009), at <http://www.state.gov/t/pm/rls/fs/128540.htm>; David Morgan, *Kenya Agrees to Prosecute US-Held Pirates—Pen-*

Union,⁶ and Denmark.⁷ According to media reports, and as Kenya recently acknowledged, two others were negotiated, with China and Canada.⁸ Only the EU-Kenya agreement has been published. The British foreign secretary told the House of Commons that Kenya did not want its agreement with the United Kingdom to be made public.⁹ Consequently, it may well be that a Kenyan preference for secrecy prevented the public release of information on the other agreements signed by Kenya.

In the wake of Kenya's agreement to prosecute pirates captured by the United States and the European Union, at least ten cases against seventy-six suspected pirates had been brought in the Mombasa law courts as of August 31, 2009.¹⁰ These cases were referred to the magistrates' courts, Kenya's courts of first instance.¹¹ Jurisdiction to prosecute piracy under Kenya's Criminal Procedure Code is granted to chief magistrates, principal magistrates, and senior resident magistrates.¹²

In the first-ever piracy trial in Kenya, *Republic v. Hassan Mohamud Ahmed*, decided in 2006,¹³ ten Somali suspects originally captured by the U.S. Navy were convicted of the crime of piracy and are serving a sentence of seven years. The Kenyan High Court subsequently rejected their appeal.¹⁴ That appellate decision produced a binding precedent, finding that under international law Kenyan magistrates' courts have jurisdiction to proceed with piracy prosecutions against non-nationals captured outside the country.

tagon, REUTERS, Jan. 29, 2009, available in LEXIS, News Library, Individual Publications File (Memorandum of Understanding, Jan. 16, 2009).

⁶ Exchange of Letters on the Conditions and Modalities for the Transfer of Persons Suspected of Having Committed Acts of Piracy and Detained by the European Union—Led Naval Force (EUNAVFOR), and Seized Property in the Possession of EUNAVFOR, from EUNAVFOR to Kenya for Their Treatment After Such Transfer, EU-Kenya, Mar. 6, 2009, 2009 O.J. (L 79) 49, reprinted in 48 ILM 751 (2009) [hereinafter EU-Kenya Exchange of Letters].

⁷ *Kenya Imposes Conditions on Acceptance of Captured Somali Pirates*, BBC, Mar. 31, 2010, available in LEXIS, News Library, Most Recent Two Years File [hereinafter *Kenya Imposes Conditions*]; *Danish Navy Forges Deal with Kenya over Somali Piracy*, ICE NEWS—DAILY NEWS, Aug. 27, 2009, at <http://www.icenews.is/index.php/2009/08/27/danish-navy-forges-deal-with-kenya-over-somali-piracy>.

⁸ *Kenya Imposes Conditions*, *supra* note 7.

⁹ Kenya: Piracy, Hansard, UK House of Commons Written Answers, pt. 0010, col. 921W (May 14, 2009), available at <http://www.publications.parliament.uk/>.

¹⁰ These numbers are based on a perusal of the court files in Mombasa. In early September 2009, Vice President Kalonzo Musyoka told the press that there were one hundred piracy suspects on trial in Kenya. Anthony Kitimo, *Kenya: Piracy Suspects Appeal to VP Kalonzo*, DAILY NATION, Sept. 4, 2009, at <http://www.allafrica.com/stories/200909040838.html>; see also *Kenya Imposes Conditions*, *supra* note 7 (placing the figure at over a hundred).

¹¹ Appeals from magistrates' courts go to the High Court and appeals from the High Court to the Court of Appeal, the highest court in Kenya's judicial system. Magistrates' courts are staffed by magistrates ranked by the magnitude of their jurisdiction in the following order descending from the top: chief magistrate, senior principal magistrate, principal magistrate, senior resident magistrate, resident magistrate, and district magistrate. The piracy cases are being tried by chief magistrates.

¹² Criminal Procedure Act (1987), Cap. 75, 1st sched., §69. *But see* note 59 *infra*. Current Kenyan laws and cases referred to in the discussion below are available online at <http://www.kenyalaw.org/update/>, unless otherwise noted.

¹³ *Republic v. Hassan Mohamud Ahmed*, Crim. No. 434 of 2006 (Chief Magis. Ct. Nov. 1, 2006) (Jaden, Acting Sr. Principal Mag.) (on file with author).

¹⁴ *Hassan M. Ahmed v. Republic*, Crim. App. Nos. 198, 199, 201, 203, 204, 205, 206, & 207 of 2008 (High Ct. May 12, 2009) (Azangalala, J.).

In the following discussion of the Kenyan piracy trials, I first examine how international law has been applied in Kenyan courts as a backdrop to its emerging application in the piracy context. In part II, I describe how Kenyan courts applied international law in the *Ahmed* case and briefly note how a new Kenyan statute may cure some of the limitations in the current case law on the availability of jurisdiction to prosecute pirates under Kenyan law. Finally, I consider the propriety and fairness of the current trials in light of the protections of criminal defendants under Kenyan law, as well as under the protections of suspects outlined in the EU-Kenya Memorandum of Understanding.

I. INTERNATIONAL LAW IN KENYAN COURTS

The ongoing piracy trials demonstrate that Kenyan courts are readier today than previously to resort to international law derived from custom and from ratified, but undomesticated treaties as sources of law for domestic application. To that extent, dualism's hold on Kenyan courts now appears attenuated. Until recently, Kenyan courts did not regard international law as part of Kenyan law unless it was specifically incorporated into Kenyan law by Parliament. This was the case with the now-repealed statute that governs the current prosecutions, which expressly incorporated the offense of piracy *jure gentium*.¹⁵ The High Court in the piracy context has definitively provided the most forceful argument in favor of considering norms of customary international law as part of Kenyan law.

Neither the Constitution nor the Judicature Act,¹⁶ which spells out the sources of Kenyan law, makes reference to international law as being such a source. In addition, in Kenyan treaty practice treaties could historically become part of Kenyan law only if they were domesticated through implementing legislation.¹⁷

Kenyan courts also asserted the supremacy of the Constitution over inconsistent treaties. Thus, in the 1970 case *Okunda v. Republic*,¹⁸ the High Court ruled that the Constitution superseded a statute of the East African Community. This decision was affirmed in a Court of

¹⁵ Piracy, PENAL CODE, Cap. 63, §69, Penal Code (Amendment) Act, No. 24 of 1967, §6, Kenya Gazette, Supp. No. 67, Acts No. 11, at 150, 153 (1967), reprinted in KENYA LAW REPORTS, THE LAWS OF KENYA, GREY BOOK 43 (rev. ed. 2007) [hereinafter Repealed §69]. Under Kenyan law, the effect on ongoing cases of the repeal of a statute is provided for in §23(3)(e) of the Interpretation and General Provisions Act, Cap. 2 (1983), which states that the repeal of a statute in whole or in part shall not "affect an investigation, legal proceeding or remedy . . . , and any such investigation, legal proceeding or remedy may be instituted, continued or enforced . . . as if the repealing written law had not been made." Notably, under the common law the repeal of penal statutes grants immunity from indictment to those whose prosecutions did not result in a conviction for offenses committed while the repealed statute was in force. See *Bennett v. Tatton*, (1918) 88 L.J.K.B. 313.

¹⁶ Judicature Act, Cap. 8 (1967), provides a hierarchical source of Kenya's law. At the apex is the Constitution, *id.* §3(1)(a); followed, respectively, by laws as passed by Parliament, *id.* §3(1)(b); statutes of general application in force as of August 12, 1897, *id.* §3(1)(c); the common law, *id.*; and customary law norms (that is, African customary, or indigenous, law) to the extent they are not repugnant to notions of justice and morality, *id.* §3(2). African customary laws here refer to cultural and religious norms in family law areas, such as marriage, divorce, and devolution of property on death. See Celestine Nyamu, *How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?* 41 HARV. INT'L L.J. 381, 401–07 (2000).

¹⁷ David Mugadu Isabirye, *The Status of Treaties in Kenya*, 20 INDIAN J. INT'L L. 63, 75 (1980) (noting that for "dualists international law is never available to a municipal court as a body of rules to be applied by it in the determination of an issue unless the constitution so provides").

¹⁸ *Okunda v. Republic*, [1970] E. Afr. L.R. 453.

Appeal decision emphasizing that the provisions of any treaty in conflict with the Constitution were void.¹⁹

In the recent past, Kenyan courts have increasingly resorted to international law. Parliament has also increasingly incorporated international law in a variety of statutes. Recent treaty-implementing legislation passed by Parliament includes the Statute of the International Criminal Court, the Treaty Establishing the East African Community, and the Convention on the Rights of the Child.²⁰

On their part, Kenyan courts have justified their resort to international law by declaring that “[i]nternational Treaties and Conventions are not to be signed and abandoned.”²¹ They have also held that litigants can rely on treaty-created rights that were ratified without reservations even where the treaty has not been domesticated by Parliament.²² In addition, as will be seen in part II, Kenyan courts have gone even further by embracing universal jurisdiction over piracy as a norm of international law.

Kenyan courts’ assumption of jurisdiction over non-Kenyan pirates captured on the high seas by foreign forces may be seen in light of this new trend regarding international law. This trend may have laid the foundation for Kenyan courts to invoke customary international law to justify their assumption of such jurisdiction. In *R.M. v. Attorney General*, the High Court, citing the Bangalore Principles,²³ held that where a treaty has been ratified but not domesticated through implementing legislation, a court may take it into account “in seeking to interpret ambiguous provisions in . . . municipal law.”²⁴ The court also quoted a House of Lords case to buttress its argument that “Parliament does not intend to act in breach of international law, including, specific treaty obligations.”²⁵ This principle is referred to as the *Charming Betsy* doctrine in the United States and holds that an “act of Congress ought never to be construed

¹⁹ E. Afr. Cmty. v. Republic, [1970] E. Afr. L.R. 457.

²⁰ International Crimes Act, Cap. 16 (2008), Kenya Gazette, Supp. No. 100 (2008); Treaty for the Establishment of the East African Community Act, Cap. 2 (2000); Children Act, Cap. 8 (2001).

²¹ *In re Sugar Act 2001* (No. 10 of 2001), *ex parte* Mat Int’l Ltd, Misc. Civ. App. No. 192 of 2004, [2004] eKLR at 12 (High Ct.). Similarly, in *Juma Ganzori v. Commissioner General Kenya Revenue Authority*, App. No. 60 of 2006, the court applied a provision of the East African Parliament’s East African Community Customs Act of 2004, and thus affirmed its supremacy over the Kenyan customs law it had replaced. Cases such as *Juma Ganzori* are heralding a whole new area of law where regional law is beginning to take precedence over domestic law.

²² One court in this context borrowed from the Bangalore Principles, *infra*, and summarized this principle in the following terms: “It is only where an Act intended to bring a Treaty into effect is itself ambiguous or one interpretation is compatible with the term of the treaty while others are not that the former will be adopted.” *R.M. [Rose Moraa] v. Attorney Gen.*, Civ. No. 1351 of 2002, [2006] eKLR at 27 (High Ct.), [2008] 1 KLR (G&F) 574. The Bangalore Principles were formulated at a high-level judicial colloquium on the domestic application of international human rights norms, which was held from February 24 to 26, 1988, organized by the Commonwealth Secretariat, and convened by P. N. Bhagwati, the former chief justice of India. The principles represent Justice Bhagwati’s summary of the discussions. Bangalore Principles on the Domestic Application of International Human Rights Norms, *reprinted in* 3 DEVELOPING HUMAN RIGHTS JURISPRUDENCE 151 (1991) [hereinafter *Bangalore Principles*].

²³ Principle 7 of the Bangalore Principles, *supra* note 22, states: “It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes—whether or not they have been incorporated into domestic law—for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.”

²⁴ *R.M. v. Attorney Gen.*, [2006] eKLR at 27–28 (quoting *R v. Chief Immigration Officer, Heathrow Airport, ex parte Bibi*, [1976] 3 All E.R. 843 (C.A.)).

²⁵ *Id.* at 27 (quoting *Solomon v. Comm’r of Customs*, [1967] 2 Q.B. 116, 143 (H.L.), and also noting that this is a “presumption in our law that legislation is to be construed to avoid a conflict with international law”).

to violate the law of nations if any other possible construction remains.”²⁶ Even though in *R.M. v. Attorney General* the Kenyan High Court invoked the principle of conforming a domestic statute to international law by virtue of the Children Act’s having been passed to implement the Convention on the Rights of the Child, it nonetheless declined to give relief since there was no ambiguity in the Act that could be resolved on the basis of rights declared in the Convention.²⁷

The court also noted that Parliament was under “no obligation to adopt, line hook and sinker,” all the provisions of the Convention on the Rights of the Child because in construing the Constitution, it enjoyed a “margin of appreciation.”²⁸ Within this margin, the court held, the “living tree principle of the interpretation of the Constitution” enabled it to adopt a broad view in case of “ambiguity, inconsistencies, unreasonableness, lack of legislative purpose or obvious imbalance or lack of proportionality or absurd situations.”²⁹

The Court of Appeal affirmed this approach to interpretation in *Rono v. Rono*.³⁰ In reversing a discriminatory order on the distribution of an intestate estate between girls and boys, the Court noted that “[a]s a member of the international community, Kenya subscribes to international customary laws and has ratified various international covenants and treaties.”³¹ According to the Court, “current thinking on the common law theory is that both international customary and treaty law can be applied by state courts where there is no conflict with existing state law, even in the absence of implementing legislation.”³² The Court of Appeal referred to the following instruments as relevant to its decision in this case, although Parliament had not passed implementing legislation for any of them: the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; and the Convention on the Elimination of All Forms of Discrimination Against Women; as well as the African Charter on Human and Peoples’ Rights. Grounding itself on this body of international law, the Court concluded that Kenya was in “tandem with emerging global culture, particularly on gender issues,”³³ and, therefore, that in resolving the central question of discrimination in the case, the Court could not rely on domestic law alone but would also take into consideration “the relevant international laws which Kenya has ratified.”³⁴ Thus, ratification without the passage of implementing legislation or domestication was sufficient for a court to have regard to the norms contained in the ratified

²⁶ *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), which has been relied on in other cases such as *Fundacao Tupy S.A. v. United States*, 11 C.I.T. 23, 29 (1987), to the effect that absent express congressional intent, statutes should not be interpreted to conflict with international obligations. For an analysis of this and related matters, see also James Thuo Gathii, *Foreign Precedents in the Federal Judiciary: The Case of the World Trade Organization’s DSB Decisions*, 34 GA. J. INT’L & COMP. L. 1, 14–19 (2005).

²⁷ *R.M. v. Attorney Gen.*, [2006] eKLR at 30. The applicant in the case had argued that §24(3) of the Act, which initially assigns parental responsibility to the mother, to the exclusion of the father in situations mentioned in that section (relating to what is termed “illegitimacy”), was not discriminatory, as it was based on a legitimate purpose. *Id.* at 31.

²⁸ *Id.* at 34.

²⁹ *Id.*

³⁰ *Rono v. Rono*, Civ. App. No. 66 of 2002, [2005] eKLR, [2008] 1 KLR (G&F) 803, *rev’g* Eldoret High Ct. Probate & Admin. Cause No. 40 of 1988 (High Ct. June 12, 1997).

³¹ *Id.* at 10.

³² *Id.* at 11.

³³ *Id.*

³⁴ *Id.* at 12.

treaty. Because Kenya has ratified the United Nations Convention on the Law of the Sea³⁵ (LOS Convention) without domesticating it through implementing legislation, these precedents are relevant to whether Kenyan courts can resort to that Convention as an available source of law, a question that figures in the piracy cases discussed below.

These judicial decisions evidence a decisive break from the strict dualism of the 1970 decision in *Okunda v. Republic*.³⁶ While not cited in the first-ever piracy judgment on appeal in the High Court,³⁷ these decisions are consistent with the invocation of customary international law to justify the jurisdiction of Kenyan courts over non-national pirates captured on the high seas by foreign forces. It is in that context, I believe, that such resort to customary international law should be seen.

II. JUDICIAL INCORPORATION OF THE INTERNATIONAL LAW OF PIRACY INTO KENYAN LAW

Article 101 of the LOS Convention limits the definition of piracy to the high seas or a place outside the jurisdiction of any state. That article and the other piracy provisions are found in Part VII of the LOS Convention. Pursuant to Article 86, the provisions of Part VII apply seaward of the exclusive economic zone; pursuant to Article 58(2), most of these provisions, including those concerning piracy, also apply within the exclusive economic zone. The piracy provisions do not apply to waters landward of the exclusive economic zone, notably internal waters, archipelagic waters, and the territorial sea.

Under the provisions in effect from 1967 until September 1, 2009, Kenya's Penal Code criminalized piracy, both in Kenya's territorial waters and on the high seas.³⁸ Piracy is often understood at international law as a crime committed on the high seas rather than in territorial waters or ports.³⁹ Thus, the definition of piracy under the repealed provisions of the Kenyan Penal Code was broader

³⁵ United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 UNTS 397, *available at* <http://www.un.org/Depts/los/index.htm> [hereinafter LOS Convention].

