PIRACY IS AN INTERNATIONAL PROBLEM THAT NEEDS A MULTI-PRONG SOLUTION

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In March of 2011, five Somalis were sentenced for piracy related offenses in the United States for the first time in well over a hundred years. Then, in October 2011, a Somali pirate leader received two life sentences for his part in the takeover of an American yacht and the deaths of the crew. Despite increased efforts to deter attacks by pursuing suspected pirates, attacks do not appear to have slowed down. As of the beginning of October 2011, the International Maritime Organization (IMO) stated that fifteen ships and 316 people are currently being held hostage by pirates in Somalia. In 2012, there were sixty

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INTRODUCTION

In March of 2011, five Somalis were sentenced for piracy related offenses in the United States for the first time in well over a hundred years. Then, in October 2011, a Somali pirate leader received two life sentences for his part in the takeover of an American yacht and the deaths of the crew. Despite increased efforts to deter attacks by pursuing suspected pirates, attacks do not appear to have slowed down. As of the beginning of October 2011, the International Maritime Organization (IMO) stated that fifteen ships and 316 people are currently being held hostage by pirates in Somalia. In 2012, there were sixty
percent less pirate attacks in the first half of the year compared to the same time period for the year before. Not only are there more pirate attempts to hijack vessels, but the pirates are more aggressive than they were in the past.\(^5\) Four American hostages were killed on the crews of hijacked vessels in February 2011, and pirates now inflict more physical abuse such as beatings and hanging hostages upside down.\(^6\) With the rise in pirate activity, the higher cost of shipping, and the increase in violence, the international world is responding not only with physical force, but also with the use of the legal system.

This note will examine the rise of modern day, maritime piracy off the coast of Somalia by looking at the causes of piracy in Somalia including a nonexistent government, illegal fishing and dumping, and the economic incentives that piracy creates. The paper will then go on to discuss the problems that exist in prosecuting maritime piracy focusing on lack of legal jurisdiction, inadequate laws, logistical problems, and the costs associated with trials. The note concludes by examining and analyzing several legal solutions to prosecuting suspected acts of piracy such as new and updated regional laws, an international anti-piracy tribunal, regional courts, and courts in Somalia.

I. MODERN MARITIME PIRACY

A. Potential Causes of Piracy in Somalia

"Somalia is one of the poorest, most violent, least stable countries anywhere on Earth."\(^7\) Whether piracy in Somalia is caused by economic problems or because Somalia is a failed state is still debated.\(^8\) What is agreed upon is that a combination of man-made problems, including a nonexistent state government, illegal fishing and dumping, and a poor economy have all contributed to the ever-growing piracy business.\(^9\) Other problems in Somalia such as weapon and people

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\(^6\) Id.


smuggling have been linked to piracy according to the UN monitoring group.\textsuperscript{10} In addition, environmental hardships including droughts and floods have contributed to piracy off the Coast of Somalia and in the Gulf of Aden.\textsuperscript{11}

1. Failed State

Somalia has not had a fully functioning government since 1991\textsuperscript{12} when the rule of dictator Siad Barre ended.\textsuperscript{13} The clans that toppled Barre did not come to a mutual agreement about the government that would take effect after Barre’s rule ended.\textsuperscript{14} The lack of a government left Somalia as a failed State.\textsuperscript{15} In fact, Somalia is considered the number one “failed state” for the fifth year because of its lack of laws and its piracy problems.\textsuperscript{16} Although there is no recognized central government in Somalia, there are various clans that have political power, interests, and agendas.\textsuperscript{17} Puntland, a part of Somalia, has in the past helped free ships that were held hostage by pirates usually when local clan leaders have an interest in releasing the vessels.\textsuperscript{18} Somalia is fighting internally; thus it does not have the law enforcement necessary to protect its coastal territory\textsuperscript{19} or to protect vessels from being hijacked by Somali pirates while passing between the Horn of Africa and the Arabian Peninsula.\textsuperscript{20}


\textsuperscript{15} GEIB & PETRIG, supra note 12, at 14.

\textsuperscript{16} \textit{Somalia Again is at Top of Failed States List}, CNN WORLD (June 21, 2001), http://articles.cnn.com/2011-06-21/world/failed.states_list_1_haiti-somalia-states-list?

\textsuperscript{17} Healy & Hill, supra note 10, at 4.

\textsuperscript{18} \textit{id.} at 11.

\textsuperscript{19} GEIB & PETRIG, supra note 12, at 14–15.

\textsuperscript{20} Middleton, supra note 7; see also Papastavridis, supra note 11, at 126.
2. Illegal Fishing and Dumping

The lack of a central government coupled with the inability to protect Somali territory has led to other problems. Initially, Somali fisherman claimed to have become pirates because they could no longer fish due to illegal dumping of toxic chemicals and overfishing in Somali waters by foreigners.\(^{21}\) Foreign fishermen used large nets to catch fish such as tuna and whitefish and eventually depleted the stocks, leaving the Somali fishermen with no marine habitat for years.\(^{22}\) Piracy off the coast of Somalia started fifteen to twenty years ago when fishermen began demanding taxes from foreign boats that were illegally fishing.\(^{23}\) From the Somali point of view, the problem of illegal fishing has not been addressed according to a senior official from the African Development Bank, Professor Mthuli Ncube.\(^{24}\)

3. The Economy and Natural Disasters in Somalia

Almost half of all Somalis rely on foreign aid to survive, and many of those people are also displaced from their homes.\(^{25}\) The poor economy, coupled with high ransoms from hijacking vessels and crews, has enticed many young Somali men to enter the piracy business.\(^{26}\) At a time when the situation in Somalia was already dire for so many, it is exacerbated for some of the neediest people in society because humanitarian workers are having a difficult time providing aid to the country.\(^{27}\) To add to the already dismal situation, environmental conditions

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\(^{21}\) Geib & Petrig, supra note 12, at 9.


