

## **PROSECUTION OF MARITIME PIRATES: THE NATIONAL COURT IS DEAD—LONG LIVE THE NATIONAL COURT?**

M.D. SAIFUL KARIM\*

### **ABSTRACT**

*Piracy is one of the main maritime security concerns in the contemporary world. The number of piracy incidents is increasing rapidly, which is highly problematic for maritime security. Although international law provides universal jurisdiction for the prosecution of maritime pirates, the actual number of prosecutions is alarmingly low compared to the number of incidents of piracy. Despite many states becoming parties to the relevant international conventions, they are reluctant to establish the necessary legal and institutional frameworks at the national level for the prosecution of pirates. The growing incidences of piracy and the consequential problems associated with prosecuting pirates have created doubts about the adequacy of the current international legal system, which is fully dependent on national courts for the prosecution of pirates. This article examines the possible ways for ensuring the effective prosecution of pirates. Contrary to the different proposals forwarded by researchers in the wake of Somali piracy for the establishment of international judicial institutions for the prosecution of pirates, this article argues that the operationalization of national courts through the proper implementation of relevant international legal instruments within domestic legal systems is the most viable solution. However, this article submits that the operationalization of national courts will not be very successful following the altruistic model of universal adjudicative jurisdiction. A state may enact legislation implementing universal jurisdiction but will not be very interested in prosecuting a pirate in its national court if it has no relation with the*

---

\* Senior Lecturer, School of Law, Faculty of Law, Queensland University of Technology, Brisbane, Australia. This article is based on a chapter of my PhD thesis. I would like to thank Professor Natalie Klein, Emeritus Professor Ivan Shearer AM RFD, Professor Stuart Kaye, and Professor Richard Barnes for their valuable comments on my PhD thesis. A very small part of this article incorporates some information from my previously published short article: Md Saiful Karim, *Is there an International Obligation to Prosecute Pirates?*, 58 NETH. INT'L. L. REV. 387 (2011).

*piratical incident. Rather, it will be successful if the global community seriously implement the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention), which obligates the states that have some connection with a piratical incident to prosecute pirates in their national courts.*

Introduction .....	38
I. International Law of Piracy .....	42
A. Definition of Piracy under UNCLOS and the Issue of the Operationalization of Courts .....	43
i. Geographic Limits .....	43
ii. Universal Jurisdiction.....	47
B. Piracy and the SUA Convention .....	50
II. The Winter of Despair and the Spring of Hope: A Case Study on Somali Piracy .....	56
A. Is an International or Regional Court the Answer?.....	59
B. Is There a Real Legal Obstacle in Prosecuting Somali Pirates in National Courts?.....	64
C. The Role of National Courts .....	72
III. Prosecution of Pirates: Operationalizing Judicial Institutions .....	76
A. Towards a Permanent International Judicial Institution for the Prosecution of Pirates? .....	76
i. ITLOS .....	76
ii. ICC .....	78
B. Operationalizing the Role of National Courts: Miles to Go before We Sleep .....	81
IV. Conclusion .....	93

## INTRODUCTION

Piracy is one of the main maritime security concerns in the contemporary world.<sup>1</sup> At the end of the nineteenth century and into the twentieth century, incidents of piracy were declining and were supposed

---

<sup>1</sup> In 2008, the U.N. Secretary General identified seven major threats to the maritime security, of which piracy was identified first. See U.N. Secretary-General, *Oceans and the Law of Sea: Rep. of the Secretary-General*, ¶¶ 54–71, U.N. Doc. A/63/63 (Mar. 10, 2008). Piracy has been identified as the major threat to the maritime security in some subsequent reports, see U.N. Secretary-General, *Oceans and the Law of Sea: Rep. of the Secretary-General*, ¶¶ 127–134, U.N. Doc. A/64/66 (Mar. 13, 2009); U.N. Secretary-General, *Oceans and the Law of Sea: Rep. of the Secretary-General*, U.N. Doc. A/65/69/Add.2 (Aug. 31, 2010).

to become an issue of historical interest.<sup>2</sup> However, piracy again emerged as a major concern for the global community from the 1970s,<sup>3</sup> when it returned more aggressively. Nowadays, piracy is one of the main problems of the sea transport system.<sup>4</sup>

The number of piracy incidents is increasing rapidly, which is highly problematic for maritime security.<sup>5</sup> There are some piracy hotspots in the world. The most affected areas for piracy are the Gulf of Aden, the Red Sea, and the waters off the coasts of Somalia, Bangladesh, Nigeria, Indonesia, and Malaysia.<sup>6</sup> Recently, a large number of piracy incidents have occurred off the coast of Somalia, leading the global community to think about this age-old problem from a new perspective.<sup>7</sup> Piracy has again become a major issue, not only for its increasing occurrence, but also for the adverse effects on global trade and commerce.<sup>8</sup> Piratical activities in the twenty-first century appear to be

<sup>2</sup> H.E. José Luis Jesus, *Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects*, 18 INT'L. J. MARINE & COASTAL L. 363, 364 (2003). The number of piracy incidents declined in the early twentieth century, as indicated by the title of an article written by E D Dickinson in 1925, namely 'Is the crime of piracy obsolete?' Dickinson was visionary enough to identify the future importance of the law of piracy and commented that '[w]hile the occasions for invoking its rules are less frequent, it may still be made a potent factor in preventing lawlessness upon the seas'. He went further and said that the law of piracy belonged to 'the law in reserve rather than to the law in history'. Edwin D. Dickinson, *Is the Crime of Piracy Obsolete?*, 38 HARV. L. REV. 334 (1925).

<sup>3</sup> Jesus, *supra* note 2, at 363–4.

<sup>4</sup> *Id.* at 363; U.N. Secretary-General, *supra* note 1; LAUREN PLOCH ET AL., PIRACY OFF THE HORN OF AFRICA 5 (2009).

<sup>5</sup> PLOCH, *supra* note 4; Int'l Maritime Org. [IMO], *Reports on Acts of Piracy and Armed Robbery Against Ships: Annual Report 2009*, ¶ 8, IMO Doc. MSC.4/Circ152 (Mar. 29, 2010); IMO, *Report on Acts of Piracy and Armed Robbery Against Ships*, ¶ 4, Doc. MSC.4/Circ133 (Mar. 19, 2009); IMO, *Reports on Acts of Piracy and Armed Robbery Against Ships: Annual Report 2010*, ¶ 5, Doc. MSC.4/Circ169 (Apr. 1, 2011); IMO, *Reports on Acts of Piracy and Armed Robbery Against Ships: Annual Report 2011*, ¶ 5, IMO Doc. MSC.4/Circ180 (Mar. 1, 2012); IMO, *Report on Acts of Piracy and Armed Robbery Against Ships: Annual Report 2012*, ¶ 5, Doc. MSC.4/Circ.193 (Apr. 2, 2013); Stuart McMillan, *Piracy: An Old Menace Re-Emerges*, N.Z. INT'L. REV., Mar.–Apr. 2002, at 21, 22.

<sup>6</sup> INT'L MAR. BUREAU, PIRACY AND ARMED ROBBERY AGAINST SHIPS—ANNUAL REPORT 2009, 6 (2010).

<sup>7</sup> Tullio Treves, *Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia*, 20 EUR. J. INT'L L. 399 (2009); Eugene Kontorovich, *A Guantanamo on the Sea: The Difficulty of Prosecuting Pirates and Terrorists*, 98 CAL. L. REV. 243 (2010).

<sup>8</sup> Alexa K. Sullivan, *Piracy in the Horn of Africa and its Effects on the Global Supply Chain*, 3 J. TRANSP. SEC. 231 (2010); Xiaowen Fu et al., *The Impacts of Maritime Piracy on Global Economic Development: The Case of Somalia*, 37 MAR. POL'Y & MGMT. 677 (2010).

more frequent, sophisticated, and severe compared to the twentieth century's blight of piratical activity.<sup>9</sup>

Although international law provides universal jurisdiction for the prosecution of maritime pirates, the actual number of prosecutions is alarmingly low compared to the number of incidents of piracy.<sup>10</sup> Despite many states becoming parties to the relevant international conventions,<sup>11</sup> they are reluctant to establish the necessary legal and institutional frameworks at the national level for the prosecution of pirates. However, due to growing awareness created by Somali piracy, states are gradually changing this attitude. Under international law, the prosecution of pirates is entirely within the domain of national courts, as no international court or tribunal has jurisdiction to prosecute an individual for piracy. International law has instead anticipated a vital role for national courts for the enforcement of international law relating to piracy. This is an area of international law where the national court is the main judicial institution for the implementation of international law.

The growing incidence of piracy and the consequential problems associated with prosecuting pirates have created doubts about the adequacy of the current international legal system, which is fully dependent on national courts for the prosecution of pirates. Although it is not possible to determine whether the non-operationalization<sup>12</sup> of national courts has played a role in the increasing occurrence of piracy, the need to reassess the existing system cannot be ignored. It is apparent

<sup>9</sup> John I. Winn & Kevin H. Govern, *Maritime Pirates, Sea Robbers, and Terrorists: New Approaches to Emerging Threats*, 2 HOMELAND SEC. REV. 131, 132 (2008).

<sup>10</sup> U.N. Secretary-General, *Report of the Secretary-General on Possible Options to Further the Aim of Prosecuting and Imprisoning Persons Responsible for Acts of Piracy and Armed Robbery at Sea off the Coast of Somalia*, U.N. Doc. S/2010/394 (Jul. 26, 2010) [hereinafter Secretary General Report 2010]; U.N. Secretary-General, *Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia*, ¶ 43, U. N. Doc. S/2011/30 (Jan. 25, 2011), 21 [hereinafter Special Adviser Report].

<sup>11</sup> See United Nations Convention on Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221 [hereinafter SUA Convention 1988].

<sup>12</sup> In this article, the term operationalization or operationalize is employed to determine whether a judicial institution is working or ready to be used for the prosecution of offenders. This term signifies something broader than the mere implementation of international law; it will be used to show whether an institution is practically operating, thereby enhancing the application of international law. On operationalization, See generally Jeni L. Burnette, *Operationalization*, in ENCYCLOPEDIA OF SOCIAL PSYCHOLOGY 635 (Roy F. Baumeister & Kathleen D. Vohs eds., 2007); CONCISE OXFORD ENGLISH DICTIONARY 1002 (Catherine Soanes & Angus Stevenson eds., 2006); *Operationalisation*, [http://www.une.edu.au/WebStat/unit\\_materials/c2\\_research\\_design/operation alism.htm](http://www.une.edu.au/WebStat/unit_materials/c2_research_design/operation%20alism.htm) (last visited Dec. 17, 2010).

that the timely prosecution of pirates will serve as an effective deterrent for people who are engaged in this activity, as well as discourage new people from being recruited as pirates.

The legal and practical complexity surrounding the prosecution of Somali pirates reveals some problems with the existing international legal and institutional framework. The situation in Somalia has compelled the global community to reflect on whether the current reliance on national courts needs reform. Through Resolution 1918, the Security Council requested the Secretary-General propose possible options for the prosecution of Somali pirates, including “options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements.”<sup>13</sup> Accordingly, the Secretary-General submitted a report to the Security Council identifying seven options for prosecuting and imprisoning persons responsible for acts of piracy and armed robbery off the coast of Somalia.<sup>14</sup> The Security Council now appears to be convinced that the establishment of specialized anti-piracy courts in Somalia and other states in the region with substantial international participation and/or support, as well as capacity building of national courts in the region (and globally), may be the most suitable option.<sup>15</sup>

Concurring with the most recent approach of the global community, this article argues that the operationalization of national courts is the most viable option for ensuring the effective prosecution of pirates. The operationalization process will only be successful if there is a firm political will from the executive of the states for the implementation of international law in the domestic arena, as well as a proactive role from judicial institutions in interpreting national law in the light of international obligations. However, in operationalizing national courts, states may be reluctant to follow the altruistic model of universal adjudicative jurisdiction established by UNCLOS. A state may not be very interested in prosecuting a pirate in its national court if it has no relation with the piratical incident.<sup>16</sup> Against this backdrop it may be

---

<sup>13</sup> S.C. Res. 1918, ¶ 4, U.N. Doc. S/RES/1918 (Apr. 27, 2010).

<sup>14</sup> See Secretary General Report 2010, *supra* note 10.

<sup>15</sup> S.C. Res 2015, ¶¶ 18, 19, U.N. Doc. S/RES/2015 (Oct. 24, 2011).

<sup>16</sup> It can be argued that countries in the African region are now prosecuting Somali pirates even without any relation to incidents of piracy. In fact, they are doing this with external financial assistance. However “the burden that long and costly trials place on these nations often makes it unappealing for them to accept captured pirates unless supplemented by financial support from

vitality important to implement the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention), which obligates the states that have some connection with a piratical incident to prosecute pirates in their national courts.<sup>17</sup>

Part I of this article introduces the international law of piracy. This part deals with some contemporary and longstanding debates surrounding the suitability of universal jurisdiction, codified in the United Nations Convention on the Law of the Sea (UNCLOS), for the prosecution of individuals involved in maritime piracy. It also examines the applicability of other international conventions in respect to maritime piracy and armed robbery. It further examines whether these later conventions are successful in filling the gaps in the UNCLOS regime. Finally, this part examines the importance of operationalizing the roles of national courts in the context of universal jurisdiction. Part II presents a case study on Somali piracy, and explains the practical complexity in prosecuting pirates based on universal jurisdiction in light of the Somali experience. Part III explores the options for the prosecution of pirates generally, and discusses the role of national and international courts in their prosecution. It also examines a number of options for the establishment of an effective prosecution system, including creating an international judicial mechanism, as well as strengthening and operationalizing the anticipated roles of national courts. Part IV concludes with some observations for a more coherent legal and institutional framework for the effective prosecution of pirates.

## I. INTERNATIONAL LAW OF PIRACY

The main aim of this section is to determine the jurisdictional scope of national courts for the prosecution of pirates. There are two important jurisdictional issues in assessing the role of judicial institutions. First, what types of maritime violence can be treated as piracy? Second, what is the jurisdictional scope for different states to prosecute the perpetrator?

---

the international community.” AMBER RAMSEY, REGIONAL COURTS AND PRISONS: DEVELOPING LOCAL CAPACITY TO PROSECUTE SOMALI PIRATES (2012).

<sup>17</sup> This proposition has been supported by economic analysis, see Paul Hallwood and Thomas J. Miceli, *The Economics of International Cooperation in the Apprehension and Prosecution of Maritime Pirates*, 43 OCEAN DEV. & INT’L L. 188 (2012).

#### A. DEFINITION OF PIRACY UNDER UNCLOS AND THE ISSUE OF THE OPERATIONALIZATION OF COURTS

The international law definition of piracy as stated in UNCLOS is very restricted in relation to the geographical and subject matter aspects.<sup>18</sup> The definition of piracy has at least three shortcomings that make the UNCLOS provisions largely inapplicable in combating many aspects of modern-day maritime violence: geographic limits, the condition of private ends, and the two ships' condition. The issues of private ends and the two ships are not very problematic for piracy.<sup>19</sup> As a large number of contemporary piratical incidents occur within the territorial seas of the coastal state, the geographic limits of UNCLOS's provision is now a very important issue and is discussed below.

##### *i. Geographic Limits*

As defined in UNCLOS, piracy must be on the high seas or in the exclusive economic zone (EEZ).<sup>20</sup> Maritime violence outside the territorial seas was historically regarded as piracy if it fulfilled other conditions. UNCLOS created the *sui generis* zone of the EEZ where the

---

<sup>18</sup> UNCLOS defines piracy as follows:

"Piracy consists of any of the following acts:

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

UNCLOS, *supra* note 11, art. 101. This definition is now regarded as the general definition of piracy. UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 1982: A COMMENTARY 197 (Myron H. Nordquist et al. eds., 2002).

<sup>19</sup> However, there are serious problems regarding the applicability of the international law of piracy in respect to maritime terrorism.

<sup>20</sup> UNCLOS, *supra* note 11, art. 58(2). According to Article 58(3) of UNCLOS, "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." This article may raise a question as to whether this due regard obligation confers any regulatory power on the coastal state. In fact "the due regard duty does not confer regulatory power on any of its beneficiary." J. Ashley Roach, *Countering Piracy off Somalia: International Law and International Institutions*, 104 AM. J. INT'L L. 397, 398–99 (2010).

coastal state has sovereign rights, not sovereignty, and UNCLOS specifically made a provision to ensure the applicability of international law related to piracy in the EEZ.<sup>21</sup> The provision does not extend to maritime violence in the territorial sea, archipelagic waters, and internal waters of the coastal state. However, many of the modern-day attacks on ships occur in the territorial seas of coastal states.<sup>22</sup> Statistics show that more than two-thirds of the reported incidents are outside the scope of the present definition of piracy under international law.<sup>23</sup> Although there had been an initiative for the reform of a piracy-related provision in the negotiation process of UNCLOS to replace the term “on the high seas” with the term “anywhere in the ocean space,” this proposal did not gain support.<sup>24</sup>

Providing jurisdiction only to coastal states in cases of armed robbery in the territorial waters and not treating such incidents as piracy is arguably justified considering the sovereignty of the coastal state over its territorial waters.<sup>25</sup> The International Maritime Organization (IMO) has divided acts of piracy into two categories based on geographical division: piracy as defined in UNCLOS and a new category called “armed robbery.”<sup>26</sup> The IMO defines armed robbery as “any unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of ‘piracy,’ directed against a ship, or against persons or property on board such a ship, within a State’s jurisdiction over such offences.”<sup>27</sup>

For the purpose of this article, the geographic limitation of the UNCLOS piracy definition is not a significant bottleneck in the process of the operationalization of the role of national courts in the global context. If there is a firm political will from states to operationalize the role of their respective national courts, the national courts can still play

---

<sup>21</sup> UNCLOS, *supra* note 11, art. 58(2).

