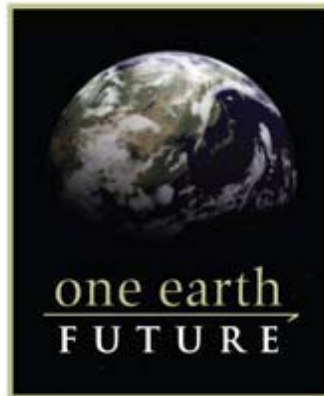


**BRINGING PIRATES TO JUSTICE:  
A CASE FOR INCLUDING PIRACY WITHIN THE JURISDICTION OF THE  
INTERNATIONAL CRIMINAL COURT**

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## **Abstract**

The large and growing impunity gap for piracy can only be closed if the international community decides to act to bring pirates to justice. Piracy is a serious crime of international concern that is increasing in frequency and severity despite the unique ways in which the international community has been working together recently in an effort to repress and combat piracy. This Article suggests that pirates should be brought to justice using the extant International Criminal Court (ICC) by way of an optional protocol to include piracy within the ICC's jurisdiction. Modern piracy is directed against victims from around the world, creates harms that are felt by the entire international community, and involves many of the same violent and cruel acts, such as murder, kidnapping, and hostage-taking, that are used to commit the crimes already within the ICC's jurisdiction. Also, like the other crimes included within the court's jurisdiction, piracy is a crime well-suited to the complementarity regime designed to help end impunity for serious crimes of concern to the international community. Nations are not prosecuting piracy suspects with any regularity, either because they do not have the laws, capacity, or resources to handle such prosecutions, or because they alone do not want to bear the various burdens associated with an expensive and difficult prosecution that affects numerous nations. The ICC could help end this culture of impunity regarding piracy offenses, and the burden of supporting the court's adjudication of piracy cases could be shared by the international community more generally.

## Introduction

Pirates do not only exist in legends and on rides at Disneyland. Modern pirates are armed with machine guns and rocket launchers and roam the seas in high-speed maneuverable skiffs that are supported by “mother ships,” enabling them to launch attacks from a distance of up to 500 nautical miles.<sup>1</sup> According to the International Maritime Bureau (IMB) Piracy Reporting Center’s October 2009 Report, worldwide actual and attempted pirate attacks in the first nine months of 2009 exceeded the total number of attacks in each of the prior four years.<sup>2</sup> In the first nine months of 2009, pirates boarded vessels in 114 cases, hijacked 34, took 661 crew members hostage, kidnapped 12, and killed 6.<sup>3</sup>

The international community as a whole feels the negative effects of piracy. Although the highest number of pirate attacks in 2009 occurred off the Gulf of Aden and the east coast of Somalia, significant attacks were also reported by Nigeria, Malaysia, Bangladesh, India, and Peru.<sup>4</sup> Victims of the attacks include flag states, ship owners, crew members, and intended recipients of lost or delayed cargo from around the globe.<sup>5</sup> Furthermore, about 80% of the world economy’s goods—including critical energy supplies like oil—flow through shared sea lanes.<sup>6</sup> Thus, piracy disrupts international trade. The presence of piracy also threatens to destabilize

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<sup>1</sup> See, e.g., PETER CHALK, *THE MARITIME DIMENSION OF INTERNATIONAL SECURITY: TERRORISM, PIRACY, AND CHALLENGES FOR THE UNITED STATES* 5-6 (2008) (noting that the more violent pirate attacks are committed by organized gangs who operate from a mother ship using sophisticated weaponry); European Security and Defence Assembly, Assembly of the Western European Union, *Report: The Role of the European Union in combating piracy*, ¶¶ 11-12, Doc. A/2037 (June 4, 2009) (explaining that pirates off the Somali coast are equipped with automatic weapons and rocket launchers and use mother ships to place skiffs in the water farther from shore); Roger Middleton, *Chatham House Briefing Paper: Piracy in Somalia: Threatening global trade, feeding local wars*, 4, AFP BP 08/02 (Oct. 2008) (noting that Somali pirates now use mother ships to increase the range from which they can launch attacks). In fact, on November 15, 2008, Somali pirates captured the *Sirius Star*, a supertanker carrying more than two million barrels of oil destined for the United States, some 450 nautical miles southwest of Kenya. It was this capture that alerted the world to pirates’ ability to extend their reach well beyond the coastlines by using mother ships from which faster, smaller skiffs loaded with outboard motors can be launched. See Thean Potgieter, *The lack of maritime security in the Horn of Africa region: scope and effect*, 31 STRATEGIC REV. S. AFR. 65 (May 1, 2009).

<sup>2</sup> International Chamber of Commerce, International Maritime Bureau, *Piracy and Armed Robbery Against Ships, Report For The Period 1 January – 30 September 2009*, 6-7 (Oct. 2009) [hereinafter IMB October 2009 Report].

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

<sup>4</sup> See IMB October 2009 Report, *supra* note 2, at 8, 10-11, 27-28.

<sup>5</sup> See *Piracy Against U.S. Flagged Vessels: Lessons Learned: Hearing Before the H. Subcomm. on Coast Guard & Maritime Transp. & Comm. on Transp. & Infrastructure* (May 20, 2009) (statement of Rear Adm. Brian M. Salerno, Asst. Commandant for marine Safety, Security and Stewardship, Dept. of Homeland Security, U.S. Coast Guard) (“[A] single piratical attack affects the interests of numerous countries, including the flag State of the vessel, various States of nationality of the seafarers taken hostage, regional coastal States, owners’ States, and cargo shipment and transshipment States.”) [hereinafter Statement of Rear Adm. Brian M. Salerno].

<sup>6</sup> See MICHAEL RICHARDSON, *A TIME BOMB FOR GLOBAL TRADE: MARITIME-RELATED TERRORISM IN AN AGE OF WEAPONS OF MASS DESTRUCTION* 3 (ISEAS Pubs. 2004) (noting that in 2002, world merchandise exports were worth \$6,270 billion and that approximately 80% of international trade by volume is carried by sea). See also *Report: The Role of the European Union in combating piracy*, *supra* note 1, at 4 (stating that some 16,000 ships per year and half of the world’s oil supplies pass through the Gulf of Aden, the busy shipping lane used to facilitate trade between Europe and Asia).

those states that depend on revenues from international shipping, such as Sudan, Saudi Arabia, Eritrea, Djibouti, Yemen, Oman, and Kenya.<sup>7</sup> Piracy even impedes the delivery of foreign aid and contributes to instability in already impoverished and unstable nations: the United Nations World Food Program had to suspend deliveries of food aid to Somalia in 2007 because of the dangers experienced in traveling through pirate-infested waters.<sup>8</sup> Finally, because many of the ships that do flow through narrow sea lanes are carrying oil or other vulnerable supplies, piracy also creates the risk of a major international environmental disaster.<sup>9</sup>

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

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<sup>7</sup> See International Expert Group on Piracy off the Somali Coast, Final Report: Workshop commissioned by the Special Representative of the Secretary General of the UN to Somalia Ambassador Ahmedou Ould-Abdallah, Nov. 10-12, 2009, Nairobi, Kenya, at 33 [hereinafter Nairobi Report].

<sup>8</sup> See Middleton, *supra* note 1, at 9.

<sup>9</sup> See Chalk, *supra* note 1, at 17.

<sup>10</sup> See, e.g., Nairobi Report, *supra* note 7, at 31; Eric Ellen, *Bringing Piracy To Account*, 102 JANE'S NAVY INT'L 29 (Apr. 1997); John Knott, *United Kingdom: Somalia, The Gulf Of Aden, And Piracy: An Overview, And Recent Developments* (Apr. 15, 2009), originally published by Mondaq Ltd., Jan. 20, 2009; Drew H. Pearson, *Can The Somali Pirates Be Stopped?*, 42 SEA CLASSICS 14, 20, available at 2009 WLNR 14868879; Fernando Peinado Alcaraz, *Chasing pirates is all very well – but who is going to lock them up?*, EL PAIS (English) Aug. 17, 2009, available at 2009 WLNR 15970667; Mike Corder, *Nations look to Kenya as venue for piracy trials*, BAY NEWS 9, Apr. 17, 2009, available at <http://www.baynews9.com/content/36/2009/4/17/461573.html?title=Nations+look+to+Kenya>.

<sup>11</sup> See, e.g., Statement of Rear Adm. Brian M. Salerno, *supra* note 5 (stating that many nations lack sufficient legal structures to prosecute piratical acts); Nairobi Report, *supra* note 7, at 25 (noting that even as to those states with national legislation to punish acts of piracy, the laws do not permit the exercise of jurisdiction beyond territorial waters); *Report: The Role of the European Union in combating piracy*, *supra* note 1, at 13 (stating that few states have adapted national laws to apply international treaty provisions regarding the repression of piracy, and indeed, within the European Union, only Germany, Finland, the Netherlands, and Sweden can exercise jurisdiction over acts of maritime piracy); Alcaraz, *supra* note 10 (noting that Spain's Penal code, for example, does not cover maritime piracy); THE TIMES (UK), "*Hijacked*" ship spotted in the Atlantic: Russian warship is on its way to save the crew, Aug. 15, 2009, available at 2009 WLNR 15912145 (noting that Portuguese law does not permit it to prosecute those accused of committing acts of maritime piracy).

<sup>12</sup> See, e.g., Corder, *supra* note 10.

<sup>13</sup> See, e.g., Veronique de Rugy, *Paying the pirate's price: do the economics of piracy demand the privatization of the sea?*, REASON MAGAZINE, July 2009, available at [http://findArticles.com/p/Articles/mi\\_m1568/is\\_3\\_41/ai\\_n32093037/?tag=content;coll1](http://findArticles.com/p/Articles/mi_m1568/is_3_41/ai_n32093037/?tag=content;coll1) (estimating between \$30 to \$150 million paid in ransom to Somali pirates in 2008); Marketplace for American Public Media, *The price of piracy on shipping*, April 10, 2009, available at [http://origin-marketplace.publicradio.org/display/web/2009/04/10/pm\\_piracy/](http://origin-marketplace.publicradio.org/display/web/2009/04/10/pm_piracy/) (estimating that Somali pirates collected some \$80 in ransoms during 2008); Munich Re, *Knowledge series, Piracy – Threat at sea: A risk analysis*, \_\_\_ (2009)

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

The reasons for including piracy within the jurisdiction of the ICC are many. As a theoretical matter, the treaty creating the ICC covers serious crimes of concern to the international community.<sup>16</sup> Piracy is a serious crime, the quintessential crime of customary international law, and the original universal jurisdiction crime.<sup>17</sup> The reality is that modern piracy involves many of the same violent and cruel acts—such as murder, kidnapping, and

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(estimating ransom payments for 2008 totaled about \$80 million, with another \$40-50 million for negotiation and delivery costs).

<sup>14</sup>See *supra* note 2.

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

<sup>16</sup> The Preamble to the Rome Statute states that the parties have agreed to create a permanent International Criminal Court with jurisdiction over the most serious crimes of concern to the international community as a whole. Rome Statute, *supra* note 15, at Preamble, ¶ 4. In addition, Article 1 also emphasizes that the court will have jurisdiction over the “most serious crimes of international concern.” Rome Statute, *supra* note 15, at Art 1. At the present time, the crimes over which the ICC does have jurisdiction are genocide, crimes against humanity, and war crimes. The parties to the Rome Statute also have declared that the ICC will have jurisdiction over the crime of aggression once a provision is adopted defining that crime and setting out the conditions under which the court can exercise jurisdiction over it. See Rome Statute, *supra* note 15, at Art. 5.

<sup>17</sup> See *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 156 (1820) (“The common law, too, recognizes and punishes piracy as an offence, not just against its own municipal code, but as an offence against the law of nations (which is part of the common law), as an offence against the universal law of society, a pirate being deemed an enemy of the human race.”); Restatement (Third) of Foreign Relations Law of the United States §§ 404, 423 (1987) (stating that piracy is one of the offenses that the United States and other states may define and adjudicate according to the universality principle); Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation*, 45 HARV. INT’L. L. J. 183, 190 (2004) (noting that international law today continues to consider piracy as universally cognizable and that it would be hard to find any authority suggesting that piracy was not covered by universal jurisdiction); Edwin D. Dickinson, *Is The Crime of Piracy Obsolete?*, 38 HARV. L. REV. 334, 335-39 (1925) (suggesting pirates as enemies of all mankind were subject to universal jurisdiction since the early seventeenth century).

hostage-taking by force and by use of sophisticated and dangerous weaponry—that are used to commit genocide, crimes against humanity, and war crimes over which the ICC currently has jurisdiction. Moreover, like the other crimes included within the court’s jurisdiction, piracy is a crime that is well-suited to the complementarity regime utilized by the ICC treaty, which is designed to help end impunity for serious crimes of concern to the international community.<sup>18</sup> Nations are not prosecuting acts of piracy with any regularity, either because they are unwilling or unable to do so.<sup>19</sup> Just as the ICC can fill the impunity gap for the crimes already within its jurisdiction, it can also fill the impunity gap for piracy. Finally, as a practical matter, the ICC already exists, it may already sit regionally if deemed necessary, and piracy can be added to its mandate by an optional protocol.<sup>20</sup>

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

## I. International Legal Framework for Combating Piracy

### A. The Basis for Universal Jurisdiction

Piracy, as recognized under customary international law, is the oldest crime to which universal jurisdiction<sup>21</sup> applies.<sup>22</sup> For centuries, nations have deemed pirates to be *hostis humani*

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

<sup>19</sup> See sources cited at *supra* note 10.