³⁶ *Okunda v. Republic*, [1970] E. Afr. L.R. 453 (High Ct.).

³⁷ *Republic v. Hassan Mohamud Ahmed*, *supra* note 13.

³⁸ The repealed provisions on piracy in the Kenyan Penal Code provided:

(1) Any person who, in territorial waters or upon the high seas, commits any act of piracy *jure gentium* is guilty of the offence of piracy.

(2) Any person who, being the master, an officer or a member of the crew of any ship and a citizen of Kenya—

(a) unlawfully runs away with the ship; or

(b) unlawfully yields it voluntarily to any other person; or

(c) hinders the master, an officer or any member of the crew in defending the ship or its complement, passengers or cargo; or

(d) incites a mutiny or disobedience with a view to depriving the master of his command,

is guilty of the offence of piracy.

(3) Any person who is guilty of the offence of piracy is liable to imprisonment for life.

Repealed §69, *supra* note 15. Section 69 was repealed by the Merchant Shipping Act of 2009, *infra* note 89.

³⁹ See M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 136–51 (2001) (arguing that universal jurisdiction over piracy is firmly established under international law and that it developed in part in the national laws and practices of major seafaring nations). Notably, Article 86 of the LOS Convention, *supra* note 35, excludes exclusive economic zones, territorial seas, and internal waters of a state from the applicability of Part VII of the Convention. Article 58(2) applies the provisions relating to piracy to the exclusive economic zone. Attacks within territorial waters are referred to as

than the definition under international law since it included the crime within Kenya's territorial waters. The Kenyan statute provided in the relevant part that "[a]ny person who, in territorial waters or upon the high seas, commits any act of piracy *jure gentium* is guilty of the offence of piracy."⁴⁰ The maximum penalty for those found guilty of this offense was life imprisonment.⁴¹ As will be discussed below, the repealed piracy provisions of the Penal Code were replaced by more elaborate piracy provisions in Kenya's 2009 Merchant Shipping Act.

The first piracy trial in Kenya pursuant to the repealed provisions of section 69 of the Penal Code, *Republic v. Hassan Mohamud Ahmed*,⁴² concerned ten Somali nationals handed over to Kenyan authorities by the United States after they were captured "approximately 200 miles from the Somali coast" by the guided-missile destroyer USS *Winston S. Churchill*.⁴³ The suspects were charged before a senior principal magistrate in Mombasa for hijacking the Indian-flagged and -registered vessel MV *Safina al Bisarat* on the high seas on January 16, 2006, threatening the lives of its crew, and demanding a ransom of fifty thousand U.S. dollars. The accused were alleged to have captured the *Al Bisarat* 300 nautical miles off the coast of Somalia by attacking the vessel from small speedboats. They allegedly held its crew captive for two days, during which time they assaulted the prisoners. They were intercepted by the *Churchill*, which had received distress calls from another vessel attacked by the suspects.

The court took into account evidence that when they were intercepted, the accused were armed with revolvers, rocket-propelled grenade launchers, and AK-47 assault rifles, and a ladder that they allegedly used to climb onto the *Al Bisarat*.⁴⁴ The court found that the accused had used the *Al Bisarat* to launch attacks on other vessels.⁴⁵ In their defense, the accused pirates had argued that they were stranded fishermen engaged in peaceful fishing and that they had been held by the crew of the *Al Bisarat*. The court rejected this defense and the claim by one of the ten that he was a child.⁴⁶ On the basis of the evidence supplied by the Indian crew members and the U.S. naval personnel who rescued them, the Somali pirates were convicted and sentenced to seven years' imprisonment each on November 1, 2006.⁴⁷

Most significant, the court was not persuaded by the defense argument that a Kenyan court did not have jurisdiction over non-Kenyan nationals captured on the high seas for offenses committed outside Kenya. The piracy suspects had argued before Mombasa acting senior principal magistrate B. T. Jaden that although piracy is defined as an offense under the LOS Convention, no Kenyan court had jurisdiction because the Convention had not been domesticated

armed robbery against ships. See International Maritime Organization [IMO], Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery Against Ships, para. 2.2, Res. A.1025(26), annex (Dec. 2, 2009), IMO Doc. A 26/Res.1025 (Jan. 18, 2010).

⁴⁰ Repealed §69, *supra* note 15, para. 1.

⁴¹ *Id.*, para. 3.

⁴² *Republic v. Hassan Mohamud Ahmed*, *supra* note 13.

⁴³ See *Capture of Suspected Somali Pirates*, US FED NEWS, Feb. 2, 2006, available in LEXIS, News Library, Wire Service Stories File.

⁴⁴ *Republic v. Hassan Mohamud Ahmed*, *supra* note 13, at 147–48, 153.

⁴⁵ *Id.* at 153. Notably, the accused persons decided to give unsworn statements when they put on their defense. Under Kenyan law, unsworn statements given in defense are not subject to cross-examination. The magistrate found the unsworn statements "not convincing in view of the overwhelming evidence from the prosecution witnesses." *Id.* at 152.

⁴⁶ *Id.* at 152, 156–57.

⁴⁷ *Id.* at 157.

through implementing legislation.⁴⁸ On behalf of the pirates, it was also argued that the offense of piracy, as provided for under the Kenyan Penal Code, did not conform with international maritime law. In addition, the accused persons argued that magistrates' courts in Kenya did not have admiralty jurisdiction since that jurisdiction was exclusively vested in the High Court.⁴⁹

With regard to the claim that only the High Court was vested with jurisdiction over maritime offenses, the court held that since the first schedule of the Criminal Procedure Code provided that a magistrates' court could try the offense of piracy, it had been properly seized of jurisdiction.⁵⁰ In response to the argument that Kenyan courts had no jurisdiction over piracy, the court noted that the defense had failed to demonstrate how the codification of customary international law under the LOS Convention negated the provisions of section 69 of the Penal Code, which provided for the offense of piracy *jure gentium*. Rather, the court understood the Convention as "amplif[ying] what is already provided for" under the Penal Code regarding piracy.⁵¹ The court recalled that section 69(1) of the Penal Code referred to both territorial waters and the high seas, and that under section 2 of the Penal Code, a person could be tried and punished under any law in force in Kenya relating to the jurisdiction of the courts of Kenya for an offense committed beyond the Kenyan courts' ordinary jurisdiction. Principal Magistrate Jaden "therefore agree[d] with the prosecution that any act of piracy *jure gentium* is a crime against mankind which lies beyond the protection of any State."⁵² Moreover, "[i]t is a crime with international dimensions."⁵³ Describing piratical acts as including violence, detention, and the causing of harm or damage, the court invoked the definition of piracy under Article 101 of the LOS Convention for the proposition that the offense consists of those acts.⁵⁴

From this decision, an appeal was filed to the High Court contesting the jurisdiction of the Principal Magistrate's Court over the accused on the grounds that they were non-Kenyans and that the acts of piracy they had been convicted of had been committed outside Kenya.⁵⁵ Just as in the trial below, the government argued that it did not matter where the crimes had been committed or who had committed them since, as the lower court had held, piracy was "a crime against mankind which lies beyond the protection of any state."⁵⁶ By this, the court was perhaps advertent to the claim that pirates and pirate ships forfeit the protection of the flag state, and any boarding, or arresting or prosecution of pirates would not breach the exclusive jurisdiction of that state.⁵⁷ The High Court, in upholding the court below, noted that section 69(1) of the Penal Code, which provides that "any person" on the "high seas" may be found guilty

⁴⁸ *Id.* at 153–54.

⁴⁹ *Id.* at 154.

⁵⁰ *Id.* The Criminal Procedure Code, *supra* note 12, schedule 1, specifies which courts have jurisdiction over particular offenses.

⁵¹ Republic v. Hassan Mohamud Ahmed, *supra* note 13, at 154.

⁵² *Id.* at 155. The prosecution had argued that "there is universal jurisdiction irrespective of where the crime occurs or the nationality of the person committing it. That it's a crime against mankind which lies beyond the protection of any state." *Id.* at 154.

⁵³ *Id.* at 155.

⁵⁴ *Id.*

⁵⁵ Hassan M. Ahmed v. Republic, *supra* note 14, at 2. The other grounds of appeal related to alleged inadequacies in the evaluation of and reliance on the evidence presented to the lower court as the basis for convicting the accused, dismissing their defense, and imposing an excessive punishment. *Id.*

⁵⁶ *Id.* at 5 (quoting *Hassan Mohamud Ahmed*, *supra* note 13, at 155).

⁵⁷ Article 92 of the LOS Convention, *supra* note 35, provides that a ship is subject to the exclusive jurisdiction of its flag state on the high seas. However, Article 110 provides that warships or vessels belonging to any government

of the offense of piracy, was broad enough to cover the prosecution of non-national suspects captured 300 kilometers off the Somali coast in international waters.⁵⁸ The court buttressed its holding by referring to another statute, the Kenyan Criminal Procedure Code. Echoing the lower court, the High Court observed that the first schedule of that statute grants jurisdiction to try such cases to the Kenyan magistrates' courts.⁵⁹ For this reason, as well as under relevant provisions of international law, the High Court concluded that the ground of appeal based "on want of jurisdiction must fail."⁶⁰

Turning to international law, the High Court recalled the government's statement at trial that Kenya had ratified and domesticated the LOS Convention, and the apparent acceptance of that statement by counsel for the appellants.⁶¹

I must hold that the Learned Principal Magistrate was bound to apply the provisions of the [LOS] Convention should there have been deficiencies in our Penal Code and Criminal Procedure Code.

I would go further and hold that even if the Convention had not been ratified and domesticated, the Learned Principal Magistrate was bound to apply international norms and Instruments since Kenya is a member of the civilized world and is not expected to act in contradiction to expectations of member states of the United Nations.⁶²

Significantly, the High Court was saying that even if the magistrate did not have jurisdiction based on an explicit statute, jurisdiction would be available under the LOS Convention, whether or not Kenya had domesticated the Convention. This reasoning, while consistent with earlier decisions mentioned above in which the High Court and Court of Appeal applied ratified, but undomesticated treaties to resolve ambiguities or gaps in domestic statutes,⁶³ is nonetheless broader than those decisions for at least two reasons. First, previous decisions that

may board a foreign ship, other than those entitled to complete immunity, that is suspected of piracy. Article 110 is therefore an exception to the rule on the exclusive jurisdiction of the flag state.

⁵⁸ Hassan M. Ahmed v. Republic, *supra* note 14, at 9.

⁵⁹ *Id.* at 10. This reasoning on the basis of a schedule to a Kenyan statute is very doubtful in my view. For further exploration of this point, see James Thuo Gathii, *Jurisdiction to Prosecute Non-national Pirates*, 31 LOY. L.A. INT'L & COMP. L. REV. 363 (2010) (also arguing that the High Court rather than courts of first instance is the appropriate venue for piracy trials under Kenyan law).

⁶⁰ Hassan M. Ahmed v. Republic, *supra* note 14, at 12.

⁶¹ *Id.* at 10–11. On behalf of the state, it was inaccurately argued both before the principal magistrate and the High Court that Kenya had domesticated the LOS Convention. While Kenya had ratified the Convention in 1989, it was not until September 1, 2009, when the Merchant Shipping Act of 2009 came into effect, that that treaty was domesticated in Kenya. The High Court noted that neither in the lower court nor on appeal was a "contrary view . . . given by counsel for the appellants" on domestication of the LOS Convention. *Id.* at 10. This observation by the High Court gives further credence to my argument that piracy has occasioned a decisive break with dualism even though the two courts' reasoning finding jurisdiction over non-national pirates captured outside Kenya leaves much room for doubt.

⁶² *Id.* at 10–11 (emphasis added) (fortifying its decision by quoting MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW 76–77 (1990), for the proposition that certain crimes such as piracy are considered so destructive of the international order that under customary international law any state may exercise jurisdiction over them, regardless of where the alleged crimes took place or the nationality of the perpetrators; and that this universal principle of jurisdiction is based on the nature of the alleged crime rather than the identity of the perpetrator or the place of commission). See also *infra* note 87 and corresponding text.

⁶³ For example, in *Rono v. Rono*, *supra* note 30, at 10, the Court of Appeal, noting Kenya's endorsement of customary international law and "ratification" of various international covenants and treaties, stated that even if some of these treaties had not been domesticated, they should be taken into account in resolving the central question of discrimination when that was in issue.

applied ratified, but undomesticated treaties or norms of customary international law largely used them as an additional backdrop against which statutory interpretation was undertaken. In the piracy context, the LOS Convention is used to affirm the existence of universal jurisdiction over piracy as an independent basis for exercising jurisdiction over non-Kenyan nationals charged with committing offenses on the high seas. Thus, international law, rather than domestic law, is invoked not simply to fill a statutory gap or to help in interpreting a statute but as a legal justification establishing the piracy jurisdiction of Kenyan courts over non-nationals who had committed the offense extraterritorially and been captured by foreign forces.

Second, the High Court's statement that Kenya was expected to "apply international norms and Instruments" as a member of the civilized world and the United Nations is a rather broad and bold claim. It is broad because the court did not give guidance on which international norms and instruments Kenyan courts would be expected to heed in future.

While Somalia may not be able to prosecute these piracy suspects in its own courts, the Kenyan High Court decision in *Hassan Mohamud Ahmed* strongly suggests that Kenya is obliged to prosecute them even if their connection to Kenya is not as strong as it arguably is to the states whose military forces arrested the suspects and brought them to Kenya, as contemplated under Article 105 of the LOS Convention. Although the court did not refer to it, such an obligation could also be said to arise from the duty to suppress piracy under Article 100 of the LOS Convention.⁶⁴

The Kenyan High Court also did not refer to the prosecution agreement that Kenya had entered into with the United States, though the agreement had been concluded earlier that year.⁶⁵ This agreement could arguably have been invoked to justify jurisdiction over the piracy suspects.⁶⁶ On this point, there is a notable contrast between Kenya's willingness to assume jurisdiction over the suspects and the practice so far adopted by the United States. The prosecution of the lone suspect who survived the 2009 attack on the *Maersk Alabama* suggests that the United States itself may try suspected pirates who attack U.S. vessels and U.S. nationals off the coast of Somalia, but not others.⁶⁷ Indeed, for nearly two hundred years before 2008,

⁶⁴ LOS Convention, *supra* note 35, Art. 100. UN Security Council Resolution 1816 (June 2, 2008) calls upon states in paragraph 11 to "cooperate in determining jurisdiction, and in the investigation and prosecution of persons responsible for acts of piracy and armed robbery off the coast of Somalia consistent with applicable international law."

⁶⁵ Jurisdiction of national courts can be provided for by agreement, as with status-of-forces agreements. See LORI F. DAMROSCH ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 830–35 (5th ed. 2009).

⁶⁶ The High Court did not refer to the agreement between Kenya and the United States of January 2009, or the one with the European Union of April 2009, as additional reasons for finding jurisdiction over the pirates. Thus, the court seemed to assume that since the offense was defined under international law, jurisdiction was automatically available in Kenya. It made no distinction between having the jurisdiction and exercising it. For considerations national courts ought to take into account in exercising universal jurisdiction, see Michael Kirby, *Universal Jurisdiction and Judicial Reluctance: A New "Fourteen Points,"* in *UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW* 240 (Stephen Macedo ed., 2004).

⁶⁷ See *United States v. Abduwali Abdukhadir Musé*, No. 9-CR-512 (S.D.N.Y. filed May 19, 2009) (charging the defendant, inter alia, with piracy against the U.S.-flagged M/V *Maersk Alabama* on the high seas and, armed with a firearm, hijacking it by force and detaining its captain in a lifeboat on or about Apr. 8–12, 2009), Superseding Indictment (S.D.N.Y. filed Jan. 12, 2010) (adding charge of hijacking two non-U.S.-flagged ships before the *Maersk Alabama*); see also Press Release, U.S. Attorney, Southern District of New York, Manhattan U.S. Attorney Files Superseding Indictment Against Alleged Somali Pirate Charging Involvement in Two Additional Hijackings (Jan. 12, 2010), available at <http://www.justice.gov/usao/nys/pressreleases/>; note 132 *infra* and corresponding text. For the disposition of the *Musé* case, see, in this Agora, J. Ashley Roach, *Countering Piracy off Somalia: International*

the United States never invoked universal jurisdiction over piracy.⁶⁸ The Kenyan High Court's assertion of jurisdiction over piracy thus differs from that of states like the United States and those of the European Union that have seized suspected pirates and have far more resources and long-established judiciaries to deal with such prosecutions. Clearly, though, there are logistical and other difficulties for these prosecutions to be conducted in distant states whose warships have captured piracy suspects in the Gulf of Aden.⁶⁹

Remarkably, Kenyan courts, which until recently were wedded to dualism, have assumed jurisdiction over piracy while neither the Constitution nor any written law until September 1, 2009, unambiguously established jurisdiction over non-nationals for acts committed on the high seas in the same way as the Merchant Shipping Act of 2009—particularly, by explicitly and extensively referring to the offense of piracy as defined in Article 101 of the LOS Convention, and by providing in addition that the offense applies to non-nationals who committed piratical attacks outside Kenya and that they may be tried in Kenya.⁷⁰

Kenya's proscription of piracy on the high seas in the now-repealed section 69 of the Penal Code, which was based on a colonial model code dating back to the end of the nineteenth century, may be argued to have incorporated the customary international law prohibition on piracy before September 1, 2009. Historical inquiry, however, reveals that this argument leaves open many questions about the content of that customary international law and the intended jurisdictional reach of the statute. Kenya's Penal Code was first enacted in 1930.⁷¹ While the 1930 code was undoubtedly British in origin, the British influence was modified to suit local circumstances and conform to similar criminal codes in other British colonies such as Nigeria, from whose code the Kenyan Penal Code was derived.⁷² The Nigerian and Kenyan Penal Codes were descended from the Queensland Criminal Code (also referred to as the Griffith Model Penal Code), crafted by Sir Samuel Griffith and adopted in many British colonies,

Law and International Institutions, 104 AJIL 397, 414 n.107 (2010). *But see* Eugene Kontorovich, Case Report: United States v. Shi, in 103 AJIL 734, 739 (2009) (arguing that the prosecution in the *Shi* case may be “a one-off occurrence” in light of the reluctance of the United States to exercise “universal jurisdiction over criminal violence on the high seas”).