\(^{25}\) Geib & Petrig, supra note 12, at 15.


such as droughts and floods have led to even more severe food shortages in the country.28 Half of Somalia was affected by the severe drought and famine that plagued East Africa.29 The drought that hit Somalia and other countries in 2011 was the worst in the last sixty years.30 The shortage of food coupled with disease made matters much worse for Somalia and caused many citizens to flee to neighboring countries.31 The ships attempting to bring in the much needed aid to relieve the suffering population have been severely hampered because of piracy, and aid is unable to reach those in need on time.32

B. The Profitableness of Piracy

Piracy is a very lucrative business.33 It is no longer mainly fishermen trying to exact justice for themselves. Instead, it has turned into a profitable business that even has manuals describing what should and should not be done to hostages in order to ensure ransoms.34

The long Somali coastline, the high number of potential targets, and the possibility for a lot of money in a place with a few opportunities draws men into piracy.35 The lure of engaging in piracy is high


31 Somalia, supra note 29.

32 Global Trade, supra note 28, at 9.

33 GEIB & PETRIG, supra note 12, at 10.


because of the potential profits that can be obtained.\textsuperscript{36} Pirates invest a few months’ worth of negotiation and some initial money in supplies and overhead expenses and expect to double the amount they originally invested.\textsuperscript{37} The cost of piracy has increased five times since 2005, and the added cost of piracy has made shipping goods more expensive.\textsuperscript{38}

Not only do pirates get money from hijacking vessels, but they also enjoy power and status within the community. In fact, pirate leaders are more powerful than the government and often have the support of the local community.\textsuperscript{39} It costs a lot of money to hold hostages for long periods of time because of the cost of feeding and housing them, having guards twenty-four hours a day, and then bringing in translators to negotiate ransoms.\textsuperscript{40} The pirates would not be able to effectively hold hostages without the support of locals, who in turn profit from the activity.\textsuperscript{41} Despite the risks, the potential rewards can seem enticing to Somali youth who are trying to escape problems such as terrorism, food shortages, and fighting.\textsuperscript{42}

1. Amount of Money Made

Shipping companies pay ransoms in order to release their crews and ships from pirates, but the payments have helped cause piracy activity to increase.\textsuperscript{43} Ransoms have risen in the past few years, and it appears as though the trend will continue.\textsuperscript{44} According to a report by the Financial Action Task Force, average ransoms have increased from $150,000 in 2005, to over $5,000,000 in 2010.\textsuperscript{45} The Danish cargo ship, M.V. Danica White, was captured by pirates, and after more than eighty days of negotiation between a security firm and the pirates, the

\begin{footnotesize}
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\item See Global Trade, supra note 28, at 5.
\item Taken by Pirates, supra note 22, at 4.
\item Middleton, supra note 7; see also Papastavridis, supra note 11, at 126–27.
\item Taken by Pirates, supra note 22, at 4.
\item Id.
\item See generally Healy & Hill, supra note 10, at 8–9.
\item Trends, supra note 35, at 23.
\item Id.
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hijackers demanded a $1.5 million payday. The increase in ransoms has made piracy look even more attractive in the midst of the harsh realities in Somalia, and it is crippling the shipping industry. To ensure ransom payments, pirates employ harsher tactics such as holding hostages longer and using more physical abuse. The real cost of the ransom payments is almost double what is actually paid to the pirates.

The people who hijack ships are not the only ones benefitting from piracy. Translators, companies, and even villages can also make a substantial amount of money from pirate activity. Translators are usually well-educated people that work for a variety of pirate groups, and they can make up to $200,000. According to Captain Darch, one of the Svitzer Korsakov, the interpreter used by his hijackers was a school teacher.

New businesses have even sprouted up to cash in on increasing pirate activity. Specialized companies to charter planes for money drops for ransom demands have been created in the last few years. Not only do exploitive businessmen profit from pirate activities, but whole villages do also. Locals benefit from piracy because pirates spend money before a ransom is even received. Different amounts are invested by financial backers into each group of pirates depending on where they will be hunting for vessels. The wives of the pirates and the hired gunmen used for protection are paid before the trips take place, and the villagers receive a percentage of ransoms for letting

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48 Trends, supra note 35, at 23.
49 Bowden, supra note 47, at 9.
50 Rudolph Atallah, Pirate Financing: Understanding and Combating a Complex System, in CONFERENCE ON GLOBAL CHALLENGE, REGIONAL RESPONSES: FORGING A COMMON APPROACH TO MARITIME PIRACY, supra note 35, at 43.
51 Taken by Pirates, supra note 22, at 8.
52 Global Trade, supra note 28, at 7.
53 Taken by Pirates, supra note 22, at 9.
54 Atallah, supra note 50, at 43.
55 Id.
56 Id.
pirates anchor ships. Pirates hold hostages on land or in ports, in places like Eyl, which hosts the pirates and hostages until ransoms are obtained. Strangers even try to partake in the negotiations process for either the family of the victims or the pirates in an effort to cash in on part of the ransom. Ransoms are broken down into increments; 50% is paid to the people financing the attacks, the pirates receive 30%, and village elders and the hired gunmen split the last 20%. Without the accommodating communities on land, pirates would be unable to carry out their pirate activities and collect ransoms.

2. Risks

Somali pirates are even bolder now than ever before and recently even went as far as hijacking a vessel that was in an Omani port which was being protected by the coast state security. Somali pirates constantly rethink their strategies to make sure that they are continually changing their methods to account for all of the anti-piracy efforts. In order to adjust to the increased patrols and the international coalition navy that countries have employed to combat maritime piracy, the pirates have broadened their range to over 1000 nautical miles by using large ships.

In spite of the risks, the payoffs of pirate activity continue to draw new pirates, even if they have jobs. One of the pirates sentenced in the killing of four Americans on the yacht, Quest, was formerly an electrician, but became a pirate after seeing the large homes and nice cars pirates possessed. The hostages were killed after navy ships closely followed the yacht and negotiations for release stalled. The pirates

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57 Id.
58 Global Trade, supra note 28, at 5.
59 Taken by Pirates, supra note 22, at 10.
60 Atallah, supra note 50, at 43.
64 Trends, supra note 35, at 24.
wanted more than just the yacht because pirates could potentially ransom hostages for a lot of money. The convicted pirate asked the judge for leniency, citing a mistake in judgment since this was his first time being involved in pirate activity. The judge imposed the mandatory life sentence. Although the pirates in this case faced repercussions for their actions, many others do not; the lure of riches and a better life is too tempting for them not to pursue.

C. Advances in Pirate Techniques

Unlike pirates of old, current pirates are technologically advanced. They employ new types of boats to travel greater distances, as well as technology to better plan and execute attacks. The technology allows the pirates to go to sea for longer periods of time and to go further from the shore. Pirates are using the ransom money they receive in order to get more modern and high-tech equipment in an effort to be more effective. Not only are radars and high powered binoculars used, but cell phones and global positioning systems are also used. The weapons used by modern pirates have also become more advanced, and the hijackers generally carry assault rifles, grenade launchers, and pistols.