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

<sup>21</sup> In 2000, a group of scholars and jurists met at Princeton University to examine the doctrine of universal jurisdiction. In the document resulting from that meeting, entitled “The Princeton Principles on Universal Jurisdiction,” universal jurisdiction was defined as “criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the

*generis* (enemies of all mankind), such that any nation may use its own domestic laws to try to punish those committing piracy, regardless of the pirates' nationalities or where the piratical acts took place.<sup>23</sup> The general heinousness of piratical acts and the fact that they are directed against ships and persons of many nationalities—thereby disrupting international trade and commerce—warrants universal jurisdiction.<sup>24</sup> Indeed, the United States Supreme Court early recognized the pirate as an enemy of all mankind over which states could exercise universal jurisdiction because the pirate “commits hostilities upon the subjects and property of any and all nations, without regard to right or duty, or any pretence of public authority.”<sup>25</sup>

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

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nationality of the victim, or any other connection to the state exercising such jurisdiction.” Princeton Principles on Universal Jurisdiction, 28 (Stephen Macedo ed. 2001).

<sup>22</sup> See sources cited *supra* at note 17. See also WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAW OF ENGLAND 72, BOOK IV, 9<sup>th</sup> Ed. (1783) (stating that piracy is a violation of the law of nations and that “every community” has a right to punish pirates); Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, 40 VAND. J. TRANSNAT’L L. 1, 11 (2007) (suggesting that piracy is the oldest offense to which universal jurisdiction applies); M. Cherif Bassiouni, *Universal Jurisdiction For International Crimes: Historical Perspectives And Contemporary Practice*, 42 VA. J. INT’L L. 81, 110-11 (2001) (“[U]niversal jurisdiction to prevent and suppress piracy has been widely recognized in customary international law as the international crime par excellence to which universality applies.”); Michael P. Scharf, *Application of Treaty-Based Universal Jurisdiction To Nationals of Non-Party States*, 35 NEW ENG. L. REV. 363, 369 (2001) (stating that piracy has been widely accepted as a crime of universal jurisdiction for 500 years).

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

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

<sup>25</sup> See *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210, 232 (1844) (Story, J.). Justice Story further explained: If [a pirate] willfully sinks or destroys an innocent merchant ship, without any other object than to gratify his lawless appetite for mischief, it is just as much a piratical aggression, in the sense of the law of nations, . . . as if he did it solely and exclusively for the sake of plunder, *lucri causa*. The law looks to it as an act of hostility, . . . it treats it as the act of a pirate, and of one who is emphatically *hostis humani generis*. *Id.* See also *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 156 (1820) (stating that piracy is an offense against the law of nations and universal law, with the pirate being an enemy of the human race).

<sup>26</sup> In fact, in connection with their efforts in the early 20<sup>th</sup> century to contribute to the attempts to codify the international law regarding piracy, the drafters of the Harvard Research Draft noted the lack of universal agreement on what exactly constituted the crime of piracy. Harvard Research in Int’l Law Draft Convention and Comment on Piracy, 26 AM. J. INT’L L. 739, 749, 769 (Supp. 1932) [hereinafter Harvard Research Draft].

<sup>27</sup> United Nations Convention on the Law of the Sea, arts. 100-108, 110, Dec. 10, 1982, 1833 U.N.T.S. 397. [hereinafter UNCLOS].

<sup>28</sup> For a list of state ratifications, see

[http://www.un.org/Depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm](http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm). Notably, although the United

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

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

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

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
  - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
  - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (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).<sup>34</sup>

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

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States is not a party to UNCLOS, it did ratify an earlier version of the treaty with identical provisions regarding piracy. See Geneva Convention on the High Seas, Apr. 20, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82.

<sup>29</sup> Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221, 27 I.L.M. 668 (1998) [hereinafter SUA Convention].

<sup>30</sup> See International Maritime Organization, [http://www.imo.org/Conventions/mainframe.asp?topic\\_id=247](http://www.imo.org/Conventions/mainframe.asp?topic_id=247).

<sup>31</sup> See, e.g., Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AM. J. INT’L L. 269, 270-72 (1988); *Report: The Role of the European Union in combating piracy*, *supra* note 1, at 12.

<sup>32</sup> UNCLOS, *supra* note 27, at Art. 105.

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

<sup>34</sup> UNCLOS, *supra* note 27, at Art. 101.

Thus, UNCLOS defines piracy as a criminal act, the vast majority of nations are party to it, and it even contains a provision which, at least in theory, requires nations to prosecute piratical acts. Nevertheless, as a tool for combating piracy, UNCLOS is lacking in several respects. First, notwithstanding that the Convention requires nations to cooperate in repressing piracy, there is no mechanism to enforce this duty. An essential step required to permit nations to prosecute acts of piracy is legislation which incorporates UNCLOS provisions into domestic law. Yet, few states have apparently implemented domestic legislation incorporating UNCLOS's provisions relating to the repression of piracy.<sup>36</sup> Moreover, apparently only one major case has been brought using the piracy provisions of UNCLOS: a Belgian prosecution against Greenpeace.<sup>37</sup>

Second, UNCLOS's definition of piracy includes only those acts that occur on the high seas or outside the territory of any state.<sup>38</sup> However, most acts of piracy today occur more often than not in territorial waters and ports, rather than in international waters, meaning that UNCLOS does not provide a jurisdictional basis to prosecute those acts.<sup>39</sup> A nation's territorial waters may extend twelve miles from its coastline, and it is only that nation which has jurisdiction to prosecute wrongful acts occurring in its sovereign territory.<sup>40</sup> In addition, island states like Indonesia and the Philippines may claim within their territory all waters between the outermost points of their outermost islands.<sup>41</sup> Therefore, attacks occurring within the straits, gulfs, and archipelagos where international ships must pass and at ports where they must dock are not subject to UNCLOS.<sup>42</sup> Nevertheless, some commentators estimate that up to 70% of recent attacks have occurred in just such locations.<sup>43</sup>

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<sup>35</sup> *Id.* at Art. 103.

<sup>36</sup> *See, e.g., Report: The Role of the European Union in combating piracy, supra* note 1, at 13.

<sup>37</sup> Carlo Tiribelli, *Time To Update The 1988 Rome Convention For The Suppression Of Unlawful Acts Against The Safety Of Maritime Navigation*, 8 OR. REV. INT'L L. 133, 136 (2006).

<sup>38</sup> UNCLOS, *supra* note 27, at Art. 101.

<sup>39</sup> In fact, the International Maritime Bureau has indicated that its reports show that most attacks against ships occur within the sovereign territory of states. *See* IMB October 2009 Report, *supra* note 2, at 4.

<sup>40</sup> UNCLOS, *supra* note 27, at Art. 2.

<sup>41</sup> *Id.* at Arts. 46-48, 52-53.

<sup>42</sup> Indeed, some commentators have even suggested that acts of piracy within the exclusive economic zones of states—which per Article 57 can extend some 200 miles from the coastline—may not be covered by UNCLOS. Although Article 58 of UNCLOS does preserve universal jurisdiction over piracy in the exclusive economic zones, states seeking to apprehend pirates in such areas would have to do so in a way that would not interfere with the rights of the state claiming that exclusive economic zone. *See* Samuel Pyeatt Menefee, *The New "Jamaica Discipline": Problems With Piracy, Maritime Terrorism And the 1982 Convention On The Law Of The Sea*, 6 CONN. J. INT'L L. 127, 146-47 (citing T.A. Clingan, Jr., *The Law Of Piracy*, in *Piracy At Sea*, 168-170. *See also* UNCLOS, *supra* note 27, at Art. 58 ("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.")

<sup>43</sup> *See, e.g., Chalk, supra* note 1, at 7-8 (noting that in 2007, about 20% of attacks occurred in waters around the Indonesian archipelago, including the Malacca Straits, while some 50% of the attacks occurred in the territorial seas around Nigeria, Somalia, the Gulf of Aden/Red Sea, Tanzania, Peru, Bangladesh, and Malaysia); Robert C. Beckman, *Combating Piracy and Armed Robbery Against Ships in Southeast Asia: The Way Forward*, 33 OCEAN DEV. & INT'L L. 317, 328 (2002) (stating that none of the attacks in the Straits of Malacca and Singapore constituted piracy under UNCLOS because they took place in territorial waters); IMB October 2009 Report, *supra* note 2, at 11

Third, at least some language in UNCLOS suggests that for an act to be deemed piracy, two ships must be involved. Article 101(a)(i) defines acts of piracy to include those illegal acts committed by the crew or passengers of a ship “against *another* ship.”<sup>44</sup> Although Article 101(a)(ii) does not include this same wording to define an act of piracy, commentators differ on whether piracy under the Convention includes internal seizures, violence by the crew, or passengers of one ship against that same ship.<sup>45</sup> If two ships are required, however, then potential pirates need only to pose as passengers or crew and thereafter hold the ship ransom in order to avoid being defined as pirates under UNCLOS.

Finally, under UNCLOS an act is not piracy unless that act is committed for “private ends.”<sup>46</sup> Accordingly, politically motivated acts of terrorism committed against ships and their crew members on the high seas may not be included within the definition of piracy under UNCLOS. While commentators differ on whether this is the case,<sup>47</sup> the presence of the “private ends” language may make prosecuting certain ship attacks difficult or impossible under UNCLOS. Indeed, perpetrators may seize upon the language as providing an opportunity to claim their acts were politically motivated, thus requiring the prosecution and courts to address this additional evidentiary and legal issue.

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

The SUA Convention was enacted, at least in part, to ensure that politically motivated attacks on ships could be prosecuted by the international community as acts of piracy.<sup>48</sup> Pursuant to Article 3, a prohibited offense is committed by anyone who (1) “seizes or exercises control over a ship by force or threat thereof or any other form of intimidation;”<sup>49</sup> (2) “performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of the ship;”<sup>50</sup> or (3) attempts to do any of the above.<sup>51</sup> In contrast to UNCLOS, this Convention applies to offenses committed even in territorial or archipelagic waters or in port, as

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(showing 12 locations where ships were attacked at ports and anchorages three or more times in the first nine months of 2009).

<sup>44</sup> UNCLOS, *supra* note 27, at Art. 101(a)(i) (emphasis added).

<sup>45</sup> See Menefee, *supra* note 42, at 144.

<sup>46</sup> UNCLOS, *supra* note 27, at Art. 101.

<sup>47</sup> See, e.g., Bahar, *supra* note 22, at 27-37 (arguing that the “private ends” language in UNCLOS does not preclude treating terrorism on the high seas as piracy inasmuch as the “private ends” language was likely meant to exclude from covering those unrecognized insurgents that were acting solely against a foreign government and ships acting pursuant to public authority). Bahar cites to a number of commentators, however, who he claims mistakenly or without analysis conclude that the “private ends” language in UNCLOS prohibits prosecuting terrorist acts on the high seas using UNCLOS. See, e.g., Zou Keyuan, *Implementing the United Nations Convention on the Law of the Sea in East Asia: Issues and Trends*, 9 SING. J. INT’L & COMP. L. 37, 44 (2005); Tammy Sittnick, *State Responsibility and Maritime Terrorism In The Strait of Malacca: Persuading Indonesia and Malaysia to Take Additional Steps to Secure the Strait*, 14 PAC. RIM. L. & POL’Y J. 743, 758 (2005); Erik Barrios, *Casting a Wider Net: Addressing the Maritime Piracy Problem in Southeast Asia*, 28 B.C. INT’L & COMP. L. REV. 149, 156.

<sup>48</sup> See, e.g., *Report: The Role of the European Union in combating piracy*, *supra* note 1, at 12; Halberstam, *supra* note 31, at 270-72.

<sup>49</sup> SUA Convention, *supra* note 29, at Art. 3(1)(a).

<sup>50</sup> *Id.* at Art. 3(1)(b).

<sup>51</sup> *Id.* at Art. 3(2)(a).

long as the ship is scheduled for international navigation.<sup>52</sup> In terms of jurisdiction, any signatory state may prosecute violations of the SUA Convention provided that (1) the offense was against a ship flying its flag; (2) the offense occurred in its territory; (3) the offense was committed by a national of the state; or (4) a national of the state was a victim of the offense.<sup>53</sup>

Nevertheless, although the SUA Convention does appear to broadly prohibit offenses consistent with modern piracy, like UNCLOS, the SUA Convention is flawed. First, notwithstanding that the Convention requires the signatory state in whose territory an offender is found to either extradite or prosecute,<sup>54</sup> the SUA Convention has apparently only been used in one instance.<sup>55</sup> Thus, whatever the Convention's merits as a tool to combat piracy, nations do not appear to be using it. One commentator has suggested there is some confusion about the treaty's applicability inasmuch as some believe it can only be used to prosecute acts committed by terrorists.<sup>56</sup>

Second, even though the SUA Convention, unlike UNCLOS, theoretically covers attacks while ships are docked or in territorial waters, the statute also typically requires that the attack "is likely to endanger the safe navigation of the ship."<sup>57</sup> Based on this language, using the SUA Convention to prosecute attacks while a ship is docked—even violent attacks—may be difficult.

Finally, although the SUA Convention does apply broadly to offenses on ships that occur wherever the ship is located as long as it is otherwise engaged in international navigation, offenses can still go unpunished because only signatory states with a nexus to the offense are entitled to prosecute.<sup>58</sup> This is in contrast to UNCLOS which at least permits—and possibly requires—all signatory nations to prosecute, whether or not they have a nexus to the offense.<sup>59</sup> Therefore, if a signatory state with the required nexus to the offense does not prosecute, or if the states with a nexus to the offense are not signatories to the SUA Convention, pirates and maritime terrorists will go unpunished.<sup>60</sup> Under the SUA Convention, other nations would not have the jurisdictional basis to prosecute.<sup>61</sup>

## II. Modern Piracy and Responses of the International Community

### A. The Nature of Modern Piracy

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<sup>52</sup> *Id.* at Art. 4.