<sup>22</sup> IMO, *Reports on Acts of Piracy and Armed Robbery Against Ships*, Doc. MSC.4/Circ 133 (Mar. 19, 2009). According to Robert C. Beckman, “Very few of the incidents in Southeast Asia are ‘piracy’ as defined in international law because they took place in waters under the sovereignty of a coastal state.” Robert C. Beckman, *Combating Piracy and Armed Robbery Against Ships in Southeast Asia: The Way Forward*, 33 OCEAN DEV. & INT’L L. 317 (2002).

<sup>23</sup> IMO, *supra* note 22.

<sup>24</sup> Nordquist, *supra* note 18, at 198–99.

<sup>25</sup> Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, 40 VAND. J. TRANSNAT’L L. 1, 18 (2007).

<sup>26</sup> Zou Keyuan, *New Developments in the International Law of Piracy*, 8 CHINESE J. INT’L L. 323, 326 (2009).

<sup>27</sup> IMO, *Draft Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships*, Doc. MSC/Circ984 (Dec. 20, 2000).



an instrumental role in combating maritime piracy and armed robbery by ensuring the prompt prosecution of alleged offenders. However, some countries may not be able to patrol their waters and prosecute pirates due to their financial and institutional deficiencies. In these areas, regional initiatives may supplement the international legal framework, which may provide a wider enforcement jurisdiction to regional (or extra-regional) countries. Article 311(3) of UNCLOS provides room for agreements by two or more states or agreements modifying the convention for specific issues based on reciprocity. This provision could be utilized in piracy-prone regions.<sup>28</sup>

Thus, the geographic limitation of UNCLOS' piracy definition is not a significant problem because, with the consent of the coastal state, other states can intervene in territorial waters to combat maritime armed robbery. For example, the increasing occurrence of piracy and armed robbery off the coast of Somalia has exerted a considerable pressure on global trade, creating an unprecedented willingness from different states and organizations to participate in an anti-piracy action. The situation prompted the call for "one of the largest anti-piracy flotillas in modern

---

<sup>28</sup> Jesus, *supra* note 2, at 383. A regional convention for piracy in the Asian region, namely the Regional Cooperation Agreement on Combating Piracy and Armed Robbery in Asia (ReCAAP), did not modify any UNCLOS provisions, but instead introduced some arrangements for reporting. In January 2009, countries in region adopted the *Code of Conduct Concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden* (the Djibouti Code of Conduct). In June 2013, 22 countries from West and Central Africa adopted the *Code of Conduct Concerning the Repression of Piracy, Armed Robbery against Ships, and Illicit Maritime Activity in West and Central Africa*. Both of these are non-legally binding documents. Another regional instrument that deals with piracy is the *CARICOM Maritime and Airspace Security Cooperation Agreement*, which was concluded between the member states of the Caribbean Community. The agreement identified *inter alia* piracy, hijacking, and other serious crimes as maritime security issues. The agreement provides permission to Security Force aircrafts or vessels of one state party to patrol the waters and airspace of another state party in furtherance of the agreement. This is an example of the modification of an UNCLOS provision in the context of a region, which has created enforcement jurisdiction for member states in the territorial seas of other member states. See Regional Cooperation Agreement on Combating Piracy and Armed Robbery in Asia (ReCAAP), Feb. 28, 2005, 44 ILM 829 (2005); Djibouti Code of Conduct, <http://www.fco.gov.uk/resources/en/pdf/pdf9/piracy-djibouti-meeting> (last visited June 24, 2010). See generally James Kraska & Brian Wilson, *Combating Pirates of the Gulf of Aden: The Djibouti Code and the Somali Coast Guard*, 52 OCEAN & COASTAL MGMT. 516 (2009); *CARICOM Maritime and Airspace Security Cooperation Agreement*, <http://www.caricomlaw.org/docs/CARICOM%20Maritime%20and%20Airspace%20Security%20Cooperation%20Agreement.pdf> (last visited June 25, 2010).

history.”<sup>29</sup> For the first time, the Security Council took action against piracy under Chapter VII of the UN Charter<sup>30</sup> and determined that piracy and armed robbery in the territorial waters and high seas off the coast of Somalia “exacerbate the situation in Somalia which continues to constitute a threat to international peace and security in the region.”<sup>31</sup> However, piracy, or Somali piracy *per se*, has not been recognized as a threat to international peace and security. The most important aspect of these Security Council resolutions has been the authorization of action against armed robbery in the territorial waters of Somalia.<sup>32</sup>

Some countries were concerned about any possible modifications of UNCLOS or customary international law by Resolution 1816. They sought assurances in this regard in the negotiation process of the resolution.<sup>33</sup> It is critical to examine whether these resolutions have in any event modified UNCLOS or changed the customary international law regarding the geographical extent of the law of piracy. These resolutions have not made any changes to the existing international law of piracy because they are limited by both *ratione temporis* and *ratione loci*.<sup>34</sup> First, these resolutions are applicable for a temporary period.<sup>35</sup> Second, they clearly state that the authorization will only be applicable in Somalia and will neither amend existing conventions nor establish customary international law.<sup>36</sup> Finally, they have been adopted with the express request from and consent of Somalia.<sup>37</sup> This again indicates the

<sup>29</sup> *Defeating Piracy Requires Restoration of Law in Somalia, Ban Says*, UNITED NATIONS, <http://www.un.org/apps/news/story.asp?NewsID=30225&Cr=piracy&Cr1=pirate> (last visited Jan. 19, 2010).

<sup>30</sup> S.C. Res. 1816, at 2, U.N. Doc. S/RES/1816 (June 2, 2008).

<sup>31</sup> *Id.* Interestingly, Somalia has declared a 200 nautical mile territorial sea, which is not acceptable under international law. It may create some ambiguities in naval operations. See United Nations, *Table of Claims to Maritime Jurisdiction (as at July 31, 2010)*, [http://www.un.org/Depts/los/legislationandtreaties/pdf/summary\\_of\\_claims.pdf](http://www.un.org/Depts/los/legislationandtreaties/pdf/summary_of_claims.pdf) (last visited Sep. 1, 2010); UNCLOS, *supra* note 11, art. 3.

<sup>32</sup> S.C. Res. 1816, *supra* note 30, ¶ 7; S.C. Res. 1846, ¶ 10, U.N. Doc. S/RES/1846 (Dec. 2, 2008); S.C. Res. 1851, ¶ 6, U.N. Doc. S/RES/1851 (Dec. 16, 2008); S.C. Res. 1897, ¶ 7, U.N. Doc. S/RES/1897 (Nov. 30, 2009); S.C. Res. 2020, ¶ 9, U.N. Doc. S/RES/2020 (Nov. 22, 2011).

<sup>33</sup> See U.N. S.C., 63rd Sess., 5902d mtg., U.N. Doc. S/PV.5902 (June 2, 2008).

<sup>34</sup> Tullio Treves, *Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia*, 20 EUR. J. INT’L L. 399, 404–05 (2009). See also M.D. Fink & Richard Galvin, *Combating Piracy off the Coast of Somalia: Current Legal Challenges*, 56 NETH. INT’L L. REV. 367, 380 (2009).

<sup>35</sup> S.C. Res. 1816, *supra* note 30, ¶ 7; S.C. Res. 1846, *supra* note 32, ¶ 10; S.C. Res. 1851, *supra* note 32, ¶ 6.

<sup>36</sup> S.C. Res. 1816, *supra* note 30, ¶ 9; S.C. Res. 1846, *supra* note 32, ¶ 11; S.C. Res. 1851, *supra* note 32, ¶ 10.

<sup>37</sup> S.C. Res. 1816, *supra* note 30, at 2; S.C. Res. 1846, *supra* note 30, at 1.

important role of the national courts of coastal states for combating maritime armed robbery within their jurisdiction, as the international community is reluctant to expand the jurisdiction of other countries in the territorial seas of coastal states. As will be discussed in Part II, in the context of Somalia, states are showing some reluctance in prosecuting apprehended pirates. Against this backdrop, the next issue to consider is whether UNCLOS has imposed an obligation to prosecute pirates by providing universal jurisdiction.

## ii. Universal Jurisdiction

UNCLOS treats pirates as *hostes humani generis* and provides universal jurisdiction to the court of the country that seizes a pirate ship.<sup>38</sup> As discussed above, piracy is regarded as a crime of universal jurisdiction<sup>39</sup> under customary international law that has been codified by international treaties. Piracy is the oldest universal jurisdiction crime.<sup>40</sup> International treaties adopted in the twentieth century have clearly established universal jurisdiction for piracy.<sup>41</sup> Pirates were already considered outlaws—a *hostis humani generis*—even before the evolution of modern international law.<sup>42</sup> It has long been recognized that every state has prescriptive, adjudicative, and enforcement jurisdiction over all piratical acts on the high seas, even in the absence of any link with the offence, perpetrator, and victim.<sup>43</sup>

<sup>38</sup> UNCLOS, *supra* note 11, art. 105.

<sup>39</sup> “. . . universal jurisdiction is criminal jurisdiction based solely on nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of victim, or any other connection to the state exercising such jurisdiction.” *The Princeton Principles on Universal Jurisdiction*, in UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 18, 21 (Stephen Macedo ed., 2004).

<sup>40</sup> Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 791 (1988); M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT’L L. 81, 108 (2001). According to M. Cherif Bassiouni, “universal jurisdiction to prevent and suppress piracy has been widely recognized in customary international law as the international crime per excellence to which universality applies.” Bassiouni, *supra* note 40, at 110–11.

<sup>41</sup> Bassiouni, *supra* note 40, at 108–12; L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 559 (H. Lauterpacht ed., 6th ed. 1947); Dickinson, *supra* note 2, at 338.

<sup>42</sup> Randall, *supra* note 40, at 791; Dickinson, *supra* note 2, at 335–39; Oppenheim, *supra* note 41, at 559.

<sup>43</sup> MANUAL OF PUBLIC INTERNATIONAL LAW 365 (Max Sorensen ed., 1968); Randall, *supra* note 40, at 791; *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 843 (CCD Mass 1822) (No. 15551) (stating that “vessels and property in the possession of pirates may be lawfully seized on the high seas by any person, and

Thus, national courts play a significant role in cases falling within universal jurisdiction.<sup>44</sup> A state exercising universal jurisdiction carries out an action in the interest of public order against enemy of mankind on behalf of the global community.<sup>45</sup> The purpose of doing so is to enhance global order by taking action against certain heinous crimes.<sup>46</sup> In exercising universal jurisdiction, the interests of the global community are apparently placed above the interests of the prosecuting state.<sup>47</sup>

According to Article 105 of UNCLOS, any state can seize a pirate vessel and the courts of the capturing country have a right to try pirates.<sup>48</sup> It is a longstanding customary international law that all states have universal jurisdiction for the apprehension and prosecution of pirates.<sup>49</sup> Article 105 allows for the exercise of jurisdiction, but does not impose an obligation to prosecute pirates in domestic court. Instead, UNCLOS calls upon states to “cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.”<sup>50</sup> The effectiveness of this provision may be questioned. The International Law Commission (ILC) comments on a similar provision of the 1958 High Seas Convention,<sup>51</sup> to the effect that:

---

brought in for adjudication”).

<sup>44</sup> *Attorney-General of the Government of Israel v. Eichmann* (Israel Sup. Ct. 1962), INT’L L. REP., vol. 36,

p. 277, 1968 (English translation).

<sup>45</sup> Bassiouni, *supra* note 40, at 88, 96.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* While it is established that the universality principle grants a basis of jurisdiction to the prosecuting state against certain crimes, whether it imposes an obligation on states to prosecute offenders for these crimes remains to be determined. Nevertheless, there is a view that, considering the heinousness of certain crimes, the principle of universal jurisdiction obliges the states to prosecute the alleged offender regardless of the location of the crime or the nationality of the alleged offender or the victim. The main distinction between universal jurisdiction and other bases of jurisdiction is that the former is based on judicial altruism. In practice, as a self-interested political entity, states are broadly reluctant to engage in this altruism. See generally Eugene Kontorovich, *The Inefficiency of Universal Jurisdiction*, 2008 U. ILL. L. REV. 389, 398 (2008); Mary Robinson, *Preface* to UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 15, 16 (Stephen Macedo ed., 2004).

<sup>48</sup> UNCLOS, *supra* note 11, art. 105.

<sup>49</sup> As observed by Justice Moore in the *S.S. Lotus* case: “. . . in the case of . . . piracy by law of nations, there has been conceded a universal jurisdiction, under which the person charged with the offence may be tried and punished by any nation into whose jurisdiction he may come.” *S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 70 (Sept. 7) (Moore, J., dissenting).

<sup>50</sup> UNCLOS, *supra* note 11, art. 100.

<sup>51</sup> Geneva Convention on the High Seas, art. 14, Apr. 29, 1958, 450 U.N.T.S. 11. Article 14 of the High Sea Convention has been reproduced verbatim in Article 100 of UNCLOS.

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. Obviously, the State must be allowed certain latitude as to the measures it should take to this end in any individual case.<sup>52</sup>

Although Article 100 of UNCLOS imposes an obligation of cooperation for the repression of piracy on the high seas, there are doubts whether the convention imposes any clear obligation for the prosecution of pirates.<sup>53</sup> The historical development of the piracy-related provisions of UNCLOS supports such an assertion.<sup>54</sup> Article 100 originated in Article 18 of the Harvard Draft on Piracy,<sup>55</sup> which states that: “the Parties to this convention agree to make every expedient use of their powers to prevent piracy, separately and in co-operation.”<sup>56</sup> The language of this draft article is even stronger than the language of Article 100 of UNCLOS. However, the reporter of the Harvard Draft Convention, Joseph W Bingham, comments that:

the draft convention does not assert a definite duty of signatories to seize or prosecute all pirates. It imposes on them by Article 18 only a *general discretionary obligation* to discourage piracy by exercising their rights of prevention and punishment as far as is expedient.<sup>57</sup>

In fact, neither Article 100 of UNCLOS nor its predecessor, Article 14 in the High Seas Convention, ever intended to impose a positive obligation on states to prosecute pirates.<sup>58</sup> UNCLOS did not make any changes and Article 14 of the High Seas Convention was reproduced verbatim in Article 100 of UNCLOS. Post-UNCLOS state practice supports the view that states always considered this obligation discretionary, as many states historically (and even currently) have not criminalized *piracy jure gentium* under national law.<sup>59</sup> It is clear that the

---

<sup>52</sup> *Report of the International Law Commission to the General Assembly*, 2 U.N. GAOR Supp. No. 9, U.N. Doc A/3159 (1956), reprinted in [1956] 2 Y.B. Int'l L. Comm'n 253, 282, U.N. Doc. A/CN.4/104 [hereinafter Report of the International Law Commission].

<sup>53</sup> DOUGLAS GUILFOYLE, *TREATY JURISDICTION OVER PIRATES: A COMPILATION OF LEGAL TEXTS WITH INTRODUCTORY NOTES* 1 (2009).

<sup>54</sup> Roach, *supra* note 20, at 405–06.

<sup>55</sup> Joseph W. Bingham, *Harvard Research in International Law: Draft Convention on Piracy*, 20 AM. J. INT'L L. (SPECIAL SUPPLEMENT) 739 (1926).

<sup>56</sup> *Id.* at 760.

<sup>57</sup> *Id.* (emphasis added).

<sup>58</sup> INT'L LAW ASS'N, *REPORT OF THE FIFTY-FOURTH CONFERENCE HELD AT THE HAGUE AUGUST 23RD TO AUGUST 29TH, 1970*, at 738 (1971).

<sup>59</sup> *See infra* Part III.B.

power to prosecute pirates is discretionary. UNCLOS does not impose a positive obligation to take proactive steps for the prosecution of pirates in national courts.

The above discussion has revealed two problematic issues in UNCLOS, namely geographical limitation and the absence of obligation for the prosecution of pirates and maritime armed robbers. It also shows that the UN Security Council resolutions adopted in the wake of Somali piracy have not entirely resolved these problems. Although international law imposes an obligation of cooperation for the repression of piracy, it is doubtful whether states have an obligation for prosecuting pirates and thus an obligation to operationalize the role of their national courts in this regard. International law has largely left the issue of operationalizing the role of national courts to the political decisions of the states.

Against this backdrop, the next section examines another important international legal instrument—the SUA Convention—to determine whether this treaty has made any changes in the international law of piracy, as well as the implications of those changes in the role of judicial institutions in combating piracy. In the next part, this article argues that the SUA Convention has introduced a more pragmatic approach beyond altruism by imposing obligations for the prosecution of pirates on states that are connected to a piratical incident in one way or another.

## B. PIRACY AND THE SUA CONVENTION

After the high-profile *MS Achille Lauro* incident,<sup>60</sup> the IMO adopted the SUA Convention, which listed a number of acts at sea, including seizure and unauthorized control over a ship, as unlawful and punishable under national laws of the parties to the convention.<sup>61</sup> The SUA Convention was further amended by a protocol adopted in

---

<sup>60</sup> Terrorists belonging to the Abu Abbas faction of the Palestine Liberation Front (PLF) hijacked the Italian cruise ship *Achille Lauro* to release some Palestinian prisoners from Israel. When Tel Aviv rejected their demands, they killed an American passenger on board named Leon Klinghoffer. The terrorists then secured an arrangement with Egypt, discharging the ship in return for a safe passage to Tunis. When US authorities came to know that they had killed an American passenger, they forced the aircraft carrying the terrorists to land in Italy. The *Achille Lauro* incident had a far-reaching effect on the development of international law related to maritime terrorism. MARTIN N. MURPHY, CONTEMPORARY PIRACY AND MARITIME TERRORISM: THE THREAT TO INTERNATIONAL SECURITY 45 (2007).