Leaving nothing to chance, the more advanced boarding techniques used by pirates help to make their hijackings successful even in the midst of an increase in navies patrolling the high seas. Even with the international community's stepped-up effort to employ a growing number of vessels to look out for pirates, it does not eliminate the risk of successful pirate attacks because the boarding takes place quickly.

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66 Id.
67 Id.
68 GEIB & PETRIG, supra note 12, at 11.
69 Id. at 10–11.
70 Piracy at Sea, supra note 23.
71 Rashid Abdi, Rethinking the Cure: Towards a Land-Based Solution for Somali Piracy, in CONFERENCE ON GLOBAL CHALLENGE, REGIONAL RESPONSES: FORGING A COMMON APPROACH TO MARITIME PIRACY, supra note 35, at 33.
72 GEIB & PETRIG, supra note 12, at 10–11.
74 Global Trade, supra note 28, at 4.
Pirates have honed their techniques and are able to board vessels within fifteen minutes.\textsuperscript{75} Even if a navy ship was close to a hijacking in progress, it would only have a short window to intercept the pirates before the attack was over.\textsuperscript{76}

Pirates are more advanced not only with their equipment and techniques, but with honing in on their targets.\textsuperscript{77} Pirates used to wait to attack until a vessel created an ideal opportunity for the hijackers to take it, but that is no longer the case. Modern pirates are able to find out more information about ships they want to capture and can create their own opportunities to take over vessels.\textsuperscript{78} Some of the Somali pirates also have an added advantage—specialized knowledge and training that was obtained during Somalia's attempt to create a coast guard that ultimately failed.\textsuperscript{79} Both the knowledge and equipment gained by attempting to train a Somali Coast Guard have been linked to piracy.\textsuperscript{80}

One of the most important advances Somali pirates have made to their piracy techniques is their innovative use of vessels. Modern pirates use smaller boats, skiffs, which have large engines and are able to move around with ease.\textsuperscript{81} They also use larger vessels, called "mother ships," to travel further from the coast and then they release the smaller, more maneuverable skiffs from the larger one.\textsuperscript{82} The mother ships are often large vessels such as fishing trawlers\textsuperscript{83} that had recently been hijacked and contain stores of food and fuel that can last for weeks.\textsuperscript{84} The pirates utilize the captured ships to aid them in their journey of finding new vessels to hijack.\textsuperscript{85} In 2010, the use of mother ships allowed pirates to start taking vessels that were hundreds of miles from shore.\textsuperscript{86} The increased area pirates are able to patrol means potential victims need to stay further from shore than ever before; thus

\textsuperscript{75} Id. \\
\textsuperscript{76} Id. \\
\textsuperscript{77} Id. at 6. \\
\textsuperscript{78} Id. \\
\textsuperscript{79} Global Trade, supra note 28, at 5. \\
\textsuperscript{80} Id. \\
\textsuperscript{81} Geiss & Petrig, supra note 12, at 10. \\
\textsuperscript{82} Id. \\
\textsuperscript{83} Global Trade, supra note 28, at 4. \\
\textsuperscript{84} Taken by Pirates, supra note 22, at 2. \\
\textsuperscript{85} Global Trade, supra note 28, at 4. \\
\textsuperscript{86} Xan Rice, US Navy Captures Somali Pirates' Mother Ship, GUARDIAN (Apr. 1, 2010), \url{http://www.guardian.co.uk/world/2010/apr/01/us-navy-captures-pirate-ship}. 
making it harder to protect the high seas against piracy.\footnote{Taken by Pirates, supra note 22, at 2; see also Global Trade, supra note 28, at 4.} Not only do mother ships allow pirates to travel further offshore, giving pirates a larger operating area, but the use of these vessels is also a hazard for potential victims. Vessels in close proximity to hijacked ships could potentially be unaware that the pirates have taken over the ship and put themselves in danger by not staying far away.\footnote{ICC, supra note 62, at 20.}

\textit{D. The Need to Deter Pirates by Prosecuting Them}

Many States that are involved in the fight against piracy use the catch-and-release approach to combat the problem.\footnote{GEIB \& PETRIG, supra note 12, at 29–30.} Catch-and-release is when a nation captures suspected pirates and, instead of prosecuting them, releases them after taking their weapons.\footnote{Id. at 29.} Many times the pirates are released because there is not sufficient evidence to prove that the suspected men are pirates and not fishermen as they claim.\footnote{Eugene Kontorovich, Equipment Articles: An International Evidence Rule for Piracy, in CONFERENCE ON GLOBAL CHALLENGE, REGIONAL RESPONSES: FORGING A COMMON APPROACH TO MARITIME PIRACY, supra note 35, at 100.} Although the method is popular and frequently used, the UN Security Council believes it undermines the anti-piracy effort because it does not punish pirate activity.\footnote{GEIB \& PETRIG, supra note 12, at 30.}

Although it may be obvious that a method such as catch-and-release is not an effective deterrent against piracy, experts are now worried that deterrents such as jail sentences might also fall short and may even act as an incentive for pirates to engage in unlawful activities.\footnote{Caitlin Dickson, Is it Worth it to Try Somali Pirates?, THE ATLANTIC WIRE (Feb. 23, 2011), http://www.theatlanticwire.com/global/2011/02/is-it-worth-it-to-try-somali-pirates/20996/.} If a pirate is convicted of his crimes, he could be sentenced to jail in Europe or the United States for a few years and receive political asylum after being released.\footnote{Id.} The fear of having acquitted pirates staying in the prosecuting countries coupled with the high costs of trying suspected pirates causes many nations to opt out of prosecuting pirates.\footnote{Kontorovich, supra note 91, at 100.}
E. Conclusion

Piracy is a global problem that affects much more than the crews and owners of the ships that are hijacked. Piracy not only costs shipping companies large sums of money, which is then distributed to consumers around the world, but it can also devastate nearby countries by affecting their economies. In Nigeria, fishing was one of the country’s biggest industries but because pirate hijackings scare fishermen from taking their boats out, there are thousands of jobs in jeopardy. Nigeria is losing $600 million from the blow to its fishing industry.96 There are many potential causes for piracy off the coast of Somalia and just as many potential solutions to fix the problem.