⁶⁸ Kontorovich, *supra* note 67, at 734.

⁶⁹ See, e.g., John Knott, *United Kingdom: Piracy off Somalia: Prosecutions, Procrastinations and Progress*, MONDAQ BUSINESS BRIEFING, Jan. 21, 2010, available in LEXIS, News Library, Wire Service Stories File (noting that many countries involved in the capture and detention of piracy suspects have been unwilling to prosecute them because of problems relating to the conditions in which they are held, the acquisition of evidence, and the possibility that they may be given asylum); see also James Thuo Gathii, *The Use of Force, Freedom of Commerce and Double Standards in Prosecuting Pirates in Kenya*, 59 AM. U. L. REV. 1317 (2010); Mike Corder, *EU to Push for Piracy Prosecutions in Africa*, AP, Apr. 26, 2010, available at http://www.salon.com/wires/world/2010/04/26/D9FANG9G3_piracy/index.html (citing reluctance of EU nations to pay for transporting suspects to Europe for trial and difficulty of prosecuting them successfully unless they are caught in the act of hijacking or attacking a ship).

⁷⁰ In contrast to Kenya, the United States in its Constitution gives Congress the power to “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.” U.S. CONST. Art. 1, §8, cl. 10.

⁷¹ The Penal Code, Ordinance No. X of 1930, established “a Code of Criminal Law in the Colony based on English criminal law and in substitution for the Indian Penal Code.” P. F. Branigan, *Review of Legislation 1930. East Africa, Kenya*, 14 J. COMP. LEGIS. & INT'L L. (3d ser.), pt. III, at 155 (1932).

⁷² For an excellent exposition of the several influences on the 1930 Kenyan Penal Code, see H. F. Morris, *A History of the Adoption of Codes of Criminal Law and Procedure in British Colonial Africa, 1876–1935*, 18 J. AFR. L. 6, 9, 11 (1974).

including Queensland, Cyprus, Palestine, Northern Rhodesia, and Tanganyika.⁷³ The Griffith code was the first effort to codify British criminal law and has remained influential in many Commonwealth jurisdictions.⁷⁴ Thus, to the extent that the Kenyan Penal Code provided for an offense of piracy, it was based on the British law of piracy as of 1930.⁷⁵

There was no agreement by states regarding the definition of piracy at the time of the enactment of the Kenyan statute in 1930 or in the immediately prior period.⁷⁶ For example, the description of what constitutes piracy in the 1899 Queensland Criminal Code is very extensive. The statute specifically mentioned that piracy consisted, among other things, of unlawfully boarding a ship “travelling at sea” without the master’s consent and with intent to commit robbery or to act in a way that would endanger the safe use of the ship; boarding a ship without such consent and committing robbery or endangering its safe use; stealing a ship or indirectly taking control of it; confining the master against his will; and trading or supplying provisions to a pirate or building a ship with the intention of using it to commit an act of piracy.⁷⁷ By contrast, the repealed section 69 of the Kenyan Penal Code merely provided that “[a]ny person who, in territorial waters or upon the high seas, commits any act of piracy *jure gentium* is guilty of the offence of piracy.”⁷⁸ This divergence in the definition of the offense of piracy at the end of the nineteenth century and in the first part of the twentieth century characterized not only the legislation of different countries,⁷⁹ but also jurists, who differed over the elements that constituted the offense, as well as the extent to which the law of nations could be used in prosecutions before municipal courts to construe a domestic statute that defined the crime of piracy.⁸⁰

⁷³ SAMUEL WALKER GRIFFITH, DRAFT OF A CODE OF CRIMINAL LAW PREPARED FOR THE GOVERNMENT OF QUEENSLAND, TOGETHER WITH AN EXPLANATORY LETTER TO THE HONOURABLE THE ATTORNEY GENERAL, A TABLE OF CONTENTS, AND A TABLE OF THE STATUTORY PROVISIONS PROPOSED TO BE SUPERSEDED BY THE CODE at x (1897) [hereinafter GRIFFITH DRAFT CODE]; see also Harry Gibbs, *Queensland Criminal Code: From Italy to Zanzibar*, 77 AUSTL. L.J. 232 (2003).

⁷⁴ ROBIN S. O'REGAN, *The Migration of the Griffith Code*, in NEW ESSAYS ON THE AUSTRALIAN CRIMINAL CODES 103 (1988).

⁷⁵ The 1930 provision on piracy read as follows: “Any person who is guilty of piracy or any crime connected with or relating or akin to piracy shall be liable to be tried and punished according to the law of England for the time being in force.” 9 KENYA, ORDINANCES 1930 (n.s.), §63 (1931).

⁷⁶ It was not until the adoption of the LOS Convention that a standard definition of piracy (Article 101) gained broad acceptance. Article 101 of the LOS Convention, *supra* note 35, is closely modeled on Article 15 of the Geneva Convention on the High Seas, Apr. 29, 1958, 13 UST 2312, 450 UNTS 82. There were 63 states parties to the Geneva Convention as of April 16, 2010, and 160 states parties to the LOS Convention as of January 1, 2010.

⁷⁷ CRIM. CODE §79 (1899) (Qld.), available at http://www.austlii.edu.au/au/legis/qld/consol_act/cc189994/.

⁷⁸ Repealed §69, *supra* note 15.

⁷⁹ For example, after reviewing several definitions of piracy in the United States and elsewhere in the period, Edwin D. Dickinson concluded:

It is evident that some of our definitions, taken literally, are much too broad. There may be robberies or murders upon the seas which are not appropriate subjects of an international jurisdiction. The distinction may be made with difficulty in some cases. But the difficulty should not be insuperable if it is remembered that piracy *jure gentium*, while it involves grievous wrong to individual rights of person or property and a grave offence against the state most immediately concerned, is primarily and above all an offence against the security of trade or travel upon the international highways of the sea.

Edwin D. Dickinson, *Is the Crime of Piracy Obsolete?* 38 HARV. L. REV. 334, 357 (1924–25).

⁸⁰ James J. Lenoir, *Piracy Cases in the Supreme Court*, 25 J. CRIM. L. & CRIMINOLOGY 532 (1934–35). One of the first efforts at codification, which arose from the lack of clarity surrounding the definition of piracy, was the Harvard Research in International Law, Part IV—Piracy, 26 AJIL Supp. 739 (1932).

Kenyan courts have now adopted the view that they have jurisdiction to prosecute pirates irrespective of their territorial or nationality links, which is consistent with one line of early Commonwealth cases that construed the applicable piracy statutes as embodying universal jurisdiction. This was not always the view of courts in the British Commonwealth whose members had adopted the Griffith code. In fact, in his 1897 draft code on which the 1899 code was based, Griffith reviewed a series of English statutory provisions with a variety of piracy definitions.⁸¹ As attorney general in 1875, he had relied on some of these statutes to argue against reversal of a piracy conviction.⁸² Noting that the offense had occurred within Queensland's territorial jurisdiction, the Queensland Supreme Court ruled against Griffith on the basis that such acts would be punishable as piracy only if they had occurred on the high seas.⁸³ In one instance of the divergences mentioned above, notwithstanding the derivation of the Kenyan Penal Code from the Queensland code, section 69 of the 1930 Kenyan Penal Code (as amended in 1967) defined piracy to include the requisite acts performed within Kenya's territorial waters, as well as on the high seas.⁸⁴

The *Hassan Mohamud Ahmed* decision might have been more convincing if the High Court had invoked common law precedents, which are persuasive authority to resolve the jurisdictional question in a Kenyan court. For example, in the 1934 House of Lords decision *In re Piracy Jure Gentium*, the Law Lords held that “[w]ith regard to crimes as defined by international law, that law has no means of trying or punishing them. The recognition of them as constituting crimes, and the trial and punishment of criminals, are left to the municipal courts of each country.”⁸⁵ Moving from this premise, the High Court might have argued that section 69 of the Penal Code was the domestic statute that provided for trial and punishment in Kenya. While such reasoning would not have definitively answered whether the Penal Code applied to non-Kenyan nationals,⁸⁶ this reasoning would have avoided resorting to Article 101 of the

⁸¹ GRIFFITH DRAFT CODE, *supra* note 73, at 36–37.

⁸² *R v. Jimmy*, (1875) 4 Q.S. Ct. R. 130, (1860–1907) Q. Crim. Rep. 93.

⁸³ (1860–1907) Q. Crim. Rep. at 94. According to the Court, it was not piracy if the alleged offense occurred within a creek or port that was part of the colony. Notably, in *R v. Gomez*, (1880) 5 Q.S. Ct. R. 189, (1860–1907) Q. Crim. Rep. 119, Griffith, then acting as defense counsel, had made the opposite argument (albeit in a murder case that had taken place outside the territorial boundaries of the Queensland Supreme Court), that the laws of Queensland did not reach the islands where the offense had been committed because the Crown, without the Queensland legislature's consent, had annexed the islands. Griffith lost that appeal.

⁸⁴ The Griffith criminal code was also influenced by English criminal statutes of the time. These statutes mainly made piracy punishable for British subjects or people owing allegiance to the Crown. For example, the 1880 Criminal Code specifically referred to British subjects as liable “in any place where the Admiral has jurisdiction,” further suggesting that this was the period before these criminal codes embraced universal jurisdiction. CRIM. CODE, 43 Vict. §106(b) (1880). In fact, as Alfred Rubin has argued, piracy acquired so many meanings in the second half of the nineteenth century in British practice that “it came to be used routinely . . . with regard to nearly any acts of foreigners against whom some forcible political action was directed.” ALFRED P. RUBIN, *THE LAW OF PIRACY* 313 (2d ed. 1998). The 1967 amendments to the Kenyan Penal Code introducing the now-repealed section 69 were justified as necessary because piracy was defined at the time by reference to the law of England, and it was thought that it “should be properly defined in the context of an independent Kenya.” 12 REPUBLIC OF KENYA, *THE NATIONAL ASSEMBLY OFFICIAL REPORT*, pt. II, col. 1753 (1967) (comments of Attorney-General Njonjo).

⁸⁵ *In re Piracy Jure Gentium*, [1934] A.C. 586 (P.C.); *see also* *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820) (upholding a conviction for piracy as defined by the law of nations, without a specific statutory definition thereof); *cf.* *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812) (holding that a person cannot be tried for an international crime in the United States unless Congress adopts a statute).

⁸⁶ Under repealed section 69, the second paragraph of the statute applied only to Kenyan citizens, while the first paragraph applied to “[a]ny person” without specification as to citizenship. Repealed §69, *supra* note 15, para. 2. In addition, the Kenyan Penal Code does not make it explicitly clear that it applies to crimes committed extraterritorially. *See* *Offences*

LOS Convention to establish the jurisdiction of Kenyan courts over piracy committed on the high seas by non-nationals who had been captured by foreign forces.⁸⁷ Notably, in a subsequent piracy conviction, *Republic v. Aid Mohammed Ahmed*, decided in March 2010, a lower court declined to follow the High Court's invocation of universal jurisdiction by reference to Article 101 of the LOS Convention and instead decided that Kenyan law sufficed to establish jurisdiction over non-Kenyan nationals for offenses committed outside Kenya.⁸⁸

On June 1, 2009, the Kenyan president signed the Merchant Shipping Act, which definitively establishes jurisdiction in Kenyan courts over non-nationals captured on the high seas and entered into effect on September 1, 2009.⁸⁹ The new law brought Kenya into compliance with parts of the LOS Convention and several conventions of the International Maritime Organization, such as the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA).⁹⁰ Section 369 of the Merchant Shipping Act adopts the definition of piracy contained in Article 101 of the LOS Convention. Section 370 lists as offenses those contained in Article 3 of the SUA Convention on hijacking and destroying ships with some minor modifications.⁹¹ To address non-Kenyan suspects operating outside Kenya's

Committed Partly Within and Partly Beyond the Jurisdiction, PENAL CODE, Cap. 63, §6 (rev. ed. 2009) (providing that "[w]hen an act which, if wholly done within the jurisdiction of the court, would be an offence against this Code, is done partly within and partly beyond the jurisdiction, every person who within the jurisdiction does or makes any part of such act may be tried and punished under this Code in the same manner as if such act had been done wholly within the jurisdiction," which strongly suggests that for an offense to come within the jurisdiction of a Kenyan court, it must have been either wholly or partially committed within the jurisdiction of the court trying the offender). For a discussion in this issue of the early history of U.S. piracy laws and their interpretation, see John H. Knox, *Extraterritoriality and Its Discontents: Limiting the Reach of U.S. Law*, 104 AJIL 351, 362–65 (2010).

⁸⁷ See Jurisdiction of Local Courts, PENAL CODE, Cap. 63, §5 (rev. ed. 2009) (providing that "[t]he jurisdiction of the courts of Kenya for the purposes of this Code extends to every place within Kenya, including territorial waters").

⁸⁸ *Republic v. Aid Mohamed Ahmed* (aka Sicid Mahamud Ahmed), at 10–11, Crim. No. 3486 of 2008 (Chief Magis. Ct. Mombasa, Mar. 10, 2010) (holding that §6 of the Penal Code extends to offenses "that are partly committed beyond" Kenya's territorial jurisdiction and that "[i]t is not a matter of the court having universal jurisdiction to try pirates but the domestic law has conferred the jurisdiction to this court").

⁸⁹ Merchant Shipping Act, Act No. 4 of 2009.

⁹⁰ Kenya has also ratified the 1988 SUA Protocol. See IMO, Status of Conventions by Country (Mar. 31, 2010), available at <http://www.imo.org/>. The other treaties the new law has domesticated include the International Convention for the Safety of Life at Sea (SOLAS) of 1974 and its Protocols of 1978 and 1988. The new law is part of a major overhaul of the maritime sector in Kenya. The authority had initially been established in subsidiary legislation in 2004. Kenya Maritime Authority Order, Legal Notice No. 79 (June 21, 2004), available at <http://faolex.fao.org/>. In 2006 the Kenyan Parliament passed the Kenya Maritime Authority Act, which established the Kenya Maritime Authority and a director general to run it, as well as a Registrar of Ships, a Registrar of Seafarers, a Principal Receiver of Wreck, and a Principal Surveyor of Ships. In my view, these reforms, while long overdue, represented very successful lobbying by interest groups in the maritime industry. The passage of the Merchant Shipping Act was given impetus by the need for a framework for prosecution of pirates off the coast of Somalia. In addition, the IMO encouraged Kenya to pass the new law so that it could "qualify for the 'White List' of countries deemed to be properly fulfilling their obligations under the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers." Efthimios E. Mitropoulos, IMO Secretary General, Meeting with H.E. Hon. Mwai Kibaki, President of the Republic of Kenya (May 4, 2006), available at http://www.imo.org/About/mainframe.asp?topic_id=1322&doc_id=6315; see also Kenya Maritime Authority Act, Cap. 5 (2006).

⁹¹ Merchant Shipping Act, *supra* note 89, §370(1) (providing that "[s]ubject to subsection (5), a person who unlawfully, by use of force or by threats of any kind seizes a ship or exercises control of it commits the offence of hijacking a ship. (2) Subject to subsection (5), a person commits an offence if he unlawfully and intentionally— (a) destroys a ship; (b) damages a ship or its cargo so as to endanger, or to be likely to endanger, the safe navigation of the ship; (c) commits, on board a ship, an act of violence which is likely to endanger the safe navigation of the ship; or (d) places or causes to be placed on a ship any device or substance which is likely to destroy the ship or is likely so to damage it or its cargo as to endanger its safe navigation. (3) Nothing in subsection (2)(d) is to be construed

territorial and maritime jurisdiction, section 370(4) provides that the law shall apply to these offenses “whether the ship . . . is in Kenya or elsewhere,” whether the acts were “committed in Kenya or elsewhere,” and “whatever the nationality of the person committing the act.”⁹² The new law therefore removes any doubt about jurisdiction over non-Kenyan pirates arrested extraterritorially, and is not limited in this respect by the nexus requirements for jurisdiction set forth in Article 6 of SUA.