<sup>61</sup> SUA Convention 1988, *supra* note 11, art. 3.

2005.<sup>62</sup> The SUA Convention followed the approach of previously adopted terrorism conventions and thereby refrained from creating universal jurisdiction compared to the piracy-related provisions of UNCLOS and the High Seas Convention.<sup>63</sup> There was a view from the proposing states that the cases covered by the proposed convention should be distinct from piracy.<sup>64</sup> This approach may have been due to the highly political nature of maritime terrorism.

The geographical extent of the SUA Convention is much wider than UNCLOS. The drafters of the SUA Convention considered two issues in framing the relevant provisions: first, making the geographical scope of the convention as wide as possible and second, creating an international element in the offences *vis-à-vis* creating jurisdiction for the flag state of the targeted vessel.<sup>65</sup> Article 4 of the convention states that:

- 1) This Convention 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.
- 2) In cases where the Convention does not apply pursuant to paragraph 1, it nevertheless applies when the offender or the alleged offender is found in the territory of a State party other than the State referred to in paragraph 1.

Moreover, the SUA Convention introduced the principle of *aut dedere aut judicare*, and thereby parties to the SUA Convention are obligated either to prosecute the offender or extradite the offender to the country where they can be tried.<sup>66</sup>

The SUA Convention provides for two types of jurisdiction: obligatory and discretionary. Each state party is obliged to establish jurisdiction over offences committed on its flagships, in its territory, and

---

<sup>62</sup> Int'l Maritime Org. [IMO], *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, IMO Doc. LEG/CONF.15/21 (Nov. 1, 2005) [hereinafter SUA Protocol 2005].

<sup>63</sup> Tullio Treves, *The Rome Convention for the Suppression of Unlawful Acts Against the Safety of Navigation*, in *MARITIME TERRORISM AND INTERNATIONAL LAW* 69, 70–71 (Natalino Ronzitti ed., 1990).

<sup>64</sup> Helmut Tuerk, *Combating Terrorism at Sea: The Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, in *LEGAL CHALLENGES IN MARITIME SECURITY* 41, 45 (Myron H. Nordquist ed., 2008). There was serious debate as to whether an incident like the *Achille Lauro* could be treated as piracy.

<sup>65</sup> Treves, *supra* note 63, at 73.

<sup>66</sup> SUA Convention 1988, *supra* note 11, art. 10.

by its nationals.<sup>67</sup> A state party may establish jurisdiction if an offence is committed by a stateless person whose habitual residence is that state; during the commission of the offence, a national of the state is injured, threatened or killed; or, the offence is committed in an attempt to compel the state to do, or to abstain, from performing any act.<sup>68</sup> Once the alleged offender is in its territory, the state party is obliged to establish jurisdiction over offences if it does not extradite the offender to another country that has established jurisdiction under the above-mentioned provisions.<sup>69</sup>

The SUA Convention did not provide any additional powers to state parties for the interdiction and boarding of ships or for the arrest of offenders.<sup>70</sup> A key problem may be apprehending offenders rather than prosecuting them, as the SUA Convention failed to incorporate any provision similar to articles 105 and 110 of UNCLOS.<sup>71</sup> Although Article 8bis of the SUA Protocol 2005 makes some provision for boarding vessels and the detention of suspected terrorists, the provision is largely based on either an advanced optional declaration or the ad hoc consent of the flag state.<sup>72</sup> Moreover, as of July 31, 2013, this protocol only had twenty-four state parties.<sup>73</sup> However, this is not a problem for piracy, as UNCLOS already gives states sufficient jurisdiction to apprehend foreign vessels in the case of piracy.<sup>74</sup>

Although enforcement jurisdiction under the SUA Convention is limited in scope, it is nevertheless important as it imposes an obligation to prosecute. It is, therefore, critical to determine whether the SUA Convention will be applicable in the case of piracy, as defined by the

---

<sup>67</sup> SUA Convention 1988, *supra* note 11, art. 6(1).

<sup>68</sup> SUA Convention 1988, *supra* note 11, art. 6(2).

<sup>69</sup> SUA Convention 1988, *supra* note 11, art. 10.

<sup>70</sup> Robert Beckman, *The 1988 SUA Convention and 2005 SUA Protocol: Tools to Combat Piracy, Armed Robbery and Maritime Terrorism*, in LLOYD'S MIU HANDBOOK OF MARITIME SECURITY 189 (Robert Herbert-Burns et al., 2009).

<sup>71</sup> According to Article 105 of UNCLOS, "On the high seas, or in any other place outside the jurisdiction of any State, 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." Again, Article 110 of UNCLOS allows for boarding of a foreign ship by a warship if that ship is engaged in piracy.

<sup>72</sup> See SUA Protocol 2005, *supra* note 62, 8 bis.

<sup>73</sup> IMO, *Status of Multilateral Conventions and Instruments in Respect of Which the International Maritime Organization or Its Secretary General Performs Depositary or other Functions*, <http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20-%202013.pdf> (last visited Aug. 23, 2013).

<sup>74</sup> UNCLOS, *supra* note 11, art. 105.



UNCLOS. This is a very important issue in relation to state responsibility for the prosecution of pirates. If the SUA Convention is applicable for piracy, states will be obligated to either prosecute or extradite captured pirates. The *travaux préparatoires* of the SUA Convention indicates that the drafters intended to create this legal regime primarily for maritime terrorism incidents such as the *Achille Lauro*.<sup>75</sup> Joyner notes that the offences set forth in the SUA Convention are distinct from the traditional international crime of piracy.<sup>76</sup> According to Helmut Tuerk there was an intention to make a clear distinction between cases covered by the SUA Convention and piracy.<sup>77</sup> However, this does not necessarily make offences mutually exclusive under the SUA Convention and piracy. A plain reading of the unlawful acts listed in the SUA Convention clearly reveals that some types of piratical acts may qualify as an offence under the SUA Convention.<sup>78</sup> José Luis Jesus is of the view that the 1988 SUA Convention seems “to apply to piracy or armed robbery against ships.”<sup>79</sup> The UN Security Council has endorsed this applicability of the SUA Convention.<sup>80</sup> Contemporary writings support the application of the SUA Convention to some types of piratical acts,<sup>81</sup> and the application of the convention has been recognized by a recent decision of a domestic

<sup>75</sup> Treves, *supra* note 63, at 70–71.

<sup>76</sup> Christopher C. Joyner, *Suppression of Terrorism on the High Seas: The 1988 IMO Convention on the Safety of Maritime Navigation*, 19 ISR. Y.B. HUM. RTS. 343, 348 (1989).

<sup>77</sup> Tuerk, *supra* note 64, at 49–50.

<sup>78</sup> Jesus, *supra* note 2, at 381.

<sup>79</sup> *Id.*

<sup>80</sup> In Resolution 1846 regarding Somali piracy the Council notes: “. . . that the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (“SUA Convention”) provides for parties to create criminal offences, establish jurisdiction, and accept delivery of persons responsible for or suspected of seizing or exercising control over a ship by force or threat thereof or any other form of intimidation; urges States party to the SUA Convention to fully implement their obligations under said Convention and cooperate with the Secretary-General and the IMO to build judicial capacity for the successful prosecution of persons suspected of piracy and armed robbery at sea off the coast of Somalia.” S.C. Res. 1846, *supra* note 32, ¶ 15.

<sup>81</sup> See Roach, *supra* note 20, at 407–08; GUILFOYLE, *supra* note 53, at 12–17; Douglas Guilfoyle, *Counter-Piracy Law Enforcement and Human Rights*, 59 INT’L & COMP. L.Q. 141, 149 (2010); Christopher Totten & Matthew Bernal, *Somali Piracy: Jurisdictional Issues, Enforcement Problems and Potential Solutions*, 41 GEO. J. INT’L L. 377, 397 (2010); Barry Hart Dubner & Karen Greene, *On the Creation of a New Legal Regime to Try Sea Pirates*, 41 J. MAR. L. & COM. 439, 450 (2010); Yvonne M Dutton, *Bringing Pirates to Justice: A Case for Including Piracy within the Jurisdiction of the International Criminal Court*, 11 CHI. J. INT’L L. 197, 208–09 (2010); George D Gabel, Jr., *Smoother Seas Ahead: The Draft Guidelines As An International Solution To Modern-Day Piracy* 81 TUL. L. REV. 1433, 1445 (2007).

court.<sup>82</sup> Consequently, parties to the SUA Convention have an international obligation to prosecute or extradite suspected pirates and armed robbers under its terms.

An offence may be qualified as an unlawful act under the SUA Convention at the same time as piracy under UNCLOS.<sup>83</sup> However, every incident of piracy may not be qualified as a SUA Convention offence. An incident of theft by one vessel against another, without endangering the safety of a vessel, may be treated as depredation and hence as piracy under UNCLOS, but it will not qualify as a SUA Convention offence.<sup>84</sup>

The important question to answer is whether the SUA Convention imposes an obligation on member states to operationalize the role of their national courts for the prosecution of pirates, and the answer is yes. Unlike UNCLOS, the SUA Convention does not leave the question to the political determination of member states. The SUA Convention's obligation to extradite or prosecute clearly imposes an obligation on states to take affirmative action to operationalize the role of their respective national courts. Parties to the SUA Convention are thereby obligated either to prosecute alleged offenders or extradite them to the country where they can be tried if the alleged offender is found in its territory.<sup>85</sup>

Article 5 of the SUA Convention imposes an obligation on states to make the offences under this convention "punishable by appropriate penalties."<sup>86</sup> Article 8 allows the master of a ship of a state party (the "flag state") to deliver a suspected offender to the authorities of any other state (the "receiving state") and the receiving state in turn may request the flag state to accept delivery of that person.<sup>87</sup> The flag state is obliged to show reason if it is not willing to receive the person.<sup>88</sup> Article 8 imposes certain rights and obligations on the flag state of the vessel where an offender or alleged offender is held. The flag state may instruct the master of the vessel to deliver the person to the nearest country. If the

---

<sup>82</sup> LJN, BM8116, Rotterdam District Court, 10/600012-09 (July 17, 2010), [http://www.unicri.it/maritime\\_piracy/docs/Netherlands\\_2010\\_Crim\\_No\\_10\\_6000\\_12\\_09%20Judgment.pdf](http://www.unicri.it/maritime_piracy/docs/Netherlands_2010_Crim_No_10_6000_12_09%20Judgment.pdf) (last visited July 15, 2012) [hereinafter LJN: BM8116, Rotterdam District Court].

<sup>83</sup> Beckman, *supra* note 70, at 189.

<sup>84</sup> GUILFOYLE, *supra* note 53, at 14.

<sup>85</sup> SUA Convention 1988, *supra* note 11, art. 10.

<sup>86</sup> SUA Convention 1988, *supra* note 11, art. 5.

<sup>87</sup> Treves, *supra* note 63, at 80–81.

<sup>88</sup> SUA Convention 1988, *supra* note 11, art. 8(5).

master does so, then the flag state has an obligation to accept that person from the receiving state. If the flag state instructs its officials to release the alleged offender without taking any legal action, it may be a violation of its obligations under Articles 5 and 8 of the SUA Convention.

Overall, it appears that UNCLOS does not impose a positive obligation to prosecute pirates. However, the SUA Convention imposes such an obligation on states that are linked with the attacked vessel, victim or suspected pirate, as well as states where the pirate is found. UNCLOS, the SUA Convention, and the Security Council resolutions together provide sufficient jurisdiction and power for the enforcement action and prosecution of pirates.<sup>89</sup> Thus, the absence of a strong, positive obligation for prosecution under UNCLOS is not a serious hurdle if states have the political will to apprehend and prosecute Somali pirates

---

<sup>89</sup> Apart from UNCLOS, the SUA Convention and above-mentioned UN Security Council resolutions, some other conventions, such as the International Convention Against the Taking of Hostages 1979 [hereinafter Hostages Convention], and the United Nations Convention Against Transnational Organised Crime 2000 [hereinafter UNTOC], may also be applicable for some types of maritime crimes that may also be classified as piracy. See GUILFOYLE, *supra* note 53, at 27, 34. According to Article 1(1) of the Hostages Convention: “[a]ny person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as 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 hostage commits the offence of taking of hostages.” *Id.* at 29. The Hostages Convention also makes attempting and abetting the above activities an offence. See *id.*

It is arguable that the Somali pirates and those helping Somali pirates may be treated as hostage-takers under this convention. The UNTOC Convention is applicable when an organized criminal group, consisting of three or more people, engage in a crime expressly set out under the convention as a “serious crime” punishable by at least four years deprivation of liberty or more serious penalty. *Id.* at 34. The crime must be transnational in nature. *Id.* It must be asked whether an incident occurring on the high seas can be treated as a transnational crime under this convention. *Id.* According to Article 15(1)(b), a state is obliged to establish jurisdiction if “[t]he offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.” *Id.* at 40. It can be assumed that this convention is applicable to flag state vessels on the high seas also. *Id.* at 34. This convention may also be applicable in a situation where planning for piracy is done in one country and the piratical act is carried out on the high seas. *Id.* These conventions also require states parties to criminalize offenses covered within the conventions. See International Convention Against the Taking of Hostages art. 1(1), 1(2), December 17, 1979, 1316 U.N.T.S. 205; United Nations Convention against Transnational Organized Crime arts. 2(b), 3(1)(b), 15(1)(b), Dec. 15, 2000, 2225 U.N.T.S. 209; International Convention for the Suppression of the Financing of Terrorism, Dec. 9 1999, 2178 U.N.T.S. 229. J. Ashley Roach is of the opinion that the Terrorism Financing Convention may also be applicable. The convention makes it an offence to finance certain crimes under international law, including offences under the SUA Convention and the Hostages Convention. He observed that “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.” Roach, *supra* note 20, at 408.

or pirates in other regions. Through Resolution 1950, the Security Council strongly reminds UN member states of the need for the domestic implementation of these conventions. Unfortunately, many countries have failed to implement relevant international legal instruments in their domestic legal frameworks. Without proactive and positive steps from the state parties to these conventions for full implementation within their domestic legal systems, combating piracy off the coast of Somalia or in other parts of the world will be very difficult.

Against this backdrop, Part II presents a case study on Somalia to determine the extent to which states are interested in taking practical action to operationalize the role of their national judicial institutions. As stated earlier, piracy off the coast of Somalia has created doubts about the effectiveness of the present international legal framework. An elaborate discussion on Somali piracy is not only needed to determine the present trend, but also to find a long-term solution to the problem.

## **II. THE WINTER OF DESPAIR AND THE SPRING OF HOPE: A CASE STUDY ON SOMALI PIRACY**

With some limitations, international law has arguably provided a workable legal framework for the prosecution of pirates. However, the situation in Somalia has revealed some practical difficulties in the prosecution of pirates under the current international legal setting. Somali piracy has not only exposed the practical problems, but also proved the ongoing relevance of academic discussions on operationalizing the role of national courts for the prosecution of pirates. A case study on Somali piracy is useful for identifying the future direction for the prosecution of pirates around the world. Although it may appear that the situation in Somalia is unique, it in some respects represents the global scenario. It is likely that threats of piracy in some other regions will become as serious as Somali piracy. For example, the Security Council has adopted two resolutions expressing its deep concern about the threat of piracy in the Gulf of Guinea.<sup>90</sup>

---

<sup>90</sup> S.C. Res. 2018, U.N. Doc. S/RES/2018 (Oct. 31, 2011); S.C. Res. 2039, U.N. Doc. S/RES/2039 (Feb. 29, 2012). The Security Council, “[u]rges States of the region of the Gulf of Guinea to take prompt action, at national and regional levels with the support of the international community where able, and by mutual agreement, to develop and implement national maritime security strategies, including for the establishment of a legal framework for the prevention, and repression of piracy and armed robbery at sea and as well as prosecution of persons engaging in those crimes, and punishment of those convicted of those crimes and encourages regional

The situation in Somalia not only reveals an ineffective legal order in Somalia, but also exposes the inadequate domestic legal arrangements for prosecution, even in some leading developed countries. It also indicates a serious limitation of the principle of universal jurisdiction in practical terms. Universal jurisdiction has proven to be insufficient in ensuring the prosecution of all pirates.

As mentioned earlier, the UN Security Council authorizes the use of all necessary means against Somali pirates.<sup>91</sup> However, most of the states participating in the anti-piracy action in the Gulf of Aden are unwilling to prosecute Somali pirates on the capturing state's home soil<sup>92</sup> and are not interested in applying universal jurisdiction; rather, they are playing a game of catch and release. According to the Report of the Special Adviser to the UN Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia, "some cases of repeat offending have been identified, where the pirates apprehended had already been released on previous occasions for lack of a host State to prosecute them. Thus, more than 90 per cent of the pirates apprehended by States patrolling the seas will be released without being prosecuted."<sup>93</sup> This is mainly due to the unavailability of national courts in the region, as it is unrealistic to expect that warships of countries far away from the region to go off-station and travel thousands of miles to their home countries in order to transfer the pirates for prosecution. In some rare cases of piracy, where the interest of the capturing countries was clearly threatened, pirates have been brought to the capturing country for trial.<sup>94</sup> Prosecuting pirates appears to be more difficult than catching them.<sup>95</sup> However, there is currently a growing awareness among states in this regard.