<sup>53</sup> *Id.* at Art. 6.

<sup>54</sup> *See id.* at Arts. 7 and 10.

<sup>55</sup> *See* Eugene Kontorovich, "A Guantanamo on the Sea": *The Difficulties of Prosecuting Pirates and Terrorists*, *forthcoming* 98 CAL. L. REV. (stating that the SUA Convention has only been used once – in a case originally brought in the United States District Court in the District of Hawaii by the United States against a cook who commandeered a fishing trawler). For a record of the facts of that case, *see United States v. Shi*, 525 F.3d 709 (9th Cir. 2008).

<sup>56</sup> *See* Beckman, *supra* note 43, at 330.

<sup>57</sup> *See* SUA Convention, *supra* note 29, at Art. 3.

<sup>58</sup> *See id.*, at Art. 6.

<sup>59</sup> *See* UNCLOS, *supra* note 27, at Art. 100.

<sup>60</sup> *See* George D. Gabel, Jr., *Smoother Seas Ahead: The Draft Guidelines As An International Solution To Modern-Day Piracy*, 81 TUL. L. REV. 1433, 1445 (2007) (citing Tina Garmon, *Comment, International Law of the Sea: Reconciling the Law of Piracy and Terrorism in the Wake of September 11<sup>th</sup>*, 27 TUL. MAR. L. J. 257, 273 (2002)).

<sup>61</sup> *Id.*

Over the last decade, pirate attacks on ships and crews have become an increasingly common occurrence.<sup>62</sup> The IMB reports that the 306 pirate attacks in the first nine months of 2009 already exceeded the total number of attacks in 2008.<sup>63</sup> Furthermore, it is important to note that the IMB tracks only those incidents that are reported. The true number of actual and attempted pirate attacks could be much higher, as it is generally believed that many ship owners do not report attacks for fear their ships will be delayed during an investigation or that their insurance premiums may rise as a result.<sup>64</sup> Moreover, the IMB reports that Somali pirates, in particular, are extending their territorial reach and now threaten the southern part of the Red Sea, the Bab el-Mandab Straits, and the east coast of Oman, as well as the Gulf of Aden and the east coast of Somalia.<sup>65</sup>

Most commentators suggest that money and opportunity explain this increase in piratical attacks. Modern pirates are primarily motivated by greed and the wealth—in terms of the cargo and crew—on merchant ships that can be held for ransom.<sup>66</sup> Some authorities estimate that ransom payments made to pirates for the safe return of crew totaled more than \$80 million in 2008.<sup>67</sup> Estimates further put the average ransom at about \$2 million, with “mere gunmen” in Somalia earning up to \$20,000 for participating in an attack—this in a country where the average income is \$500 per year and many are at risk of starvation.<sup>68</sup> These lucrative potential payoffs have also had the effect of increasing the stakes of piracy, which also likely explains the increasingly violent nature of the attacks. For example, the use of guns more than doubled in the first nine months of 2009 from the same period in 2008.<sup>69</sup>

In terms of opportunity, the huge amount of commercial maritime traffic provides pirates with plenty of targets. Seaborne trade increased some 300% between 1970 and 2006 from about

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<sup>62</sup> Between January 2005 and September 2009, the IMB reports some 1,377 pirate attacks worldwide. IMB October 2009 Report, *supra* note 2, at 6-7. This amounts to almost one attack every day some place in the world.

<sup>63</sup> IMB October 2009 Report, *supra* note 2, at 6-7. In the waters off the coast of Somalia 47 pirate attacks were reported in the first nine months of 2009 as compared to 12 for the same period of the prior year. In the Gulf of Aden, 100 attacks were reported in the first nine months of 2009 as compared to 51 for the previous year. See ICC Commercial Crime Services, *Unprecedented increase in Somali pirate activity*, Oct. 21, 2009, available at [http://www.icc-css.org/index.php?option=com\\_content&view=Article&id=376](http://www.icc-css.org/index.php?option=com_content&view=Article&id=376).

<sup>64</sup> See IMB October 2009 Report, *supra* note 2, at 27 (noting that a Denmark-based Risk Intelligence organization estimates that some 50% of pirate attacks on vessels related to the oil industry go unreported); see also, e.g., Chalk, *supra* note 1 at 7; JOHN S. BURNETT, *DAUGHTER WATERS: MODERN PIRACY AND TERROR ON THE HIGH SEAS* 181 (Penguin Books 2003).

<sup>65</sup> IMB October 2009 Report, *supra* note 2, at 27.

<sup>66</sup> See, e.g., *Report: The Role of the European Union in combating piracy*, *supra* note 1, at 4 (suggesting that pirate attacks in waters off the Somali coast have become a regular source of income for inhabitants of Somalia because the ransoms paid are huge and the risks to the pirates are minimal); Potgieter, *supra* note 1 (suggesting that pirates are after money, cargo, and ransom from ship owners, either for themselves or to finance militias on shore).

<sup>67</sup> See sources cited at *supra* note 13. Regarding individual ransom payments, the Ukrainian ship *Faina*, which was carrying 33 T-72 tanks, air defense systems, and rocket launchers, was held for five months until the pirates were paid a ransom of \$3.2 million dollars. The Saudi ship, *Sirius Star*, carrying two million barrels of oil, was released after about two months when pirates received a \$3 million ransom. See *Report: The Role of the European Union in combating piracy*, *supra* note 1, at 4.

<sup>68</sup> See Scott Baldauf, *Pirates, Inc.: Inside the booming Somali business*, THE CHRISTIAN SCIENCE MONITOR, May 31, 2009, available at 2009 WLNR 10358969. See also Nairobi Report, *supra* note 7, at 17 (stating that an armed pirate can earn between \$6,000 and \$10,000 for a single hijacking yielding a ransom of about \$1 million).

<sup>69</sup> See IMB October 2009 Report, *supra* note 2, at 27.

2.5 billion tons to about 7.5 billion tons per year.<sup>70</sup> About 80% of all global freight is shipped by sea, and some 12 to 15 million containers are on the world's oceans at any given time.<sup>71</sup> Much of that freight travels through narrow and congested maritime chokepoints, such as the Malacca Straits, the Strait of Bab el-Mandab, the Hormuz Straits, the Suez Canal, and the Panama Canal.<sup>72</sup> Ships must significantly reduce their speed to ensure safe passage through these narrow sea lanes, making the large and slow-moving merchant vessels easy targets for pirates who can quickly overtake them using small, fast, and maneuverable skiffs.<sup>73</sup> While the slow-moving merchant vessels are often large, they are often also manned with small crews who are unable to sufficiently guard the ship from attack.<sup>74</sup> In fact, pirates are often able to board the ship and take hostages within 15 to 30 minutes of being sighted.<sup>75</sup> Nor can crewmembers typically defend themselves since in most cases, ships do not carry weapons. Ordinarily, customs officers impound weapons onshore until the ship sails out of territorial waters, so having weapons at all is often not worth the trouble.<sup>76</sup>

Money and opportunity may also explain why much of modern piracy is now purportedly being carried out by well-organized pirate gangs—some of which are funded by investors who can share in the profitable rewards of this violent and disruptive activity.<sup>77</sup> Some pirates have done so well that they are now wealthy enough to hire others to mount the attacks: they invest in the weapons, boats, and communications equipment, but do not perform any attacks, thereby acquiring profit with little risk of arrest or prosecution.<sup>78</sup>

## B. Responses of the International Community

The international community appears to understand the severity of the problem of modern piracy and the need for aggressive action by the international community to combat it. For example, because of concerns about the consequences of acts of piracy on world trade and

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<sup>70</sup> See Matthew Gianni, *Real and Present Danger: Flag State Failure and Maritime Security and Safety*, World Wide Fund for Nature and International Transport Worker's Federation, 3 (Oslo/London June 2008).

<sup>71</sup> Chalk, *supra* note 1, at 10.

<sup>72</sup> *Id.* at 11.

<sup>73</sup> See *id.* See also Report: *The Role of the European Union in combating piracy*, *supra* note 1, at 5-6.

<sup>74</sup> See Chalk, *supra* note 1, at 11.

<sup>75</sup> See Lauren Ploch, *et al.*, Congressional Research Service, Report for Congress, *Piracy off the Horn of Africa*, 10 (Sept. 28, 2009).

<sup>76</sup> See, e.g., Burnett, *supra* note 64, at 88; Report: *The Role of the European Union in combating piracy*, *supra* note 1, at 15.

<sup>77</sup> See, e.g., Baldauf, *supra* note 68 (reporting that modern pirates are backed by a network of investors and corrupt officials who purchase speedboats, sophisticated weaponry and machinery, such as GPS devices, and choose targets based on the Lloyd's of London list of insured ships, and thereafter pay themselves by underground money transfers); James Kraska, *Coalition Strategy and the Pirates of the Gulf of Aden and the Red Sea*, 28 COMP. STRATEGY 197, 199 (2009) (stating that most of the ransom money collected by Somali pirates is siphoned off to organized crime kingpins who live in Puntland, and more recently, have moved to luxury compounds in Mombasa, Kenya); Potgieter, *supra* note 1, (stating that modern pirates are often organized along military lines, and that one of the most prominent groups is the Somali Marines which boasts between 75 and 100 members and possesses arms which include AK-47s, heavy machine guns, and rocket launchers); Report: *The Role of the European Union in combating piracy*, *supra* note 1, at 6 (noting that piracy today is more like organized crime with many competing pirate gangs, and with profits shared according to fixed rules whereby 30% goes to investors, 50% to the attackers; and 5% to families of deceased or captured pirates).

<sup>78</sup> See Report: *The Role of the European Union in combating piracy*, *supra* note 1, at 6.

humanitarian food aid deliveries,<sup>79</sup> in November 2007, some countries—including France, Denmark, the Netherlands, and Canada—began providing naval escorts for World Food Program ships.<sup>80</sup> More generally, beginning in late 2008, a multinational naval force (CTF-150) started conducting counter-piracy operations around the Gulf of Aden, the Arabian Sea, and the Indian Ocean.<sup>81</sup> The multinational naval force, which operated under a rotating command by the United States, Germany, and Denmark, included naval vessels from some 15 states.<sup>82</sup> In January 2009, CTF-150 was replaced by CTF-151, which is also a multinational naval force that combines military force, intelligence sharing, and coordinated patrols with the goal of countering and suppressing acts of piracy.<sup>83</sup> The European Union has also launched its own counter-piracy operation off the coast of Somalia using frigates and naval patrol aircraft.<sup>84</sup> Not only Western nations are participating in these counter-piracy operations. Pakistan, Japan, and Turkey are among the nations that have contributed to CTF-151.<sup>85</sup> China, Russia, and India have not formally joined a particular task force, but they have coordinated their actions with other forces.<sup>86</sup>

The United Nations Security Council has backed these coordinated efforts to combat the increased threat of piracy with a number of resolutions authorizing military action against Somali pirates at sea and on Somali territory.<sup>87</sup> In a resolution dated June 2, 2008, the Security Council authorized coalition navies for an initial period of six months to enter the territorial waters of Somalia and use “all necessary means to repress acts of piracy and armed robbery.”<sup>88</sup> By Resolution 1851, on December 16, 2008, the Security Council sanctioned even broader military action, allowing states to use land-based operations in Somalia to fight piracy.<sup>89</sup> By that resolution, for a period of one year, “[s]tates and regional organizations cooperating in the fight against piracy and armed robbery at sea off Somalia’s coast” were permitted to take “all necessary measures ‘appropriate in Somalia,’ to interdict those using Somali territory to plan, facilitate, or undertake such acts.”<sup>90</sup> Member nations unanimously supported that resolution, stressing the many negative consequences resulting from piracy off of Somalia’s coast.<sup>91</sup> The representative from Norway emphasized the threat to his country, since about 1000 Norwegian ships pass through the Bay of Aden each year.<sup>92</sup> The representative from Turkey pointed out

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<sup>79</sup> Ninety-five percent of all humanitarian aid provided by the World Food Programme is transported by sea. *See* The Secretary-General, *Report of the Secretary-General pursuant to Security Council resolution 1846 (2008)*, ¶ 35, U.N. doc. S/2009/146 (March 16, 2009).

<sup>80</sup> *See, e.g., Report: The Role of the European Union in combating piracy, supra* note 1, at 8; Middleton, *supra* note 1, at 7.

<sup>81</sup> *See* The Secretary-General, *Report of the Secretary-General pursuant to Security Council resolution 1846 (2008)*, ¶ 30, U.N. doc. S/2009/146 (March 16, 2009).

<sup>82</sup> *See, e.g., id.; Nairobi Report, supra* note 7.

<sup>83</sup> *Id.*

<sup>84</sup> *See Report: The Role of the European Union in combating piracy, supra* note 1, at 9.

<sup>85</sup> *See id.*

<sup>86</sup> *See id.*

<sup>87</sup> *See* S.C. Res. 1816, U.N. Doc. S/RES/1816 (June 2, 2008); S.C. Res. 1838, U.N. Doc. S/RES/1838 (Oct. 7, 2008); S.C. Res. 1844, U.N. Doc. S/RES/1844 (Nov. 20, 2008); S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008).

<sup>88</sup> *See* S.C. Res. 1816, U.N. Doc. S/RES/1816 (June 2, 2008).

<sup>89</sup> S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008).

<sup>90</sup> *Id.* at ¶ 1.

<sup>91</sup> *Id.* at ¶ 12.