As noted above, however, the current piracy prosecutions are all being conducted under the repealed piracy provisions of the Penal Code, rather than the new Merchant Shipping Act. Questions can be asked about these prosecutions besides those raised about the appropriate jurisdictional bases.

III. STATUS, FAIRNESS, AND PROPRIETY OF THE PIRACY PROSECUTIONS IN KENYA

As mentioned in the introduction, as of August 31, 2009, there were ten ongoing piracy prosecutions in Kenya involving at least seventy-six suspects, all before the Chief Magistrate’s Court in Mombasa. Each of the accused persons was charged with committing the crime of piracy contrary to section 69(1) as read with section 69(3) of the Penal Code. The suspects were all denied bail and, with the exception of those in one case, are in custody awaiting the hearing of their trials, most of which began in earnest in September and October 2009. The exceptional case is the recently decided *Republic v. Aid Mohammed Ahmed*, which became the second completed piracy trial in Kenya’s history. Aid Mohamed Ahmed had been charged with seven others with attacking and detaining the Yemeni-flagged *Waadi Omar 2* on the night of November 8–9, 2008, and for attempting to hijack the Danish MV *Powerful* on November 11, 2008.⁹³ On March 10, 2010, the Chief Magistrate’s Court in Mombasa sentenced the eight defendants to twenty years’ imprisonment each.⁹⁴

The remaining cases are *Republic v. Said Abdallah Haji*, charged with eight others with attacking the Saint Vincent and the Grenadines–flagged MV *Maria K* on May 22, 2009;⁹⁵ *Republic v. Mohamed Hassan Ali* and *Republic v. Aidid Mohamed Mohamud*, together charged with five others with committing piracy against the Maltese vessel *Anny Petrakis* on May 7,

as limiting the circumstances in which the commission of any act may constitute—(a) an offence under subsection (2)(a), (b) or (c); or (b) attempting or conspiring to commit, or aiding, abetting, counselling, procuring or inciting, or being of and part in, the commission of such an offence.”). Article 5 of SUA provides that “[e]ach State Party shall make the offences set forth in article 3 punishable by appropriate penalties which take into account the grave nature of those offences.” Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Art. 5, Mar. 10, 1988, S. TREATY DOC. NO. 101-1 (1989), 1678 UNTS 221.

⁹² Merchant Shipping Act, *supra* note 89, §370(4)(a), (b), (c).

⁹³ *Republic v. Said [sic] Mohamed Ahmed*, Crim. No. 3486 (Chief Magis. Ct. filed Nov. 19, 2008). The accused were arrested on November 11, 2008, by the Royal British Marines from the HMS *Cumberland* and turned over to Kenyan officials on November 19, 2008. Bruce Zagaris, *French Capture 9 Somali Pirates and NATO and Russia Send Naval Patrols to Gulf of Aden*, Int’l Enforcement L. Rep., Jan. 2009, § Int’l Maritime Piracy, n.11, available in LEXIS, News Library, Most Recent Two Years File.

⁹⁴ *Republic v. Aid Mohamed Ahmed*, *supra* note 88, at 18.

⁹⁵ *Republic v. Said Abdallah Haji*, Crim. No. 2127 (Chief Magis. Ct. filed June 26, 2009). The accused were apprehended by the Italian naval warship *Maestrale*, and turned over to Kenyan officials on June 25, 2009. See U.S. Office of Naval Intelligence: Civil Maritime Analysis Dep’t, Worldwide Threat to Shipping Mariner Warning Information (June 10, 2009), available at http://www.nga.mil/MSISiteContent/StaticFiles/MISC/wwtts/wwtts_20090610100000.txt.

2009;⁹⁶ *Republic v. Liban Ahmed Ali*, charged with ten others with attacking the Liberian-flagged *Safmarine Asia* with rocket-propelled grenades and gunfire on April 15, 2009;⁹⁷ *Republic v. Jama Abdikadir Farah*, charged with six others with the attempted hijacking of the Panamanian *Nepheli* on May 6, 2009;⁹⁸ *Republic v. Ahmed Abdikadir Hersi*, charged with ten others with attempting to attack the French naval vessel FNS *Nivôse* on May 3, 2009;⁹⁹ *Republic v. Mohamud Abdi Kheyre*, charged with six others with attacking the Marshall Islands MV *Polaris* on February 11, 2009;¹⁰⁰ *Republic v. Shafili Hirsi Ahmed*, charged with six others with attempting to hijack the Greek-flagged MV *Antonis* on May 26, 2009;¹⁰¹ and *Republic v. Mohamud Mohamed Hashi*, charged with eight others with attacking the German MV *Courier* on March 3, 2009.¹⁰²

In many of these cases,¹⁰³ beginning the proceedings has been delayed more than once. Delays have arisen because of the distance of witnesses. In one case witnesses were noted to have returned to France, and in another to Yemen,¹⁰⁴ after their piracy ordeals. In another case, two lawyers claim to have received conflicting instructions regarding their representation from the

⁹⁶ *Republic v. Mohamed Hassan Ali*, Crim. No. 1694 (Chief Magis. Ct. filed May 18, 2009), and *Republic v. Aidid Mohamed Mohamud*, Crim. No. 1784 (Chief Magis. Ct. filed May 27, 2009) (consolidated by the court's order of Sept. 2, 2009). The accused were arrested on May 7, 2009, by the Spanish navy. *Spanish Naval Ship Captures Another Seven Pirates*, ANSAMED, May 8, 2009, available in LEXIS, News Library, Wire Service Stores File. The accused were turned over to Kenyan authorities on May 16, 2009.

⁹⁷ *Republic v. Liban Ahmed Ali*, Crim. No. 1374 (Chief Magis. Ct. filed Apr. 23, 2009). The accused were arrested by the French navy on April 15, 2009, and turned over to Kenyan officials on April 22, 2009. Sharon Otterman & Mark McDonald, *French navy Seizes 11 Accused of Pirate Attacks off Somalia*, N.Y. TIMES, Apr. 16, 2009, at A8; *Trials of 11 Suspected Somali Pirates Begin in Kenya*, BBC, Apr. 22, 2009, available in LEXIS, News Library, Most Recent Two Years File [hereinafter *Trials of 11 Begin*].

⁹⁸ *Republic v. Jama Abdikadir Farah*, Crim. No. 1695 (Chief Magis. Ct. filed May 18, 2009). The accused were arrested on May 7, 2009, by the Spanish navy. Their boat allegedly capsized as a result of evasive action taken by the *Nepheli* and they were pulled out of the water by the crew of the *Marqués de la Ensenada*, a ship that had responded to the *Nepheli*'s distress signal. *Spanish Navy Detains Suspected Pirates off Somalia*, AFR. NEWS DAILY, May 8, 2009, at <http://www.africanewsdaily.com/newsdetails.php?newsid=1315>.

⁹⁹ *Republic v. Ahmed Abdikadir Hersi*, Crim. No. 1582 (Chief Magis. Ct. filed May 11, 2009). The accused were arrested by the French navy on May 3, 2009, when they mistook the French FNS *Nivôse* for a commercial vessel and made a run at it, but were trapped by a helicopter before they could fire or flee. Anne Barrowclough, *Pirates Sent Packing by Friends in High Places; Somalia*, TIMES (London), May 5, 2009, at 33.

¹⁰⁰ *Republic v. Mohamud Abdi Kheyre*, Crim. No. 791 (Chief Magis. Ct. filed Mar. 6, 2009). The accused were arrested by the United States Navy on February 11, 2009. *Piracy on the High Seas: Hearing Before the Subcomm. on Surface Transportation and Merchant Marine Infrastructure, Safety, and Security of the S. Comm. on Commerce, Science and Transportation*, 111th Cong. (May 5, 2009) (testimony by Brian Salerno, assistant commandant, U.S. Coast Guard), available in LEXIS, News Library, Most Recent Two Years File.

¹⁰¹ *Republic v. Shafili Hirsi Ahmed*, Crim. No. 2463 (Chief Magis. Ct., originally filed as Crim. No. 825, May 9, 2009, in Malindi, Kenya). The accused were arrested by the Swedish navy on May 26, 2009, and handed over to Kenyan officials on June 9, 2009. The order to transfer the case to Mombasa was issued by Judge Omondi on July 21, 2009. An issue that arose in this case is that one of the accused was allegedly fourteen years old. The magistrate hearing the matter ordered on June 9, 2009, that the accused be remanded to the Children's Remand Home. However, on the same afternoon, the accused asserted that he was sixteen and the court referred him for age assessment.

¹⁰² *Republic v. Mohamud Mohamed Hashi*, Crim. No. 840 (Chief Magis. Ct. filed Mar. 11, 2009). On March 3, 2009, the accused were arrested by the German navy. Their trial began on April 22, 2009, according to an unattributed report, see *Trials of 11 Begin*, *supra* note 97, but they were later reported to be awaiting trial, see André Jensen, Editorial, *Prison No Deterrent to Piracy*, HERALD (S. Afr.), May 4, 2009.

¹⁰³ These observations are based on a perusal of the court files on two occasions, first, between August 26 and 28, 2009, and again between February 22 and 25, 2010.

¹⁰⁴ *Republic v. Ahmed Abdikadir Hersi*, *supra* note 99, and *Republic v. Aid Mohamed Ahmed*, *supra* note 88, respectively.

same set of suspects.¹⁰⁵ Mostly, though, the suspects have joined thousands of Kenyan suspects on the crowded court calendar who are awaiting their trials.

The longer the trials, the longer the pretrial detention is likely to be. The court files show that in almost all the cases, the suspects have continually complained of ill treatment by prison authorities and the other prisoners with whom they are held. They have also complained of lack of medical attention and food.¹⁰⁶ These complaints have been raised in the monthly court appearances required under Kenyan law for all suspects held and awaiting trial by the state. The responses of the various magistrates before whom these suspects have made these complaints have not been consistent. The courts have generally ordered that the piracy suspects receive medical attention and be fed.¹⁰⁷ In at least one case, however, they declined to order that the suspects be permitted to contact their families in Somalia.¹⁰⁸ In another, the suspects were allowed to communicate with their relatives in Somalia in the presence of an investigating officer and an interpreter provided by the court.¹⁰⁹

While all the suspects enjoy legal representation, in one case the defense lawyer notified the court that upon commencement of the trial he will file an application under the Vienna Convention on Consular Relations for the Transitional Federal Government of Somalia to provide legal representation for one of the accused.¹¹⁰ In another, the court was notified of a jurisdictional challenge when trial begins, suggesting that, notwithstanding the High Court's 2009 decision in *Hassan M. Ahmed v. Republic*, the question of jurisdiction is likely to continue to be raised and may be heard again in the High Court and perhaps go all the way to the Court of Appeal, Kenya's highest court.

One additional point relating to the status of these cases is that the prosecution is not being conducted by police inspectors, who have little legal training, particularly in matters of international law, but by state counsel, who are all lawyers deputized from the Office of the Deputy Public Prosecutor in the attorney general's chambers.¹¹¹ State counsel potentially offer far superior prosecution of these cases than police inspectors. They have received support from the counterpiracy program of the EU–United Nations Office on Drugs and Crime (EU-UNODC) in Kenya. The EU-UNODC counterpiracy program has provided support for prosecutors dedicated to pursuing piracy cases in terms of “office improvements, evidence handover routines

¹⁰⁵ Republic v. Liban Ahmed Ali, *supra* note 97.

¹⁰⁶ For example, in *Republic v. Liban Ahmed Ali*, *supra* note 97, on their appearance in court on May 25, 2009, the accused told the court they had not eaten for the previous forty-eight hours.

¹⁰⁷ For example, in *Republic v. Said Abdallah Haji*, *supra* note 95, the magistrate ordered on August 20, 2009, that the accused receive medical treatment in the prison clinic.

¹⁰⁸ For example, when the accused made such an application on May 25, 2009, in *Republic v. Liban Ahmed Ali*, *supra* note 97, the court noted that this was a question for the prison authorities to decide.

¹⁰⁹ Republic v. Mohamed Abdi Kheyre, *supra* note 100 (Order of T. Gesora, magis., July 1, 2009) (on file with author).

¹¹⁰ Republic v. Liban Ahmed Ali, *supra* note 97.

¹¹¹ See Maureen Mudi, *Wako Says Police Prosecutors Will Be Dumped*, STANDARD (Nairobi), Sept. 14, 2009, available at <http://www.eastandard.net/business/InsidePage.php?id=1144023923&cid=4&> (noting that Attorney General Amos Wako planned to reduce reliance on the three hundred police prosecutors in the country who handle more than 90 percent of all the criminal cases, yet lack the legal expertise to do so, and that efforts to phase out police prosecutors had failed by the end of 2008 since only 52 of the planned increase in state counsel to 150 had been employed because of inadequate funding); see also Philip Muyanga, *Death Knell Tolls for Prosecutors*, NATION (Kenya), Sept. 13, 2009, available in LEXIS, News Library, Most Recent Two Years File.

and training in the Law of the Sea.”¹¹² However, the heavy caseloads and the likelihood that the witnesses in these cases have already left Kenya do not make them amenable to expeditious prosecution without the EU-UNODC’s assistance in ensuring the delivery of witnesses to trial, providing interpreters, and overcoming other bottlenecks.

Kenyan law guarantees criminal defendants rights that are for the most part analogous to those guaranteed under Kenya’s international law obligations.¹¹³ These include the rights of all accused persons to a fair trial within a reasonable time by an impartial tribunal;¹¹⁴ to the presumption of innocence; to be informed in a language they understand of the charges against them; to have adequate time and facilities to prepare a defense; to defend themselves or to have legal representation of their choice;¹¹⁵ to cross-examine prosecution witnesses; to be provided at no cost with an interpreter to enable them to understand the language used at trial;¹¹⁶ and not to give incriminating evidence against themselves.¹¹⁷ The Kenyan Constitution also prohibits torture and inhuman or degrading treatment.¹¹⁸

In the agreement Kenya signed with the European Union, Kenya committed itself to ensuring that the piracy suspects would be humanely treated and provided with “adequate accommodation and nourishment, [as well as] access to medical treatment.”¹¹⁹ The agreement provides that the suspects will be treated “in accordance with international human rights obligations, including the prohibition against torture and cruel, inhumane and degrading treatment or punishment, the prohibition of arbitrary detention and in accordance with the requirement to have a fair trial.”¹²⁰ The agreement further specifies in more detail than Kenyan law that the piracy suspects have the right not only to be tried promptly, but to be released if it is determined that their detention is unlawful.¹²¹ For its part, the European Union agreed to assist in securing the attendance of witnesses.¹²² The agreement also provides that national and humanitarian agencies, and representatives of the European Union and the European Union Naval Force Somalia, shall have access to persons detained pursuant to the agree-

¹¹² United Nations Office on Drugs and Crime, UNODC and Piracy, *available at* <http://www.unodc.org/easternafrica/en/piracy/index.html?ref=menuaside>.

¹¹³ Kenya is party to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171 (acceded May 1, 1972), and the African (Banjul) Charter on Human and Peoples’ Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev.5, 21 ILM 58 (1982) (ratified Jan. 23, 1992). The fact that the Somali nationals now charged in Kenyan courts are foreigners calls for Kenya to ensure that the trials are conducted fairly and properly. OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 269–70 (1991) (arguing that exercise of universal jurisdiction by a state with no territorial or nationality links “should require” that such a state fully meet the “criteria of a fair trial and the limits on punitive action that are part of basic human rights”); *see also* Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 840 (1988).

¹¹⁴ CONST. §77(1).

¹¹⁵ *Id.* §77(2) (a), (b), (c), (d), respectively. However, there is no right to legal representation for indigent defendants unless they are charged with offenses such as murder and robbery with violence, which are punishable by death.

¹¹⁶ *Id.* §77(2)(e), (f).

¹¹⁷ *Id.* §77(7).

¹¹⁸ *Id.* §74(1) (“No person shall be subject to torture or to inhuman or degrading punishment or other treatment.”).

¹¹⁹ EU-Kenya Exchange of Letters, *supra* note 6, Annex (Provisions on the Conditions of Transfer of Suspected Pirates and Seized Property from the EU-Led Naval Force to the Republic of Kenya), para. 3(a), 2009 O.J. (L 79) 51.

¹²⁰ *Id.*, para. 2(c).

¹²¹ *Id.*, para. 3(c).

¹²² *Id.*, paras. 6(a) & (b)(2) & (3).

ment.¹²³ An EU delegation visited Kenya between March 29 and April 1, 2009, to assess Kenya's needs for the detention and trial of the suspects and an amount of 1.74 million euros was promised.¹²⁴ These funds are being devoted to the EU-UNODC counterpiracy program.