---

cooperation in this regard." *Id.* ¶ 5. See also Eero Tepp, *The Gulf of Guinea: Military and Non-Military Ways of Combatting Piracy*, 14 *BALTIC SEC. & DEF.* 181 (2012); Int'l Crisis Group, *The Gulf of Guinea: The New Danger Zone*, Africa Report No. 195 (December 12, 2012).

<sup>91</sup> SC Res 1816, *supra* note 30, ¶ 7.

<sup>92</sup> Special Adviser Report, *supra* note 10.

<sup>93</sup> *Id.* at 13.

<sup>94</sup> *Somali 'pirate' to be tried in US*, BBC News, <http://news.bbc.co.uk/2/hi/8003936.stm>, (last visited June 27, 2010); Toby Sterling, *Dutch Court Sentences Five Somali Pirates to Five Years*, THE GUARDIAN, <http://www.guardian.co.uk/world/feedarticle/9131897> (last visited June 27, 2010); Kim Landers, *Eleven Somalis Appear in US Court on Piracy Charges*, ABC News, <http://www.abc.net.au/news/2010-04-24/somalis-appear-in-us-court-on-piracy-charges/408776> (last visited June 27, 2010); Matthew Kang, *Somali Pirates to Face Trial in Germany*, DeutscheWelle (May 13, 2010), <http://www.dw-world.de/dw/article/0,,5464451,00.html>; Peter Sedik, *Five Somalis Sentenced in Europe's First Pirate Trial*, Epoch Times (June 17, 2010), <http://www.theepochtimes.com/n2/world/somali-pirate-trial-37611.html> (all these trials involved an attack on the prosecuting country's ship).

<sup>95</sup> Kontorovich, *supra* note 7, at 244–46.

There are some practical difficulties in prosecuting pirates under the current international legal regime. Prosecution may create a complex legal scenario involving different branches of international law. The main concerns of the arresting states are that the pirates may face the death penalty or inhuman treatment in Somalia if they are extradited and, if they are prosecuted in the arresting state, they may seek asylum after serving the sentence.<sup>96</sup> For example, on September 17, 2008, a Danish naval ship captured ten pirates off the coast of Somalia. After six days of detention, the Danish government freed the pirates; they were not extradited to Somalia because the Danish authority suspected they would face the death penalty,<sup>97</sup> and Danish law does not permit extradition if there is any possibility of the death penalty.<sup>98</sup> Denmark did not prosecute the criminals because it would be difficult to deport them back to Somalia after serving the sentence.<sup>99</sup>

It has been argued by some commentators that although UNCLOS provides for a universal jurisdiction, international human rights and humanitarian law have created some constraints on the prosecution of Somali pirates.<sup>100</sup> This problem shows that the application of UNCLOS may be restrained by other branches of international law—a legal complexity that was seemingly not contemplated by the drafters of the convention.

Contemporary commentary has canvassed three options for the prosecution of pirates: first, prosecution in the capturing state; second, prosecution in a third state of the particular region; and third, creating one or more international or hybrid judicial institutions for prosecution.<sup>101</sup> The prosecution of pirates in their home country may not appear to be a viable option in the case of Somalia, as there is no effective central government in the country. However, the prosecution of pirates in their home country may be a viable option for many other piracy-prone regions, including Southeast Asia. Despite the absence of an effective

---

<sup>96</sup> *Id.* at 267.

<sup>97</sup> Treves, *supra* note 7, at 408.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> See generally Kontorovich, *supra* note 7; Michael H. Passman, *Protections Afforded to Captured Pirates Under the Law of War and International Law*, 33 TUL. MAR. L.J. 1 (2008); GUILFOYLE, *supra* note 81, at 152–67.

<sup>101</sup> Fink & Galvin, *supra* note 34, at 389–95; Kontorovich, *supra* note 7; Treves, *supra* note 37.

central government, Somalia is the largest prosecutor of Somali pirates.<sup>102</sup> Thus, prosecuting pirates in their own country is not a failed proposition in practical terms.

Initially, in his 2010 report, the UN Secretary-General identified seven options to further the aim of prosecuting and imprisoning Somali pirates and armed robbers.<sup>103</sup> These options are broadly divided into two categories: international and national courts. International courts include options for the establishment of an international or regional court. National courts refer to national courts and those with external participation. In a recently adopted resolution, the UN Security Council clearly showed its interest in a specialized national court (or an internationalized national court).<sup>104</sup> However, is a specialized national court the best option?

#### A. IS AN INTERNATIONAL OR REGIONAL COURT THE ANSWER?

The international legal system is fully dependent on national courts for the prosecution of pirates. There are some benefits in relying on national courts for the prosecution of crimes with international significance, including the collection of evidence, using the same language of the defendants and their counsel, and close proximity to victims.<sup>105</sup> However, in the case of the prosecution of pirates, even this benefit may not be available all the time. For example, if a Somali pirate is prosecuted in a national court of the United States under universal jurisdiction for attacking a Japanese vessel, none of the above-mentioned benefits will be available in that trial. In the wake of Somali piracy, some

---

<sup>102</sup> U.N. Secretary-General, *Report of the Secretary-General on Specialized Anti-piracy Courts in Somalia and other States in the Region*, 5 U.N. Doc. S/2012/50 (Jan. 20, 2012) [hereinafter Secretary General Report 2012].

<sup>103</sup> These options are: 1) Prosecution in regional States, 2) A new Somali court sitting in the territory of a third State in the region, 3) A new special chamber within the national jurisdiction of a State or States in the region, without the participation of the United Nations, 4) A new special chamber within the national jurisdiction of a State or States in the region, with the participation of the United Nations, 5) A new regional tribunal through a regional treaty, 6) A new international tribunal on the basis of an agreement between a State in the region and the United Nations, 7) A new international tribunal established by the Security Council resolution like the ICTY [International Criminal Tribunal for the former Yugoslavia]. Secretary General Report 2010, *supra* note 10, at 1–2.

<sup>104</sup> S.C. Res. 2015, U.N. Doc. S/RES/2015 (Oct. 24, 2011).

<sup>105</sup> Antonio Cassese, *The Rationale for International Criminal Justice*, in THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE, 123 (Antonio Cassese ed., 2009). *See also*, Dutton, *supra* note 81, at 223; William W Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 TEX. INT'L L.J. 729, 734 (2003).

researchers and practitioners are proposing the creation of an international judicial institution for the prosecution of Somali pirates.<sup>106</sup> There are even proposals for creating a permanent international judicial forum for the prosecution of pirates.<sup>107</sup>

There are several reasons for proposing this type of court. First, most of the countries currently participating in anti-piracy actions in the Gulf of Aden are from outside of the African region. It is unreasonably cumbersome for them to bring a captured pirate to their own territory for prosecution. Moreover, states showed a clear unwillingness to prosecute captured pirates in their national courts. Second, an international court may also resolve questions of the possible violation of human rights of the accused in the regional prosecuting states as well as the uncertain legal status of transferring pirates to a third party by the capturing state. The constitution of the proposed court may clearly authorize such a transfer. Finally, there is scope to create the jurisdiction for the prosecution of armed robbers who are engaged in violence within the territorial waters of Somalia. This is a very important issue while Somalia's judicial system is unreliable because of the lack of an effective government in the country and the question of *non-refoulement* due to the probable violation of human rights of the accused within Somalia.

The Secretary-General identified an option for establishing an international tribunal based on an agreement between a state in the region and the UN.<sup>108</sup> This tribunal may be established along the lines of UN-assisted tribunals such as the Special Court of Sierra Leone (SCSL) and the Special Tribunal for Lebanon (STL).<sup>109</sup> The SCSL is a hybrid judicial institution with the jurisdiction to try violations of international humanitarian law committed in Sierra Leone between November 30, 1996 and January 16, 2002.<sup>110</sup> Its territorial jurisdiction is limited to within the boundary of Sierra Leone, and its temporal jurisdiction is limited to a specific time span, which is notably a period before its establishment.<sup>111</sup> It mainly sits in Sierra Leone, with offices in the Hague

---

<sup>106</sup> Dubner & Greene, *supra* note 81, at 463.

<sup>107</sup> ELIZABETH ANDERSEN, BENJAMIN BROCKMAN-HAWE & PATRICIA GOFF, *SUPPRESSING MARITIME PIRACY: EXPLORING THE OPTIONS IN INTERNATIONAL LAW* 18 (2009).

<sup>108</sup> Secretary General Report 2010, *supra* note 10, at 33–35.

<sup>109</sup> *Id.*

<sup>110</sup> Stephen J. Rapp, *The Compact Model in International Criminal Justice: The Special Court for Sierra Leone*, 57 *DRAKE L. REV.* 11, 12 (2008–2009). See S.C. Res. 1315, U.N. Doc. S/RES/1315 (2000).

<sup>111</sup> Rapp, *supra* note 110, at 12.



and New York.<sup>112</sup> The applicable law of the SCSL is the international criminal law and Sierra Leonean law.<sup>113</sup> The STL was established through a Security Council resolution<sup>114</sup> that implemented an agreement between the UN and Lebanon for the prosecution of the perpetrators who killed the former Lebanese Prime Minister Rafiq Hariri and performed other connected attacks.<sup>115</sup> The applicable law of the STL is the Lebanese law.<sup>116</sup> This court deals with an issue that mainly concerns Lebanese criminal law.<sup>117</sup>

For considerable practical reasons, the establishment of an international tribunal in Somalia may not be a viable option. However, an UN-assisted international tribunal could be established in another country in the region, preferably one that is already prosecuting Somali pirates that are apprehended by patrolling states. One advantage of such a court is that, with the participation of UN-nominated judges and prosecutors, concerns about the violation of international human rights laws and the standards of due process can be eliminated, or at least reduced. If the tribunal is established under an agreement between the UN and the host states, the main basis of jurisdiction from the perspective of international law will be the universal jurisdiction regime as established by UNCLOS. However, this type of court may not be suitable for the prosecution of Somali pirates due to other jurisdictional problems, which will be discussed at the end of this section.

Another option for the prosecution of pirates captured in the Gulf of Aden region is the establishment of an ad hoc international tribunal in a regional state through a Security Council resolution.<sup>118</sup> The court could be modeled on the International Criminal Tribunal for the former Yugoslavia (ICTY) and hosted by a state under a special agreement with the UN. The easiest way would be to establish the tribunal as a subsidiary organ of the Security Council, with judicial power similar to the ICTY.<sup>119</sup> The Security Council may adopt a resolution to this effect.

---

<sup>112</sup> RUTH MACKENZIE, CESARE P.R. ROMANO & YUVAL SHANY WITH PHILIPPE SANDS, PROJECT ON INT'L COURTS & TRIBUNALS, MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS 212 (Oxford Univ. Press 2010) (1999).

<sup>113</sup> Rapp, *supra* note 110, at 22.

<sup>114</sup> S.C. Res. 1757, U.N. Doc. S/RES/1757 (May 30, 2007).

<sup>115</sup> Nidal Nabil Jurdi, *The Subject-Matter Jurisdiction of the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUST. 1125, 1125-26 (2007).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> Secretary General Report 2010, *supra* note 10, at 35-36.

<sup>119</sup> S.C. Res 827, U.N. Doc S/RES/827 (May 25, 1993).

However, questions may arise as to whether the establishment of such a tribunal through a resolution of the Security Council is legal; that is, does the Security Council have the power to establish such a tribunal?

The Security Council does have significant power to take action under Chapter VII of the UN Charter if there is an existence of any threat to the peace or breach of the peace.<sup>120</sup> In the ICTY, it was challenged by one accused that the constitution of the tribunal through a resolution of the Security Council was illegal.<sup>121</sup> The defense contended in the *Tadić* case that the tribunal should have been created either by a treaty or by an amendment of the UN Charter and that the Security Council had no power to create a judicial institution. The Appeals Chamber of the ICTY responded that the Security Council has wide discretion under Article 39 of the UN Charter<sup>122</sup> and it finally decided that the ICTY had been lawfully established as a measure under Chapter VII of the charter.<sup>123</sup>

From the experience of the ICTY, it can be arguably concluded that the Security Council will be able to lawfully establish an ad hoc judicial institution for the prosecution of Somali pirates. However, one particular problem the ICTY has faced is a crisis of legitimacy.<sup>124</sup> The General Assembly was initially not happy with the establishment of the tribunal by the Security Council and did not allocate any budget to the ICTY in its first year.<sup>125</sup> However, the widespread effects of Somali piracy on the global economy may lead the General Assembly to take a different approach in the case of the proposed tribunal for the prosecution of Somali pirates. As Somalia itself is most likely to agree with this arrangement, the proposed tribunal may not face a legitimacy crisis as the ICTY did.

For all of these options, the Security Council could adopt a resolution authorizing states to transfer suspected parties to the relevant court or tribunal for prosecution to remove any concern over the legality of such an action. The transfer of pirates to these tribunals could also be possible without such expressed authorization under universal

---

<sup>120</sup> U.N. Charter art. 39.

<sup>121</sup> Prosecutor v. Tadić, Case No. IT-94-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 28–32 (Int'l Crim. Trib. for the former Yugoslavia).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* ¶ 40.

<sup>124</sup> Gregory P. Lombardi, *Legitimacy and the Expanding Power of the ICTY*, 37 NEW ENG. L. REV. 887 (2002–2003); see generally Mark A. Drumbl, *Looking Up, Down and Across: The ICTY's Place in the International Legal Order*, 37 NEW ENG. L. REV. 1037 (2002–2003).

<sup>125</sup> MOHAMMED BEDJAOUL, *THE NEW WORLD ORDER AND THE SECURITY COUNCIL: TESTING THE LEGALITY OF ITS ACTS* 123 (1994).

jurisdiction. However, Security Council authorization will remove any doubt.

Nevertheless, some jurisdictional issues remain in following the models of the ICTY, the SCSL, and the STL. All of these courts were established with a very clear geographical and temporal jurisdiction. All of these tribunals have the jurisdiction to try incidents committed at a specific place and during a specific period. The jurisdiction *ratione materie*, *ratione temporis*, *ratione loci*, and *ratione personae* are very clear in the case of these tribunals. However, Somali piracy is a very different phenomenon.

Identifying *ratione materie* may not be very problematic for the proposed tribunal by including maritime piracy and armed robbery within the jurisdiction of the court. However, determination of the *ratione personae* or personal jurisdiction of the court will be very difficult. If only Somali pirates are included within the jurisdiction of the proposed court, it will create some practical problems. First, in each case, the court must determine whether the person is a national of Somalia. In the absence of an effective central government in the country, it will be difficult for the prosecution to present any reliable government documents in this regard. Then, if non-Somali citizens are engaged in piratical activities in the region, the proposed court will not be able to prosecute them.

The issue of *ratione loci* jurisdiction may also be a problematic issue for the proposed court. The *ratione loci* jurisdiction of the above three tribunals is very specific and confined to a certain country. However, the geographical reach of Somali piracy is gradually expanding far beyond the East African coast,<sup>126</sup> even as far as Oman's waters.<sup>127</sup> According to Jack Lang, Special Adviser to the Secretary-General on Legal Issues related to Piracy off the Coast of Somalia, there is a wide "geographical expansion of attacks to the entire Indian Ocean. Such attacks, long restricted to the north, today reach the southern and eastern Indian Ocean up to 1,500 kilometres off the coast."<sup>128</sup> Thus, the determination of the *ratione loci* jurisdiction of the proposed court is complicated. The question of the jurisdiction of the *ratione temporis* is equally problematic. The jurisdiction *ratione temporis* of the ICTY, the

---

<sup>126</sup> *Somali Pirates 'Expanding Reach'*, BBC News (June 10, 2009), <http://news.bbc.co.uk/2/hi/8093213.stm>.

<sup>127</sup> *Pirates Expand to Oman's Waters*, BBC News (June 12, 2009), <http://news.bbc.co.uk/2/hi/8098365.stm>.

<sup>128</sup> U.N.S.C. Rep. of the Security Council, U.N. Doc. S/PV.6473, (Jan. 5, 2011).

SCSL, and the STL is for a very specific period. There is currently no end date for Somali piracy.

Another of the options suggested by the Secretary-General's report is the establishment of a new regional court based on a multilateral agreement among regional states with the participation of the UN.<sup>129</sup> There is no significant legal obstacle in establishing this type of court. However, it will require consultation and arrangement among regional states, which may take some time. Moreover, many of the stakeholder states are not from the African region. How they can transfer pirates to a regional court for prosecution to which they are not party would need to be addressed. Although the geographical extent of Somali piracy may be confined to the regional boundary of Africa, its effects are global. There may be one argument that extra-regional countries may also want to participate in a regional court; however, it would be better to establish an international court to avoid jurisdictional uncertainties.

Somali piracy is strong evidence in support of the central argument of this article—that the operationalization of national courts is the only viable answer to the problem. From the recent UN Security Council proceedings, it is clear that the Security Council is willing to ensure the prosecution of Somali pirates through national courts in the region with substantial international participation and support.<sup>130</sup> The idea of establishing an international tribunal such as the ICTY or a regional court, therefore, appears to have been abandoned. Although detailed reasoning of the Security Council's decision was not publicly disclosed, it can be assumed that the Security Council decided that the means of prosecution through national courts outweighed the establishment of an international or regional court, or that the disadvantages of an international or regional court were too great to create an effective regime.