II. PROBLEMS PROSECUTING MARITIME PIRACY

Owing to jurisdictional limitations with the logistics of prosecutions, States are often unable or unwilling to domestically prosecute pirates.97 A few States have tried pirates,98 but the prosecution is often riddled with problems such as outdated anti-piracy laws, lack of jurisdiction, and numerous logistical problems. Jurisdictional issues, such as attacks occurring outside of the limits of coastal states,99 and evidentiary problems, such as the hardships of securing crime scenes, are not the only difficulties that face prosecuting countries.100 Hijacked vessels usually complete their voyages, if at all possible, and it can be difficult to have witnesses testify at trials even if they can be tracked down.101 Financial problems also contribute to whether pirates are prosecuted. There are high costs to consider when witnesses would have to be flown from their home countries to a different country where the trial is occurring. Sometimes prosecuting countries may not have the money or the resources to ensure the witnesses’ testimony.102

97 GEIB & PETRIG, supra note 12, at 29.
98 Id. at 30.
100 Id. at 72.
101 Id.
102 Id.
Also, pirates can flee before they are apprehended and may enter the jurisdiction of another country, complicating their apprehension.\textsuperscript{103}

These numerous problems that countries face cause many States to opt out of prosecuting pirates. If the State that captures the pirates decides not to prosecute the suspected pirates it had apprehended, then the State whose ship was attacked can prosecute the pirates. Even though this option exists and allows more countries the opportunity to prosecute pirates, few nations have done so.\textsuperscript{104} Countries that apprehend pirates usually only prosecute the pirates if it affects their national interests.

Not only does the prosecution and defense of suspected pirates cause problems, but their release from imprisonment can also complicate matters. States worry about pirates seeking asylum in their countries after they have served their sentences.\textsuperscript{105} The case of Sufi & Elmi v. United Kingdom gives insight into what could end up occurring if pirates are released in other countries after serving their sentences and if they applied for asylum.\textsuperscript{106} The European Court of Human Rights ruled that returning a Somali to Somalia, specifically Mogadishu, would violate Article 3 of the European Convention on Human Rights which states “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”\textsuperscript{107} Even if pirates serve life sentences, the cost of housing the pirates for the duration of their prison sentences is high. The logistical difficulties with prosecuting suspected pirates are not the only hurdle prosecuting countries must face when attempting to bring pirates to justice; the country must have the legal framework necessary to try suspected pirates.\textsuperscript{108}

\textsuperscript{103} Id.
\textsuperscript{104} GEIß & PETRIG, supra note 12, at 32.
\textsuperscript{105} Id. at 136.
III. PROPOSED SOLUTIONS TO PROSECUTING MARITIME PIRACY

A. International Anti-piracy Laws

Pirates are considered to be an enemy to everyone and every nation has the right to capture pirates.\(^\text{109}\) International law allows any nation to have criminal jurisdiction in piracy cases.\(^\text{110}\) The 1982 United Nations Convention on the Law of the Sea (UNCLOS) is customary international law,\(^\text{111}\) and in 2008, the UN Security Council in Resolution 1838 made it known that UNCLOS would be used for anti-piracy measures.\(^\text{112}\) UNCLOS Article 101 states that:

Piracy consists of any of the following acts:
(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
   i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
   ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
(c) any act inciting or of intentionally facilitating an act described in sub-paragraph (a) or (b).\(^\text{113}\)

UNCLOS Article 105 allows any State to seize a pirate ship on the high seas. The Article states that:

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a

\(^{109}\) James Kraska, *Looking for Law in all the Wrong Places: Maritime Piracy as a Domestic Legal Problem*, in CONFERENCE ON GLOBAL CHALLENGE, REGIONAL RESPONSES: FORGING A COMMON APPROACH TO MARITIME PIRACY, supra note 35, at 104–05.

\(^{110}\) *Id.*

\(^{111}\) *Id.* at 104.

\(^{112}\) *Id.*

ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.\textsuperscript{114}

The seizing country is then able to prosecute the pirates under its national laws. Although the universal jurisdiction appears as though it would make prosecuting pirates fairly simple, the country apprehending the ship must have national laws that criminalize piracy and, in reality, that is not always the case.\textsuperscript{115} Many of the navies that patrol the high seas and capture pirates do not or cannot prosecute them under their nation’s laws.\textsuperscript{116}

Countries cannot simply rely on UNCLOS in the fight against piracy. It does not require States to prosecute pirates and only requires countries to suppress piracy as stated in Article 100, which provides that “[a]ll 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.”\textsuperscript{117} Article 105 also allows countries to prosecute pirates under their national laws, but it does not require States to have national piracy laws under which to try pirates.\textsuperscript{118} Also, there are unanswered jurisdictional questions since every nation is capable of prosecuting pirates found within its territory according to international laws, but there are few requirements or limits that specify which country has the highest jurisdiction in a given situation.\textsuperscript{119}

UNCLOS attempts to aid in the suppression of piracy acts committed on the high seas, but many acts can occur closer to the shore. If a crime on the water occurs within a country’s coastal territory which is twelve nautical miles from shore, then it is viewed as “armed robbery at sea”; if it is further out, then it is piracy.\textsuperscript{120} Pirates are able to use the legal definition of piracy to their advantage by exploiting countries that are unable to protect their coast lines. In the case of Somalia, a country that does not have a government with the ability to police its

\textsuperscript{114} Id. art. 105.
\textsuperscript{115} Papastavridis, supra note 11, at 141.
\textsuperscript{116} Id.
\textsuperscript{117} UNCLOS, supra note 113, art. 100.
\textsuperscript{118} Guilfoyle, supra note 108, at 97.
\textsuperscript{119} Id.
\textsuperscript{120} Kraska, supra note 109, at 105.
coastal territory, UN Security Resolution 1816 (2008) has tried to solve the problem by allowing other nations to fight piracy within Somalia’s territory.\textsuperscript{121} Although the resolution aids in combating the problem of armed robbery at sea and pirates seeking sanctuary in Somalia’s coastal territory, it does not solve the problem on a larger scale. When trying to capture suspected pirate ships, pursuing nations cannot seize pirates within the coastal territories of other countries; therefore the pirates can easily escape by fleeing into the territorial sea of another country.\textsuperscript{122} Although international laws provide some legal framework to help in the prosecution of pirates, individual States still need national anti-piracy laws in order to effectively combat the problem.