<sup>92</sup> *See id.* (statement of Jonas Gahr Store, Minister for Foreign Affairs of Norway).

that two Turkish commercial vessels were still being held hostage.<sup>93</sup> Yemen's representative noted that due to regional proximity, Yemen was suffering the ill effects of the surge in piratical activity, including a proliferation of acts of piracy and human trafficking, as well as an uninterrupted flow of refugees towards its territory.<sup>94</sup>

International cooperation extends beyond the acts described above. To strengthen the international coordination called for by Security Council Resolution 1851, the United States created an international Contact Group on Piracy off the Coast of Somalia (the Contact Group).<sup>95</sup> Participants in the Contact Group formed four working groups to address counter-piracy efforts, focusing on (1) military coordination and information sharing, (2) judicial aspects of piracy, (3) shipping self-awareness, and (4) improvement of diplomatic and public information aspects of piracy.<sup>96</sup> Some 50 nations are now members of the Contact Group, together with international organizations such as the African Union, the League of Arab States, INTERPOL, NATO, and the European Union.<sup>97</sup> In addition, nations in the areas closest to important shipping lanes have also been coordinating separately to address the problem of piracy. In January 2009, 17 states from the areas surrounding the Western Indian Ocean, the Gulf of Aden, and the Red Sea met in Djibouti, and at the conclusion of the meeting adopted a Code of Conduct concerning the repression of piracy (the "Djibouti Code").<sup>98</sup> The Djibouti Code covers, among other things, the possibilities of shared patrol operations by ship and by air, as well as the use of piracy information exchange centers in Kenya, Tanzania, and Yemen. Nine states—Djibouti, Ethiopia, Kenya, Madagascar, Maldives, Seychelles, Somalia, Tanzania, and Yemen—signed the code at the conclusion of the meeting.

In short, the international community and individual nations are apparently willing to expend time, resources, and money to combat the threat piracy poses to the safety and security of ships and crews from around the globe, international trade, humanitarian aid deliveries, the stability of nations, and the environment. However, even though the international community seems to be uniquely focused on the problem, since undertaking these protective measures beginning in 2007, pirate attacks have only become more common and more violent.<sup>99</sup> Despite the presence of these multinational naval forces, in the last week of 2009, Somali pirates seized a

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<sup>93</sup> See *id.* (statement of Baki Ilkin of Turkey).

<sup>94</sup> See *id.* (statement of Abdullah M. Alsaidi of Yemen).

<sup>95</sup> See Statement of Rear Adm. Brian M. Salerno.

<sup>96</sup> See *id.*

<sup>97</sup> See, e.g., *Contact Group on Piracy Off Somalia Marks First Anniversary*, US FED. NEWS, Jan. 28, 2010, available at 2010 WLNR 1791847; [www.state.gov/t/pm/ppa/piracy/index.htm](http://www.state.gov/t/pm/ppa/piracy/index.htm).

<sup>98</sup> See, e.g., International Maritime Organization, *High-level meeting in Djibouti adopts a Code of Conduct to repress acts of piracy and armed robbery against ships*, Jan. 30, 2009, available at [http://www.imo.org/About/mainframe.asp?topic\\_id=10933](http://www.imo.org/About/mainframe.asp?topic_id=10933); *IMO Djibouti meeting agrees antipiracy measures*, MARINE LOG, January 30, 2009, available at [www.marinelog.com/DOCS/NEWSMMIX/2009jan00302.html](http://www.marinelog.com/DOCS/NEWSMMIX/2009jan00302.html); *Nine countries sign deal to fight Somali piracy*, January 29, 2009, available at [http://www.alarabiya.net/save\\_print.php?print=1&cont\\_id+65299&lang=eng](http://www.alarabiya.net/save_print.php?print=1&cont_id+65299&lang=eng). 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) is available at IMO Council Document C 102/14.

<sup>99</sup> See IMB October 2009 Report, *supra* note 2, at 5-6, 27.

British-flagged chemical tanker and a Greek bulk carrier.<sup>100</sup> Furthermore, as discussed below, the pirates face little threat of prosecution and punishment.

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

Although some attacks may have been thwarted due to the cooperative efforts of the international community, few of the pirates are prosecuted, despite the existence of universal jurisdiction, UNCLOS, and SUA.<sup>101</sup> Apparently, states have used universal jurisdiction as a basis for prosecuting piracy only in very few instances even though such jurisdiction has existed for hundreds of years.<sup>102</sup> States have used UNCLOS and the SUA Convention provisions even more rarely as a basis on which to prosecute acts of piracy.<sup>103</sup> Furthermore, most states have not likely incorporated those treaty provisions into their national laws.<sup>104</sup> Failing to incorporate treaty provisions aside, some states do not even have national laws that criminalize piracy, and where states have such laws, they are not uniform in how they operate or the conduct they prohibit.<sup>105</sup>

Instead of bringing pirates to justice, a culture of impunity reigns, with captured pirates often released and permitted to continue their illegal activities. In September 2008, a Danish warship captured 10 Somali pirates, but then later released them on a Somali beach, even though the pirates were found with assault weapons and notes stating how they would split their piracy proceeds with warlords on land.<sup>106</sup> Britain's Royal Navy has been accused of releasing suspected

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<sup>100</sup> See Jay Bandahur, *Piracy at Sea*, THE NEW YORK TIMES (Jan. 3, 2010), available at <http://www.nytimes.com/2010/01/04/opinion/04bahadur.html>.

<sup>101</sup> Some nations have undertaken to prosecute piracy, but the prosecutions are few when compared to the number of pirates (including those who finance and plan the attacks) who must have participated in several hundred attacks that have occurred in each of the last several years. For example, the Netherlands is prosecuting five Somali pirates who attacked a Dutch Antilles-flagged ship for sea robbery. France is prosecuting several more piracy suspects. See Corder, *supra* note 10. The United States is trying its first pirate in more than a century—a Somali who allegedly participated in hijacking the *Maersk Alabama* and holding its American captain hostage off the coast of Somalia during April, 2009. See Ed Pilkington, *Somali teen faces first US piracy charges in over a century*, GUARDIAN.CO.UK, Apr. 22, 2009, available at <http://guardian.co.uk/world/2009/apr/21/somali-pirate-trial-new-york>. Furthermore, as discussed in more detail below, the European Union and the United States have entered into agreements to have Kenya try pirates they capture.

<sup>102</sup> See Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L. J. 183, 192 (2004) (citing PROFESSOR ALFRED RUBIN, THE LAW OF PIRACY 302, 348 n.50 (2d ed. 1998)).

<sup>103</sup> See *supra* notes 33 (noting that UNCLOS apparently has only been used once in a case against Greenpeace) and 51 (noting that the SUA Convention apparently has only been used once – in *United States v. Shi*, 525 F.3d 709 (9th Cir. 2008)).

<sup>104</sup> See *Report: The Role of the European Union in combating piracy*, *supra* note 1, at 13 (stating that few states have incorporated the UNCLOS piracy provisions into their national laws).

<sup>105</sup> See, e.g., sources cited *supra* at note 11. See also Knowledge series, *Piracy—threat at sea: A risk analysis*, *supra* note 13, at 29 (stating that national laws regarding piracy are very diverse: some do not even mention piracy, while some require many conditions be met before an offense can qualify as an act of piracy); *Report: The Role of the European Union in combating piracy*, *supra* note 1, at 13 (indicating that some states do not define the crime of piracy in their criminal law).

<sup>106</sup> See Paulo Prada and Alex Roth, *On the Lawless Seas, It's Not Easy Putting Somali Pirates in the Dock*, WALL STREET JOURNAL, Dec. 12, 2008. See also Jeffrey Gettleman, *Pirates Outmaneuver Warships Off Somalia*, THE NEW YORK TIMES, Dec. 15, 2008 (reporting that both Danish and American navies had been releasing suspected pirates).

pirates even though hostages were found on board their vessels.<sup>107</sup> In September 2009, the Seychelles released 23 suspected Somali pirates.<sup>108</sup> Canadian naval forces have disarmed and released pirates because the Canadian government has stated it lacks jurisdiction under international law to prosecute them.<sup>109</sup> Rear Admiral Baumgartner of the Coast Guard described the impunity problem for the United States Congress:

Most of the pirates literally “get away” with their illegal conduct. Cases in which pirates have been apprehended and actually brought to justice for their crimes are the exception rather than the rule—the decision to try Abdul Wali-i-Musi<sup>110</sup> 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.<sup>111</sup>

It was this culture of impunity that U.S. Secretary of State Condoleezza Rice mentioned in stating her support for Security Council Resolution 1851, which authorized military action into Somalia in order to catch suspected pirates.<sup>112</sup>

Yet, despite this recognition that pirates are not being brought to justice and punished for their crimes, few nations are stepping up to prosecute suspected pirates. According to one report, between August 2008 and September 2009, some 343 suspected pirates were caught by naval forces and disarmed and released, while only 212 were sent somewhere to be prosecuted.<sup>113</sup> If nations are not willing and able to prosecute the pirates they capture, then the culture of impunity cannot end. Pirates will instead understand that even if captured in the act, they stand a good chance of being released and allowed to continue with their disruptive and violent behavior.

The lack of sufficient laws alone cannot explain the reluctance of nations to embrace their duty to help end impunity for piracy, because many nations have neither tried to use the laws that exist nor adopted domestic legislation criminalizing the conduct that comprises modern piracy.

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<sup>107</sup> See Jason Groves, *Navy gives Somali pirates food and water . . . then lets them sail off scot free*, MAILONLINE, Jan. 28, 2010, available at <http://www.dailymail.co.uk/news/artice-1246300/Navy-gives-pirates-food-water> -- let-sail...

<sup>108</sup> See Guelph Mercury, *Dispute between Somalia, neighbouring Seychelles over freeing of pirates in apparent trade*, Sept. 7, 2009, available at 2009 WLNR 17581248.

<sup>109</sup> See Guelph Mercury, *Canadian warship helps U.S.-flagged vessel evade pirates off Somalian coast*, May 22, 2009.

<sup>110</sup> Abdul Wali-i-Musi is the alleged pirate who attacked the *Maesk Alabama* who is being held for trial in the United States.

<sup>111</sup> See *International Efforts to Combat Maritime Piracy: Hearing Before the H. Subcomm. on International Organizations, Human Rights, and Oversight* (April 30, 2009) (statement of Rear Adm. William Baumgartner), available at <http://foreignaffairs.house.gov/111/bau043009.pdf> [hereinafter Statement of Rear Adm. William Baumgartner].

<sup>112</sup> See S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008) (statement of U.S. Sec’y of State Condoleezza Rice) (noting that also limiting the effectiveness of the response to piracy and armed robbery “was the impunity; piracy currently paid, and pirates paid little for their criminality”).

<sup>113</sup> See Jon Ungeod-Thomas and Marie Woolf, *Navy releases pirates caught red-handed: A legal loophole has helped scores of Somali gunmen escape justice*, SUNDAY TIMES (U.K.), Nov. 29, 2009, available at 2009 WLNR 24107815.

Even with sufficient laws, the lack of domestic law enforcement capabilities in certain interested states makes it virtually impossible for them to prosecute. Some territorial states or states whose nationals are committing pirate attacks are failed states or otherwise lack the institutional capacity to bring pirates to justice, making it unrealistic to expect that these states could alone manage the burden of prosecutions.<sup>114</sup> In his Congressional testimony, Rear Admiral Baumgartner made just this point when explaining the situation in Somalia: he noted that in contrast to Indonesia, Malaysia, and Singapore—which border the Malacca Straits—the states surrounding the Gulf of Aden and the Horn of Africa generally lack the maritime capabilities to respond to acts of piracy in their waters, and that Somalia in particular lacks judicial and law enforcement capacity to address piracy.<sup>115</sup> Moreover, where the acts of piracy occur within territorial waters—and most do<sup>116</sup>—under UNCLOS, only the coastal states would have jurisdiction to try the pirates under domestic laws.<sup>117</sup> However, if domestic laws or domestic law enforcement capabilities are lacking, and absent the willingness of other nations to invoke universal jurisdiction or the provisions of the SUA Convention, those pirates necessarily go unpunished. Even so, other nations wishing to prosecute would likely have to rely on local authorities to provide them with custody over the suspected pirates located within sovereign territory—something that will be difficult if the state lacks institutional capacity.

Even for states with significant institutional capacity, prosecuting pirates may prove difficult from both an evidentiary and cost-benefit perspective, particularly because the prosecuting state usually has to jail and possibly take responsibility for the pirate if convicted. Ships may be attacked by nationals of one state, registered under the flag of one state, owned by nationals of another state, insured by a company in another state, operated by a crew comprised of nationals from a number of other states, and transporting cargo from a number of other nations.<sup>118</sup> As a result, most interested nations would have to collect evidence from a location thousands of miles away from home, the pirates and witnesses would have to be transported to the interested country for trial, and the pirates would then likely have to be provided translation services.<sup>119</sup> Therefore, although many nations may be the direct victims of a piracy incident and

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<sup>114</sup> See, e.g., James Kraska and Brian Wilson, *Combating pirates of the Gulf of Aden: The Djibouti Code and the Somali Coast Guard*, OCEAN AND COASTAL MANAGEMENT, 2 (2009) (noting that captured pirates cannot be turned over to local authorities in Somalia because the failed state generally has no responsible authorities); Knowledge series, *Piracy – Threat at sea: A risk analysis*, *supra* note 13, at 29 (suggesting that many nations with territorial jurisdiction over acts of piracy do not have the security, enforcement, and financial resources to catch and prosecute pirates).