Among the beneficiaries of this funding is the now much-reformed Shimo la Tewa prison in Mombasa, where the piracy suspects are being held while awaiting trial.¹²⁵ Although the suspects had complained earlier about their inhumane treatment by both the prison authorities and other detainees, when actor Nicholas Cage, as a UN goodwill ambassador, visited the prison in November 2009 at the invitation of the EU-UNODC counterpiracy program, he declared it the "warmest prison in the world."¹²⁶ At the same time, a French nongovernmental organization (NGO), Lawyers of the World, was reported in August 2009 to have been pressing the European Union about violations of the pirates' rights, as guaranteed in the EU agreement with Kenya.¹²⁷ The NGO was said to be seeking to represent twenty-four suspected pirates, and the hearing of one of the cases for the first eleven was reported to be starting on August 3.¹²⁸ If this French NGO was allowed audience in the courts, the rights specified in the EU-Kenyan agreement were likely to have been invoked in court and their bindingness on Kenya tested. In that case, the rights guaranteed under this agreement would have entered the judicial system. Until that time, these rights had been invoked only in the diplomatic realm.

IV. CONCLUSION

Kenyan courts have justified the piracy prosecutions as authorized under Kenya's Penal Code, supplemented by Article 101 of the LOS Convention. While Kenyan law criminalizes piracy on the high seas, prior to the first prosecution of Somali pirates in 2006, there was no judicial precedent regarding whether jurisdiction existed over piracy suspects with no nationality or territorial links to Kenya who had been captured by foreign forces. Thus, the appeal against the first-ever piracy conviction to the High Court was expected. In upholding the jurisdiction of Kenyan courts over piracy on the high seas when a Kenyan territorial or nationality nexus was lacking, the High Court cited the LOS Convention. Kenya's Parliament subsequently passed a new law that is consistent with this extremely broad jurisdiction over piracy.

The current piracy trials have joined the huge backlog of cases in Kenya's criminal justice system. Although the suspects continue to allege mistreatment, lack of medical attention, and

¹²³ *Id.*, para. 5(f) & (e), respectively.

¹²⁴ Kenya: Piracy, *supra* note 9, pt. 0007, col. 465W–466W (May 8, 2009). In another response to a question, the British secretary of state for foreign affairs told the House of Commons that the German ambassador to Kenya had visited pirates transferred to Kenya by German forces on March 10 and April 8, 2009. *Id.*, pt. 0010, col. 921W (May 14, 2009).

¹²⁵ Before the EU-UNODC funding, this prison was notorious for crowding and unsanitary conditions in the humid and sweltering heat of Mombasa.

¹²⁶ *Nicholas Cage Visits Kenyan Prison*, AFRICA NEWS, Nov. 17, 2009, available in LEXIS, News Library, Most Recent Two Years File.

¹²⁷ Sarah McGregor, *EU, Kenya Somali-Pirate Treaty "Violates Rights", Lawyers Say*, BLOOMBERG NEWS, Aug. 19, 2009, available at http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aDs_bA4DXiTg.

¹²⁸ Sarah McGregor, *Aid Group to Defend Somali Piracy Suspects, Ensure Fair Trials*, BLOOMBERG NEWS, Aug. 3, 2009, available at <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a5wQ7mZHZEYY>.

lack of confidence in Kenya's judicial system, the EU-UNODC program has made efforts to alleviate these problems. If the problems are eventually addressed, the suspects will be assured of the right to an expeditious trial with the facilities and support that would be available in any EU member country or the United States. Finally, it is apposite to note that the assumption by Kenyan courts of jurisdiction over piracy demonstrates an unprecedented resort to international law. Only two short decades ago, Kenyan courts took the view that the Kenyan constitutional system required domestication of ratified treaties before they could be judicially applied.¹²⁹ By invoking the LOS Convention, a ratified, but undomesticated treaty, to justify jurisdiction over these pirates, Kenyan courts seem to have finally wrestled free of their attachment to dualism.

Having done so, Kenya has nevertheless declined to accept any more piracy suspects from non-Kenyan naval forces since late 2009. In late March 2010, the attorney general revealed that he had not been consulted when the prosecution agreements were entered into and that Kenya was shouldering more than its fair share of the burden in prosecuting piracy.¹³⁰ Soon thereafter, the minister of foreign affairs, who had negotiated the agreements, announced that Kenya had not received the assistance in bearing that burden promised by its partners in those agreements. For this reason, the minister announced that Kenya would no longer accept any piracy suspects.¹³¹

Kenya's recent refusal to undertake further piracy prosecutions has already resulted in indictments in the United States and Germany, countries that had previously relied primarily on Kenya for that purpose.¹³² It is unclear at this point whether these indictments will mark the beginning of a new trend in which countries whose navies capture suspected pirates for attacks on their flag vessels will undertake their prosecution themselves. A Security Council resolution of April 27, 2010, "acknowledg[ed] the difficulties Kenya [has] encounter[ed]" in prosecuting suspected pirates and imprisoning those who are convicted and called on all nations to take on those burdens. Moreover, the Security Council requested that the Secretary-General report to it on other possible options for dealing with the situation off the coast of

¹²⁹ Okunda v. Republic, [1970] E. Afr. L.R. 453, 457.

¹³⁰ *Somali Piracy Cases Stall over AG Remarks*, DAILY NATION (Kenya), Apr. 6, 2010, available at <http://www.nation.co.ke/News/-/1056/893802/-/vsele4/-/index.html>; see also *AG Queried over Country's Role on Piracy Cases*, *id.*, Mar. 30, 2010, available at <http://allafrica.com/stories/201003300855.html>.

¹³¹ See *Kenya Ends Somali Pirates' Trials*, BBC, Apr. 1, 2010, available at <http://news.bbc.co.uk/2/hi/africa/8599347.stm>. For example, a member of Kenya's Parliamentary Committee on Defence and Foreign Relations stated that the failure to deliver promised funds for constructing the water and sewage system and painting the Shimo la Tewa prison where the piracy suspects are held was a reason to withdraw from the prosecution agreements. *AG Queried over Country's Role on Piracy Cases*, *supra* note 130. Later, Kenya reportedly agreed to "resume taking on new piracy cases." Tom Maliti, *UN: Donors to Spend \$3.9 Million to Prosecute Somali Piracy Suspects in Kenya, Seychelles*, CANADIAN PRESS, June 15, 2010, at <http://ca.news.yahoo.com/s/capress/100615/world/piracy>.

¹³² *United States v. Mohammed Modin Hasan*, No. 10-CR-56 (E.D. Va. filed Apr. 21, 2010) (charging accused, inter alia, with piracy on the high seas, attacking USS *Nicholas* on the high seas, and assaulting its crew with firearms within the special maritime and territorial jurisdiction of the United States on or about Mar. 31, 2010); *United States v. Maxamad Cali Saciid* (aka Mohammed Said), No. 10-CR-57 (E.D. Va. filed Apr. 21, 2010) (charging accused, inter alia, with piracy on the high seas, attacking USS *Ashland* on the high seas, and assaulting its crew with firearms in the special maritime and territorial jurisdiction of the United States on or about Apr. 10, 2010); Matthias Gebauer, Horand Knaup, & Marcel Rosenbach, *First Trial of Somali Pirates Poses Headache for Germany*, DER SPIEGEL, Apr. 20, 2010, available at <http://www.globalpolicy.org/>.

Somalia, including the creation of a regional or international antipiracy court.¹³³ The challenges presented by Kenya's piracy prosecutions and the lessons learned from them can therefore be seen as already opening a conversation about alternatives to national piracy prosecutions in general, and to those confronting Kenya in particular.

AN EMPIRICAL EXAMINATION OF UNIVERSAL JURISDICTION FOR PIRACY

*By Eugene Kontorovich and Steven Art**

This essay presents a systematic study of the incidence of universal jurisdiction (UJ) prosecutions for the international crime of piracy. Using data on the number of piracies committed in a twelve-year period (1998–2009) obtained from international agencies and maritime industry groups, we determined the percentage of these cases where nations exercised universal jurisdiction. Studies of the worldwide use of UJ prosecutions for other crimes simply count how often universal jurisdiction has been exercised but do not attempt to determine the *rate* of prosecution.¹ Simply counting cases does not allow one to appreciate the significance of universal jurisdiction in relation to the total problem. While the expressive or symbolic value of universal justice may be satisfied by a small number of isolated prosecutions, the deterrent effect depends on its incidence relative to the number of perpetrated crimes.

We found that of all clear cases of piracy punishable under universal jurisdiction, international prosecution occurred in no more than 1.47 percent. This figure includes the unprecedented international response to the Somali piracy surge that began in 2008, which accounts for the vast majority of prosecutions. Prior to 2008, nations invoked universal jurisdiction, a doctrine that arose precisely to deal with piracy, in a negligible fraction of cases (just 0.53 percent, a total of four cases).

Determining the rate of UJ prosecutions requires knowing both their number (the numerator) and the total number of instances of crime punishable under universal jurisdiction (the denominator). For human rights abuses, the former can easily be determined because indictments and prosecutions are highly visible and relatively few in number. On the other hand, because universal jurisdiction covers such broad categories of conduct as torture and war crimes, the universe of universally cognizable offenses that go unprosecuted may be quite high,

¹³³ SC Res. 1918, pmb. & op. para. 4 (Apr. 27, 2010).

* Eugene Kontorovich is Associate Professor, Northwestern University School of Law; Steven Art is Law Clerk, Hon. Diane Wood, U.S. Court of Appeals for the Seventh Circuit. The authors thank Bernard Black, John McGinnis, Andrew Mwangura, and Jide Nzelibe for their comments and suggestions, and William Scharf for helpful research assistance. The views expressed in this essay are strictly personal and do not represent any position taken by the U.S. Courts.

¹ *E.g.*, LUC REYDAMS, *UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES* (2004); Wolfgang Kaleck, *From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998–2008*, 30 MICH. J. INT'L L. 927, 932–58 (2009). While this study focuses on prosecutions based on universal jurisdiction, for piracy such jurisdiction also includes the authority to board and search a foreign ship on the high seas and to seize the ship if warranted by that search. See United Nations Convention on the Law of the Sea, Arts. 105–06, 110, *opened for signature* Dec. 10, 1982, 1833 UNTS 397, available at <http://www.un.org/Depts/los/index.htm> [hereinafter LOS Convention].

and cannot be estimated with any precision.² Atrocities rarely occur in public and the perpetrators—often government actors with great power—take pains to prevent reporting. In recent years scholars have made important empirical efforts to measure state compliance with human rights treaties, including those that give rise to UJ norms. But these studies underscore the “denominator problem.” They develop indices or use proxy measurements to rank countries ordinally along a general axis of human rights compliance³ rather than directly measuring the absolute number of violations.⁴

Piracy provides a unique opportunity to study the incidence of universal jurisdiction for a particular offense. Piracy is the original UJ crime,⁵ and it has been an inspiration for the modern expansion of universal jurisdiction.⁶ Most important, studying piracy avoids the denominator problem: Excellent data exist on the actual number of pirate attacks. The International Maritime Organization (IMO) and the International Maritime Bureau (IMB) compile extensive data on all attacks at sea. These agencies receive reports directly from attacked vessels and other sources. As a service to the shipping industry, this information has been assembled in regular reports for decades. The IMO and IMB reports can be used both to count the total number of incidents of piracy and to help establish the number of resulting universal cases.

To determine the denominator—the number of piracies eligible for UJ prosecution—we undertook a detailed and comprehensive examination of over four thousand reports of maritime incidents totaling several hundred pages. From these records, we identified 1158 cases of pirate attacks cognizable under universal jurisdiction in the period from 1998 to 2009. A further examination of the reports, along with other sources, allowed us to determine the numerator—the number of cases in which universal jurisdiction has been exercised. We found that the nations that apply international criminal law to pirates are different from those that use it to punish other offenses. Four non-Western states—China, India, Kenya, and Yemen—are the only ones to have used universal jurisdiction to prosecute piracy. For war crimes and human rights offenses, universal jurisdiction has been exercised almost exclusively by European and other Western nations.⁷ Moreover, UJ piracy prosecutions have invariably been

² See Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?* 111 YALE L.J. 1935 (2002); Herbert F. Spier, *Violations of Human Rights—How Many? The Statistical Problems of Measuring Such Infractions Are Tough, but Statistical Science Is Equal to It*, 49 AM. J. ECON. & SOC. 199 (1990).

³ E.g., Eric Neumayer, *Do International Human Rights Treaties Improve Respect for Human Rights?* 49 J. CONFLICT RESOL. 925 (2005); Steven C. Poe, C. Neal Tate, & Linda Camp Keith, *Repression of the Human Right to Personal Integrity Revisited: A Global Cross-national Study Covering the Years 1976–1993*, 43 INT’L STUD. Q. 291, 297 (1999).

⁴ Todd Landman, *Measuring Human Rights: Principle, Practice, and Policy*, 26 HUM. RTS. Q. 906 (2004); Ethan E. Fosse, *The Future of Human Rights Measurement: Towards an International Survey of Rights* (Measurement & Human Rights Issue Paper, Carr Center for Human Rights Policy, Harvard Kennedy School of Government, Aug. 2008).

⁵ See RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §34 cmt. b (1965); EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON AND OTHER PLEAS 113 (London, E. & R. Brooke 1797) (1628).

⁶ See Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation*, 45 HARV. INT’L L.J. 183, 184, 197–207 (2004).

⁷ See Council of the European Union, AU-EU Technical ad hoc Expert Group, Report on the Principle of Universal Jurisdiction, para. 19, Doc. 8672/1/09 REV 1, annex, at 16 (2009) (reporting that “[n]o African state is known to have exercised universal jurisdiction effectively,” while UJ cases have been instituted in eight Western

conducted by states in the region of the crime; most assertions of universal jurisdiction over other conduct involve nations outside the region where the crime took place.

The rarity of UJ prosecutions for piracy suggests that the adoption of UJ treaties and the internalization of UJ norms do not in themselves translate into prosecution. However, the increase in UJ prosecutions as a result of the ongoing Somali piracy crisis suggests some factors that contribute to greater use of universal jurisdiction. The Somali piracy outbreak caused the major powers of the world to devote far greater enforcement resources to apprehending the criminals, a necessary condition for applying universal jurisdiction. Furthermore, the perpetrators come from a failed state that has little ability to prosecute or to oppose judicial intervention by outside states. Thus, the number of UJ cases correlates with the willingness of countries to engage in extraterritorial apprehension.

The infrequency with which nations exercise universal jurisdiction to prosecute piracy does not mean that universal jurisdiction over this crime has fallen into desuetude or disfavor. While UJ prosecution for piracy has its origins in centuries-old custom, the International Law Commission codified it in the 1956 draft articles that formed the basis for the 1958 Geneva Convention on the High Seas, whose provisions in this regard were retained in the 1982 United Nations Convention on the Law of the Sea (LOS Convention).⁸ The availability and important role of universal jurisdiction in the prosecution of piracy has been reaffirmed recently by the UN Security Council and other international bodies, states, and scholars.⁹

This essay proceeds as follows: part I describes the data and their limitations; part II presents our findings on the incidence of universal jurisdiction over piracy; and part III explores reasons for the low rates of universal jurisdiction and considers the implications.

I. DATA COLLECTION

Maritime attacks and piracy remain a persistent international problem, as tables 1 and 2 show. To give a sense of the general problem of maritime security, table 1 (p. 439) shows the prevalence of maritime attacks, which include incidents within territorial waters or otherwise not included in the definition of piracy. Table 2 (p. 440) shows the prevalence of the international crime of piracy during the twelve-year period studied. Attacks occur in waters around the world but focus on vital shipping arteries. While the current concern over Somali piracy suggests an out-of-the-blue resurgence of a forgotten crime, attacks in the Strait of Malacca and the South China Sea in the early 2000s approached the recent record set by the Somalis.

Efforts to Track Piracy

Several organizations track piratical incidents and trends—the IMO, the IMB, and the Civil Maritime Analysis Department of the United States Navy’s Office of Naval Intelligence

European nations). The experts were apparently unaware of the piracy prosecutions in Kenya, which demonstrates the lack of attention that the exercise of universal jurisdiction over this crime has received.

⁸ Geneva Convention on the High Seas, Art. 15, Apr. 29, 1958, 13 UST 2312, 450 UNTS 82; LOS Convention, *supra* note 1, Art. 101.

⁹ ELIZABETH ANDERSEN, BENJAMIN BROCKMAN-HAWE, & PATRICIA GOFF, SUPPRESSING MARITIME PIRACY: EXPLORING THE OPTIONS IN INTERNATIONAL LAW 7, 15–16 (report on workshop sponsored by the American Society of International Law, the Academic Council on the United Nations System, and the One Earth Future Foundation, 2009), available at <http://www.asil.org/files/suppressing-maritime-piracy.pdf> (also on file with the ASIL library).