1. The Need for National Laws in all States

There is a lack of national laws under which to prosecute pirates, and there needs to be strong cooperation between States when it comes to prosecuting pirates.\textsuperscript{123} It is difficult for a nation that captures pirates to adequately collect evidence if they do not know which nation will ultimately be prosecuting the pirates.\textsuperscript{124} A different nation may prosecute suspects from the one which originally apprehended the pirates, and a third nation may even house the pirates for the duration of their imprisonment.\textsuperscript{125} A variety of different national laws place restrictions on countries pertaining to what each country can and cannot do in relation to apprehending and prosecuting pirates. Denmark and Germany’s national laws only allow for the prosecution of pirates that either threatened their country’s national interests or harmed their citizens. French law allows captains to apprehend and hold pirates, but does not authorize captains to arrest and detain suspected pirates.\textsuperscript{126} In order to actually detain pirates, a French captain needs judicial authority and is unable to act without it.\textsuperscript{127} Even countries that have existing piracy laws need better and more up-to-date laws that allow countries and their citizens to effectively combat piracy.

\textsuperscript{121} Id.
\textsuperscript{122} Id.
\textsuperscript{123} Guilfoyle, supra note 108, at 96.
\textsuperscript{124} Id.
\textsuperscript{125} Id.
\textsuperscript{126} Papastavridis, supra note 11, at 141.
\textsuperscript{127} Id.
2. The Need for Updated Laws

Nations are free to create their own definition of piracy although many States use the UNCLOS definition of piracy as stated in Article 101 as their definition for the crime. The problem with relying on UNCLOS for the definition of piracy is that it was created for the purpose of establishing the scope of enforcement, and neither includes punishment for engaging in pirate activity nor does it prohibit certain acts.

Although there are problems with depending on UNCLOS to define piracy, even States that have their own definitions of piracy are not immune to problems. Piracy definitions are often old and out-of-date which can lead to different problems, but problems nonetheless.

i. United States

In the United States, piracy is mentioned in the Constitution of the United States, but the definition and law are far from precise. Article 1 Section 8 clause 10 of the United States Constitution gives Congress the power to “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations,” but Title 18 U.S.C. § 1651 does not define piracy and instead punishes piracy based on the description “as defined by the law of nations . . . .” This unclear definition can lead to different interpretations and judicial outcomes based on similar facts.

a. Current Law and Cases

The need for updated piracy laws in the United States is most apparent after the conclusion of two recent piracy cases that appeared similar, but resulted in two very different outcomes. The difference between the two conclusions comes down to the interpretation of “piracy as defined by the law of nations.”

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128 See UNCLOS, supra note 113, art. 101(a).
129 GEIB & PETRIG, supra note 12, at 142.
130 U.S. CONST. art. 1, § 8, cl.10.
132 Id.
1. United States v. Said

In *United States v. Said*, the defendants were in a skiff and pulled along the USS Ashland, and one of the defendants shot at the Ashland not realizing it was a U.S. Navy ship. The Ashland, in return, destroyed the skiff, killing one of the suspects in the process and apprehending the rest.133 Judge Jackson found that the government did not show that the unauthorized violence committed by the defendants on the high seas is piracy under the law of nations as stated in 18 U.S.C. § 1651. Since the defendants did not board, take control of the Ashland, or take anything of value from the vessel, the defendant’s actions did not constitute piracy.134 The court further explained that if the defendant’s actions were considered piracy, then the definition would be a broad standard and there is no Supreme Court case law that would have backed up that ruling.135 The court ruled that the definition must be read as it was intended when it was first enacted and ultimately threw out the piracy charges and went ahead with the other charges.

2. United States v. Hasan

A few months after *United States v. Said* was decided, a similar case was also tried in Norfolk, Virginia. In this case, pirates fired on the USS Nicholas because they thought it was a merchant vessel when in reality it was a Navy frigate.136 As with the previous case, the defendants argued that they did not commit piracy according to the law of nations because they did not take property137 and because piracy is defined as “robbery upon the sea.”138 Therefore, the court had to decide what the definition of piracy entailed, and ultimately Judge Davis reached the opposite conclusion of Judge Jackson. Judge Davis ruled that the failed attempt on the U.S. Navy ship constituted piracy by using UNCLOS and the 1958 High Seas Treaty to define piracy under the law of nations.139 The broader definitions used allowed an attempt to be considered piracy instead of limiting the definition to boardings, taking control of ships, or taking anything of value from the vessel.

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134 *Id.* at 557.
135 *Id.* at 567.
137 *Id.* at 603.
138 *Id.* at 620–21.
139 *Id.* at 603, 642.
Although the two cases seemed similar, two judges reached very different conclusions based on similar facts using the same law.

3. Subsequent United States Piracy Cases

Years after the first modern day United States piracy trials, the question of what constitutes piracy remains unresolved. In July 2012, U.S. District Judge Hueville found that although the modern day piracy definition is based on international law, there must be proof that piracy acts occurred while on the high seas. A month later, U.S. District Judge Doumar, who also believed that the definition was based on modern international law, sentenced pirate Mohammad Saaili Shibin to a dozen life sentences for acting as the negotiator during the hijacking of two vessels, one of which was an American yacht. Although Mohammad Saaili Shibin did not commit acts of piracy on the high seas, Judge Doumar believes that the high seas element is not necessary. Shibin is the highest ranking pirate to be prosecuted in the United States, and he was the negotiator for an American yacht in which four people were killed and the negotiator for a German ship in which the twenty-two crew members were tortured during their captivity.

The lack of a concrete definition as to what constitutes piracy creates uncertainty in prosecuting, defending, and ruling on piracy cases. With impending piracy cases, such as the 2013 trial date for the Somali men alleged to have helped to commit the murder of the four Americans on the yacht, the need for a more defined United States piracy law is urgent.