<sup>115</sup> Statement of Rear Adm. William Baumgartner, *supra* note 111. The lack of judicial capacity in Somalia was in fact a reason the Danish naval commander cited for simply releasing the 10 captured pirates on the beach. Commander Dan B. Termansen of Danish Fleet Headquarters said: “It is an illusion to think that these 10 would be brought to trial by the Somali authorities.” Nick Blenkey, *Time for on board security teams?*, MARINE LOG, Oct. 1, 2008, available at 2008 WLNR 25870132.

<sup>116</sup> See IMB October 2009 Report, *supra* note 2, at 4.

<sup>117</sup> See UNCLOS, *supra* note 27, at Art. 101.

<sup>118</sup> See, e.g., Kraska, *supra* note 77, at 207 (emphasizing the logistical difficulties associated with prosecuting pirates because the cases involve suspects from one country, witnesses and victims from other countries, and vessels that are registered in or carrying cargo from other countries). In fact, data collected by InterCargo News indicates that 28 countries were affected by just nine acts of piracy against nine bulk carriers between July 2008 and December 2008 in Somali waters.

<sup>119</sup> See, e.g., Alcaraz, *supra* note 10 (quoting Roger Middleton of the London-based think tank, Chatham House, as stating that one of the reasons pirates are not prosecuted is because it is expensive to gather evidence and witnesses and move them from the site of the crime); Statement of Rear Adm. William Baumgartner, *supra* note 111 (“all too

therefore have a special interest in seeing the pirates brought to justice, that interest may not be enough to compel them to take on the burden and costs of such an international prosecution. Given that these difficulties may convince directly affected nations to forgo prosecution, one can understand that nations with a less direct interest may not want to assert universal jurisdiction to prosecute acts of piracy.

Beyond the difficulties and costs associated with prosecution, there is evidence that nations—particularly Western nations—are avoiding their duty to prosecute pirates because of fears that if convicted, those pirates will then seek political asylum for themselves and their families. Roger Middleton, a researcher for Chatham House, the London-based think tank, explains: “These countries don’t want to be bombarded by claims of asylum from the pirates, who would ask not to be deported to Somalia, a country at war.”<sup>120</sup> In fact, in April 2008, the British Foreign Office warned the Royal Navy that detaining pirates at sea could be a violation of their human rights and could also lead to asylum claims by pirates seeking to relocate to Europe.<sup>121</sup> Fears about asylum claims may not be completely unfounded. Reports indicate that at least two of the pirates on trial for attacking a Dutch vessel have declared their intention to try to stay on as residents.<sup>122</sup>

#### **D. Kenya: the Current Solution**

Although states have generally refused to prosecute captured pirates in their own domestic courts with any regularity, they have not given up on the idea of bringing pirates to justice. Many nations recently turned to Kenya as a venue for prosecuting pirates captured off the coast of Africa. Beginning in late 2008 and throughout 2009, Kenya signed agreements with the United States, Britain, the European Union, Denmark, Canada, and China whereby it will detain and try suspected pirates in its courts in Mombasa.<sup>123</sup> These agreements provide for Kenya to receive financial support for the prosecution of pirates. Although the present amount of support is estimated to be in the range of \$2.4 million, Kenya has requested additional funds.<sup>124</sup> As of October 2009, Kenya was host to about 123 piracy suspects, 10 of whom have been tried and sentenced.<sup>125</sup>

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frequently the navies that apprehended the pirates have faced significant legal and logistical challenges in transporting pirates, evidence and witnesses to appear in their courts”); Kraska and Wilson, *supra* note 114, at 2 (suggesting that the great expense and burden of transporting pirates explain why few western countries are willing to prosecute).

<sup>120</sup> See Alcaez, *supra* note 10.

<sup>121</sup> See Economist Intelligence Unit, *Africa politics: Combating piracy*, EIU VIEWSWIRE, Feb. 13, 2009, available at 2009 WLNR 2884026.

<sup>122</sup> See Bruno Waterfield, *Somali pirates embrace capture as route to Europe*, TELEGRAPH.CO.UK, May 19, 2009, available at <http://www.telegraph.co.uk/news/worldnews/piracy/5350183/Somali-pirates-embrace-capture-as-route-to-Europe.html>.

<sup>123</sup> See, e.g., *Paris-based Group Says Accused Somali Pirates Denied Rights*, VOANEWS.COM, Aug. 27, 2009, available at 2009 WLNR 16728133; Bernard Sanga, *Country Declines to Host Detention Camp for Pirates*, EAST AFRICAN, Oct. 12, 2009, available at 2009 WLNR 20138549. The agreement between the United States and the Government of Kenya was memorialized in a Memorandum of Understanding dated January 16, 2009, and describes the conditions of transfer of suspected pirates and property captured in the western Indian Ocean, the Gulf of Aden, and the Red Sea. See Statement of Rear Adm. Brian M. Salerno, *supra* note 5.

<sup>124</sup> See Sanga, *supra* note 123.

<sup>125</sup> See *id.*

Nevertheless, while relying on Kenya seems a convenient solution for nations wishing to avoid the difficulties and costs associated with prosecuting pirates in their own courts, it offers only a partial, temporary solution to the impunity problem for piracy. Kenya only has so much capacity, and will not be able or willing to shoulder the entire burden of bringing pirates to justice. Recent statistics indicate that even without the addition of the suspected pirates, the Kenyan judiciary system is significantly overburdened. Kenya has approximately 53,000 prisoners, yet its national capacity allows it to house about 16,000.<sup>126</sup> Its current backlog of cases is over 870,000.<sup>127</sup> In addition, there are only three prosecutors in the Mombasa office of the Department of Public Prosecutions, and they have indicated they will be unable to take on the extra burden of piracy prosecutions without additional help from prosecutors who would have to travel from Nairobi—and Kenya would need other countries to provide travel expenses.<sup>128</sup> But even with a few additional prosecutors, Kenya still would not have the capacity to handle a significantly greater number of piracy cases. Kenyan prosecutors report that they are facing complex legal challenges which require additional specialized assistance—such as paralegal case management support and assistance with legal research.<sup>129</sup> Indeed, Kenya’s capacity to expeditiously adjudicate piracy cases is hindered by what its own authorities admit are outdated and formal rules of evidence which render essentially inadmissible many modern forms of evidence.<sup>130</sup>

Beyond the problems relating to capacity, some have raised concerns that Kenya is denying suspected pirates basic human rights as well as access to the fair trial processes the international community expects defendants to receive. According to Lawyers of the World, a Paris-based legal-aid network, Kenyan prisons are overcrowded and at least some accused pirates were held for months without adequate access to medical care or basic amenities, such as soap.<sup>131</sup> That same organization also points out that under Kenyan domestic law, defendants are not entitled to legal aid except in capital cases.<sup>132</sup> Although some groups like Lawyers of the World have agreed to represent suspected pirates in Kenya, under Kenyan law the government does not provide them with defense attorneys because convicted pirates in Kenya face a maximum of life in prison, not death.<sup>133</sup>

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<sup>126</sup> *See id.*

<sup>127</sup> *See id.*

<sup>128</sup> *See* Report of the Joint European Commission/United Nations Office on Drugs and Crime (UNODC) Programme, *EU Support To The Trial And Related Treatment Of Piracy Suspects* (May 2009), at 7 [hereinafter UNODC Report].

<sup>129</sup> *See id.*

<sup>130</sup> *See id.* at 6. In fact, a Navy Judge Advocate General who participated in an early Kenya trial of Somali pirates during 2006, described some of the issues with the rules of evidence used in Kenya. For example, although United States naval personnel photographed the pirate skiff and the weapons contained on it after capture, none of those photos was admissible at trial because Kenya requires the actual photographer to testify concerning the photos, and flying the photographer to Kenya would have been prohibitively expensive. By contrast, in federal courts in the United States, such photographs would be admissible upon the testimony of anyone who could authenticate the accuracy of the photograph. In addition, under evidentiary rules in Kenya only originals, as opposed to photocopies, are admissible. *See* Bahar, *supra* note 22, at 82.

<sup>131</sup> *See* Paris-based Group Says Accused Somali Pirates Denied Rights, VOANEWS.COM, *supra* note 123.

<sup>132</sup> *See id.*

<sup>133</sup> *See id.*

Finally, accusations that the Kenyan government does not respect human rights lead one to seriously question whether relying on Kenya to bring pirates to justice is the best solution to the impunity problem. According to Amnesty International's 2009 Report on Human Rights in Kenya, the government has failed to investigate and prosecute the allegations of torture and unlawful killings committed by Kenyan police during and after the December 2007 disputed presidential and parliamentary elections.<sup>134</sup> A Special Rapporteur for the United Nations emphasized the "terrible" Kenyan criminal justice system, at least in part, explained why police could murder with impunity. He noted that the investigation, prosecution, and judicial processes in Kenya are slow and corrupt.<sup>135</sup> In fact, the ICC prosecutor has asked the court to open an investigation into Kenya's post-election violence, arguing that there is a reasonable basis to believe that crimes against humanity were committed in connection with the December 2007 elections and thereafter.<sup>136</sup>

In sum, it is unlikely that Kenya will have sufficient capacity or ability to deliver efficient and fair trial processes that would allow it to serve as the solution to ending the culture of impunity that surrounds piracy. Only recently, Kenya's Internal Security Minister complained that its current piracy cases have already overstretched the capacity of Kenya's security agencies and courts.<sup>137</sup> As argued below, having an international court with authority to adjudicate piracy cases should help address the many legal, practical, and political obstacles that prevent nations from prosecuting acts of piracy and bring an end to impunity for this serious international crime.

### **III. The Case for an International Criminal Court with Authority to Adjudicate Piracy Cases**

#### **A. The National Versus International Debate**

Historically, states have enforced violations of international criminal law using two approaches: (1) domestication and adjudication of international law at the national level and (2) adjudication of international law using supranational courts or tribunals, such as the ICC. According to Professor Antonio Cassese, however, many legal scholars argue that the best judicial forum for prosecution of criminal offenses is national courts, rather than supranational courts.<sup>138</sup> There are two main reasons for this conclusion. First, national courts usually are physically closest to the location where the criminal offense was committed. Therefore, they should also be closest to the evidence necessary to prosecute the offense: namely, the defendant, the victims, the witnesses, and the physical evidence.<sup>139</sup> In addition, that proximity to the offense means that the trial will occur in the language of the defendant and his counsel, and allow the defendant—if convicted—to serve his sentence in his own country, close to his

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<sup>134</sup> See Amnesty International, *Human Rights In Republic Of Kenya 2009*, available at <http://www.amnesty.org/en/region/kenya/report-2009>.

<sup>135</sup> See Philip Alston, Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mission to Kenya (May 26, 2009), at ¶23, 16-17.

<sup>136</sup> See BOSTON GLOBE, *Inquiry into Kenya violence sought*, Nov. 27, 2009, available at 2009 WLNR 23980844.

<sup>137</sup> *Govt Decries Lack of Global Support Over Piracy*, NATION (KENYA), Oct. 12, 2009.

<sup>138</sup> See Antonio Cassese, *The Rationale for International Criminal Justice*, in THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE, 123 (Antonio Cassese ed., 2009).

<sup>139</sup> See, e.g., *id.*; William W. Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 TEX. INT'L L. J. 729, 734 (2003).

family.<sup>140</sup> National courts should also be closest to the community whose values and rules were breached as a result of the crime. Therefore, they may be better able through a local trial, to heal and provide justice to the community which has suffered from the crimes committed.<sup>141</sup> Second, proceeding through national courts is often considered less expensive than adjudicating criminal offenses in supranational tribunals for many of the same reasons cited above: proximity to the offense and the witnesses and evidence.<sup>142</sup>

Nevertheless, there are problems with relying on national courts to prosecute criminal offenses, particularly serious offenses that concern or cause harm to the international community more generally. First, national courts may not have the sufficient legal capacity or expertise to adjudicate serious crimes of international concern.<sup>143</sup> For example, some states may not have the proper legislative provisions to cover the type of criminality at issue.<sup>144</sup> Even if they do, the matters at issue may be too complicated for national courts—their police, prosecutors, and judges—either because of the type of crime committed or because, for example, the crime involves persons and evidence from more than one state.<sup>145</sup> Second, it may be difficult for national courts to administer justice in an unbiased and fair manner.<sup>146</sup> Not only may national courts or the government have a significant stake in the outcome of any prosecution, but also national courts may not have the procedural rules in place to adequately protect the accused. Nor does proceeding through national courts allow for uniformity in the provisions for punishment of those committing international crimes.

These failings at the national level explain the international community's increasing reliance on international courts as a forum to prosecute serious international crimes.<sup>147</sup> International courts can be specifically established with the legal capacity (legislation, judges, and personnel) to adjudicate the crimes in question.<sup>148</sup> In addition, international courts should be able to provide justice that is fairer and more impartial, given that the judges will not be linked to the state where the crime was committed or the defendants that committed the crime.<sup>149</sup> Finally, international courts can apply international laws and rules, and thereby ensure not only that fair

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<sup>140</sup> See, e.g., Cassese, *supra* note 138, at 123

<sup>141</sup> See, e.g., Cassese, *supra* note 138, at 123; Burke-White, *supra* note 139, at 735.

<sup>142</sup> See Burke-White, *supra* note 139, at 734.

<sup>143</sup> See, e.g., Cassese, *supra* note 138, at 124; Burke-White, *supra* note 139, at 734.

<sup>144</sup> See Cassese, *supra* note 138, at 125.

<sup>145</sup> See *id.* at 124.

<sup>146</sup> See, e.g., Cassese, *supra* note 138, at 124; Burke-White, *supra* note 139, at 734.