#### B. IS THERE A REAL LEGAL OBSTACLE IN PROSECUTING SOMALI PIRATES IN NATIONAL COURTS?

The first legal obstacle identified by a commentator is that the Somali pirates “could perhaps claim combatant status with its attendant

---

<sup>129</sup> Secretary General Report 2010, *supra* note 10, at 4.

<sup>130</sup> S.C. Res. 2015, *supra* note 104.

Geneva Convention protections.”<sup>131</sup> However, this argument appears to be unsustainable in the case of Somali piracy because the Third Geneva Convention is only applicable in cases of declared war or any other armed conflict and the Somali piracy is neither an armed conflict nor a declared war.<sup>132</sup> There is an assumption that Somali pirate groups initially evolved to save the fishing resources of Somalia from illegal foreign fishing and the dumping of hazardous waste in the absence of an effective central government.<sup>133</sup> The ILC observed that piracy “may be

<sup>131</sup> Kontorovich, *supra* note 7, at 259. As per Article 4(a)(2) of the Third Geneva Convention, irregular militants, organized resistance movements, and other volunteer corps may qualify as prisoners of war (POW). In this view, Somali pirates may qualify as POWs because they have a local command structure, openly carry arms, and have a mechanism to peacefully handle significant amounts of ransom. Although they do not observe all rules or customs of war, they mostly treat their hostages reasonably. It has been argued that one particular problem may arise in the prosecution of pirates: they may claim a special hearing to determine their status of POW. Under the Third Geneva Convention, if there is a doubt about their belligerent status, they are entitled to enjoy the status of POW until there is a determination from a competent tribunal. Kontorovich, *supra* note 7, at 259, 262; Geneva Convention Relative to the Treatment of Prisoners of War art. 5, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention].

<sup>132</sup> Third Geneva Convention, *supra* note 131, at art. 2. According to an opinion paper published by the ICRC:

International armed conflicts exist whenever there is resort to armed force *between two or more States*.

Non-international armed conflicts are protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State [party to the Geneva Conventions]. The armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organisation. International Committee of the Red Cross (ICRC), *How is the Term “Armed Conflict” Defined in International Humanitarian Law?*, <http://www.icrc.org/eng/resources/documents/article/other/armed-conflict-article-170308.htm> (emphasis added) (last visited Nov. 2, 2010).

First, Somali piracy and action against Somali pirates by the international anti-piracy force cannot be treated as an international armed conflict, as it does not concern two states. Most of the anti-piracy operations occur in international waters outside of Somali territory, so this excludes any *prima facie* case in favor of the proposition that the pirates are entitled to claim a special hearing to determine POW status. It may be misleadingly argued that action within the Somali territorial waters may qualify as an internal armed conflict. However, it is merely a law enforcement operation with the prior consent of the Somali government. The Security Council resolutions have been adopted with the express consent and request of the Somali government.

<sup>133</sup> TED DAGNE, CONG. RESEARCH SERV., RL33911, SOMALIA: CURRENT CONDITIONS AND PROSPECTS FOR A LASTING PEACE 15 (2011), available at <http://fas.org/sgp/crs/row/RL33911.pdf>; Paul Salopek, *Off the Lawless Coast of Somalia, Questions of Who is Pirating Whom*, CHICAGO TRIBUNE (Oct. 10, 2008), [http://articles.chicagotribune.com/2008-10-10/news/0810090770\\_1\\_somalia-ground-for-industrial-waste-pirates](http://articles.chicagotribune.com/2008-10-10/news/0810090770_1_somalia-ground-for-industrial-waste-pirates); Julio Godoy, *Somalia: Questions Abound about EU’s ‘Combating’ of Piracy*, INTER PRESS SERV. (June 16, 2010), <http://www.ipsnews.net/2010/06/somalia-questions-abound-about-eursquos-combating-of-piracy/>; Press Release, Security Council, Security Council Stresses Long-Term Solution Needed to Problem of Prosecuting, Imprisoning Pirates Operating

prompted by feelings of hatred or revenge and not merely by the desire for gain.”<sup>134</sup> If an incident qualifies as piracy under the international law of the sea, a remote or distant relationship between that incident and armed conflict cannot make a pirate a POW.<sup>135</sup> It appears that discussion on the POW issue in the case of Somali pirates is best regarded as irrelevant. In fact, there is no practical example that pirate has claimed POW status in any ongoing or completed prosecutions.

Another legal obstacle is that there may be a long period of detention for pirates before they are presented to a court, as it may take several weeks to bring arrested pirates to the territory of the arresting state. In two cases before the European Court of Human Rights, a question was asked regarding whether the detention of a suspected drug smuggler in the arresting vessel for two weeks before appearing in a court is compatible with Article 5(3) of the European Convention on Human Rights, which provides that arrested or detained persons “shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial.”<sup>136</sup> In these cases, the court decided that this long delay might be permissible in these particular cases because of the wholly exceptional circumstances.<sup>137</sup> Similarly, this issue was raised

---

off Somalia Coast, Welcomes Report on Issue, U.N. Press Release SC/10014 (Aug. 25, 2010), available at <http://www.un.org/News/Press/docs/2010/sc10014.doc.htm>.

<sup>134</sup> Report of the International Law Commission, *supra* note 52, at 282.

<sup>135</sup> As observed by one commentator:

[i]magine persons displaced by civil war (not insurgents) cross a land border and begin hijacking trucks, to make a living following the destruction of their farm lands. In such a case we would not seriously contend that such displaced persons were in any sense acting as belligerents. Douglas Guilfoyle, *The Laws of War and the Fight against Somali Piracy: Combatants or Criminals?*, 11 MELB. J. INT’L L. 141, (2010). However, most of the victims of piracy incidents are oil tankers that are not connected with illegal fishing or the dumping of waste. Clearly, pirates do not only attack the vessels of countries against which they have an allegation of illegal fishing and waste dumping. Rather, the intention of Somali pirates is clearly ransom. Even if Somali piracy originated as a protest against illegal fishing and dumping of wastes, people involved with these activities still qualify as pirates and cannot be treated as POWs. They are engaged in piratical acts for financial incentives, without any direct relation to the attainment of any political aim, so they should be treated as pirates. *List of Ships Attacked by Somalian Pirates Since 2009* (April 23, 2009), <http://coordination-maree-noire.eu/spip.php?article9780&lang=en>; Jeffrey Gettleman, *Somali Pirates Tell Their Side: They Want Only Money*, N.Y. TIMES (September 30, 2008), [http://www.nytimes.com/2008/10/01/world/africa/01pirates.html?\\_r=0](http://www.nytimes.com/2008/10/01/world/africa/01pirates.html?_r=0).

<sup>136</sup> Convention for the Protection of Human Rights and Fundamental Freedoms art. 5, Nov. 4, 1950, 213 U.N.T.S. 222.

<sup>137</sup> The Court observed in the *Rigopoulos* case that “having regard to the wholly exceptional circumstances of the instant case, the time which elapsed between placing the applicant in detention and bringing him before the investigating judge cannot be said to have breached the requirement of promptness in paragraph 3 of Article 5.” *Rigopoulos v. Spain*, App. No.

in the District Court of Rotterdam in a piracy prosecution case where the defense lawyer claimed that, by presenting suspected pirates before the magistrate forty days after the arrest, the prosecution violated Article 5(3) of the European Convention on Human Rights. However, the court was of the opinion that there was no reason to decide that the breach of procedural rules found in this matter would have affected the right of the suspect to a fair trial.<sup>138</sup>

A problematic legal obstacle for developed capturing countries appears to be the risk that pirates may claim asylum.<sup>139</sup> According to the relevant European human rights law, Somali pirates may qualify as refugees because of the routine brutality of the Somali government.<sup>140</sup> Western countries may be deemed as lucrative destinations for Somali pirates to claim asylum and eventual residence. However, an arguably better view is that this issue is not a serious obstacle in prosecuting pirates in Western developed countries. Considering the serious nature of contemporary piracy, developed countries could change their domestic laws and make piracy a punishable offence with a longer imprisonment term, such as twenty years. Lengthier sentences should be a greater deterrent against the crime in the first instance and make it less likely that an asylum claim would be sustained, especially if the situation in Somalia improves over time. Moreover, despite some rumors,<sup>141</sup> there is no known incident where a Somali pirate has claimed asylum in a Western developed country where they are currently being prosecuted. Thus, it appears that only high costs and other associated problems in bringing accused persons and witnesses to trial in countries that are far from Somalia are the only serious practical problems.

---

37388/97, Eur. Ct. H.R. (1999). The court confirmed this position again in the Medvedyev case. *Medvedyev and Others v. France*, App. 3394/03, Eur. Ct. H.R. (2010).

<sup>138</sup> L.J.N. Rotterdam, *supra* note 82, at 7.

<sup>139</sup> Marie Woolf, *Pirates Can Claim UK Asylum*, THE SUNDAY TIMES, [http://www.thesundaytimes.co.uk/sto/news/uk\\_news/article84478.ece](http://www.thesundaytimes.co.uk/sto/news/uk_news/article84478.ece) (last visited Jan. 1, 2010). On the issue of asylum claims, see generally Yvonne M. Dutton, *Pirates and Impunity: Is the Threat of Asylum Claims a Reason to Allow Pirates to Escape Justice?*, 34 FORDHAM INT'L L. J. 236 (2011).

<sup>140</sup> According to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), state parties are not allowed to expel, return or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture. See Amitai Etzioni, *Somali Pirates: An Expansive Interpretation of Human Rights*, 15 TEX. REV. L. & POL. 39, 53–55 (2010).

<sup>141</sup> Kathryn Westcott, *Pirates in the Dock*, BBC News (May 21, 2009), <http://news.bbc.co.uk/2/hi/africa/8059345.stm>.

Another apparent legal obstacle is whether transferring pirates to a third country for prosecution is legal under UNCLOS. Pursuant to Article 105, any state can seize a pirate vessel and the courts of the capturing country have a right to try pirates.<sup>142</sup> According to the ILC:

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.<sup>143</sup>

Based on this comment, an author stated that this provision was included in UNCLOS to preclude the transfer of suspected pirates to third party states.<sup>144</sup> However, the ILC Commentary merely indicates that a state cannot exercise judicial power in foreign territory.<sup>145</sup> Piracy is a universal jurisdiction crime under customary international law and, as such, the receiving state's authority to prosecute can be established under customary international law.<sup>146</sup>

However, whether the pre-UNCLOS customary international law of piracy survives after the near-universal acceptance of UNCLOS is a contested issue.<sup>147</sup> Nevertheless, whether Article 105 authorizes the transfer of suspected pirates to a third party may not be a serious

<sup>142</sup> UNCLOS, *supra* note 11, art. 105.

<sup>143</sup> *Report of the International Law Commission to the General Assembly*, 1956 U.N.Y.B. Int'l L. Comm'n 253, 283. This comment was on the corresponding article of the Draft 1958 High Seas Convention.

<sup>144</sup> 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 I.L.M. 747, 748 (2009); Eugene Kontorovich, *International Legal Responses to Piracy off the Coast of Somalia*, ASIL (Feb. 6, 2009), <http://www.asil.org/insights/volume/13/issue/2/international-legal-responses-piracy-coast-somalia>.

<sup>145</sup> GUILFOYLE, *supra* note 53, at 1.

<sup>146</sup> GUILFOYLE, *supra* note 53, at 5; Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Separate Opinion of President Guillaume, 2002 I.C.J. 3, 37; Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Joint separate opinion of Judges Higgins, Kooijmans and Buerghenthal, 2002 I.C.J. 81; IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 229 (7th ed., 2008). As Justice Moore observed in the SS Lotus case: "in the case of . . . piracy by law of nations, there has been conceded a universal jurisdiction, under which the person charged with the offence may be tried and punished by any nation into whose jurisdiction he may come." S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) (Moore, J., dissenting) (emphasis added).

<sup>147</sup> See generally Kontorovich, *supra* note 144, at 748. See also Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L. J. 183 (2004); Samuel Pyeatt Menefee, *Piracy, Terrorism and the Insurgent Passenger: A Historical and Legal Perspective*, in MARITIME TERRORISM AND INTERNATIONAL LAW 60–61 (Natalino Ronzitti ed., 1990); Samuel Pyeatt Menefee, *Foreign Naval Intervention in Cases of Piracy: Problems and Strategies*, 14 INT'L J. MARINE & COASTAL L. 353, 361 (1999).



problem, as the quoted sentence of the ILC commentary does not refer to adjudicative jurisdiction of the prosecuting state. Rather, it is related to the enforcement jurisdiction of the seizing state.<sup>148</sup> It is clear that the quoted sentence in the ILC commentary relates to the seizure of the vessel and not the prosecution of pirates.<sup>149</sup> It simply indicates that a state is not authorized to seize a pirate ship in the territorial, archipelagic, and internal waters of another state.<sup>150</sup>

The transfer of pirates is undoubtedly permissible under the SUA Convention. Indeed, it is not only a legally valid action, but also a duty of the capturing country to transfer the suspected pirate to a country that is willing to establish jurisdiction under the SUA Convention. However, according to the SUA Convention, a state can establish jurisdiction only if it has a connection with the incident, ship, victim, or person involved in the incident, or if the offence is committed to compel the state to do, or abstain from doing, any act.<sup>151</sup> Clearly, third party countries may not qualify according to these criteria.

Some authors argued that if any state has a nexus to the incident, or if the perpetrator or victim is not interested in prosecuting a pirate, prosecution is not possible under this convention.<sup>152</sup> However, Article 8 of the SUA Convention allows the master of a ship of a state party (the “flag state”) to deliver a suspected offender to the authorities of any other state (the “receiving state”), and the receiving state in turn may request the flag state to accept delivery of that person.<sup>153</sup> Moreover, the receiving state may also notify the states that are willing to establish jurisdiction under Article 6(1) to determine if they may accept the person. However, if no state is interested in accepting the person, there is no bar in the SUA Convention for the receiving state to prosecute the alleged offender. Article 10, in fact, imposes an obligation on the state party in the territory of which an offender or alleged offender is found to either extradite the alleged offender to a country that is willing to establish

---

<sup>148</sup> Roach, *supra* note 20, at 405; MYRES S. MCDUGAL & WILLIAM T. BURKE, *THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA* 877 (1962).

<sup>149</sup> Roach, *supra* note 20, at 405.

<sup>150</sup> *Id.*

<sup>151</sup> SUA Convention 1988, *supra* note 11, art. 6.

<sup>152</sup> Dutton, *supra* note 81, at 209; Gabel, *supra* note 81, at 1445; Tina Garmon, *International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11th*, 27 TUL. MAR. L. J. 257, 273 (2002).

<sup>153</sup> Treves, *supra* note 63, at 80–81.

jurisdiction under Article 6(1) of the SUA Convention or to prosecute the offender in its own court.<sup>154</sup>

It is also pertinent to discuss whether there are any legal obstacles within the national legal systems of the regional countries for prosecuting Somali pirates. This issue can be discussed using Kenya as an example. The jurisdiction of the Kenyan Magistrate Courts for the prosecution of pirates was initially challenged in the High Court of Kenya.<sup>155</sup> However, the Kenyan authorities have solved this problem by amending relevant law.<sup>156</sup> The national legal framework does not appear

<sup>154</sup> Guilfoyle, *supra* note 81, at 149.

<sup>155</sup> Initially, the Kenyan Authority was prosecuting pirates under sections 69 (1) and (3) of the *Kenyan Penal Code*, which reads as follows:

69 (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.

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

The Penal Code, (2009) Cap. 63 § 69(1), (3) (Kenya). The jurisdiction of the Kenyan Magistrate Courts for the prosecution of pirates under universal jurisdiction was first challenged in the *Hassan M Ahmed v. Republic* case. Hassan M. Ahmed v. Republic, (2009) K.L.R. (H.C.K.) (Kenya), available at <http://kenyalaw.org/caselaw/cases/view/55714/>. However, the High Court of Kenya rejected the challenge, citing that a Kenyan court “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.” *Id.* After a brief discussion on the principle of universal jurisdiction under international law, the court held that the Kenyan Court has the jurisdiction to try Somali pirates under universal jurisdiction. *Id.* The issue arose again in the High Court of Kenya in *Re Mohamud Mohamed Dashi & 8 Others*. In *re Mohamud Mohamed Dashi & 8 Others*, (2010) K.L.R. (H.C.K.) (Kenya). In this case, the defense argued the contradiction of Section 69 with Section 5 of the *Kenyan Penal Code*. Section 5 reads as follows: “The jurisdiction of the Courts of Kenya for the purpose of this Code extends to every place within Kenya, including territorial waters. (emphasis added).” The Penal Code, (2009) Cap. 63 § 5 (Kenya). Interestingly, this contradiction was not argued in *Hassan M. Ahmed v. Republic*. Compare Hassan M. Ahmed v. Republic, (2009) K.L.R. (H.C.K.) (Kenya) with *In re Mohamud Mohamed Dashi & 8 Others*, (2010) K.L.R. (H.C.K.) (Kenya). After a very comprehensive discussion on the Kenyan Constitutional law, the Penal Code and other relevant national laws, the High Court of Kenya held that the Magistrates Court has no jurisdiction to prosecute pirates for an incident that occurred on the high seas. *In re Mohamud Mohamed Dashi & 8 Others*, (2010) K.L.R. (H.C.K.) (Kenya).