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141 Id.
142 Id.
143 Id.
b. Recently Proposed Law

Proposed Bill H.R. 2839, short-titled the Piracy Suppression Act of 2011, could potentially be a start to help prosecute pirates better in the United States and to deter their conduct.\textsuperscript{146} In order to accomplish this, the bill would increase the penalty of piracy to have the maximum punishment include death.\textsuperscript{147} The bill also provides a concrete definition of piracy which is similar to Article 101 of UNCLOS and was also used in the Hasan case, where it ultimately led to the suspected pirate’s conviction.\textsuperscript{148} Lastly, the bill addresses the cost of apprehending pirates and would reimburse countries that aided United States flagged ships and would transfer the costs of protecting ships from other countries unless they contributed to the anti-piracy effort within a certain amount of time.\textsuperscript{149}

1. Increasing the Penalty of Piracy to the Death Penalty

The proposed bill states that “[w]hoever commits an act of piracy shall be punished by death or imprisoned for life.”\textsuperscript{150} The bill would increase the maximum penalty of piracy to include the death penalty and is supposed to act as a deterrent against people engaging in pirate activity. By making the risk greater, there are hopes that many young Somalis will not see an opportunity to make easy money with no significant repercussions. Not only could the death penalty act as a possible deterrent, but it could also eliminate asylum concerns for pirates that receive the death penalty.

One of the major drawbacks of incorporating the death penalty is that it may be disliked by many of the other countries participating in the anti-piracy effort. If countries are trying to work together on an international level, having the death penalty is contrary to the views held by other countries. Article 5 of the Universal Declaration of Human Rights states that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,” and the death penalty could be considered torture and degrading treatment.\textsuperscript{151} Despite the

\textsuperscript{146}H.R. 2839, 112th Cong. § 1 (2011) [hereinafter Act].
\textsuperscript{147}Id. § 2.
\textsuperscript{148}Compare Act, supra note 146, § 2, with Hasan, 747 F. Supp. 2d at 619–20.
\textsuperscript{149}Act, supra note 146, § 3.
\textsuperscript{150}Id. § 2(a)(1).
potential problems that could develop from including the death penalty, the overall goal of deterring pirate activity is furthered.

2. Creating a Definition of Piracy

Another potential benefit the Piracy Suppression Act of 2011 creates is a clear definition of piracy. The potential bill defines piracy as:

(A) any illegal act of violence, detention, or deprestation that is committed for private ends by the crew or passengers of a private vessel and directed against a vessel, person, or property on the high seas or in any other place outside the jurisdiction of any State; or
(B) inciting or facilitating an act of piracy, as defined in subparagaph (A); and
(C) any act of voluntary participation in the operation of a vessel with knowledge of facts making it a pirate ship.\footnote{152}

The bill could possibly help ease the process of prosecuting and defending suspected pirates because it eliminates ambiguity that previously plagued the courts. A more precise definition that includes “attempt” addresses the problem that occurred in the \textit{Said} case.\footnote{153} Additionally, it would help prevent inconsistent rulings in similar cases which is what occurred in the \textit{Said} and \textit{Hasan} cases under the current piracy laws.

The proposed definition is similar to the piracy definition used under international law. Although the definitions are not identical, the similarities between the definitions could help make the prosecution of pirates more uniform. The proposed definition is not exactly the same as the international one because it eliminates the two-ship requirement which is in UNCLOS. The proposed definition takes into account the new methods that pirates employ, and the broader definition allows the prosecution to address a more diverse variety of situations. Lastly, the definition, like the proposed penalty, can act as a deterrent because it incorporates the attempted piracy definition and allows more people to be prosecuted.

\footnote{152} \textit{Act, supra} note 146, § 2.
\footnote{153} \textit{Said}, 757 F. Supp. 2d at 557.
3. Addressing the Costs of Anti-piracy Efforts

Another important part of the Piracy Suppression Act of 2011 includes the financial incentives. The bill seeks money from "foreign flagged" vessels the United States protects from attempts of hijackings unless they join the maritime task force within a certain amount of time. The bill is attempting to shift costs to the country benefiting from the anti-piracy efforts as well as to get other countries involved in the fight against piracy. If a country joins in on the piracy fight, they do not need to repay costs to the United States for protecting their vessel but must repay otherwise. Allowing countries to be reimbursed by the United States government for their effort in protecting American vessels also provides an incentive for other countries to help endangered United States vessels. It is expensive to fight piracy, and many countries will likely have more of an incentive to help United States ships if they know they will be reimbursed for their expenses. The cost of deterring pirates is high, and creating a provision that shifts costs to the countries that are benefited allows countries to receive the money they expend in the former's effort which is beneficial to both countries involved.

c. Conclusion

Although the United States currently has piracy laws, the ambiguity of the definition leads to inconsistent rulings and lessens deterrence. The proposed bill attempts to solve some of the major problems that occur while trying to fight piracy. Creating harsher penalties and thus increasing the risks of engaging in piracy, making a broader and more precise definition of piracy, and addressing the financial costs associated with combating piracy are steps in the right direction for the United States. Other countries, such as India, still lack anti-piracy laws altogether and are trying to figure out a way to effectively combat piracy.

ii. India

India does not currently have an anti-piracy law in its penal code. It recently drafted a new law that will combine provisions in the Indian Penal Code with the UNCLOS definition of piracy in order to give
more power to agencies to be able to effectively prosecute suspects.\textsuperscript{154} The Indian government is in a rush to create an anti-piracy law because it is currently not covered under India’s legislation. Since there is no piracy law on the books, the Indian government charges pirates with offenses such as trespassing and armed robbery.\textsuperscript{155} The government wants to be able to prosecute pirates as an example to other potential pirates. The Indian government is even more concerned about creating laws to deter piracy after Somali pirates refused to release Indian hostages after receiving a ransom.\textsuperscript{156} Originally, the Indian Navy practiced catch-and-release and only recently started to detain pirates because of the increased activity.\textsuperscript{157} Although India has pirates in custody, courts do not have the ability to try the pirates yet, since piracy is not a crime.\textsuperscript{158} Having the necessary national laws is essential to effectively fighting piracy.