<sup>147</sup> For example, in 1993, the United Nations established the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 (ICTY) to preside over trials against those who had committed atrocities and crimes against humanity during armed conflict in the Balkans. See generally PAUL R. WILLIAMS & MICHAEL P. SCHARF, *THE ROLE OF JUSTICE IN PEACE BUILDING: WAR CRIMES AND ACCOUNTABILITY IN THE FORMER YUGOSLAVIA* (Rowman and Littlefield, 2002). The United Nations thereafter established the International Criminal Tribunal for Rwanda (ICTR) to preside over crimes committed during the civil war in Rwanda. See generally VIRGINIA MORRIS & MICHAEL P. SCHARF, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA* (Transnational Pubs., Inc., Irvington-on-Hudson, 1998). Finally, in 2002, after the required 60 states had ratified the Rome Statute, states created the ICC—the first permanent, treaty-based international criminal court established to help end impunity for perpetrators of the most serious crimes of genocide, crimes against humanity, and war crimes. See generally WILLIAM SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* (Cambridge 3d ed. 2007).

<sup>148</sup> See *id.*

<sup>149</sup> See, e.g., Cassese *supra* note 138, at 127.

procedures are followed, but also that there is uniformity in the application of laws and the sentencing of offenders.<sup>150</sup>

None of these factors is reason enough to abandon efforts to encourage national and regional prosecutions of piracy offenses.<sup>151</sup> However, they do show that perhaps a supranational enforcement mechanism can solve many of the problems associated with national prosecutions, including those problems which are currently leading to an impunity gap for piracy offenses.

## **B. The Appeal of an International Criminal Court with Authority to Adjudicate Piracy Cases**

### **1. Physical Proximity of the Court to the Piracy Offense**

One of the main reasons national courts are considered preferable is because they are close to the evidence and scene of the crime. However, this is rarely the case with piracy. The crime usually takes place hundreds of miles from the perpetrators' state and thousands of miles from the states that are most directly harmed.<sup>152</sup> Since so many nations are usually involved in a single incident, no matter where the court is held, people and evidence will have to be brought far from home. To illustrate this complexity is the case of the U.S.-flagged commercial ship, the *MV Maersk Alabama*. The ship was attacked in waters near Somalia by Somali pirates, but the U.S. is prosecuting the defendant, Abdul Wali-i-Musi in New York.<sup>153</sup> Although Somalia is close to this offense and many others, piracy trials in the nearly non-existent courts of Somalia are not presently a viable means to bring pirates to justice.<sup>154</sup> Thus, the case is proceeding far from the defendant's home; evidence and witnesses will have to be brought to New York; and if convicted, the defendant will serve his sentence in the United States.<sup>155</sup>

Regarding the argument that national courts may be best able to heal and provide justice to the community most affected by the offense, piracy is again a unique international crime. Unlike other international crimes—such as genocide, which is directed against one particular ethnicity or community—piracy attacks are directed against many different nations and victims. It is because the pirate attacks the persons and property of all nations that in 1844 the United States Supreme Court recognized the pirate as an enemy of all mankind over which states could

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<sup>150</sup> *See id.*

<sup>151</sup> In his Article entitled *Regionalization Of International Criminal Law Enforcement: A Preliminary Exploration*, Professor William Burke-White argues that balancing the various factors described above leads to the conclusion that the “effectiveness, cost, and legitimacy of international criminal justice appear to be maximized through enforcement at the regional level” as opposed to the supranational level or national level. *See* Burke-White, *supra* note 139, at 742-43. His argument, however, is about international criminal justice generally, rather than about any specific international crime, such as piracy. In the piracy context, regional enforcement mechanisms—such as relying on Kenya to try piracy cases—have some of the same failings as national enforcement mechanisms. For example, many nations and regions may lack the legal capacity and expertise required to fairly adjudicate piracy cases. Thus, although we may not wish to abandon regional enforcement mechanisms for piracy, in the case of Kenya, it requires funds and training to improve the legal capacity of its police, prosecutors, and courts. *See generally* UNODC Report, *supra* note 128.

<sup>152</sup> *See* sources cited at *supra* note 118.

<sup>153</sup> *See* Pilkington, *supra* note 101.

<sup>154</sup> *See generally* S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008), *supra* note 89.

<sup>155</sup> *See supra* Section II.D.

exercise universal jurisdiction.<sup>156</sup> Thus, piracy affects not just one nation, but rather the international community—not only because the victims are from many nations, but also because piracy threatens the safety and security of international trade, humanitarian aid deliveries, the stability of nations, and the environment. Therefore, it is the kind of crime over which an international criminal court could properly pass judgment on behalf of the world community.

In sum, although an international criminal court with authority to adjudicate piracy cases may not be located close to the offense, this is a shortcoming also shared by most national courts that could prosecute piracy offenses. In fact, one of the reasons states almost always refuse to prosecute suspected pirates in their national courts is precisely because the offenses involve so many different nationalities and occur so far away.<sup>157</sup> An international court is conceivably the only venue that could properly pass judgment on criminals whose victims include the entire world community.

## 2. The Financial Costs of Adjudicating Piracy Offenses

Although prosecuting piracy offenses in an international court may be costly, national prosecutions are also costly due to the international nature of piracy offenses. One of the main reasons states are not prosecuting piracy offenses domestically even when their nationals are directly affected by the attacks is the perceived financial costs of prosecution.<sup>158</sup> In most instances, the affected states would have to transport the defendants long distances, jail them while they await trial, pay for lawyers and translators, and pay to bring witnesses to the site of the trial.

Kenya is an excellent case in point. Victims and witnesses from around the world still need to be transported there to appear at trial, and translators need to be provided. In addition, organizations have stepped up to provide lawyers to defendants who are not otherwise entitled to state-provided defense attorneys. According to some reports, Kenya has already received about \$2.4 million in funding to try piracy cases.<sup>159</sup> Others estimate that Kenya and other countries in the region have already received close to \$7 million for piracy trials.<sup>160</sup> Nevertheless, as of October 2009, only 10 of the suspected pirates brought to Kenya had been tried and sentenced,<sup>161</sup> and Kenyan authorities have stated that they need millions in additional funds to help them build the capacity to prosecute the approximately 100 more pirates still awaiting trial.<sup>162</sup>

Finally, although supporting an international criminal court with authority to adjudicate piracy cases would be costly, the costs are likely commensurate with those necessarily required

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<sup>156</sup> See, e.g., *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210, 232 (1844) (Story, J.); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 156 (1820).

<sup>157</sup> See sources cited at *supra* notes 118 and 119.

<sup>158</sup> See sources cited at *supra* note 119.

<sup>159</sup> See Sanga, *supra* note 123.

<sup>160</sup> See Tristan McConnell, *Efforts to keep international shipping safe are hanging on the need to win cases in the creaking Kenyan court system*, THE TIMES (U.K.), Dec. 10, 2009, available at 2009 WLNR 24881133.

<sup>161</sup> See Sanga, *supra* note 123.

<sup>162</sup> See Sanga, *supra* note 123. See generally UNODC Report, *supra* note 128, at 6-16 (discussing the more than \$2 million in funds that would be needed to help Kenya improve its legal capacity to adjudicate piracy cases).

to try cases that concern attacks committed at sea and involving perpetrators, victims, and witnesses from around the world. In fact, a comparison of the ICC's 2010 budget with the amounts already spent to support trials in Kenya provides some evidence that pirates could be brought to justice by an international court at a cost that is not prohibitive. The ICC's budget for 2010 is approximately \$140 million, but it supports an administrative, prosecutorial, and judicial staff of more than 700.<sup>163</sup> Furthermore, with those funds, ICC prosecutors travel all over the world to investigate difficult and significant cases involving genocides, crimes against humanity, and war crimes, and the court hires translators and provides funds for witness travel.<sup>164</sup> If \$140 million is a guide to what it costs to operate a court with 700 people dedicated to handling investigations and prosecutions of a variety of international crimes, it may be possible to fund a special piracy chamber comprised of only 20 staff members for a small portion of that budget—perhaps less than \$10 million. Given the amounts already spent on trials in Kenya, and the additional amounts needed to provide Kenya with the capacity to try those cases—especially as it only has three prosecutors in its Mombasa office<sup>165</sup>—spending \$10 million (or even \$20 million) on a dedicated and specialized piracy team of experienced administrative, prosecutorial, and judicial staff would not seem extraordinary.

### 3. Legal Capacity and Expertise of the Court

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

By contrast, many national courts that would have jurisdiction over piracy cases are significantly lacking in legal capacity, judicial resources, and expertise. Many states do not have laws that would permit them to prosecute piracy offenses, either because they have not incorporated the provisions of UNCLOS<sup>166</sup> or the SUA Convention, or because they otherwise do not have domestic laws which criminalize piracy.<sup>167</sup> In addition, many nations—like Somalia—would be unequipped to prosecute piracy cases even if they had sufficient laws on their books. They simply do not have the stability, institutions, or personnel to allow them to investigate and fairly adjudicate such matters.<sup>168</sup>

Furthermore, even with the help of the international community, states in the African region cannot necessarily provide the legal capacity and expertise to adjudicate piracy cases that

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<sup>163</sup> See generally Proposed Programme Budget for 2010 of the International Criminal Court, International Criminal Court, Assembly of States Parties, ICC-ASP 8/10 (July 17, 2009) [hereinafter 2010 ICC Proposed Budget].

According to Annex V(a) of the 2010 ICC Proposed Budget, the court expects a total staff of approximately 781.

<sup>164</sup> See generally *id.*

<sup>165</sup> See UNODC Report, *supra* note 128, at 7.

<sup>167</sup> See sources cited at *supra* note 10.

<sup>167</sup> See sources cited at *supra* note 10.

<sup>168</sup> See sources cited at *supra* notes 114 and 115.

an international court could offer. The Kenyan experience is telling in this regard. In addition, although Tanzania, another country in the region, has apparently indicated it would be willing to have its courts handle piracy cases with funding assistance from the international community, its laws would have to be amended for it to have jurisdiction over piracy offenses occurring outside of Tanzanian waters.<sup>169</sup> Additional legislative amendments may be necessary to ensure that evidentiary and procedural rules promote efficient trials.<sup>170</sup> In short, these regional courts are lacking in legal capacity and expertise—things that should necessarily be present in any international criminal court with authority to adjudicate piracy cases.

#### **4. Ability of the Court to Ensure Unbiased and Fair Administration of Justice**

The general consensus is that international courts are less subject to political manipulation and bias, and should be able to more fairly administer justice not only because of that lack of bias, but also because such courts can establish rules and procedures that ensure a fair trial. Even though piracy offenses may not be committed by governments or government forces, some governments may benefit, either because they receive bribes or payoffs, or because they recognize that piracy is a viable way for people in the community to earn a living that they may not otherwise be able to earn.<sup>171</sup> Thus, some governments may have little incentive to initiate proceedings against their citizens. An international criminal court would not face similar incentives to forgo piracy prosecutions.

Even if states are not making political decisions to forgo piracy prosecutions, their laws and practices may be such that they cannot deliver the kind of humanitarian treatment and fair trials the international community expects all defendants should receive. Commentators have criticized Kenya for failing to treat suspect pirates humanely and also for denying them the kind of rights associated with fair trial processes.<sup>172</sup> An international criminal court can apply international principles, rules, and procedures that would meet the humanitarian and fair trial standards required by the international community. Furthermore, an international court would have the benefit of ensuring greater uniformity in adjudicating piracy offenses. At present, states have very diverse laws and sentencing possibilities as they relate to piracy offenses.<sup>173</sup> While uniformity in trial and sentencing standards are not required, certainly such uniformity can add to the overall fairness of the criminal processes as they relate to piracy.

#### **5. Conclusion**

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<sup>169</sup> See UNODC Report, *supra* note 128, at 13.

<sup>170</sup> See *id.*

<sup>171</sup> See, e.g., Nairobi Report, *supra* note 7, at 15 (noting that pirates in Somalia can earn much more from attacking ships than they can through the scarce legal employment available in Somalia); Ploch, *et al.*, Congressional Research Service, Report for Congress, *Piracy off the Horn of Africa*, 10 (Sept. 28, 2009), *supra* note 75, at 6 (stating that some have alleged that regional and local officials in the Puntland region of Somalia ~~are alleged to~~ have facilitated and profited from piracy).

<sup>172</sup> See sources cited at *supra* note 131 and 135.

<sup>173</sup> See, e.g., Knowledge series, *Piracy – threat at sea: A risk analysis*, *supra* note 13, at 29 (stating that national laws regarding piracy are very diverse: some do not even mention piracy, while some require many conditions be met before an offense can qualify as an act of piracy).