<sup>156</sup> Kenya passed a new law, namely *Merchant Shipping Act 2009*, which broadens the jurisdiction of Kenyan courts. This law not only grants extra-territorial jurisdiction to Kenyan courts, but also implements all relevant international legal instruments. *Merchant Shipping Act* (2012) Cap. 389 §§ 369(1), 371. However, despite the legislative reform, the jurisdiction of the Magistrates Court for prosecution was again challenged in *Republic v. Abdirahman Isse Mohmud & 3 Others*, where the defense claimed that the Magistrates Court has no jurisdiction under the *Merchant Shipping Act 2009*. However, the Kenyan High Court rejected this view and held that the Magistrates Court has jurisdiction under the newly enacted law. *Republic v. Abdirahman Isse Mohamud & 3 Others*, (2012) (Misc Criminal Application, no 72 of 2011). This decision ends the longstanding battle over jurisdiction. Paul Musili Wambua, *The Jurisdictional Challenges to the Prosecution of Piracy Cases in Kenya: Mixed Fortunes for A Perfect Model in the Global War Against Piracy*, 11 WORLD MAR. U. J. MAR. AFF. 95, 102 (2012).

to be a serious problem any longer for the operationalization of national courts in regional countries. In addition to Kenya, other regional countries, namely Seychelles, Mauritius, and the United Republic of Tanzania, have comprehensively reformed their national laws.<sup>157</sup>

As these countries prosecute Somali pirates after necessary reforms in their domestic legal systems, there is no significant jurisdictional issue for the court. For example, the jurisdiction to prosecute Somali pirates in the Supreme Court of Seychelles has been discussed in *Republic v. Mohamed Ahmed Ise & 4 Others*.<sup>158</sup> The Supreme Court of Seychelles, after analyzing the customary international law, UNCLOS, and relevant national laws, held that it has the jurisdiction to prosecute pirates of foreign nationalities for attacking a foreign vessel on the high seas under universal jurisdiction.<sup>159</sup>

Having a suitable national legal framework is not enough for the effective prosecution of pirates. Another legal obstacle may be proving any case before a national court. While potentially refuted through circumstantial evidence, suspected pirates may claim that they are innocent fishermen and not pirates. This assertion is the most likely to be used because some of the pirates are, in fact, fishermen at the same time.<sup>160</sup> Bringing the pirates, victims, and witnesses to the capturing country from a remote place may be unduly burdensome work. According to a report of the UN Secretary-General, the principal reason for releasing apprehended Somali pirates is a lack of evidence that is sufficient to support prosecution and not a lack of arrangement for prosecution.<sup>161</sup> However, the establishment of an international court is not the answer to this problem, as an international court will face the same problem. This is a ground reality of this type of situation and not a unique weak point of the national court.

Finally, another obstacle in the operationalization of national courts in regional countries is a lack of funding. For example, Kenya submitted a budget of \$5.1 million (USD) to the United Nations Office

---

<sup>157</sup> Secretary General Report 2012, *supra* note 102, at 14–30.

<sup>158</sup> *Republic v. Mohamed Ahmed Ise & Four Others*, (2010) Criminal Side no. 76 of 2010 (Sup. Ct. of Sey.)

<sup>159</sup> *Id.*

<sup>160</sup> Mohamed Abshir Waldo, *The Two Piracies In Somalia: Why The World Ignores The Other?*, WARDHEER NEWS (Jan. 8, 2009), [http://wardheernews.com/Articles\\_09/Jan/Waldo/08\\_The\\_two\\_piracies\\_in\\_Somalia.html](http://wardheernews.com/Articles_09/Jan/Waldo/08_The_two_piracies_in_Somalia.html).

<sup>161</sup> Secretary General Report 2010, *supra* note 10, at 14.

on Drugs and Crime (UNDOC) for eighteen months.<sup>162</sup> However, the country received only \$2.3 million (USD), leaving a gap of \$2.6 million (USD).<sup>163</sup> According to an expert, considering this lack of funding, “it would be very difficult (and politically imprudent too) for Kenya to support the prosecutions by its limited resources.”<sup>164</sup> Thus, providing the necessary funding to regional countries is the most important issue for the operationalization of their respective domestic courts.

### C. THE ROLE OF NATIONAL COURTS

Whatever international institutions are created for the prosecution of pirates, national courts will remain the key player. Considering the large number of pirates apprehended in different regions of the world, one or more international courts might not be able to handle the situation. Therefore, strengthening national judicial institutions is essential for ensuring the effective prosecution of pirates, which may then work as a deterrent to piratical incidents around the world.

As mentioned above, the Secretary-General identified an option to establish a Somali court in a regional state, similar to the Lockerbie court.<sup>165</sup> The report proposed the establishment of a Somali court in a regional state with or without the participation of the UN.<sup>166</sup> The participation of the UN would mean the appointment of UN-selected judges and prosecutors.<sup>167</sup> However, there was no participation of the UN or regional organizations in the Lockerbie court.<sup>168</sup> Although such a court would be established mainly under the national law of Somalia,<sup>169</sup> if there is participation of the UN, this court cannot be treated as purely a national court, and it will not be an international court either. In that case, it will be an internationalized national court.

---

<sup>162</sup> Wambua, *supra* note 156, at 111.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> Secretary General Report 2010, *supra* note 10, at 27–29. Lockerbie Court was a Scottish court sitting in the Netherlands to prosecute two Libyan officials accused of the Pan Am Flight 103 bombing, which killed 259 passengers and crew as well as 11 residents of the Scottish town of Lockerbie. See Michael P. Scharf, *Terrorism on Trial: The Lockerbie Criminal Proceedings*, 6 ILSA J. INT’L & COMP. L. 355 (2000).

<sup>166</sup> Secretary General Report 2010, *supra* note 10, at 27.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 27 n.41.

<sup>169</sup> *Id.* at 27.

The establishment of this court requires a special agreement between Somalia, the host state, and the UN. This option has some practical and jurisdictional limitations. First, due to concerns about the Somali legal system, it will be difficult for some Western countries to transfer pirates to Somalia. Moreover, the present government in Somalia is not recognized by all of the states of the world, which may create some practical problems.<sup>170</sup> However, if the UN supervises the court, these concerns may not be a serious problem. There may be some complexity regarding the legal status of the proposed court under the Somali legal system in relation to appeals. Moreover, this court would apparently create a double standard, or two types of justice, within the Somali legal system if deviation from Somali law is allowed for piracy prosecution. Despite these minor problems, it appears to be a workable solution.

Similar to this court, another form of internationalized national court proposed by the Secretary-General's report is a special chamber within the national jurisdiction of a state or states in the region, with the participation of the UN.<sup>171</sup> This court would primarily be a national court, but there would be some UN-nominated judges.<sup>172</sup> Its jurisdiction would be based on the national law of the host state in accordance with the universal jurisdiction provided by international law. There is no significant jurisdictional problem in this type of solution. The establishment of this type of court requires a significant commitment from a regional state. Moreover, it may require major changes in the domestic legal and institutional frameworks of the host country to conform to the international standard. The relationship of this court with the superior court of the host state is an issue to be determined.

The need to operationalize national courts can be explained by using Somali piracy as an example. To achieve the goal of the effective prosecution of Somali pirates, building judicial capacity and prison facilities within Somalia and other regional states may be the most viable option. This must be supplemented by the willingness for the prosecution of pirates by extra-regional states in some circumstances. At present, at least twenty countries, including regional and extra-regional countries, are engaged in the prosecution of Somali pirates.<sup>173</sup> However, the number of prosecutions in countries outside the African region is very low and

---

<sup>170</sup> Roach, *supra* note 20, at 401.

<sup>171</sup> Secretary General Report 2010, *supra* note 10, at 30.

<sup>172</sup> *See id.*

<sup>173</sup> Secretary General Report 2012, *supra* note 106, at 4–5.

countries outside the region are only prosecuting pirates if the incident involves a direct attack on their ships.<sup>174</sup> Over the past five years, 1,063 Somali pirates have been prosecuted or are in the process of being prosecuted in twenty countries, as shown in Table 1.<sup>175</sup>

**Table 1: Prosecution of Somali Pirates by National Courts  
(2006–January 2012)<sup>176</sup>**

Country	Number held	Notes
Belgium	11	Convicted
Comoros	6	
France	15	5 convicted
Germany	10	
India	119	
Japan	4	
Kenya	143	50 convicted
Madagascar	12	
Malaysia	7	
Maldives	37	Awaiting deportation in absence of a law under which to prosecute
Netherlands	29	10 convicted
Oman	22	All convicted
Seychelles	70	63 convicted
Somalia–Puntland	290	Approximately 240 convicted
Somalia–Somaliland	94	68 convicted (approximately 60 subsequently released)
Somalia–South Central	18	Status of trial unclear
Republic of Korea	5	5 convicted, appeal pending before the Supreme Court

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

Spain	2	Both convicted
United Arab Emirates	10	
United Republic of Tanzania	12	6 convicted
US	28	17 convicted
Yemen	129	123 convicted and 6 acquitted
Total	1,063	

Somalia is the greatest prosecutor of its pirates. Strengthening legal and institutional frameworks within Somalia may further increase the number of prosecutions. However, considering the present volatile situation and the concern over human rights violations, the global community will primarily have to rely on the prosecution of Somali pirates in other states in the region.

In his report, the Secretary-General identified the establishment of a special chamber within the national jurisdiction of a state or states as an option in the region.<sup>177</sup> For the speedy and effective prosecution of pirates, it may be a viable option. The UN can extend financial help to regional states for establishing such special tribunals. Moreover, it can observe these tribunals to ensure that the due process and human rights standards are maintained. Finally, the Security Council, through Resolution 2015 of October 24, 2011, decided to consider the establishment of specialized “anti-piracy courts in Somalia and other States in the region with substantial international participation and/or support.”<sup>178</sup> Subsequently, the Secretary-General has submitted a report to the Security Council on the establishment of specialized anti-piracy courts in Somalia and other states in the region.<sup>179</sup> The Secretary-General has identified a detailed framework for international assistance for enhancing the capacity of national courts in five regional states that are willing to prosecute Somali pirates.<sup>180</sup> He identified specific measures to be taken for capacity building in relation to the “main components of the criminal process—investigations, prosecution, the courts, legal aid and defense representation and prisons.”<sup>181</sup> As observed in this article,

<sup>177</sup> Secretary General Report 2010, *supra* note 10, at 3–4.

<sup>178</sup> S.C. Res. 2015, U.N. Doc. S/RES/2015 (Oct. 24, 2011).

<sup>179</sup> See generally Secretary General Report 2012, *supra* note 103.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 5.

capacity building is critical for the operationalization of both legal and institutional national courts.

The global community needs to provide necessary funding to the regional countries, particularly Somalia, for the capacity building of its courts and prison facilities. Significant funding is reasonable given that the maritime piracy cost the global economy between \$5.7 and \$6.1 billion in 2012, and given the incalculable human cost involving killings and widespread hostage-taking<sup>182</sup> as well as the serious negative effects imposed by Somali piracy on global trade and commerce.

### III. PROSECUTION OF PIRATES: OPERATIONALIZING JUDICIAL INSTITUTIONS

For ensuring the prosecution of pirates, the worldwide operationalization of the role of judicial institutions is essential. The pertinent question is, though, can an existing court or tribunal could be used for the prosecution of pirates? Two international judicial institutions—the International Tribunal for the Law of the Sea (ITLOS) and the International Chamber Of Commerce (ICC)—are the most relevant in this regard, considering their existing jurisdictional framework.

#### A. TOWARDS A PERMANENT INTERNATIONAL JUDICIAL INSTITUTION FOR THE PROSECUTION OF PIRATES?

##### *i. ITLOS*

ITLOS was established under UNCLOS as a judicial institution for the settlement of disputes concerning the implementation and interpretation of the convention.<sup>183</sup> However, the drafting history of UNCLOS does not provide any indication that the tribunal may act as a

---

<sup>182</sup> Jonathan Bellish, *The Economic Cost Of Somali Piracy, 2012*, at 1 (Oceans Beyond Piracy Working Paper, 2013), available at [http://oceansbeyondpiracy.org/sites/default/files/ecop2012final\\_2.pdf](http://oceansbeyondpiracy.org/sites/default/files/ecop2012final_2.pdf); Press Release, Security Council, Human Cost of Piracy Off Somalia Coast “Incalculable”, Full Range of Legal, Preventative Measures Needed to Thwart Attacks, Security Council Told; U.N. Press Release SC/10551 (Feb. 22, 2012).

<sup>183</sup> UNCLOS, *supra* note 11, Annex. VI, art. 21.



criminal court or that there was any intention of the drafter (even at the early stage of negotiation) that ITLOS may work as a criminal court.<sup>184</sup>

Nevertheless, some commentators have suggested that pirates should be put under the jurisdiction of ITLOS.<sup>185</sup> However, it is not possible to include the prosecution of pirates under the jurisdiction of ITLOS without amending UNCLOS or adopting a new treaty. Undoubtedly, the existing judges of ITLOS are competent in the law of the sea. However, they may not all be competent or willing to adjudicate criminal proceedings. This problem may be solved by creating a special chamber for piracy prosecution. The existing location of the tribunal, Hamburg, is also not suitable for piracy prosecution, as most of the incidents are occurring in the African and Asian regions. However, arrangements could be made to situate a special chamber on piracy in a piracy-prone region.

One commentator suggested that ITLOS has the jurisdiction *ratione materiae*, and it is possible to create the jurisdiction *ratione personae* over Somali pirates through a Security Council resolution.<sup>186</sup> This proposition has two aspects: whether ITLOS has the jurisdiction *ratione materiae* and whether it is possible to create ITLOS' jurisdiction *ratione personae* over pirates through a UN Security Council resolution. As noted earlier, piracy has not been identified as a breach or threat to international security under the UN Charter. Such a resolution may be suitable for creating jurisdiction over Somali pirates, but not over piracy generally. Moreover, whether the tribunal has jurisdiction *ratione materiae* is not fully clear. However, jurisdiction can be created through an amendment to UNCLOS or the adoption of a new agreement. All of the above problems can be solved through the adoption of a new international treaty or an amendment to UNCLOS. Even if this step is feasible, ITLOS should not be considered the most suitable forum for the prosecution of pirates. It can be submitted that piracy as a crime of international significance should not be isolated from other international

---

<sup>184</sup> See generally CTR. FOR OCEANS LAW & POLICY, UNIV. OF VA. SCH. OF LAW, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 331–420 (Myron H. Nordquist et al. eds., 1989).

<sup>185</sup> See generally Craig Thedwall, *Choosing the Right Yardarm: Establishing an International Court for Piracy*, 41 GEO. J. INT'L L. 501 (2010); Beck Pemberton, *The International Tribunal for the Law of the Sea as a High Court of Piracy* (One Earth Future Foundation Working Paper, 2010), available at <http://oneearthfuture.org/sites/oneearthfuture.org/files/documents/publications/ITLOS-Beck-Pemberton.pdf>.

<sup>186</sup> Thedwall, *supra* note 185, at 518.

or transnational crimes such as terrorism, drug trafficking, human trafficking and migrant smuggling, money laundering, organized crime, and transnational wildlife and forest crime. However, that does not necessarily mean that it is not legally possible to establish a separate court for piracy. However, if a separate court for piracy is established now, in the future we may have to establish many specialized courts for other maritime crimes if they become an endemic threat like piracy.

ii. ICC

Some commentators have suggested that pirates should be subject to the jurisdiction of the ICC through the negotiation of a new agreement.<sup>187</sup> It was even suggested that some piratical acts, including extensive and unjustified appropriation of property, unlawful confinement, the taking of hostages, and willful killing may even be qualified as war crimes.<sup>188</sup> However, “pirate attacks may be more akin to intermittent internal disturbances, such as sporadic acts of violence, not falling within the statutory definition of armed conflict.”<sup>189</sup> Thus, these activities cannot be treated as war crimes. Rather, we should examine how piracy can be included within the jurisdiction of the ICC.

It must further be considered whether it would be suitable to include piracy within the jurisdiction of the ICC. The present structure of the court makes it unlikely. First, assembling a large number of suspected pirates and witnesses in the Netherlands from around the world may be difficult. Further, the prosecution of piracy in the ICC may be costly. However, these problems can be solved by establishing one or more special benches of the ICC, which could then sit in the piracy-prone regions. If the proposed piracy benches of the ICC sit regionally, it will largely solve the question of proximity of offence and offender. To make this arrangement more effective, the global community may also need to “create a comprehensive provision that defines piracy and recognizes the numerous crimes—such as hostage-taking or money

---

<sup>187</sup> Mario Silva, *Somalia: State Failure, Piracy, and the Challenge to International Law*, 50 VA. J. INT'L L. 553, 577 (2010); Max Boot, *Pirates, Then and Now: How Piracy was Defeated in the Past and Can Be Again*, FOREIGN AFF., July-Aug. 2009, at 94, 107; Francis J. Crystals, *Somali Piracy Part 1: Issues of International Law*, CRYSTALS & GAISH (Apr. 14, 2009), <http://francisjcrystals.blogspot.com/2009/04/somali-piracy-part-1-issues-of.html>.

<sup>188</sup> Totten & Bernal, *supra* note 81, at 402.

<sup>189</sup> *Id.* at 419.

laundering or organized crime—it can encompass.”<sup>190</sup> It has been suggested that there is a need to “look beyond existing treaties and towards domestic laws in crafting an international definition of piracy and related offenses.”<sup>191</sup> Whether states will agree to broaden the definition of piracy is uncertain. Moreover, the establishment of such a court is a technically difficult issue.