TABLE 1. ATTACKS AT SEA—BY REGION, 1998 TO 2009

Year	Total	Malacca Strait	Indian Ocean	East Africa	West Africa	South America	Mediterranean & Black Seas	South China Sea	North Atlantic & Other Regions
1998	210	6	25	19	22	38	2	94	4
1999	309	37	51	16	36	29	4	136	
2000	471	112	109	29	33	41	2	140	5
2001	370	58	86	22	58	23	2	120	1
2002	383	34	66	23	47	67	3	140	3
2003	452	36	96	22	67	72	1	154	4
2004	330	60	41	13	57	46		113	
2005	266	20	51	49	23	26		97	
2006	240	22	53	31	31	31	1	66	5
2007	282	12	40	60	60	25	3	67	15
2008	306	2	26	134	50	19	2	72	1
2009	406	0	27	222	46	36	0	71	4

Sources: Compiled from annual, quarterly, and monthly piracy reports of the International Maritime Organization and the International Maritime Bureau.

(ONI). The former two produce comprehensive periodical reports that count piratical incidents. The IMO reports constitute our primary source of data on the number of attacks. We use the IMB and ONI reports to corroborate the IMO data, to ensure that counted attacks qualify for the exercise of universal jurisdiction, and to obtain more qualitative information on subsequent responses. In 1995 the IMO began publishing monthly and quarterly reports “of all incidents of piracy and armed robbery against ships reported to the Organization,”¹⁰ and in 1997 annual summaries of attacks in the previous year.¹¹

The IMO gathers data from a combination of sources, including its direct communication with vessels and local authorities, and reports of other organizations, such as the IMB. The IMB, a division of the International Chamber of Commerce, was established in 1981 to “act as a focal point in the fight against all types of maritime crime and malpractice.”¹² In 1992 the IMB opened its Piracy Reporting Centre in Kuala Lumpur.¹³ The centre’s efforts are focused in significant part on the production of quarterly and annual reports that catalog all attacks on shipping. While IMO reports incorporate IMB data, each organization relies on unique sources and definitions, which leads to discrepancies between their calculations of the number of incidents of piracy.

The IMO and the IMB define piracy and armed robbery differently for the purpose of counting and categorizing the incidents. The IMB (wrongly) noted that while “*classical piracy*” is defined as “an act committed in the HIGH SEAS,” such “pirates have all come and gone.”¹⁴ Thus, the IMB employs a definition of piracy for reporting purposes that is broader than the

¹⁰ See IMO MARITIME SAFETY COMMITTEE, REPORTS ON ACTS OF PIRACY AND ARMED ROBBERY AGAINST SHIPS, ANNUAL REPORT—1996, para. 1, MSC/Circ.785 (Mar. 17, 1997) [hereinafter MAR. SAFETY COMM. date REPORT] (on file with authors).

¹¹ *Id.*, para. 2.

¹² See, e.g., ICC INTERNATIONAL MARITIME BUREAU, PIRACY AND ARMED ROBBERY AGAINST SHIPS, 2007 ANNUAL REPORT 2 (2008) [hereinafter ICC 2007 REPORT] (on file with authors).

¹³ See IMB Piracy Reporting Centre, at <http://www.icc-ccs.org/>.

¹⁴ See ICC INTERNATIONAL MARITIME BUREAU, PIRACY AND ARMED ROBBERY AGAINST SHIPS, 1992 ANNUAL REPORT, item 3 (1993) (on file with authors).

TABLE 2. PIRATICAL INCIDENTS—BY REGION, 1998 TO 2009

Year	Total	Malacca Strait	Indian Ocean	East Africa	West Africa	South America	Mediterranean & Black Seas	South China Sea	North Atlantic & Other Regions
1998	17	3	1	1				12	
1999	38	16	2	9	3			8	
2000	137	75	15	17	2	3		24	1
2001	79	27	15	9	5	1		22	
2002	49	13	15	8	3	3		7	
2003	122	26	11	14	6	11		51	3
2004	97	42	14	9	4	4		24	
2005	65	18	8	26	1			12	
2006	61	9	2	18	10		1	17	4
2007	89	10	11	33	12	3		13	7
2008	154	2	1	117	6	2		25	1
2009	250			204	13	8		25	

Sources: Compiled from annual, quarterly, and monthly piracy reports of the International Maritime Organization and the International Maritime Bureau.

international law definition because the IMB definition includes attacks in territorial waters.¹⁵ The IMO, on the other hand, defines piracy by explicit reference to Article 101 of the LOS Convention, which excludes acts committed in territorial waters from its definition of piracy.¹⁶ The IMO's Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery Against Ships makes piracy and armed robbery separate reporting categories, the latter being a catchall for acts of violence that do not fall under universal jurisdiction.¹⁷ The agencies' different definitions reflect differing missions. As a United Nations agency, the IMO is interested in the international legal aspects of piracy. The IMB, by contrast, primarily serves commercial shippers who care about attacks regardless of their legal label.¹⁸

As is common with domestic crime data,¹⁹ underreporting is a problem in all sources covering attacks at sea.²⁰ The first reason for the underreporting of incidents is technical. The IMB and the IMO rely primarily on self-reporting by a network of shipmasters, shipping companies, and local authorities. When serious efforts at reporting began in the early 1990s, there was greater underreporting because it took time for the agencies to gain the confidence and contacts of those with knowledge of attacks.²¹ Technological advances have improved the accuracy and limited the redundancy of reports.

¹⁵ See ICC 2007 REPORT, *supra* note 12, at 3.

¹⁶ *Id.*

¹⁷ IMO, Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery Against Ships, Art. 2.2, Res. A.1025(26), annex (Dec. 2, 2009), IMO Doc. A 26/Res.1025 (Jan. 18, 2010).

¹⁸ See ICC 2007 REPORT, *supra* note 12, at 3.

¹⁹ See, e.g., DANE ARCHER & ROSEMARY GARTNER, VIOLENCE AND CRIME IN CROSS-NATIONAL PERSPECTIVE 36–42 (1984).

²⁰ EU Presidency Statement—Piracy at Sea (May 10, 2001) (statement by Dr. Marie Jacobsson), at http://www.europa.eu-un.org/articles/es/article_233_es.htm (“The EU would like to express its concern over the current underreporting of acts of piracy and armed robbery against ships.”).

²¹ The IMB had a larger self-reporting problem in the early years than the IMO. Letter from Cyrus Mody, manager, International Maritime Bureau, to the authors (Jan. 26, 2009) (on file with authors).

In addition, shippers have incentives to underreport. Almost all shipping companies pay for piracy insurance and the fees for such insurance, already high, go up when a ship is attacked.²² Moreover, reporting hit-and-run incidents or failed attempts may be inconvenient enough to make it a poor business practice.²³ An investigation would require the ship to stop in port, and such delays cost tens or hundreds of thousands of dollars a day. Yet a major attack, such as one that results in significant evasive actions or the actual seizure of a vessel, would be difficult or almost impossible to hide. Consequently, underreporting will typically involve attempted acts of piracy or hit-and-run incidents. Most piratical incidents fall into these categories (most attempts fail), which suggests that our count of reported incidents of piracy significantly understates the actual number. Industry sources have guesstimated piracy underreporting at roughly 50 percent,²⁴ though there is no reason for confidence in this figure, and the actual underreporting could be more extensive. One should keep in mind, however, that the IMB counts coastal banditry, port robberies, and similar local events. Most underreporting is thought to involve these lower-stakes incidents, many of which would fall outside the definition of piracy because they occur in waters subject to territorial sovereignty.

Underreporting means that our data will tend to overestimate the incidence of UJ prosecution. For the same reasons that the most underreported incidents—again, usually attempts—fail to be recorded, they are unlikely to be the subject of a UJ prosecution. The exercise of universal jurisdiction is most likely in response to high-stakes or high-visibility crimes, and much less likely in the absence of formal notification to authorities.

Counting Piracies

We used IMO and IMB piracy reports to identify pirate attacks that could be subject to universal jurisdiction. First, we created a database of every incident of piracy subject to UJ prosecution from 1998 to 2009. We began with the year after the IMO started producing annual reports (avoiding reliance on its earliest reports, which were less comprehensive)²⁵ and ended with the last full year. Next, we examined the reports to identify the number of UJ piracy prosecutions that ensued.

Our inventory of piracy incidents over the past twelve years was drawn from the annual and quarterly IMO piracy reports. The IMO's monthly piracy reports, which describe incidents in richer narrative detail, enabled us to identify the international or local response to each act of piracy and to find UJ prosecutions. We cross-checked the incidents in the IMO reports against the detailed information in the IMB annual piracy reports about precisely where attacks occurred and the ships' flag state, which is relevant to whether the crime falls within universal

²² See Tom Gjelten, *World News: As Piracy Insurance Gets Pricier, Owners Try Guards* (National Public Radio May 8, 2009), at <http://www.npr.org/templates/story/story.php?storyId=103921419>.

²³ See Sam Bateman, *Outlook: The New Threat of Maritime Terrorism, in VIOLENCE AT SEA: PIRACY IN THE AGE OF GLOBAL TERRORISM* 241, 245 (Peter Lehr ed., 2007); Richard Pollak, *The Cost of Doing Business on the Open Sea*, NATION, Apr. 22, 2009, available at <http://www.thenation.com/doc/20090511/pollak> ("The IMB estimates that more than half of attacks go unreported . . .").

²⁴ ANDERSEN, BROCKMAN-HAWE, & GOFF, *supra* note 9, at 2; Bateman, *supra* note 23, at 245; Pollak, *supra* note 23. This happens to be quite close to some estimates of the underreporting rate for simple robbery in the United States. See ARCHER & GARTNER, *supra* note 19, at 39.

²⁵ See EU Presidency Statement, *supra* note 20 (recognizing improvements in IMO reporting).

jurisdiction.²⁶ In addition, these annual reports contain narratives of individual incidents that help in verifying information from the IMO monthly reports about whether a prosecution ensued.

Finally, the ONI produces weekly reports on threats to shipping. The ONI does not provide quantitative data but collects richer detail than either the IMB or the IMO. The weekly ONI reports track not just piratical attacks but also “any recent developments in the efforts to prevent piracy and prosecute the aggressors,”²⁷ including prosecutions of piracies from previous months or years. We therefore searched each weekly report for the prosecution of any piracy reported by the IMO sources. Finally, a broad search of the literature, including reports by governments and international agencies, academic studies, and news accounts, was conducted to find UJ cases not reported elsewhere.

The IMO annual piracy reports are the point of departure for determining the total incidents of piracy that could have been punished under universal jurisdiction from 1998 to 2009. Beginning in June 2001, the IMO reported completed piracies separately from attempts.²⁸ We include both completed attacks and attempts for substantive and technical reasons. The LOS Convention’s definition of piracy apparently covers attempts.²⁹ In addition, because attempts were not counted separately until midway through the period of study, we would have been unable to classify incidents before June 2001 as attempts or completed attacks. Where the IMO reports distinguish between attempted and committed attacks, our data maintain the distinction.

On the basis of the detailed accounts of the response to each incident of piracy in the IMO monthly reports, we created a list of every pirate attack that was reported to local law enforcement authorities,³⁰ noting the location and date of each incident, and whether it was an attempt. By means of the narrative accounts in the reports, supplemented by news sources and other information, each incident was examined to determine whether a UJ prosecution had been undertaken. Where a monthly IMO report signaled that an investigation was continuing at the time the piracy report was issued, we classified the incident as pending.

Monthly piracy reports produced by the IMO after June 2002 helpfully distinguish between attacks that occurred in international waters and those that occurred in territorial waters or at port.³¹ For purposes of finding exercises of universal jurisdiction, we examined only those incidents in IMO monthly reports after June 2002 that were categorized as occurring in international waters. (The annual and quarterly reports distinguished between attacks occurring on the high seas and those occurring in territorial waters from the start, so no similar complication was created when we identified the total incidents of piracy using those reports.) For incidents of piracy reported to the IMO *before* July 2002, we individually examined every attack at sea

²⁶ See ICC 2007 REPORT, *supra* note 12, at 5, tbl.1.

²⁷ See National Geospatial-Intelligence Agency, Worldwide Threats to Shipping Reports, at <http://www.nga.mil/NGAPortal/MSI.portal>.

²⁸ MAR. SAFETY COMM. JUNE 2001 REPORT, MSC.4/Circ.3, Annexes 1 & 2 (June 30, 2001) (on file with authors).

²⁹ See LOS Convention, *supra* note 1, Arts. 101(b), (c), & 103.

³⁰ Of all cases in the IMO monthly reports, 889 were not reported to enforcement authorities. We presume, unless there is clear evidence to the contrary, that these cases would not be prosecuted under universal jurisdiction.

³¹ MAR. SAFETY COMM. JUNE 2001 REPORT, *supra* note 28, Annexes 1 & 2.

documented in IMO monthly reports.³² We first identified cases that resulted in at least a law enforcement investigation, and then determined whether the incident occurred on the high seas. This approach ensured that our study would include every occasion when a UJ prosecution of piracy might have taken place prior to July 2002.

The IMB annual piracy reports, like the IMO monthly reports before 2002, make no distinction between those incidents that are and are not subject to universal jurisdiction, namely, between acts of piracy occurring on the high seas and in the exclusive economic zone seaward of the territorial sea, and other attacks occurring in waters subject to territorial sovereignty, namely, internal and archipelagic waters and the territorial sea. However, we examined every narrative provided by the IMB relating to acts of piracy from 1998 to 2009, except for incidents involving a vessel that was berthed or at anchor.³³ Assessing the IMB data in this manner ensured that any arguable UJ prosecution of an act of piracy would not be excluded from our data set.

In total, we examined 2661 maritime attacks (in 143 IMO monthly piracy reports constituting 563 pages) to see whether they resulted in a UJ prosecution. Of these, 1772 incidents were reported to national or local law enforcement. Only these were examined to determine whether and what type of an enforcement response occurred. In 149 cases, there was some international response or, more commonly, a domestic law enforcement investigation pending at the time that the IMO monthly report was issued. We examined these incidents for UJ prosecution, drawing also on information from IMB and ONI reports, as well as news sources.

In terms of the units we used, we counted cases on the basis of initiated criminal proceedings, rather than arrest alone or ultimate conviction. (This standard translates into different things in different countries but in the United States would mean the filing of an indictment.) IMO and IMB records give no idea as to how many pirates took part in each attack, which varied considerably from three or four to two dozen. For consistency, we used for our denominator the number of incidents of piracy, and for our numerator, the number of attacks that resulted in criminal proceedings, rather than the number of individual defendants charged with piracy. Thus, the indictment of a group of seven pirates for a particular attack was counted as a single use of universal jurisdiction. We are interested in countries' decisions to prosecute, not the size of pirate gangs.

Starting in 2008, pirate attacks surged in the Gulf of Aden. According to the IMO's 2008 annual report, there were 154 incidents of piracy worldwide in 2008,³⁴ 117 of which took place off East Africa. The next year, 2009, was even worse, with 154 piracies in the first two quarters alone³⁵ and a total of 250 piratical incidents throughout the year.³⁶ As in 2008, the overwhelming number of all incidents—204 of them—were attributed to piracy in the Gulf of Aden, off

³² This means that we examined the response to every incident reported to the IMO, whether or not it met the international legal definition of piracy, in the fifty-three monthly reports that were published between January 1998 and July 2002.

³³ According to Cyrus Mody of the International Maritime Bureau, "Incidents in which a vessel was at berth or at anchor would be within port limits [or] territorial waters. All other incidents would be deemed to be in International waters." E-mail from Cyrus Mody, manager, International Maritime Bureau, to authors (Feb. 3, 2009) (on file with authors).

³⁴ See MAR. SAFETY COMM. 2008 REPORT, MSC.4/Circ.133, Annex 2 (Mar. 19, 2009).

³⁵ See MAR. SAFETY COMM., 2009 FIRST QUARTERLY REPORT, MSC.4/Circ.139, Annexes 1–2 (Sept. 22, 2009); MAR. SAFETY COMM., 2009 SECOND QUARTERLY REPORT, MSC.4/Circ.140, Annexes 1–2 (Sept. 22, 2009).

³⁶ See MAR. SAFETY COMM. 2009 REPORT, MSC.4/Circ.152, Annex 2 (Mar. 29, 2010).

the coast of Somalia. Because of the volume of recent attacks, the complex international response, and our concern that criminal proceedings related to these attacks may be developing in real time, we relied primarily on an extensive search of governmental and news sources, as well as interviews with maritime sources, to gather information on prosecutions begun during this time. As a result, our data on UJ prosecutions for 2009 may be less precise than for prior years. Nonetheless, we include the most recent years because it extends the scope of the study, reflects the significance of the international efforts against Somali piracy, and allows us to contrast UJ rates before and during the international response in the Gulf of Aden.

A final consideration to be taken into account is that including recent years creates possible lag effects. UJ prosecutions for past piracies are limited only by countries' statutes of limitations. New prosecutions for attacks in the data set may still be initiated, which would understate the use of universal jurisdiction for the piracies in this period.³⁷ However, we would have counted prosecutions between 1998 and 2009 for acts before that period if any charges had been filed. The lag problem is the price of including data about an important, but recent period in antipiracy efforts. Of course, any study of criminal enforcement fails to capture future prosecutions for past events. But the problem is least significant with piracy, where charges in all known cases were filed within a year of the crime. Human rights cases, by comparison, can be launched decades after the crime, especially since statutory limitations periods often do not apply to such offenses.