\textbf{B. International Tribunal or Courts Outside of Somalia}

Although the creation of an international tribunal was suggested by Spain and backed by China, North Atlantic Treaty Organization (NATO), and Russia, it has yet to get the support needed to come to fruition.\textsuperscript{159} There have been a few ideas as to whether the international tribunal should be created by the UN Security Council Resolution or a treaty. Other ideas for the set-up include amending the International Criminal Court or the International Tribunal for the Law of the Sea in order to include piracy trials.\textsuperscript{160} An international tribunal could solve

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\textsuperscript{157} Pandit, \textit{supra} note 155.
\textsuperscript{158} \textit{Id}.
\end{flushright}
major problems that currently affect the prosecution of pirates such as having a single location to try all piracy cases which would create uniform laws and rulings.\textsuperscript{161} The international tribunal could also be a deterrent to potential pirates because there would be definite consequences for engaging in piracy.\textsuperscript{162}

Despite the potential benefits an international tribunal could have, there are also a lot of drawbacks. Although there are already established international tribunals; none of them try as many cases as an international piracy tribunal would try.\textsuperscript{163} The sheer number of cases would make it impractical to have an international court or courts outside of Somalia.\textsuperscript{164} Another problem with creating an international tribunal comes down to dollars and cents. Not only will setting up the courts and training the personnel be expensive, but paying the salaries of the UN workers would be more costly than relying on regional courts.\textsuperscript{165} Other potential problems would be the amount of time it would take to create a court as well as jurisdictional issues.\textsuperscript{166} The current international tribunals do not have the jurisdiction to try piracy cases nor are they equipped; potentially it would take years as well as a lot of funding in order to turn a pre-existing international court into an international piracy tribunal.\textsuperscript{167} Another problem with expanding the international jurisdiction is the concern that it would be unlimited, and state sovereignty could be eroded and other nations would be influenced over domestic policies.\textsuperscript{168} Lastly, having a court outside of Somalia is not an option because Somalia is against the idea. There would be numerous problems to sort out in order to create such a court, and the Somali government would have to make changes to the constitution to make it work.\textsuperscript{169}

Despite the fact that an international tribunal to combat piracy offers a seemingly simple solution to a complex problem, it is not a via-

\textsuperscript{161} Id.
\textsuperscript{162} Spain Proposes, supra note 159.
\textsuperscript{163} GUILFOYLE, supra note 160.
\textsuperscript{164} Alan Cole, Prosecuting Piracy: Challenges for the Police and the Courts, in CONFERENCE ON GLOBAL CHALLENGE, REGIONAL RESPONSES: FORGING A COMMON APPROACH TO MARITIME PIRACY, supra note 35, at 110.
\textsuperscript{165} GUILFOYLE, supra note 160.
\textsuperscript{166} Id.
\textsuperscript{167} Id.
\textsuperscript{168} Hasan, 747 F. Supp. 2d at 610.
ble option. Multiple countries have recommended forming a single court to try piracy cases, but because of the numerous issues such as high cost, jurisdictional problems, and the quantity of cases, the option of an international court did not gain enough support.

C. Regional Courts in Seychelles and Kenya

The UN and other countries, such as the United States and Canada, have agreements with Kenya and Seychelles that enables patrolling States to capture and transfer suspected pirates to a court in Kenya or Seychelles to receive a trial. Kenya and Seychelles are currently bearing the burden of pirate prosecutions worldwide. The cost of piracy is felt globally and likewise, the cost of fighting should also be borne globally since the problem affects everyone. The United States and European Union are trying to help the prosecution of suspected pirates by financially contributing to the countries conducting trials.

There are some legal concerns with transferring pirates to third party countries such as Kenya. According to UNCLOS Article 105, international law allows for the country that apprehended the pirates to prosecute them under the country’s national laws. The definition with Article 105 concerning third parties was intentional and written in order to ensure third parties did not prosecute pirates apprehended by others. It is a violation of UNCLOS to use Kenya and other third party places to try piracy cases.

1. Courts in Seychelles

Seychelles decided to combat piracy in 2010 because it was affecting two of the island’s major industries, fishing and tourism, and has caused shipping prices for Seychelles to increase dramatically.

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172 Papastavridis, supra note 11, at 142.

173 Id.

174 Id.

175 Jennie Ryan, Seychelles President Urges Greater Anti-Piracy Measures, JURIST (Dec. 5, 2011), http://jurist.org/paperchase/2011/12/seychelles-president-urges-greater-anti-piracy-measures.php; see also Tatenda Malan, Seven Somali Pi-
Tourism was affected because the islands were once a destination for many yachters, but the fears of piracy have scared off potential tourists.\(^{176}\) The tuna industry was jeopardized by piracy, which is estimated to have cost the island more than 4% of its gross domestic product.\(^{177}\)

Seychelles is one of the few nations that have stepped up to prosecute pirates.\(^{178}\) The State wants to bring the suspected pirates to trial because it wants to make it clear that such behavior will not be tolerated.\(^{179}\) The nation wanted to give its attorney general more authority to prosecute acts of piracy so Seychelles even changed its laws to include conspiracy in order to broaden the prosecution of suspected pirates.\(^{180}\) The new legislation the country passed created domestic anti-piracy laws in order to prosecute piracy offenses committed inside or outside of Seychelles’ territory.\(^{181}\) The new law includes provisions from UNCLOS, carries a maximum penalty of thirty years in prison, and includes a fine on people that commit or attempt or conspire to commit piracy.\(^{182}\) The country expanded its law because piracy is increasing and Seychelles wants to combat it.\(^{183}\) Not only has Seychelles changed its laws to more effectively combat piracy, but also it is willing to take pirate cases from other countries if there is enough evidence to prosecute them.\(^{184}\) Pirates have been sentenced to eighteen years in jail in Seychelles for attacking French vessels in 2010, and the judge did not take into account the age or circumstances of the sus-

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\(^{178}\) Ryan, *supra* note 175.

\(^{179}\) Malan, *supra* note 175.


\(^{181}\) *Law Change*, *supra* note 180.

\(^{182}\) *Id.*

\(^{183}\) *Id.*

\(^{184}\) *Id.*
pects because of the negative impact piracy has on world trade.\textsuperscript{185} The captured pirates that are brought to Seychelles are given protection under Seychelles' Constitution that guarantees a right to a fair trial and legal representation.\textsuperscript{186} Seychelles has taken a strong stance against piracy, and it has captured over 100 pirates, convicted over twenty-three of those, and released forty others because there was not enough evidence to continue with the prosecution.\textsuperscript{187}

Seychelles has made changes not only to its laws to combat piracy, but also to its prison system. Seychelles created a prison specifically for pirates, with a separate portion that is detached from the main population for extra security.\textsuperscript{188} Seychelles made an agreement with Somalia regarding the repatriation of certain Somali prisoners.\textsuperscript{189} The nation signed agreements with representatives from Puntland, Somaliland, and the Transitional Federal Government for the repatriation of Somali pirates convicted in Seychelles.\textsuperscript{190} These agreements would allow the pirates to serve the rest of their sentences in their countries to be closer to their homes and families, and they would be housed according to international human rights standards.\textsuperscript{191} In May of 2011, Puntland agreed to have all the Somali pirate prisoners be transferred to a prison in Puntland once it is completed.\textsuperscript{192}

Seychelles may be a small country, but it is making a huge statement in the fight against piracy. The country has not only changed its

\begin{footnotes}
\item[185] ICC, supra note 62, at 31.
\item[187] Id.
\item[189] ICC, supra note 62, at 31.
\item[190] \textit{Somali Pirates to be Returned from Seychelles}, \textit{AFROL NEWS} (Feb. 11, 2011) [hereinafter \textit{Returned}], www.afrol.com/articles/37299 (link now non-functional; article on file with the Regent Journal of International Law).
\end{footnotes}
law in order to more effectively combat piracy, but it also has made changes to prisons and has volunteered to prosecute pirates captured by other nations. The State even took the unprecedented step of a repatriation agreement with different locations in Somalia. Seychelles is a strong ally to other countries around the world that are combating piracy.