The prosecution of pirates in the ICC is not presently possible without amending the ICC statute. Amendment of the Rome Statute would be a lengthy process and any change would only come into effect after one year of the adoption and ratification of the amendment.<sup>192</sup> The ICC will not be able to take cognizance of offences committed before the entry into force of the proposed amendment. According to Article 24 of the Rome Statute, “no person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.” Moreover, “in the event of a change in the law applicable to a given case prior to a final judgment, the law more favorable to the person being investigated, prosecuted or convicted shall apply.”<sup>193</sup>

However, it may be argued that, albeit weakly, this provision is only applicable in the case of entry into force of the Rome Statute. If a new crime is added to the statute, the court can take cognizance of an incident relating to such a crime if the incident occurred after the entry into force of the Rome Statute, but before the entry into force of the proposed amendment. However, it can only be done after entry into force of the amending legal instrument. This interpretation can be challenged using another article of the statute. According to Article 22 of the Rome Statute, “A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a *crime within the jurisdiction of the court*.”<sup>194</sup>

Although piracy is a well-recognized crime under international law, it is clearly not a crime under the jurisdiction of the court before the entry into force of the proposed amendment. Moreover, if the Rome Statute is amended, dissenting state parties will have a right to withdraw from the statute.<sup>195</sup> However, this problem may be solved by adopting an

---

<sup>190</sup> ANDERSEN ET AL., *supra* note 107, at 5.

<sup>191</sup> *Id.*

<sup>192</sup> Rome Statute of the International Criminal Court art. 121, § 4, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

<sup>193</sup> *Id.* art. 24.

<sup>194</sup> *Id.* art. 22 (emphasis added).

<sup>195</sup> *Id.* art. 121, § 6.

optional protocol that would only be applicable to states that will ratify the protocol. However, if the adoption of a new protocol modifies the provisions of the Rome Statute, particularly the provision regarding retrospective effects, parties may arguably have the right to withdraw from the ICC. Thus, the establishment of one or more benches for the prosecution of pirates through an optional protocol may be problematic.

The extent to which this proposed international judicial institution would be successful is difficult to predict at present. Any proposed court would have several limitations. First, there is no international maritime police force; thus, the political will of states still remains the key factor. Second, creating an international judicial institution will not necessarily create an enforcement jurisdiction for foreign states within the territorial sea and archipelagic and internal waters of the coastal states. As discussed earlier, a large amount of maritime violence occurs within these waters. Finally, considering the number and frequency of piracy and armed robbery incidents, one or two international courts will not be enough for the prosecution of pirates from around the world. Even, after the establishment of an international judicial avenue, the operationalization of national judicial institutions will remain a critical issue.<sup>196</sup>

The present experience of the ICC also proves that international courts are not a very suitable institution for the prosecution of pirates. With its annual budget of nearly \$140 million (USD) and \$900 million (USD) spending in the first ten years,<sup>197</sup> the ICC has dealt with only twenty-one cases since its establishment in 2002.<sup>198</sup> As noted above,

---

<sup>196</sup> The jurisdiction of the ICC is based on a doctrine of complementarity, according to which a case will only be admissible in the court if and when states are genuinely unwilling or unable to carry out investigations or prosecutions. According to this principle, primary responsibility is vested in national courts. However, this assignment of responsibility is subject to certain standards that depend on two conditions, namely “unwillingness” and “inability.” Unwillingness involves an assessment of the state’s subjective motives as to whether it is willing to investigate or prosecute the matter. Conversely, “inability” involves assessment in a more objective term to determine the situation where “due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.” The doctrine of complementarity further underlines the ongoing importance of national courts, even after the establishment of an international court for the prosecution of pirates. Rome Statute, *supra* note 192, Preamble, ¶ 10, art. 1, 17, 20, § 3; Jann K. Kleffner, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, 1 J. INT’L CRIM. JUST. 86, 87 (2003).

<sup>197</sup> Jon Silverman, *Ten Years, \$900m, One Verdict: Does the ICC Cost Too Much?*, BBC NEWS MAG. (Mar. 14, 2012), <http://www.bbc.co.uk/news/magazine-17351946>.

<sup>198</sup> *Situations and Cases*, INT’L CRIM. CT., [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/) (last visited Jul. 25, 2014).

1,063 Somali pirates have been prosecuted in the national courts of twenty states since 2006.<sup>199</sup> This number clearly shows that global piracy is not a suitable area for transferring jurisdiction from national courts to international courts considering the practical reality. For a sustainable solution to the problem, the role of national courts must be operationalized.

#### B. OPERATIONALIZING THE ROLE OF NATIONAL COURTS: MILES TO GO BEFORE WE SLEEP

The prosecution of piracy has long relied on the concept of universal jurisdiction over piracy, which is mainly based on a system of judicial altruism.<sup>200</sup> In practice, there are few incidents where a state has shown interest in prosecuting pirates by exercising universal jurisdiction.<sup>201</sup> With the exception of the prosecution of Somali pirates by some regional states, most of the pirates prosecuted recently have not reflected the exercise of universal jurisdiction.<sup>202</sup> In many of the cases, the incidents involved attacks on a vessel of the prosecuting state.<sup>203</sup> The recent “catch and release” phenomenon in the Gulf of Aden is not an exception to the overall attitude of the states. An empirical study of 754 piratical incidents eligible for universal jurisdiction in the period from 1998 to 2007 showed that there was reliance on universal jurisdiction in only four cases.<sup>204</sup> That is, there was a prosecution based on universal jurisdiction in only 0.53 percent of the incidents.<sup>205</sup>

As observed by the Head of the Public Prosecutor’s Office in Hamburg, Germany:

What is totally clear, however, is that the German judicial system cannot and should not, act as World Police. Active prosecution measures will only be initiated if the German State has a particular,

---

<sup>199</sup> Secretary General Report 2012, *supra* note 103, at 5.

<sup>200</sup> *See supra* Part I.A.ii.

<sup>201</sup> Eugene Kontorovich & Steven Art, *An Empirical Examination of Universal Jurisdiction for Piracy* 8 (Nw. U. Sch. of Law Pub. Law & Legal Theory Series, No. 09-26, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1519518](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1519518).

<sup>202</sup> *Id.* at 8–9.

<sup>203</sup> *See id.*

<sup>204</sup> *Id.* at 8.

<sup>205</sup> *Id.*

well-defined interest in prosecution—this, I think, is in accordance with the stance taken by all German ministries and authorities.<sup>206</sup>

Spanish prosecutors also took a similar approach.<sup>207</sup> However, Spain later amended domestic legislation. The recent prosecution of pirates in the US also shows a similar approach.<sup>208</sup> The US authorities are only interested in prosecuting pirates if the victim's vessel flies the US flag.<sup>209</sup> As observed by Eugene Kontorovich, "The U.S. has a policy of only prosecuting when the attack directly affects the U.S."<sup>210</sup>

Moreover, most of the maritime violence occurs within the domestic jurisdiction of coastal states. This makes the role of national courts prominent. As observed by Dubner:

most of the human rights violations and losses to commercial shipping occur either in territorial waters, internal waters, or international straits . . . The result is that unless the coastal or archipelagic state is desirous and capable of stopping these acts of maritime violence, the piracy will not be stopped. Why? Because even if the coastal state has municipal legislation dealing with piracy, it may be unable or unwilling to enforce it.<sup>211</sup>

Dubner was writing in 1997, but the situation has remained unchanged. Even if international law is fully implemented within the national legal framework, the problem will not be solved if states continue to show reluctance to apprehend pirates and submit them to

<sup>206</sup> Ewald Brandt, Statement at Maritime Talks 2009 at the International Tribunal of the Law of the Sea (Apr. 24, 2009), available at <http://www.iflos.org/en/events/maritime-talks/maritime-talks-2009-piracy—scourge-of-humanity.aspx>.

<sup>207</sup> *Spain: About Face on Piracy Suspects*, CHICAGO DEFENDER (May 7, 2009), <http://chicagodefender.com/2009/05/07/spain-about-face-on-piracy-suspects/>.

<sup>208</sup> According to Rear Admiral William Baumgartner of the US Coast Guard: "Most often, the pirates literally 'get away' with their illegal conduct. Cases in which pirates have been apprehended and actually brought to justice for their crimes are the exception rather than the rule—the decision to try Abdul Wali-i-Musi notwithstanding. Most often, even in cases in which pirate attacks have been thwarted or the pirates apprehended, the pirates escape prosecution and eventually return to their criminal, but successful, business model: pirating vessels and demanding huge ransoms." *International Efforts to Combat Maritime Piracy: Hearing Before the H. Subcomm. on Int'l Org., Human Rights, & Oversight of the H. Comm. on Foreign Aff.*, 111th Cong. 4 (2009) (statement of Radm. William Baumgartner, Dep't. of Homeland Sec., U.S. Coast Guard), available at <http://democrats.foreignaffairs.house.gov/111/bau043009.pdf>.

<sup>209</sup> Eugene Kontorovich, Comment to *US Will Prosecute More Pirates in the Eastern District of Virginia*, OPINIO JURIS (Apr. 22, 2010, 9:16 AM), <http://opiniojuris.org/2010/04/22/us-will-prosecute-more-pirates-in-the-eastern-district-of-virginia/>.

<sup>210</sup> *Id.*

<sup>211</sup> Barry Hart Dubner, *Human Rights and Environmental Disaster—Two Problems That Defy the Norms of the International Law of Sea Piracy*, 23 SYRACUSE J. INT'L L. & COM. 1, 34 (1997) (footnotes omitted).

their respective national courts. Thus, the issue of operationalization is critical.

An increasing awareness among states to operationalize the role of national courts is the most viable solution to the problem. The global community should come forward to prosecute piracy on the high seas and to take appropriate steps to ensure the prosecution of armed robbers who are engaged in maritime violence within the jurisdiction of the coastal state. The SUA Convention deals with the issue of prosecution more comprehensively than UNCLOS. The role that international law expects from national courts may be achieved by applying both conventions concurrently. UNCLOS may be suitable for apprehending pirates in the high seas, but the application of the SUA Convention is needed to ensure the prosecution of the captured pirates, as well as the prosecution of armed robbers who have engaged in violence within the jurisdiction of coastal states.

Recent UN Security Council resolutions provided an indication of the increasing realization of this proposition. Resolution 1816, which was the first resolution to address Somali piracy, primarily discusses states' obligations under UNCLOS. In a subsequent resolution, the Security Council noted that the SUA Convention provides for parties' jurisdiction to prosecute or transfer a suspected person to another state party for prosecution in cases of seizure or unauthorized control over a vessel.<sup>212</sup> The Security Council also urged the state parties to the SUA Convention to build judicial capacity for the prosecution of Somali pirates.<sup>213</sup> Although this resolution was only concerned with Somali pirates, this is a clear affirmation of state parties' obligations for establishing judicial capacity for the prosecution of persons engaged in unlawful acts under the SUA Convention.

An encouraging aspect of the SUA Convention is that it has no geographical limitations and it imposes a clear obligation to prosecute or extradite. If all relevant countries are party to this convention, the victim state may request the coastal state to hand over the suspected offenders. Moreover, the SUA Convention imposes a clear obligation on the state parties to criminalize offences listed in this convention under domestic law. This is a very important issue in relation to the exercise of jurisdiction by national courts.

---

<sup>212</sup> S.C. Res. 1846, para. 15, U.N. Doc. S/RES/1846 (Dec. 2, 2008).

<sup>213</sup> *Id.*

International law is not the main obstacle in combating piracy. In general, international law provides a workable legal framework. Many of the UNCLOS legal loopholes have been arguably solved by the SUA Convention.<sup>214</sup> An increased political will to implement the relevant provisions of UNCLOS and the SUA Convention can ensure the operationalization of the role of national courts in combating piracy and maritime armed robbery as envisioned by these conventions.

The main obstacle in operationalizing national courts is the non-implementation of the international law of piracy in the domestic legal system.<sup>215</sup> There are four main issues regarding the operationalization of national courts for the prosecution of pirates: criminalization of the act of piracy (including participation, facilitation, conspiracy, and attempts) under a domestic law endorsement of a universal jurisdiction; legal and operational arrangements for enforcement (through detention and arrest at sea); trial of apprehended pirates; and international cooperation for the apprehension and prosecution of pirates.<sup>216</sup>

In practice, the state of implementation of international law in domestic legal systems is poor. Most countries are yet to implement UNCLOS and the SUA Convention in their domestic legal framework.<sup>217</sup> The IMO conducted a review of national legislation on piracy in 2010. As shown in the Table 2, among the forty countries that submitted samples of their legislation, only six countries implemented the definition of piracy from Article 101 of UNCLOS within their national legalization, and only eight countries wholly or partially implemented universal jurisdiction under Article 105 of UNCLOS.<sup>218</sup>

---

<sup>214</sup> See *supra* Part I.B.

<sup>215</sup> See generally Yvonne M. Dutton, *Maritime Piracy and the Impunity Gap: Insufficient National Laws or a Lack of Political Will?*, 86 TUL. L. REV. 1111 (2012).

<sup>216</sup> Int'l Maritime Org. [IMO], *Piracy: Establishment of a Legislative Framework to Allow for Effective and Efficient Piracy Prosecutions*, at 2, IMO Doc. LEG 98/8/2 (Feb. 18, 2011).

<sup>217</sup> Int'l Maritime Org. [IMO], *Piracy: Review of National Legislation*, at 3, IMO Doc. LEG 97/9 (Sept. 10, 2010).

<sup>218</sup> *Id.*



**Table 2: Implementation of International Law in National Legislation (40 Countries)<sup>219</sup>**

Category	Number of Responses
Party to UNCLOS	31
Piracy defined as in UNCLOS 101	10
UNCLOS definition otherwise incorporated	6
Universal jurisdiction of UNCLOS 105 wholly or partially implemented	8
Piracy addressed by reference to the Law of Nations ( <i>jure gentium</i> )	5
Piracy addressed by reference to other laws on crimes of violence	27
Party to SUA 1988	37
SUA in full force	7
SUA offences (articles 3.1(a) and (b)) effectively applicable to piracy	10
SUA mandatory jurisdiction conditions (Article 6.1) effectively implemented	4
SUA discretionary jurisdiction conditions (Article 6.2) implemented	0
SUA jurisdiction condition (Article 6.4) implemented	0

The implementation record of the SUA Convention is more discouraging among the states that responded to the IMO survey. Only four countries had implemented the mandatory jurisdiction conditions under Article 6.1.<sup>220</sup> No countries had effectively implemented the discretionary jurisdiction under Article 6.2 or jurisdiction under Article 6.4.<sup>221</sup>

Against this backdrop, the UN Security Council urged member states to criminalize piracy within domestic law.<sup>222</sup> Due to the increasing efforts of the UN Security Council and different specialized agencies of

<sup>219</sup> *Id.* at 1.

<sup>220</sup> *Id.* at 3.

<sup>221</sup> *Id.*

<sup>222</sup> S.C. Res. 1918, para. 2, U.N. Doc. S/RES/1918 (Apr. 27, 2010); S.C. Res. 1950, para. 13, U.N. Doc. S/RES/1950 (Nov. 23, 2010); S.C. Res. 1976, para. 13, U.N. Doc. S/RES/1976 (Apr. 11, 2011); S.C. Res. 2020, para. 15, U.N. Doc. S/RES/2020 (Nov. 22, 2011).

the United Nations, states are showing their willingness to update their respective national laws to implement relevant international legal instruments.<sup>223</sup> A number of countries of the African region, including Kenya, the Seychelles, Mauritius, and the United Republic of Tanzania, have amended their national laws.<sup>224</sup> Countries outside the African region have also shown some interest in amending their domestic legislation.<sup>225</sup> The Czech Republic, France, Italy, Malta, Panama, and Spain, for example, recently amended their relevant legislation.<sup>226</sup>

A liberal approach from judges in interpreting national law is also needed for operationalization of national courts. In many countries, piracy laws are very old. For example, the US piracy law was enacted in 1819<sup>227</sup> and did not define the crime of “piracy.” It simply states that “[w]hoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.”<sup>228</sup> In a recent case, *United States v. Said*, a US district court decided that as this law was enacted in 1819 so “law of nations” means international law in 1819, and thus they considered the definition of piracy under customary international law as not well settled.<sup>229</sup> The court was reluctant to consider the definition of piracy provided by the 1958 High Seas Convention and UNCLOS.<sup>230</sup> Instead they decided that the 1820 decision of the US Supreme Court in *United States v. Smith*, which defines piracy as robbery at sea,<sup>231</sup> was still the authority in the US; thus, unless a pirate succeeds in stealing something, a piracy charge cannot be sustained.<sup>232</sup>

However, the legal reasoning behind this decision has been doubted by some US experts.<sup>233</sup> On the heels of *United States v. Said*,

<sup>223</sup> See generally U.N. Secretary-General, Letter dated Mar. 23, 2012 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2012/177 (Mar. 26, 2012) [hereinafter Secretary General Letter].

<sup>224</sup> Secretary General Report 2012, *supra* note 103, at 14–30.

<sup>225</sup> See, e.g., Secretary General Letter, *supra* note 223, at 8–9 (statements made by Bangladesh and Chile).

<sup>226</sup> Secretary General Letter, *supra* note 223, at 2.

<sup>227</sup> See *United States v. Said*, 757 F. Supp. 2d 554 (E.D. Va. 2010).

<sup>228</sup> 18 U.S.C. § 1651 (2012).

<sup>229</sup> *Said*, 757 F. Supp. 2d at 557–66.

<sup>230</sup> *Id.* at 564–66.

<sup>231</sup> *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820).

<sup>232</sup> *Said*, 757 F. Supp. 2d at 561.