II. THE RARITY OF UNIVERSAL JURISDICTION

This part reports the proportion of high seas piracies that ultimately result in prosecution based on universal jurisdiction over that crime.³⁸ In addition, we discuss the relationship between these prosecution rates and clearance rates for other crimes. Finally, this part describes the circumstances of the few cases where universal jurisdiction was used.

The Rate of Prosecution Using Universal Jurisdiction

In the twelve-year period from 1998 to 2009, the incidence of universal jurisdiction over piracies was so low as to be trivial—just under 1.5 percent of reported cases. Between 1998 and 2009, there were 1158 reported pirate attacks in international waters, all subject to universal jurisdiction. These incidents resulted in only seventeen prosecutions—roughly one in every sixty-eight attacks.³⁹ A high seas pirate's chances of facing universal jurisdiction have been slim.

³⁷ For example, in early 2010 the United States charged a Somali pirate, already under indictment for attacking a U.S. vessel, with additional counts specifying attacks against other, non-American vessels. *United States v. Abdulwali Abdulkadir Musé*, No. 9-CR-512 (S.D.N.Y. filed May 19, 2009) (charging the defendant, inter alia, with piracy against the U.S.-flagged M/V *Maersk Alabama*), Superseding Indictment (S.D.N.Y. filed Jan. 12, 2010) (adding charge of previously hijacking two non-U.S.-flagged ships); see also Press Release, U.S. Attorney, Southern District of New York, Manhattan U.S. Attorney Files Superseding Indictment Against Alleged Somali Pirate Charging Involvement in Two Additional Hijackings (Jan. 12, 2010), available at <http://www.justice.gov/usao/nys/pressreleases/>.

³⁸ We do not include prosecution premised on other jurisdictional bases, including prosecutions by the flag state. See *supra* note 37.

³⁹ Cyrus Mody reports that he is not aware of any instances of UJ prosecutions of piracy during this time period. E-mail from Cyrus Mody, manager, International Maritime Bureau, to authors (May 15, 2009) (on file with authors).

TABLE 3. THE UNIVERSAL JURISDICTION DOCKET, 2008 AND 2009

	Date of Handover	Apprehending Nation	Number of Alleged Pirates	Prosecuting Nation	Date of Attack	Flag of Vessel
1	Nov. 19, 2008	United Kingdom	8	Kenya		Yemen
2	Mar. 5, 2009	United States	7	Kenya	Feb. 11, 2009	Marshall Islands
3	Mar. 11, 2009	Germany	9	Kenya	Mar. 3, 2009	Germany
4	Mar. 11, 2009	Russia	10	Yemen	Feb. 12, 2009	Iran
5	Apr. 8, 2009	Germany	7	Kenya		Germany
6	Apr. 22, 2009	France	11	Kenya	Apr. 15, 2009	Liberia
7	May 8, 2009	France	11	Kenya	May 3, 2009	France
8	May 16, 2009	Spain	7	Kenya	May 6, 2009	Panama
9	May 16, 2009	Spain	7	Kenya	May 7, 2009	Malta
10	June 25, 2009	Italy	9	Kenya	May 22, 2009	Greece/Denmark
11	June 8, 2009	Sweden	7	Kenya	May 26, 2009	Greece
12	June 10, 2009	United States	17	Kenya	May 13, 2009	Egypt
13	Nov. 9, 2009	Germany	7	Kenya	Oct. 27, 2009	France

Sources: Compiled from annual, quarterly, and monthly piracy reports of the International Maritime Organization and the International Maritime Bureau, as well as contemporaneous news accounts.

TABLE 4. UNIVERSAL JURISDICTION PROSECUTION RATES COMPARED

	1998–2009	1998–2007	2008–2009
Prosecutions	17	4	13
Incidents of Piracy	1158	754	404
Prosecution Rate	1.47%	0.53%	3.22%

Sources: Compiled from annual, quarterly, and monthly piracy reports of the International Maritime Organization and the International Maritime Bureau.

Because we studied responses only to reported attacks, the actual rate of UJ prosecution for attacks committed is probably even lower than recounted here.

The recent piracy boom off the coast of Somalia has led to a notable increase in the use of universal jurisdiction compared to the preceding ten-year period, though the rate remains low in absolute terms and relative to other international crimes. Furthermore, while there has been a substantial increase in the number of states deploying warships in the Gulf of Aden for the purposes of deterring and detaining pirates, very few states have been willing to prosecute pirates on the basis of universal jurisdiction. Kenya accounts for over 76 percent of UJ prosecutions in the twelve-year period of study—all but four of them.⁴⁰ According to information available as of early 2010, thirteen UJ cases were brought in 2008 and 2009, involving some 117 suspected pirates (see table 3 above).⁴¹ The UJ prosecution rate for this period is 3.22 percent—approximately 6 times the average of the preceding ten years (see table 4 above).

⁴⁰ These findings are consistent with Alfred Rubin's conclusion that in the Age of Sail—when piracy was a much more serious menace—universal jurisdiction was used only a “very few times,” which suggests that the modern low rate of prosecution is not a result of piracy's becoming economically less significant. ALFRED P. RUBIN, *THE LAW OF PIRACY* 302, 348 (2d ed. 1998).

⁴¹ See, e.g., Catherine Philp, *Captives Being ‘Dumped’ in Kenya to Avoid Legal Snags*, *TIMES* (London), June 12, 2009, at 41, available in LEXIS, News Library; Celestine Achieng, *U.S. Navy Hands over 17 Pirates to Kenya*, *REUTERS*, June 10, 2009, available in *id.*

The number of pirate attacks per year in 2008 and 2009 amounted to slightly less than 2.68 times the number in prior years, so the rise in UJ prosecution greatly outpaced the increase in attacks. Despite this sharp increase in the rate of UJ prosecution, the absolute rate remained quite low relative to clearance rates for noninternational crimes.⁴²

Domestic Prosecutions and Clearance Rates for Other Crimes

Whether the UJ prosecution rate is low or high cannot be answered in the abstract. Rather, it must be compared to some benchmark. Two countervailing considerations are at work here. First, the exercise of universal jurisdiction substitutes for prosecution by states with a nexus to the offense. Thus, one would not expect a wide use of universal jurisdiction if the flag state or victims' or perpetrators' home states took effective antipiracy action. At the same time, the UJ prosecution rate should be considered alongside the clearance rates for other crimes.⁴³ The level of criminal enforcement for domestic crimes varies greatly around the globe, and if clearance rates for serious noninternational crimes are comparable to those for piracy, it would be inaccurate to think of the piracy prosecution rate as low. For example, in regions where piracy is prevalent, a 3.22 percent clearance rate (the prosecution rate throughout 2008 and 2009), while certainly ineffective as an instrument of deterrence, may not be aberrant. Yet it is implausible for prosecutions of piracy based on universal jurisdiction to be rare *both* because it is effectively dealt with by the immediately affected nations *and* because their police generally respond ineffectively to it.

Serious crimes are not perfectly policed even in the best legal system. Clearance rates vary greatly by country and by crime, with more serious crimes having higher rates of clearance because more resources are expended on solving them. To be sure, using clearance rates as a measure is inherently problematic. Clearance rates are not prosecution rates. Indeed, most nations do not report prosecution rates, the focus of our study. Moreover, what the best comparator offenses would be does not readily come to mind. Piracy comprises elements of aggravated robbery, kidnapping, and often murder.⁴⁴ We do not claim that these crimes are substantively similar to piracy, or that one would expect similar levels of enforcement. Rather, the discussion of clearance rates below is intended to give a general frame of reference for the data we present on piracy, and such comparisons are commonplace in empirical literature on crime.

In the United States, clearance rates for all violent crimes are roughly 45 percent, and around 27 percent for robbery.⁴⁵ Interpol data for the period from 1971 to 1996 suggest an average global homicide clearance rate of 70 percent with a 24 percent standard deviation. Robbery,

⁴² Interestingly, the *absolute number* of UJ piracy cases in the last twelve years is on par with the number of European UJ human rights cases resulting in convictions during the same period, though more individual defendants have been convicted of piracy. See Kaleck, *supra* note 1.

⁴³ Clearance rates refer to the "solving" of a crime by the police. A crime is "cleared," generally, when a suspect has been arrested and referred for prosecution.

⁴⁴ Perhaps the best analog to high seas piracy would be attacks against shipping in territorial waters, which are prosecuted under domestic law, but we have not discovered any source for this information.

⁴⁵ FEDERAL BUREAU OF INVESTIGATION, 2008 CRIME IN THE UNITED STATES tbl.26 (2009).

by comparison, has a 41 percent clearance rate with a 25 percent standard deviation. The average global clearance rate for all crime was 51 percent.⁴⁶ Among European states, clearances for violent crime do not go below 40 percent.⁴⁷

Universal jurisdiction serves as a backstop for enforcement by directly affected states, which might establish jurisdiction based on the vessel's flag, nationality of the defendant or the victim, or other traditional grounds. Such prosecutions would not necessarily be reported in publicly available sources, especially in countries like Somalia. This absence limits the strength of our conclusions because one would expect UJ prosecution rates to be partly a function of the domestic prosecution rate—the more domestic prosecution there is, the less UJ prosecution will there be. Yet maritime experts believe prosecution rates for piracies are quite low relative to those for other crimes.⁴⁸ The conventional view is that a great deal of work is left for universal jurisdiction to do if nations are willing to exercise it.⁴⁹ Indeed, piracy is largely committed off the coasts of states that cannot devote adequate resources to enforcement. While IMO data do not comprehensively report domestic prosecutions, investigations by local authorities were noted in fewer than 150 of the 1158 piracies in the twelve-year period from 1998 to 2009. A survey of ONI reports reveals a few dozen arrests and fewer prosecutions, though these data as well are by no means comprehensive.

Thus, the comparable clearance-rate issue and non-UJ prosecution issue meet with the same response. Universal jurisdiction applies to piracy precisely because states with flag or nationality jurisdiction will typically not be in a position to take enforcement action. This is because of piracy's locus—on the high seas, where policing requires expensive naval assets—and perhaps because it generally occurs off the coasts of nations with weak enforcement capabilities. Universal jurisdiction, in theory, exists to fill this jurisdictional gap. Consequently, even if clearance rates for noninternational crimes in the relevant coastal states are low, this factor only explains why we do not see traditional national prosecution. The lack of traditional national prosecution does not explain why there have been few UJ piracy prosecutions by other countries, but rather reveals the greater need for such prosecutions.

Narrative Descriptions of the Cases

The few UJ piracy prosecutions that took place in the period of study fall into two groups: three desultory prosecutions by China and India in the late 1990s and early 2000s, and a longer

⁴⁶ Ming-Jen Lin, *Does Democracy Increase Crime? The Evidence from International Data*, 35 J. COMP. ECON. 467, 471 (2007) (citing Interpol figures).

⁴⁷ Paul R. Smit, Ronald F. Meijer, & Peter-Paul J. Groen, *Detection Rates, an International Comparison*, 10 EUR. J. CRIM. POL'Y & RES. 225, 226 (2004). To be sure, a variety of problems affect the accuracy of international crime data, and clearance rates in particular. Clearance rates apply only to reported crimes, and as with piracy, underreporting is a major concern. See Lin, *supra* note 46, at 469.

⁴⁸ See Timothy Martin, *Maritime Piracy: Out of Sight, out of Mind?* in GOORANGAI, NO. 2, 1990 (Occasional Papers of the Royal Austl. Naval Reserve Prof. Stud. Program, Aug. 2006); see also Martin Murphy, *Piracy and UNCLOS: Does International Law Help Regional States Combat Piracy?* in VIOLENCE AT SEA, *supra* note 23, at 155, 161–63.

⁴⁹ See Press Release, Security Council Authorizes States to Use Land-Based Operations in Somalia, as Part of Fight Against Piracy off Coast, Unanimously Adopting 1851 (2008), UN Doc. S/9541 (Dec. 16, 2008) (statement of U.S. secretary of state Condoleezza Rice) (arguing that failure to bring UJ prosecutions against pirates was because “political will was lacking,” resulting in “impunity” for pirates).

docket almost exclusively in the Kenyan courts, which in recent years became a de facto international forum for the prosecution of Somali pirates captured by third-country navies (see table 3). The first case in our data set involves the *Alondra Rainbow*, a Panama-registered, Japanese-owned tanker with an Indonesian and Philippine crew carrying \$14 million in aluminum from Indonesia to Japan.⁵⁰ Indonesian pirates seized the ship in November 1999, setting the crew adrift. The IMB issued an urgent alert, leading to a month-long search for the vessel. The Indian navy found it and arrested the pirates.⁵¹ In 2001 the Mumbai Sessions Court ruled that the LOS Convention gave it jurisdiction and indicted the suspected pirates.⁵² In February 2003, fifteen defendants were sentenced to seven years' imprisonment.⁵³ The incident was celebrated as the first prosecution of piracy in modern times.⁵⁴ However, in April 2005, the Mumbai High Court overruled the court below, acquitting all of the accused. The Japanese shipmaster refused to identify the pirates in court by the time of the appeal,⁵⁵ perhaps fearing reprisal by other pirates on future trips.

Piracy has long been a serious problem in the South China Sea, and has led to a couple of universal jurisdiction prosecutions by China. In 1998 the disappearance in international waters of the *Petro Ranger*, an oil tanker from Singapore bound for Vietnam, attracted significant attention. The repainted ship was found by the Chinese Coast Guard during a routine inspection. China returned the ship to its owner, but it released the pirates without prosecution.⁵⁶ The release was criticized by international authorities, who had long been frustrated by China's lax approach to piracy. China pledged more aggressive action and shortly thereafter—as India pursued the *Alondra Rainbow* case to much acclaim—launched a crackdown.⁵⁷ In March 1999, a Panamanian bulk hauler was taken by pirates between India and China.⁵⁸ The pirates put the crew into rafts and repainted the vessel. Chinese port officials discovered the ship when it came in for repairs. In February 2000, a Chinese court convicted all fourteen of the Burmese defendants; one of them was sentenced to death. In February 2003, a Chinese court also sentenced ten Indonesian pirates to prison terms for seizing the Thailand-registered oil tanker *Siam Xanxai* off Malaysia in June 1999.⁵⁹ These pirates were also arrested during a port call.

⁵⁰ See Vijay Sakhuja, *Sea Piracy in South Asia*, in *VIOLENCE AT SEA*, *supra* note 23, at 23, 29; R. S. Vasan, *Alondra Rainbow Revisited, A Study of Related Issues in the Light of the Recent Judgment of Mumbai High Court* (S. Asia Analysis Group, Paper No. 1379, May 13, 2005), at <http://www.southasiaanalysis.org/papers14/paper1379.html>.

⁵¹ *Navy, Coast Guard Nab Pirates, Rescue Hijacked Merchant Vessel off Goa Coast*, INDIAN EXPRESS, Nov. 17, 1999, available at <http://www.indianexpress.com/ie/daily/19991117/ige17049.html>.

⁵² Jon D. Peppetti, *Building the Global Maritime Security Network: A Multinational Legal Structure to Combat Transnational Threats*, 55 NAVAL L. REV. 73, 109 (2008).

⁵³ *Id.*

⁵⁴ *Id.* The director of the IMB hoped that “this case [would] serve[] as a warning that the world will no longer tolerate this crime.” Press Release, International Maritime Bureau, Indian Court Jails Pirates in Breakthrough for Marine Security (Feb. 25, 2003), at http://www.iccwbo.org/collection9/folder22/id2094/printpage.html?news_xsl=&article_xsl=.

⁵⁵ Vasan, *supra* note 50.

⁵⁶ Charles Glass, *The New Piracy*, LONDON REV. BOOKS, Dec. 18, 2003, at 3, available at http://www.lrb.co.uk/v25/n24/glas01_.html.

⁵⁷ Keyuan Zou, *New Developments in the International Law of Piracy*, 8 CHINESE J. INT'L L. 323, 341–42 & n.83 (2009).

⁵⁸ *Id.* at 343.

⁵⁹ *Id.*; *India Shows the Way in Piracy Battle*, ASIA TIMES ONLINE, Feb. 27, 2003, at http://www.atimes.com/atimes/South_Asia/EB27Df01.html.