In sum, piracy is an international problem, and an international criminal court can bring pirates to justice and end the culture of impunity that currently reigns. In many cases, states are unwilling to shoulder the burden of prosecuting pirates because of the evidentiary difficulties and costs associated with hosting piracy trials. In other cases, states are unable to shoulder the burden of trying pirates because they do not have the legal capacity and judicial expertise required to investigate and prosecute such offenses. In both instances, an international criminal court could fill the impunity gap because the costs of prosecution could be shared by the international community as a whole, and the court could be established with the precise legal capacity and expertise that would enable it to efficiently and fairly adjudicate piracy cases. Indeed, these concerns have recently led many states and their representatives to call for a special international court to deal with cases of maritime piracy.<sup>174</sup>

#### IV. Piracy Should be Included within the Jurisdiction of the ICC

##### A. The Proposal

To help close the impunity gap for piracy offenses, this Article proposes including piracy within the jurisdiction of the ICC. The ICC came into existence in 2002 when the required number of states ratified the Rome Statute, thereby creating the court.<sup>175</sup> As of January 2010, 110 countries are States Parties to the ICC.<sup>176</sup> The crimes over which the court presently has jurisdiction are genocide, crimes against humanity, and war crimes.<sup>177</sup> According to the Preamble of the Rome Statute, the ICC was created with the aim of ending impunity for the perpetrators of “the most serious crimes of concern to the international community as a whole.”<sup>178</sup> In addition, because it is the duty of each state to exercise jurisdiction over those responsible for international crimes, the jurisdiction of the ICC was created to be complementary to national criminal jurisdiction: it will only investigate and prosecute where a national state with

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<sup>174</sup> See, e.g., S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008), *supra* note 89, Statement of Carsten Staur from Denmark (suggesting that in the long term states might need to examine the possibility of bringing pirates before an international tribunal for prosecution); Frank Gardner, *How Do You Tackle Piracy?*, BBC NEWS, Dec. 13, 2009, available at <http://news.bbc.co.uk/2/hi/africa/7782016.stm> (reporting that senior naval officers from the United States, France, and other nations agreed on the need to establish an international court to adjudicate piracy cases because there was presently nowhere to take arrested pirates to stand trial); *Germany Calls for International Court to Prosecute Pirates*, FOX NEWS.COM, Dec. 23, 2008, available at <http://www.foxnews.com/story/0,2933,471804,00.html> (reporting the German Defense Minister’s call for an international court to prosecute pirates); *Netherlands proposes international anti-piracy tribunal*, EXPATICA.COM, May 30, 2009, available at [http://www.expatica.com/nl/news/dutch-news/Netherlands-proposes-international-anti\\_piracy-tribunal\\_53106.html](http://www.expatica.com/nl/news/dutch-news/Netherlands-proposes-international-anti_piracy-tribunal_53106.html) (reporting that the Netherlands’ call for an international tribunal to try pirates because of the failings in the current legal framework); *Russia, Italy want to cooperate in forming intl court on sea piracy*, RUSSIA & CIS MILITARY INFORMATION WEEKLY, Oct. 30, 2009, available at 2009 WLNR 22822513 (reporting that Russia and Italy agree on the urgent need to cooperate to form an international court to prosecute piracy offenses); *PACE president wants to discuss proposed European security treaty in Russia*, RUSSIA & CIS MILITARY INFORMATION WEEKLY, Dec. 4, 2009, available at 2009 WLNR 25508342 (reporting that the President of the Parliamentary Assembly of the Council of Europe wants to meet with the Russian leadership to discuss the Russian initiative for an international anti-piracy court).

<sup>175</sup> See Schabas, *supra* note 147.

<sup>176</sup> See <http://www.icc-cpi.int/Menus/ASP/states+parties/The+States+Parties+to+the+Rome+Statute.htm>.

<sup>177</sup> See Rome Statute, *supra* note 15, at Arts. 6, 7, and 8.

<sup>178</sup> See Rome Statute, *supra* note 15, at Preamble ¶4.

jurisdiction over a case is “unwilling or unable genuinely to carry out the investigation or prosecution.”<sup>179</sup>

One reason I propose adding piracy to the jurisdiction of the ICC is that the ICC already exists. As a result, including piracy within the ICC’s jurisdiction would be less costly than establishing an entirely new international tribunal for piracy. The ICC has been in operation for more than seven years, and it has operating procedures, facilities, and a large staff. Furthermore, if states wish the ICC to adjudicate piracy cases in those regions where piracy offenses most frequently occur, the court is permitted to sit regionally.<sup>180</sup> Having the ICC sit regionally could potentially produce additional cost-savings because at least some defendants or witnesses may not have to be transported to the ICC’s current headquarters in The Hague. If the court does sit regionally, it may be able to share its expertise and resources with local judges and lawyers, thereby building local capacity to prosecute piracy cases.

Although piracy could be added to the crimes included within the court’s jurisdiction by amendment to the Rome Statute, proceeding by way of an optional protocol would arguably be more efficient and expeditious.<sup>181</sup> Amendments to the Rome Statute may only occur upon adoption by two-thirds of the States Parties, which must then be ratified by seven-eighths of the States Parties in order to take effect. Even so, states that have not accepted the amendment have certain rights to withdraw as States Parties to the Rome Statute.<sup>182</sup> By contrast, an optional protocol will come into effect by those states that sign it.<sup>183</sup> Any such protocol should create a separate chamber within the ICC to specifically handle piracy cases.<sup>184</sup> Having a separate chamber could ensure that piracy cases would be investigated, prosecuted, and adjudicated by those with the necessary expertise. Such a focus on expertise should also produce benefits in terms of fairness, speed, and efficiency. In addition, having a special chamber for piracy cases should make decisions about whether to have such a chamber sit regionally easier because only personnel specifically assigned to that chamber would be involved in and affected by the decision.

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

## **B. Theoretical and Practical Reasons to Include Piracy within the ICC’s Jurisdiction**

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<sup>179</sup> See Rome Statute, *supra* note 15, at Preamble ¶10 and Art. 17(1)(a).

<sup>180</sup> See Rome Statute, *supra* note 15, at Art. 3(3).

<sup>181</sup> The idea of potentially proceeding by a protocol, rather than by amendment, was raised during an Expert Workshop on Piracy hosted by the One Earth Future Foundation and the American Society of International Law on October 16-17, 2009 entitled “Suppressing Maritime Piracy: Exploring the Options in International Law.”

<sup>182</sup> See Rome Statute, *supra* note 15, at Art. 121.

<sup>183</sup> According to the UN Treaty Collections Definition of Key Terms, an optional protocol is an instrument that contains additional rights and obligations to a treaty. However, an optional protocol is independent of the main treaty and subject to independent ratification, meaning that not all parties of the main treaty need consent to it. See [http://treaties.un.org/Pages/Overview.aspx?path=overview/definition/page1\\_en.xml#protocols](http://treaties.un.org/Pages/Overview.aspx?path=overview/definition/page1_en.xml#protocols).

<sup>184</sup> The idea of potentially creating a separate chamber to handle piracy cases was also raised and discussed at the October 16-17, 2009 Workshop entitled “Suppressing Maritime Piracy: Exploring the Options in International Law.”

## 1. Piracy is a Serious Crime of Concern to the International Community

There are many theoretical and practical reasons to include piracy within the jurisdiction of the ICC. Piracy, like the other crimes already covered by the ICC treaty, is a serious crime of concern to the international community as a whole. Piracy is the first crime over which states decided the exercise of universal jurisdiction was appropriate, both because of the heinousness of piratical attacks and also because piracy by its very nature harms the world community as a whole.<sup>185</sup> Indeed, pirate attacks occur all over the world,<sup>186</sup> and the victims of attacks are similarly diverse.<sup>187</sup> Furthermore, piracy disrupts international trade, and even creates the risk of a major international environmental disaster.<sup>188</sup> Piracy also disrupts foreign aid, thereby contributing to instability in already impoverished and unstable nations.<sup>189</sup>

In addition, even though a pirate attack cannot be compared to a genocide that involves the mass murder of hundreds or thousands of people, including it within the ICC—especially by way of a protocol and a special chamber that would handle only piracy cases—will not trivialize the court or its mission in ending impunity for the most serious crimes of concern to the international community. Pirate attacks are characterized by increasing cruelty and violence which will certainly not cease until pirates are brought to justice.<sup>190</sup> In fact, pirates are committing some of the very acts that are included within the definition of acts that can constitute crimes against humanity when committed as part of an attack against a civilian population: namely, murder, torture, and rape.<sup>191</sup>

With respect to the present crimes covered by the Rome Statute, the ICC Prosecutor has stated his investigatory focus is on “those who bear greatest responsibility” or are the masterminds of the criminal activity.<sup>192</sup> Even if most of the captured and convicted pirates are lower-level perpetrators, they still committed serious crimes and deserve to be punished. Indeed, these ‘low-level’ pirates are those who threaten innocent civilians and hold them hostage at gunpoint in exchange for a portion of a ransom payment. Most importantly, the prosecution of lower-level pirates is a promising avenue towards obtaining the evidence necessary to prosecute the masterminds of piracy, who are likely well-hidden on shore. Notably, ad hoc international criminal tribunals for the former Yugoslavia and Rwanda have both prosecuted lower-level perpetrators for precisely these reasons. Richard Goldstone, the former chief prosecutor for the International Criminal Tribunals for both Yugoslavia and Rwanda, explained that his prosecutorial strategy necessarily required indicting non-leader perpetrators, especially because evidence against leaders was often more difficult to obtain, and because indicting those at the lower levels could provide the building blocks necessary to indict those at the top.<sup>193</sup>

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<sup>185</sup> See sources cited *supra* at notes 17 and 22.

<sup>186</sup> See IMB October 2009 Report, *supra* note 2, at 8, 10-11, 27-28.

<sup>187</sup> See *supra* note 5.

<sup>188</sup> See Chalk, *supra* note 1, at 17.

<sup>189</sup> See Middleton, *supra* note 1, at 9.

<sup>190</sup> IMB October 2009 Report, *supra* note 2, at 27.

<sup>191</sup> See Rome Statute, *supra* note 15, at Art. 7(1).

<sup>192</sup> See Office of the Prosecutor, International Criminal Court, Paper on some policy issues before the Office of the Prosecutor, Sept. 2003, available at [http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905\\_Policy\\_Paper.pdf](http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf).

<sup>193</sup> See *Living History Interview, Judge Richard Goldstone*, 5 TRANS. L. & CONTEMP. PROBS. 373, 380-81 (1995).

## 2. Employing a Complementarity Regime to End Impunity for Piracy Offenses

Employing a complementarity regime like that used by the ICC can help to end impunity for piracy offenses. Under that regime, the ICC may exercise jurisdiction where the nation having jurisdiction over the offense is “unwilling or unable genuinely to carry out the investigation or prosecution.”<sup>194</sup> Under the Rome Statute, “unwillingness” includes instances where national proceedings are a sham or are inconsistent with an intention to bring the person to justice, either because such proceedings are unjustifiably delayed or are not being conducted independently or impartially. The idea behind including the “unwillingness” provision was to preclude the possibility of sham prosecutions aimed at shielding perpetrators due to, for example, government participation in or complicity with the offense.<sup>195</sup> A nation’s “inability” to prosecute includes instances where, because of the collapse or unavailability of its national judicial system, the nation cannot obtain the accused or the necessary evidence, or is otherwise unable to carry out the proceedings.<sup>196</sup> Thus, nations may, and are encouraged to, prosecute offenses nationally, but the ICC’s complementarity provides another forum in which perpetrators can be brought to justice when national jurisdictions are either unwilling or unable to fight impunity.

Complementarity could work very well for piracy cases, allowing the Court to accept jurisdiction over cases that states refuse to prosecute, either because they prefer not to bear the costs and risks associated with prosecution, or because they simply do not have the stability or judicial resources to do so.<sup>197</sup> Admittedly, a state’s preference not to bear the costs of transporting witnesses or a state’s fears concerning asylum claims may not constitute “unwillingness” in the same way currently envisioned by the ICC, because the concern is not with potential government involvement in the crime or other bias. However, “unwillingness” in the context of piracy cases may simply be a form of “inability” because nations—even wealthy nations—may not have sufficient resources to bear the burden of such costly prosecutions, particularly given that in many cases, the nation is only one of many victim nations. In any event, unwillingness should be judged by a standard that recognizes the precise difficulties associated with having any single nation shoulder the unique burden of adjudicating piracy cases.

In sum, using the ICC’s complementarity regime would allow states to continue to prosecute piracy cases when they determine they have a sufficient interest in the particular offense to justify the costs and difficulties associated with prosecution—such as the decision of the United States to prosecute the pirate accused of hijacking the *MV Maersk Alabama*. In addition, employing such a regime could also ensure that nations do not simply release suspected pirates and allow them to return to their criminal activities. Those criminal activities pirates return to not only threaten and harm innocent lives, but also interfere with international trade, humanitarian aid, and the right of the world community to generally enjoy shared sea resources.<sup>198</sup>

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<sup>194</sup> See Rome Statute, *supra* note 15, at Preamble ¶10 and Art. 17(1)(a).

<sup>195</sup> See John T. Holmes, *The Principle of Complementarity*, 50, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS* (Roy S. Lee, ed. 1999) [hereinafter *MAKING OF THE ROME STATUTE*].

<sup>196</sup> See Rome Statute, *supra* note 15, at Art. 17(3).

<sup>197</sup> See *supra* Section II.C.

<sup>198</sup> See *supra* Section II.C.

### 3. That Piracy was not Included in the Original ICC Treaty is no Bar to Including it Now

The historical record indicates that the drafters of what later formed the basis of the Rome Statute creating the ICC considered piracy—to the extent referenced in Article 3 of the SUA Convention—for inclusion within the ICC’s jurisdiction<sup>199</sup> along with a host of other crimes which were termed “treaty-based” crimes.<sup>200</sup> Specifically, the 1994 draft of the Rome Statute prepared by the International Law Commission (ILC) at the request of the United Nations referenced crimes that were established under about nine different treaty regimes and which constituted exceptionally serious crimes of international concern.<sup>201</sup> In addition to Article 3 of the SUA Convention, the 1994 ILC draft statute included various treaties that were established to suppress crimes such as terrorism, hijacking, hostage-taking, and narcotics trafficking.<sup>202</sup> The reference to narcotics trafficking is of particular note, given that it was Trinidad and Tobago in 1989 which called for an international criminal court—after the idea had languished for many years—with the express purpose of establishing a court that could adjudicate illicit narcotics trafficking crimes of a transnational nature.<sup>203</sup>

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<sup>199</sup> The 1994 ILC Draft Statute did not include piracy within the meaning of UNCLOS for consideration as a treaty crime within the jurisdiction of the proposed international criminal court. The ILC’s stated reasons for declining to include piracy under Art. 101 of UNCLOS were as follows: the provisions of UNCLOS require states to cooperate in repressing piracy, the treaty confers jurisdiction on the state seizing the pirate vessel, and the treaty covers a very wide range of acts. Therefore, “on balance,” the ILC decided not to include piracy under UNCLOS as a crime over which the proposed international criminal court might exercise jurisdiction. See 1994 ILC Draft Statute, *supra* note 202, Commentary to Annex, Comment 1(d).