<sup>233</sup> See Eugene Volokh, *Piracy Charges Dismissed by Federal Judge*, VOLOKH CONSPIRACY (Aug. 17, 2010, 7:55 PM), <http://volokh.com/2010/08/17/piracy-charges-dismissed-by-federal-judge/>; David Glazier, *How to Define Piracy (Cont'd): A Critique of U.S. v. Said*, OPINIO JURIS (Aug.

another US district court has taken a totally opposite view in *United States v. Hasan*.<sup>234</sup> In this case, the court denied the defendant's argument that there is no consensus definition of piracy under modern international law.<sup>235</sup> After a very extensive discussion on US and foreign cases,<sup>236</sup> and relevant national and international legal instruments, the court concluded that "the definition of piracy in UNCLOS reflects the current state of customary international law for purposes of interpreting 18 U.S.C. § 1651."<sup>237</sup> Agreeing with the district court decision in *United States v. Hasan*, the United States Court of Appeals for the Fourth Circuit finally overturned the decision of *United States v. Said* in its decision in *United States v. Dire*.<sup>238</sup>

The experience in the United States shows the importance of the approach of the judiciary in the operationalization of national courts. A court may take a rigid position, despite inclusion of universal jurisdiction in the national legal framework. For example, Article 381 of the Criminal Code of the Netherlands has vested universal jurisdiction for criminal proceedings in cases of piracy.<sup>239</sup> However, the Netherlands court made the universal jurisdiction subject to the "reasonable interest" test.<sup>240</sup> Thus, the Netherlands courts will only prosecute if the Netherlands has a reasonable interest.

This attitude supports the main argument of this article that the altruistic model is not working. Neither the executive department of the government nor the courts are supportive of the idea that a state will prosecute a pirate when that country has no involvement with the incident or with the persons involved with the incident. Moreover,

---

18, 2010, 7:45 AM), <http://opiniojuris.org/2010/08/18/how-to-define-piracy-contd-a-critique-of-us-v-said/>; Julian Ku, *How to Define Piracy (Cont'd): U.S. Judge Dismisses Piracy Charges*, OPINIO JURIS (Aug. 17, 2010, 9:11 PM), <http://opiniojuris.org/2010/08/17/how-to-define-piracy-contd-us-judge-dismisses-piracy-charges/>; Julian Ku, *How to Define Piracy Under U.S. Law and the "Law of Nations"*, OPINIO JURIS (Aug. 14, 2010, 12:42 AM), <http://opiniojuris.org/2010/08/14/how-to-define-piracy-under-us-law-and-the-law-of-nations/>.

<sup>234</sup> *United States v. Hasan*, 747 F. Supp. 2d 599, 602 (E.D. Va. 2010).

<sup>235</sup> *Id.* at 606.

<sup>236</sup> *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818); *Dole v. New England Mut. Marine Ins. Co.*, 7 F. Cas. 837, 847 (C.C.D. Mass. 1864) (No. 3966); *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *United States v. Madera-Lopez*, 190 F. App'x 832, 836 (11th Cir. 2006); *In re Piracy jure gentium*, [1934] A.C. 586 (P.C.).

<sup>237</sup> *Hasan*, 747 F. Supp. 2d at 633.

<sup>238</sup> *United States v. Dire*, 680 F.3d 446, 469 (4th Cir. 2012).

<sup>239</sup> LJN: BM8116, Rotterdam District Court, *supra* note 82.

<sup>240</sup> *Id.* For the approach of Dutch courts, see *Arrest Warrant of 11 April 2000, President Guillaume (Separate Opinion)*, *supra* note 146, at 41–42.

despite a clear jurisprudence establishing universal jurisdiction, there is no recent record of piracy prosecution based only on universal jurisdiction, with the exception of the prosecution of Somali pirates in regional countries.

It is clear that there is a need for legal reform in many countries.<sup>241</sup> It remains a significant challenge that states are not prompt in enacting necessary domestic legislation after ratifying an international treaty. Although international law imposes a general obligation to cooperate, it does not impose a positive obligation on states to take practical action for enforcing the law of piracy on the high seas. However, without a proactive role of states *vis-à-vis* enforcement, the operationalization of national courts for the prosecution of pirates cannot be ensured.

In the absence of a global police force, international law is wholly dependent on states for enforcement. Recent joint action by different states off the coast of Somalia can be treated as an encouraging example in respect to enforcement, although the failure of the prosecution of apprehended pirates has largely overshadowed the positive effect of this enforcement action. Nevertheless, the global community needs to consider the issue of enforcement seriously and systematically.

Building necessary facilitates for prosecution and imprisonment is a critical issue in developing/least developed countries. Many developing/least developed countries may lack adequate court and prison facilities and suffer from shortage of trained human resources. A global initiative for capacity building is needed. The Secretary-General, in his report submitted in 2012, identified specific measures for assistance for specialized anti-piracy courts in Somalia, the Seychelles, Kenya, Mauritius, and the United Republic of Tanzania.<sup>242</sup> He also identified specific measures to be taken by the United Nations Development Programme (UNDP) and UNDOC in relation to each of these countries.<sup>243</sup> In his report, the Secretary-General stated the following:

---

<sup>241</sup> Douglas Guilfoyle, *Prosecuting pirates in national courts: US v Said and piracy under US Law*, EJIL TALK! (Aug. 23, 2010), <http://www.ejiltalk.org/prosecuting-pirates-in-national-courts-us-v-said-and-piracy-under-us-law/>. See also Samuel Pyeatt Menefee, "Yo Heave Ho!": *Updating America's Piracy Laws*, 21 CAL. W. INT'L L.J. 151 (1990) (explaining the need for amendment of the domestic piracy-related law of the United States in the light of developments in international law).

<sup>242</sup> U.N. Secretary-General, *Rep. of the Secretary-General on specialized anti-piracy courts in Somalia and other States in the region*, para. 115–23, U.N. Doc. S/2012/50 (Jan. 20, 2012).

<sup>243</sup> *Id.* para. 115–23.

If further international assistance were provided and the other matters set out in the present report are implemented, the projection is that in two years, Somalia, Kenya, Seychelles, Mauritius and the United Republic of Tanzania collectively could conduct a maximum of 125 piracy prosecutions per year in accordance with international standards, involving up to 1,250 suspects. This would be a very significant contribution to combating piracy off the coast of Somalia, and would be greater than the total number of suspects prosecuted globally to date.<sup>244</sup>

This projection of the Secretary-General strongly supports the need for global assistance for operationalizing national courts. Mere legal implementation of international law within domestic legal systems will not be enough. There must be concerted efforts ensuring institutional support.

However, there is no well-funded project for institutional development and equipping developing countries' coast guard forces for combating piracy all over the world. At present, the United Nations (including UNDP and UNDOC) is mainly concerned with providing financial assistance for the prosecution of Somali piracy.<sup>245</sup> While the IMO has a long-term project for combating piracy, which began in 1998,<sup>246</sup> this project is for organizing regional seminars and workshops in the piracy-infested areas of the world and for evaluation and assessment, mainly to develop regional agreements on the implementation of counter piracy measures.<sup>247</sup> Although national courts should be the main actors for the prosecution of pirates, the system should not be operated based on the altruistic model. The failure of the altruistic model of the universal jurisdiction-based system can be explained by simple example. If a military vessel of the United Kingdom apprehends a pirates' vessel and arrests some pirates on the high sea while the pirates are attacking a vessel flying the flag of Liberia, who should take responsibility for prosecuting the pirates—the United Kingdom or Liberia? Common sense leads us to think that it should be Liberia. The United Kingdom has already given a free service to Liberia by saving its vessel, so why would it take further responsibility for the prosecution of the pirates?

---

<sup>244</sup> *Id.* para. 124.

<sup>245</sup> *Id.* para. 84.

<sup>246</sup> *Piracy and armed robbery against ships*, INT'L MAR. ORG., <http://www.imo.org/ourwork/security/piracyarmedrobbery/pages/default.aspx> (last visited July 25, 2012).

<sup>247</sup> *Id.*

Unfortunately, under UNCLOS, Liberia has no obligation to prosecute these pirates.

Although UNCLOS does not impose a responsibility for prosecution on the flag state of an attacked vessel,<sup>248</sup> Article 6 of the SUA Convention imposes an obligation on each state party to take such measures as may be necessary to establish its jurisdiction over the SUA Convention offences when the offence is committed against or on board a ship flying the flag of the state at the time the offence is committed. However, there is a serious practical difficulty in implementing this SUA Convention obligation. Under international law, owners have full liberty to choose the flag for their ship, provided they satisfy the registration requirements of the flag state. Consequently, every state has the right to set its own regulations and standards for the registration of ships. The nationality of a ship is determined by the flag it flies. UNCLOS imposed a condition of a “genuine link” between the ship and the flag state, without precisely defining the term.<sup>249</sup> This seems to be an incomplete provision and has created more problems than it has solved. A mere administrative act such as registration is insufficient to fulfill the condition of “genuine link.”<sup>250</sup>

These legal loopholes have created profitable business for flags of convenience. A huge number of ships, about 69.7 percent of the total

---

<sup>248</sup> *But see* UNCLOS, *supra* note 11, art. 94 (imposing a duty to the flag state for effective exercise of jurisdiction and control in administrative, technical and social matters over ships flying its flag). An obligation for prosecution of pirates for the flag state can arguably be extrapolated from this article.

<sup>249</sup> *Id.* arts. 91, 94.

<sup>250</sup> ALAN KHEE-JIN TAN, *VESSEL-SOURCE MARINE POLLUTION: THE LAW AND POLITICS OF INTERNATIONAL REGULATION* 47–57 (2006). *See also* *M/V Saiga* (No. 2) (St. Vincent v. Guinea), Case No. 2, Judgment of July 1, 1999, 2 ITLOS Rep. 10, *available at* [http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_2/merits/Judgment.01.07.99.E.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_2/merits/Judgment.01.07.99.E.pdf); Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, 1960 I.C.J. 150 (June 8), *available at* <http://www.icj-cij.org/docket/files/43/2419.pdf>. However, the original meaning of the term “genuine link” was different, as stated by the ICJ in the *Nottebohm* case: “nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual’s connection with the State which has made him its national.” *Nottebohm Case* (Liech. v. Guat.), Second Phase, 1955 I.C.J. 4, 23 (Apr. 6), *available at* <http://www.icj-cij.org/docket/files/18/2674.pdf>.

merchant fleet, operate with flags of convenience.<sup>251</sup> The leading flags of convenience country, Panama, alone represents 22.5 percent of the world tonnage, followed by Liberia at 12.1 percent, and Marshall Islands at 7.1 percent.<sup>252</sup> Despite their position as leading shipping nations (in respect of registered tonnage), none of these countries is currently participating in the anti-piracy operation off the coast of Somalia.<sup>253</sup> The most problematic aspect of this culture of flags of convenience is that the vessels have little connection with the flag state.<sup>254</sup> The practice of flags of convenience has created anarchy in the international maritime sector. The effect of this fundamental flaw in the international system has not been highlighted in the existing literature on piracy.

Accordingly altruistic model will not be very successful. The flag state of the attacked vessel should take the main responsibility for the prosecution of pirates. If there is an assurance from the flag state that they will accept apprehended pirates for prosecution, more states could well be encouraged to instruct their naval vessels to help foreign vessels in piratical incidents, as their efforts will have greater consequence.<sup>255</sup> As observed by a senior official of the US Government

flag states should consider their counter-piracy responsibilities – including by prosecuting the pirates that attack their ships. The economic stakes for flag states are significant. Ship registrations earn millions of dollars a year for flag states, tens of millions of dollars in

<sup>251</sup> Inst. of Shipping Econ. & Logistics, *ISL Comment*, SHIPPING STAT. & MARKET REV., July 2011, at 5.

<sup>252</sup> *Id.*

<sup>253</sup> *About CMF*, COMBINED MAR. FORCES, <http://combinedmaritimeforces.com/about/> (last visited Feb. 8, 2014); *Mission*, EU NAVFOR, <http://eunavfor.eu/mission/> (last visited Feb. 8, 2014). According to an official of the United States Department of State, “one of the primary challenges we face is that many states, to varying degrees, have not demonstrated sustained political will to criminalize piracy and to prosecute suspects who attack their interests. The world’s largest registry states (so-called ‘flags of convenience’) have generally proven either incapable or unwilling to prosecute suspected pirates who attack their ships.” Jennifer Landside, *Transnational Piracy: To Pay or to Prosecute?: Remarks*, 105 AM. SOC’Y INT’L L. PROC. 549, 550 (2011).

<sup>254</sup> The absence of any real relationship between the flag state and the vessel has been clearly portrayed by Judge ad hoc Shearer in his dissenting opinion in the Volga Case: “It is notable that in recent cases before the Tribunal [ITLOS], including the present case, although the flag state has been represented by a state agent, the main burden of presentation of the case has been borne by private lawyers retained by the vessel’s owners.” Volga Case (Russ. v. Austl.), Case No. 11, Judgment of Dec. 23, 2002, 6 ITLOS Rep. 10 (Shearer, J., dissenting), available at [http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_11/diss.op.Shearer.E.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_11/diss.op.Shearer.E.pdf)

<sup>255</sup> However, despite this problem some states are still taking the responsibility of combating piracy off the coast of Somalia because of the commercial interests of their nationals regarding cargo ownership or their beneficial ownership of vessels.

some cases. Those financial rewards come with responsibilities, including the defense of their ships through prosecution of suspected pirates.<sup>256</sup>

Moreover, some flag states that are operating open registry may be ideal place for the prosecution of pirates because prosecution in these countries may be less expensive than in developed countries currently participating in the anti-piracy naval operation.

The UN Security Council also emphasized the issue of the prosecution of pirates by a country that has some link with the incident. The UN Security Council, through its Resolution 2020:

Calls upon all States, and in particular flag, port, and coastal States, States of the nationality of victims, and perpetrators of piracy and armed robbery, and other States with relevant jurisdiction under international law and national legislation, to cooperate in determining jurisdiction, and in the investigation and prosecution of all persons responsible for acts of piracy and armed robbery off the coast of Somalia.<sup>257</sup>

However, this resolution targeted all countries with a possible jurisdiction. This resolution does not indicate which country should take the main responsibility. Obviously, from a practical perspective, the flag state of the attacked vessel and the state of the nationality of the perpetrators of piracy should take the main responsibility. Other states may not have a significant interest in the matter. In the case of maritime armed robbery, however, the coastal state should take a proactive role for prosecution, as it has an international responsibility for safeguarding foreign nationals within its sovereign jurisdiction. This is not just an issue of jurisdiction. The main issue is who should take on the burden of prosecution.

The global community should follow a policy that is pragmatic and implementable, not just based on altruism. Accordingly, a number of initiatives must be taken for the operationalization of national courts for the prosecution of pirates. First, the global community should take the necessary steps to ensure proper implementation of international law on maritime piracy in the national legal systems of all countries. Second, there should be an increasing effort at the global level to ensure the availability of the necessary funding for the establishment of institutional

---

<sup>256</sup> Thomas Kelly, Principal Deputy Assistant Sec'y, Bureau of Political-Military Affairs, Remarks at Combating Piracy Week (Oct. 25, 2012), available at <http://www.state.gov/t/pm/rls/rm/199929.htm>.

<sup>257</sup> S.C. Res. 2020, para. 14, U.N. Doc. S/RES/2020 (Nov. 22, 2011) (emphasis omitted).



facilities in the developing countries, particularly in the piracy-prone regions. Finally, it is time to examine how to ensure the implementation of the responsibilities of the flag states of attacked vessels.

However, as explained above, ensuring the implementation of the responsibilities of flag states is not an easy task because of the widespread use of flags of convenience. Nevertheless, it does not diminish in any way the legal obligation of the flag state, whether it is a flag of convenience country or not. Proper implementation of the flag state responsibilities may encourage ship-owners to flag their vessels in countries that are capable of fulfilling their international responsibility. A counter-argument may be made that a country of beneficial ownership of vessel should take the responsibility. However, this relationship is neither an international law recognized relationship nor is it easy to determine.

#### IV. CONCLUSION

Maritime piracy and armed robbery is an area in which the international legal system is dependent on the role of national courts. However, previous experience has shown that, due to a lack of political will from states, this anticipated role of national courts does not match the reality. This does not necessarily mean that transferring the role of national courts to international courts will change the present unsatisfactory scenario. The global community may even consider establishing a permanent court for piracy. However, for the practical reasons outlined here, one or more international courts will not be able to solve the problem completely. The most viable solution will be to operationalize the anticipated role of national courts.

This situation raises the issue of the need to re-examine the limitations of national judicial institutions as an international law actor in this world of sovereign states. While this is not to suggest that the international court itself is a successful actor in the international legal system, it is argued that a more coherent international legal system, clearly identifying the roles of international and national courts and backed by a proactive global political will, may pave the way to overcoming the present unsatisfactory situation.

Although there may arguably be a scope for creating new international courts, national courts are and should be the primary actors in this regard. However, despite legal commitments from state parties, the role of national courts has not been operationalized properly. States

have shown widespread reluctance in realizing the full potential of national courts. Somali piracy has clearly revealed this longstanding reluctance of states.

This article proposed a number of suggestions for the operationalization of judicial institutions. First, states must ensure the proper implementation of the international law of piracy in their respective domestic legal systems. This legal implementation must be supplemented by institutional arrangements for the enforcement of the relevant legislation. The global community should immediately take concerted action in building the capacity of developing/least developed countries. Finally, the system cannot be successful if it is based on a fully altruistic model of universal jurisdiction. There should be an increasing dialogue among states for proper implementation of the flag state's obligations.