With the surge of Somali piracy that began in 2008, Kenya emerged as the central venue for UJ prosecutions of suspects captured by the unprecedented multinational flotilla policing the Gulf of Aden. Nevertheless, the first Kenyan prosecution had occurred earlier, in 2006. The USS *Churchill*, on antiterrorism patrol in the Gulf of Aden, responded to an IMB report of a pirate attack on an Indian bulk carrier and captured the perpetrators.⁶⁰ The United States sent the ten captured Somalis to Kenya for trial, where they were convicted and sentenced to jail terms. As the piracy problem escalated in 2008, patrolling nations caught hundreds of pirates. Unwilling to bring them back to their countries for trial, the patrolling vessels destroyed their firearms and equipment but released them. This unsatisfactory state of affairs led the United States and European states, in the winter of 2008 to 2009, to establish protocols so that suspected pirates who were captured could be transferred to Kenya for trial. The Kenyan cases all stem from transfers from foreign naval vessels.⁶¹ Separately, Yemen began proceedings against Somalis transferred there by the Russian navy.⁶²

III. WHY SO FEW?

Given piracy's excellent pedigree as a UJ crime, the extreme rarity of universal jurisdiction as a response requires some explanation. To be sure, there are too few prosecutions for any statistical inference to be drawn about the circumstances in which universal jurisdiction is likely to be used. Moreover, the data on piracy prosecutions are not entirely comprehensive, and developments continue to unfold in ways that depart from previous experience. Yet thus far the data are sufficiently stark to warrant preliminary observations. Moreover, the notable differences between the ten-year period from 1998 to 2007 and the past two years can serve as a basis for rough conjecture about the driving factors of UJ prosecution for piracy.

Separation of Apprehension and Adjudication

The most obvious reason for the low rate of UJ prosecution of pirates is the failure to exercise universal enforcement jurisdiction. The standard domestic criminal regime provides for a public authority to apprehend criminals, and a public authority to prosecute them. While universal jurisdiction over pirates authorizes all nations to capture them beyond the jurisdiction of any state, doing so requires the deployment of significant naval resources. The vastness of the high seas alone means that such an undertaking will be costly in terms of manpower and equipment, as well as dangerous. Before the current Somali piracy outbreak, no nation in modern times

⁶⁰ Report of the Monitoring Group on Somalia Pursuant to Security Council Resolution 1630 (2005), paras. 99–103, UN Doc. S/2006/229, at 29–30.

⁶¹ See, e.g., Eugene Kontorovich, *Introductory Note to Exchange of Letters Between the European Union and the Government of Kenya on the Conditions and Modalities for the Transfer of Persons Suspected of Having Committed Acts of Piracy*, 48 ILM 747, 747 (2009). In 2010 Kenya dramatically announced that it would no longer accept transfers of pirate suspects, though it has softened these statements in negotiations with coalition states. *Kenya Willing to Try More Somali Pirates*, VOANEWS.COM, June 1, 2010, at <http://www1.voanews.com/english/news/africa/Kenya-Willing-to-Try-More-Somali-Pirates-with-Help-from-Wealthier-Nations-95304929.html>. At the same time, the Seychelles began trying transferred pirates under universal jurisdiction, though the much smaller country cannot handle the same volume of cases as Kenya. See *Seychelles to Set up Courts to Fight Piracy: U.N.*, AGENCE FRANCE-PRESSE, May 5, 2010, at http://ca.news.yahoo.com/s/afp/100505/world/somalia_piracy_shipping_un_seychelles.

⁶² *Twelve Somalis on Trial in Yemen over Oil Tanker Attack*, DEUTSCHE PRESSE-AGENTUR, Sept. 29, 2009, available in LEXIS, News Library, Wire Service Stories File.

had been willing to send its vessels out of region specifically to deal with pirates. Much of the low UJ rate can be explained by the failure of nations for most of this period to make any efforts to capture foreign pirates. At least until 2008, states essentially ignored universal jurisdiction over piracy, but not for lack of pirates. This is itself noteworthy, since international law gives nations an unusual explicit affirmative duty to repress piracy outside their territory.⁶³

Yet the problem goes beyond the failure to catch pirates. Prosecuting pirates, even when apprehended, is cumbersome, as evidenced by the ongoing “catch and release” phenomenon in the Gulf of Aden. The coalition of more than twenty nations from around the world releases many of the suspected pirates it captures.⁶⁴ The capturing states often cite evidentiary difficulties, the cost of prolonged incarceration, and other factors in explaining their release policies.⁶⁵ But even in some easy cases, no nation can be found to prosecute captured suspects,⁶⁶ which may explain why developing countries account for all UJ piracy cases: they have lower costs of prosecution and detention.

Universal jurisdiction involves prosecution of a crime by a nation that was not directly affected by it. Even if a crime’s UJ status means that it harms all nations in some inchoate way, enforcing states bear all of the costs while sharing only a small fraction of the benefit. In either case, universal jurisdiction faces serious collective action problems. Thus, perhaps the most obvious reason for the lack of universal jurisdiction is the fact that it is universal. Patrolling nations seem more likely to transfer captured pirates for prosecution by Kenya, as opposed to releasing them, when the attack in question involves a national interest. In the majority of such transfers the attacked ships flew the flag of the capturing nation or associated states (see table

⁶³ LOS Convention, *supra* note 1, Art. 100; Commentary to the Articles Concerning the Law of the Sea, Art. 38 cmt. 2, in Report of the International Law Commission on the Work of Its Eighth Session, [1956] 2 Y.B. Int’l L. Comm’n 265, 282, UN GAOR, 11th Sess., Supp. No. 9, UN Doc. A/3159 (1956).

⁶⁴ *Combating Piracy on the High Seas: Hearing Before the House Armed Services Comm. on Counter-piracy Operations in the U.S. Central Command Area of Operations* (Mar. 5, 2009), available in LEXIS, U.S. Congress Library, Fed News Service File (statement of Vice Adm. William E. Gortney); see also Jason Groves, *Navy Gives Somali Pirates Food and Water . . . Then Lets Them Sail off Scot Free*, DAILY MAIL ONLINE, Jan. 28, 2010, at <http://www.dailymail.co.uk/news/article-1246300/Navy-gives-pirates-food-water--lets-sail-scot-free.html> (reporting that of sixty-six suspected pirates captured by Royal Navy in 2009, all were freed); Valentina Pop, *EU Mission Alone Cannot Solve Piracy Problem, Says Admiral*, EUOBSERVER.COM, Feb. 2, 2009, at <http://euobserver.com/13/29390>.

⁶⁵ See Contact Group on Piracy off the Coast of Somalia, 2nd Meeting of Working Group 2 on Legal Issues, Chairman’s Conclusions 1 (May 2009), available at http://www.marad.dot.gov/documents/WG2-2nd_Meeting_chair-conclusions-May_5-6-2009-mtg.pdf (noting the centrality of evidentiary problems); Joint UNODC/European Commission Program, EU Support to the Trial and Related Treatment of Piracy Suspects 3 (May 2009) [hereinafter EU Support], at <http://www.asil.org/files/AnnexE-ECAssistance.pdf>; Eur. Parl. Ass., Pol. Aff. Comm., Rapporteur’s Explanatory Memorandum to Report, Piracy—A Crime and a Challenge for Democracies, Doc. 12193, at 12, para. 67 (Apr. 1, 2010), at <http://assembly.coe.int/Documents/WorkingDocs/Doc10/EDOC12193.pdf> (“As regards countries such as Somalia, concerned to keep asylum requests to a minimum, some states might be reluctant to take pirates home to submit them to a trial, fearing that they would apply for asylum, or would argue that their return is impossible due to the situation in the country.”); Groves, *supra* note 64 (noting that the Royal Navy cites evidentiary reasons for releasing pirates); Eugene Kontorovich, “*A Guantanamo on the Sea*”: *The Difficulty of Dealing with Pirates and Terrorists*, 98 CAL. L. REV. 234, 262–66 (2010).

⁶⁶ Office of Naval Intelligence, Worldwide Threat to Shipping Mariner Warning Information, para. D3 (Dec. 23, 2009), at http://www.nga.mil/MSISiteContent/StaticFiles/MISC/wwtts/wwtts_20091223100000.txt (reporting Dutch capture of pirates who had been identified by photographs taken by victims, and suggesting prosecution would be unusually easy); *Suspected Somalia Pirates Freed by Dutch Navy*, BBC NEWS, Dec. 18, 2009, at <http://news.bbc.co.uk/2/hi/8420207.stm> (reporting same group of pirates freed because the “European Union has tried in vain since their arrest to find a country which would agree to prosecute them”).

3).⁶⁷ The chief prosecutor in Hamburg, Germany, where pirates caught by that country would probably be tried, stated: “[T]he German judicial system cannot, and should not, act as World Police. Active prosecution measures will only be initiated if the German State has a particular, well-defined interest”⁶⁸ If this represents the policy of nations at the height of the Somali piracy epidemic, which saw unprecedented international interest in the problem, it would apply a fortiori in less turbulent times.

Responses Before and After the Somali Surge Compared

Comparing the use of universal jurisdiction during the first ten years under study to its use during the subsequent Somali epidemic—when UJ prosecution increased significantly—may help isolate some of the factors that support a broader use of the doctrine.

One nation—Kenya—accounts for almost all UJ cases between 2008 and 2009. Yet the pirates were apprehended by a flotilla from roughly twenty countries—including contingents from China, the European Union, India, NATO, and Russia. Without the deployment of these forces from outside the region, there would probably not have been a single UJ prosecution, since Kenya and other regional states lack the resources to capture pirates on the high seas or the legal authority for national naval or police forces to do so. The allocation of significant enforcement resources by third-party states is a prerequisite for exercising universal jurisdiction. But if the dedication of resources makes the significant increase in UJ prosecutions possible, it still begs the question, what triggered the outpouring of international naval support in response to the 2008 Somali piracy surge?

Certainly the issue captured global attention. In 2008 alone, the Security Council passed five resolutions dealing with the problem. In European countries with a significant shipping industry, it became a “first ranking political issue.”⁶⁹ Yet the number of attacks alone does not explain the level of interest. There were comparable spikes of piracy in 2000 and 2003 in the Strait of Malacca and the South China Sea.⁷⁰ Naval and maritime officials were greatly concerned about Asian piracy at the time, especially the possibility that pirates would link up with terrorists to close the Strait of Malacca. Moreover, piracy in those years was much more violent. Perhaps

⁶⁷ The Marshall Islands are associated by treaty with the United States, and the EU nations with each other. Indeed, the Somali expedition is the first naval deployment under the European Union’s joint security policy.

⁶⁸ Ewald Brandt, *Prosecution of Acts of Piracy off Somalia by German Prosecution Authorities*, Presentation at International Foundation for Law of the Sea Conference, Piracy—Scourge of Humanity (Apr. 24, 2009) [hereinafter IFLOS Conference], at <http://www.iflos.org/en/events.aspx#2669> (defining such interests as “when German nationals have been killed or injured—when a ship flying the German flag has been attacked by pirates—when pirates are blackmailing a German shipping company [and]—when pirates have been detained by the German Navy”); see also [Written] Testimony of Ambassador [Stephen] Mull Before the Senate Armed Services Committee on Combating Piracy on the High Seas 3 (May 5, 2009), at http://www.marad.dot.gov/documents/Mull_05-05-09.pdf (noting, as regards international prosecution of pirates, “America’s willingness to prosecute when our people and interests have been attacked”). Similarly, a Spanish judge ordered Somali pirates captured by that nation’s navy released on the grounds that their crime had too little relation to Spain to warrant prosecution. See Daniel Woolls, *Spain: About Face on Piracy Suspects*, CHI. DEFENDER ONLINE, May 8, 2009, at <http://www.chicagodefender.com/article-4353-spain-about-face-on-piracy-suspects.html>.

⁶⁹ See Gert-Jürgen Scholz, *Piracy and Armed Robbery Against Ships: The Policy of the Federal Ministry of Transport, Building and Urban Affairs 1*, Presentation at IFLOS Conference, *supra* note 68.

⁷⁰ NATO Parliamentary Assembly, Committee on the Civil Dimension of Security, *The Growing Threat of Piracy to Regional and Global Security*, para. 9, Doc. 169 CDS 09 E rev 1 (2009), at <http://www.nato-pa.int/Default.asp?SHORTCUT=1770>.

some of the greater concern about Somali piracy is due to recent spectacular seizures, including a U.S.-flagged vessel, a laden Saudi-oil tanker, and a cargo ship loaded with battle tanks.

A final aspect of the greater use of universal jurisdiction for Somali pirates involves state failure. Pirates venture out to sea from the coast of the state where they are based. Universal jurisdiction becomes important when that state is unwilling or unable to take action. However, the inability of the home state to respond effectively is not a sufficient condition for universal jurisdiction. For many years Indonesia and Malaysia were underequipped to confront their piracy problems. In view of the importance of the Strait of Malacca to international shipping, several years ago United States officials mentioned the possibility of sending forces to help hunt down pirates in the area.⁷¹ Yet those nations rejected the offer, citing concerns about having their sovereignty eroded and the offense to local sensibilities that would arise from a foreign naval presence.⁷² In the case of Somalia, the weak UN-backed Transitional Federal Government welcomed the arrest of Somali nationals off its coast by foreign navies.⁷³ The complete collapse of the Somali government appears to be an important prerequisite to the deployment of significant external enforcement assets.

Implications for Universal Jurisdiction

Over the years, prosecution of piracy on the basis of universal jurisdiction has turned out to be exceedingly rare in relation to the number of offenses committed, and fairly rare even in the post-2008 circumstances of a high-profile crisis. This raises some questions about the incidence of universal jurisdiction in general. To be sure, other UJ crimes are generally more heinous than piracy, and one might therefore expect them to be met with a fundamentally greater level of prosecution (though the absolute number of piracy UJ cases is nearly identical to the number of European UJ human rights cases resulting in convictions during the period of study).⁷⁴ Yet, while the benefits to the forum state of exercising universal jurisdiction over human rights offenses may be greater, the costs are correspondingly higher. Human rights offenses are generally perpetrated through the mechanisms of state or quasi-state power. Thus, the exercise of universal jurisdiction will be limited by diplomatic considerations: For example, Belgium and Spain have changed their laws to preclude some UJ cases because of pressure from target countries.⁷⁵ Arresting war criminals who still command armed forces is harder than catching pirates.

⁷¹ See Ellen Nakashima & Alan Sipress, *Singapore Goes It Alone in Maritime Security Drill*, WASH. POST, June 2, 2004, at A12; Institute for the Analysis of Global Security, *Chilly Response to U.S. Plan to Deploy Forces in the Strait of Malacca* (May 24, 2004), at <http://www.iags.org/n0524042.htm>.

⁷² Marcus Hand, *Malaysia Rejects US Marine Squad Plan for Malacca Strait*, LLOYD'S LIST, Apr. 6, 2004, at 12.

⁷³ See, e.g., SC Res. 1851, pmbl. (Dec. 16, 2008) ("Noting the several requests from the [Transitional Federal Government] for international assistance to counter piracy off its coast, including the letter of 9 December 2008 from the President of Somalia requesting the international community to assist the TFG in taking all necessary measures to interdict those who use Somali territory and airspace to plan, facilitate or undertake acts of piracy and armed robbery at sea, and the 1 September 2008 letter from the President of Somalia to the Secretary-General of the UN expressing the appreciation of the TFG to the Security Council for its assistance and expressing the TFG's willingness to consider working with other States and regional organizations to combat piracy and armed robbery off the coast of Somalia").

⁷⁴ See *supra* note 42.

⁷⁵ See, e.g., Steven R. Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 AJIL 888 (2003); *Spain Parliament Passes Law Limiting Reach of Universal Jurisdiction Statute*, JURIST PAPER CHASE, Oct. 16, 2009, at <http://jurist.law.pitt.edu/paperchase/2009/10/spain-parliament-passes-law-limiting.php> (amending Art. 23(4) of the Organic Law on the Judiciary, No. 6/1985).

European states attribute their relatively infrequent use of universal jurisdiction over human rights crimes not just to diplomatic difficulties but to the evidentiary problems, as with piracy.⁷⁶

The international legal response to piracy shows the importance of extraterritorial enforcement efforts to the exercise of universal jurisdiction. However, piracy is unique among UJ crimes in that all states are authorized not only to prosecute pirates, but to seize their ships and arrest the suspects on the high seas.⁷⁷ Other UJ offenses do not expand the authority of states to make arrests outside their own territory; absent the consent of the territorial sovereign, states cannot exercise enforcement jurisdiction in the places where those crimes occur. This suggests that the emergence of a robust UJ regime for other crimes may depend on states' ability and willingness to find means to deal with the problem posed by the absence of universal enforcement jurisdiction. Thus, although the situations are different, the low prosecution rates for piracy found in this study raise some questions about the UJ prosecution rate for other UJ offenses.

IV. CONCLUSION

The evidence presented here suggests that the nominal availability of universal jurisdiction for piracy does not translate in practice into ending impunity for the crime. In the absence of a reasonable prospect of being implemented, universal jurisdiction for piracy is unlikely to provide significant deterrence. Moreover, while all UJ crimes are said to be offenses against the entire international community, there is a sharp subject-based stratification in the community members' interest in prosecuting such crimes. Piracy attracts the (very rare) efforts of certain non-Western nations, while human rights crimes have mainly attracted the efforts of Western states. Further empirical research could examine factors conducing toward cooperation in repressing crimes of universal concern.

⁷⁶ See Council of the European Union, *supra* note 7, at 26, para. 25.

⁷⁷ Under the Security Council resolutions on Somali piracy, participating states may fight piracy in the territorial sea of Somalia and take appropriate related measures on its land territory. See, e.g., SC Res. 1851, *supra* note 73, paras. 6, 7; SC Res. 1816, para. 7 (June 2, 2008).