<sup>200</sup> See Report of the International Law Commission on the work of its forty-sixth session, 2 May 2-22 July 1994, Ch. II. B. I., United Nations General Assembly Official Records, Forty-ninth Session, Supplement No. 10, U.N. Doc. A/49/10 (1994), Art. 20 (a-e) and Annex [hereinafter 1994 ILC Draft Statute].

<sup>201</sup> See *id.* In Article 20 (a-e), the 1994 ILC Draft Statute included the following within the jurisdiction of the proposed court: genocide, aggression, serious violations of the laws and customs applicable in armed conflict, crimes against humanity, and “[c]rimes, established under or pursuant to the treaty provisions listed in the Annex, which having regard to the conduct alleged, constitute exceptionally serious crimes of international concern.”

<sup>202</sup> See ILC Draft Statute, at Annex.

<sup>203</sup> See Roy S. Lee, *Introduction: The Rome Conference and Its Contributions to International Law*, 2, in MAKING OF THE ROME STATUTE, *supra* note 198. In response to this call, the United Nations instructed the ILC to examine the possibility of creating such a court and direct its attention to preparing a draft Code of Crimes against the Peace and Security of Mankind. See Roy S. Lee, *Introduction: The Rome Conference and Its Contributions to International Law*, 3, in MAKING OF THE ROME STATUTE, *supra* note 198. The ILC presented a draft Statute for an International Criminal Court to the General Assembly in 1993. See Lawyers Committee for Human Rights, *Establishing an International Criminal Court: Major Unresolved Issues in the Draft Statute* (May 1998), 4, available at [www.iccnw.org/documents/LCHRUnresolvedissues.pdf](http://www.iccnw.org/documents/LCHRUnresolvedissues.pdf). It thereafter presented a revised draft Statute in 1994, with a recommendation to “convene an international conference of plenipotentiaries to study the draft Statute and to conclude a convention on the establishment of an International Criminal Court.” *Id.* In 1995, the United Nations established an Ad Hoc Committee to review the 1994 ILC Draft Statute and to prepare the text of a convention creating the court. See Lee, *supra* note 198, at 3-4, in MAKING OF THE ROME STATUTE. The work of the Ad Hoc Committee is contained in the Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, United Nations General Assembly Official Records, Fiftieth Session, Supplement No. 22, A/50/22 (1995) [hereinafter 1995 Ad Hoc Committee Report]. In 1996 and 1997, a Preparatory Committee took over the task of drafting the statute based on the 1994 ILC Draft Statute and also based on proposals and amendments submitted by states. See Lee, note 198, at 4, in MAKING OF THE ROME STATUTE. The work of the Preparatory Committee is contained in Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I (Proceedings of the Preparatory Committee during March-April and August 1996), Vol. II

However, many state delegations firmly believed that jurisdiction should be limited to the “core” crimes of aggression, genocide, crimes against humanity, and war crimes. During reviews of the 1994 ILC Draft Statute, treaty crimes were removed to bracketed form in the draft statute submitted for review at the Rome Conference in 1998.<sup>204</sup> The final Rome Statute excluded them altogether and confined the court’s jurisdiction to the core crimes.<sup>205</sup> Since a significant number of states continued to insist that the court’s jurisdiction should include terrorism and narcotics trafficking, Resolution E was adopted at the end of the Conference, recommending that a future Review Conference “consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court.”<sup>206</sup> Therefore, even though the ICC’s jurisdiction is currently limited to the core crimes, at least some member states believe its jurisdiction should be expanded.

The historical record demonstrates that state delegations generally raised several objections to including treaty-based crimes within the jurisdiction of the ICC. For example, states argued that limiting the number of crimes over which the court had jurisdiction would simplify negotiations and likely ensure more broad-based support for the court.<sup>207</sup> They also suggested that including treaty crimes would create issues regarding individual criminal responsibility of nationals of states not parties to particular treaties and possibly make it more difficult for states not parties to those treaties to join the court.<sup>208</sup> States further expressed concern that including additional crimes could overburden the court, especially because they believed many of the treaty-based crimes could be better handled nationally.<sup>209</sup> Finally, with regard to terrorism in particular, states suggested the crime could be difficult to define.<sup>210</sup>

None of these reasons for excluding treaty-based crimes from the ICC’s jurisdiction, however, should now serve as a basis for refusing to include piracy crimes within the court’s jurisdiction by optional protocol. First, the process of negotiating the Rome Statute is over; therefore, raising the possibility of including piracy within the jurisdiction of the court will not

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(Compilation of Proposals), United Nations General Assembly Official Records, Fifty-first Session, Supplements No. 22 and 22A, A/51/22 (1996) and Report of the Preparatory Committee on the Establishment of an International Criminal Court submitted to the Rome Conference, A/CONF.183/2 (Apr. 14, 1998) [hereinafter 1998 PrepComm Report]. In December 1997, the United Nations called to convene a United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, to be held in Rome, Italy, from June 15 to July 17, 1998, to finalize and consider the adoption of a convention (the “Rome Conference”). See General Assembly Resolution 160/52 entitled Establishment of an International Criminal Court, United Nations General Assembly Official Records, Fifty-second Session, Supplement No. 32, A/52/32 (1997). The 1998 PrepComm Report contains the text of the draft statute that was initially considered during the Rome Conference.

<sup>204</sup> See 1998 PrepComm Report, *supra* note 206, at ¶ 27 n.28. In footnote 28, the Preparatory Committee stated that it considered these crimes without prejudice to their final inclusion in the statute. Furthermore, it discussed them only in a general manner and did not have time to examine them as thoroughly as the other crimes.

<sup>205</sup> See Rome Statute, *supra* note 15, at Art. 5.

<sup>206</sup> See Final Act of the Conference, Resolution E, A/CONF.183/C.1/L.76?Add. 14, at 8.

<sup>207</sup> See, e.g., 1995 Ad Hoc Committee Report, *supra* note 206, at ¶¶ 54, 81; Preparatory Committee on the Establishment of an International Criminal Court, Summary of the Proceedings of the Preparatory Committee during the period 25 March 12 April 1996, U.N. Doc. A/AC.249/1, ¶63 [hereinafter 1996 PrepComm Report].

<sup>208</sup> See 1996 PrepComm Report, *supra* note 210, at ¶ 63.

<sup>209</sup> See, e.g., 1995 Ad Hoc Committee Report, *supra* note 206, at ¶¶ 54, 81; 1996 PrepComm Report, *supra* note 210, at ¶ 67.

<sup>210</sup> See 1996 PrepComm Report, *supra* note 210, at ¶ 63.

impinge on negotiations or detract from support for the court.<sup>211</sup> In addition, because this proposal suggests proceeding by protocol, negotiations concerning piracy can proceed separately and apart from any negotiations presently underway with regard amending to the Rome Statute. Furthermore, proceeding by optional protocol and by a separate chamber for piracy cases can help separate piracy offenses from the crimes currently included within the Rome Statute, thereby addressing any fears that including piracy within the jurisdiction of the ICC would somehow detract from the ICC's mission to end impunity for the most atrocious crimes and punish those most responsible for them.

In addition, questions of which states had or had not ratified certain treaties are now irrelevant. Piracy would be defined in connection with the optional protocol to the Rome Statute. And, one might expect that states would be very willing to ratify a protocol giving the ICC authority to prosecute piracy offenses. States are already turning pirates over to Kenya for prosecution, making it unlikely they would raise sovereignty concerns in connection with relinquishing suspected pirates to an international tribunal. Also, as noted above, many state representatives have already expressed support for an international tribunal to try piracy cases.<sup>212</sup>

Furthermore, although including piracy offenses within the jurisdiction of the ICC will certainly impose some burden on the ICC, it is well equipped, with significant resources and personnel at its disposal, to handle that burden.<sup>213</sup> If one creates a separate chamber to adjudicate piracy offenses, adding piracy to the jurisdiction of the ICC should not distract the court from its other duties. The burden on the ICC would be significantly less than the burden on those national courts that lack the resources and expertise to try piracy cases.<sup>214</sup> One of the reasons that some states still push to include terrorism and narcotics trafficking within the ICC's jurisdiction is that those offenses cause a great amount of harm to some states that are without the ability and resources to mount the kinds of investigations and to handle the kinds of adjudicatory processes that would be required to bring those criminals to justice.<sup>215</sup> Although larger countries like the United States regularly prosecute narcotics trafficking crimes, the United States has brought only one piracy case in the last century.

Finally, unlike the crime of terrorism—which some states object to including within the ICC's jurisdiction because of the difficulty of defining the crime so as to clearly distinguish

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<sup>211</sup> It is noteworthy that although the Lawyers Committee for Human Rights stated in its position paper its preference for limiting the jurisdiction of the ICC at least initially in order to facilitate adoption of the Rome Statute, it nevertheless stated that its "acceptance of a narrower jurisdiction for the court should not be taken as a reflection on the desirability of including treaty-based crimes, if consensus on such treaties is reached." Moreover, the Committee emphasized that it "strongly believes that the Statute should provide for a mechanism of periodic review that would enable states parties to consider the addition of other crimes to the court's jurisdiction at a later stage." Lawyers Committee for Human Rights, *Establishing an International Criminal Court: Major Unresolved Issues in the Draft Statute* (New York: Lawyers' Committee for Human Rights, 1996), position paper at 18.

<sup>212</sup> See sources cited at *supra* note 176.

<sup>213</sup> See 2010 ICC Proposed Budget, *supra* note 164.

<sup>214</sup> See Section II.B., *supra*.

<sup>215</sup> For example, in responding to arguments that the ICC's jurisdiction should be confined to several "core" crimes, some states noted that the new court would not replace national courts, but would provide an option for adjudication of cases like terrorism and narcotics trafficking, which required large-scale intelligence gathering and other significant resources to prosecute—resources which some states did not have. See 1995 Ad Hoc Committee Report, *supra* note 206, at ¶¶55, 82.

between international terrorists and freedom fighters<sup>216</sup>—the crime of piracy can be easily defined for the court. The texts of UNCLOS and the SUA Convention already exist. There have also been some efforts by groups like the Comité Maritime International (“CMI”) to draft a model piracy act to address the perceived flaws in both UNCLOS and the SUA Convention regarding their ability to capture the variety of acts that constitute modern piracy within their purview.<sup>217</sup> In addition, defining the crime of piracy anew can have additional benefits beyond addressing flaws under the current international legal framework: drafters could include provisions regarding evidentiary and other standards that are necessary to make piracy prosecutions both efficient and fair, thereby avoiding some of the problems associated with trials in Kenya.

## V. Conclusion

The large and growing impunity gap for piracy can only be closed if the international community decides to act to bring pirates to justice. Piracy is a serious crime of international concern that is only increasing in frequency and severity despite the unique ways in which the international community has been working together recently in an effort to repress and combat piracy.<sup>218</sup> Indeed, although the international community may be thwarting some pirate attacks, it fails to send pirates the message that piracy will not be tolerated. Instead of prosecuting the pirates captured by naval forces patrolling pirate-infested waters, nations often simply release pirates—even those “caught in the act.”<sup>219</sup> Some pirates fare even better: they receive food and water before they are released to continue their criminal activities.<sup>220</sup> Thus, not only do pirates see that “crime pays” when they receive a portion of the significant ransoms that are now being paid for the safe release of ships and their crews, but they also see that “crime pays” even when they are captured by naval patrols. Until the international community commits to regularly bring pirates to justice, it is unlikely pirates will change their cost-benefit analysis.

This Article suggests that pirates should be brought to justice using the extant ICC by way of an optional protocol to include piracy within the ICC’s jurisdiction. Modern piracy is directed against victims from around the world, creates harms that are felt by the entire international community, and involves many of the same violent and cruel acts, such as murder, kidnapping, and hostage-taking, that are used to commit the crimes already within the ICC’s jurisdiction.<sup>221</sup> Also, like the other crimes included within the court’s jurisdiction, piracy is a crime well-suited to the complementarity regime designed to help end impunity for serious crimes of concern to the international community. Nations are not prosecuting piracy suspects with any regularity: either because they do not have the laws, capacity, or resources to handle such prosecutions, or because they alone do not want to bear the various burdens associated with an expensive and difficult prosecution that affects numerous nations.<sup>222</sup> The ICC could help end this culture of impunity regarding piracy offenses, and the burden of supporting the court’s

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<sup>216</sup> See *supra* note 213.

<sup>217</sup> See International Maritime Organization, Legal Committee, 93<sup>rd</sup> session, *Maritime criminal acts – draft guidelines for national legislation, submitted by the Comité Maritime* (August 15, 2007).

<sup>218</sup> See *supra* notes 99 and 100 and accompanying text.

<sup>219</sup> See *supra* notes 106-111 and accompanying text.

<sup>220</sup> See *supra* note 107.

<sup>221</sup> See *supra* Section II.A.

<sup>222</sup> See *supra* Section II.C.

adjudication of piracy cases could be shared by the international community more generally. All acts of piracy will not cease because pirates are prosecuted. However, closing the impunity gap will deter those who learn that pirates will be punished for their crimes, rather than rewarded.