2. Courts in Kenya

Kenya is another African nation that has stepped up to fight the growing piracy problem. Like Seychelles, Kenya also prosecutes and imprisons Somali pirates who were captured by other nations. The port of Mombasa takes so many piracy cases that it has been a challenge for Kenyan courts. As of November 2010, Kenya has convicted fifty people of piracy and is in the process of trying sixty-nine others.

i. Benefits

Having an African nation such as Kenya prosecute pirates can be extremely beneficial to all involved in the process. Trying Somali pirates close to the location where the crime occurred helps solve or lessen problems such as high trial costs, the difficulty of procuring evidence, finding and procuring witnesses, and language barriers. Also, the deterrent effect of prosecuting pirates is greater when they are tried closer to where the crime is committed. In August of 2012, seven Somali pirates were sentenced to twenty years in prison in Kenya.

196 Geij & Petrig, supra note 12, at 136.
The Kenyan magistrate delivered the harsh sentence in hopes that it would serve as a deterrent to other pirates.\(^{199}\) Lastly, Kenya, as a nation, benefits from prosecuting pirates because other countries have invested in Kenya in order to create the needed infrastructure to prosecute and house pirates.

Kenya not only tries pirates it apprehends, but also has made agreements with entities such as the European Union and nations such as the United States to try suspected pirates it apprehends. In reciprocation, those countries are improving the archaic Kenyan court system as well as making improvements to Kenyan prisons.\(^{200}\) The UN Office on Drugs and Crimes (UNODC) has worked with Kenya to improve its judicial system and has even helped provide a new state of the art courtroom that is equipped with high security.\(^{201}\) The new court was built near the prison in Mombasa, where many of the pirates have been housed.\(^{202}\) Constructing the court close to the prison reduced the distance between the two, which increases security since the chance of escape is slimmer.\(^{203}\) The UNODC has also made upgrades to other Kenyan facilities such as the prisons where convicted pirates are housed.\(^{204}\) Despite all the benefits both Kenya and the other nations receive from Kenya trying piracy cases, there are also many drawbacks.

**ii. Problems**

Kenya’s legal system is burdened with around 900,000 backlogged cases, and its prisons are beyond capacity.\(^{205}\) The sheer quantity of cases tried in Kenya is not the only reason the courts are overburdened.\(^{206}\) Trials are inhibited for a multitude of reasons such as language barriers, inability to gather information about suspects, and the lack of live recording facilities.\(^{207}\) Miscommunications between Kenya

\(^{199}\) Id.


\(^{201}\) *New Courtroom in Mombasa to Bring Pirates to Justice*, supra note 194.

\(^{202}\) Ross, supra note 188, at 112.

\(^{203}\) Id.

\(^{204}\) *New Courtroom in Mombasa to Bring Pirates to Justice*, supra note 194.


\(^{206}\) Id.

\(^{207}\) Id.
as a prosecuting country and the apprehending countries have complicated matters too. Initially, Kenya had a hard time prosecuting pirates that the United Kingdom apprehended because the crewmembers would throw the pirates’ weapons overboard, which was problematic because Kenyan law requires the weapons for prosecution.\textsuperscript{208} Another hurdle both the apprehending party and prosecuting party had to rectify was transferring suspects. Human rights treaties may affect transfers because some treaties may not allow the transfer of pirates to other countries without a human rights guarantee.\textsuperscript{209} The numerous logistical problems are compounded by legal problems.

\textbf{a. Legal Challenges}

Although Kenya has stepped up to the plate in order to try pirates, their laws are not adequate to effectively prosecute or defend pirates. Like so many other countries such as the United States, the act of piracy under Kenyan law was undefined.\textsuperscript{210} At the time that the European Union and the United States made agreements with Kenya to prosecute pirates the nations apprehended, Kenya was trying piracy cases under the Penal Code of Kenya Section 69(1) which stated: “[a]ny person who in territorial waters or upon the high seas, commits any act of piracy \textit{jure gentium} is guilty of the offence of piracy.”\textsuperscript{211} The problem with Kenya’s anti-piracy law arose in the case of \textit{In re Mohamed Hashi et. al.} in which the jurisdiction of Kenyan courts to try pirates apprehended on the high sea was questioned.\textsuperscript{212} Although Section 69(1) of the Code gave Kenya jurisdiction over acts of piracy that occurred on the high seas, Section 5 of the Kenyan Penal Code stated that “[t]he jurisdiction of the Courts of Kenya for the purpose of this Code extends to every place within Kenya, including territorial waters” which directly contradicted Section 69(1). In the case, the judge concluded Section 5 of the Penal Code applied and the court did not have the authority to try pirates captured outside of territorial waters.\textsuperscript{213}

\textsuperscript{208} Guilfoyle, \textit{supra} note 108, at 97.
\textsuperscript{209} \textit{Id.} at 97–98.
\textsuperscript{210} Mwangura, \textit{supra} note 205.
\textsuperscript{213} \textit{Id.}
Kenya has since replaced the Penal Code with Part XVI of the Merchant Shipping Act of 2009 which states:

"piracy" means—
(a) any act 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) against another ship or aircraft, or against persons or property on board such ship or aircraft; or
   (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
(b) any voluntary act of participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; or
(c) any act of inciting or of intentionally facilitating an act described in paragraph (a) or (b)

Despite the changes to Kenya’s definition of piracy, jurisdictional problems still exist. Kenya’s new law does not address piracy acts that occur in territorial waters as the previous definition did. Another problem is that although Kenya has updated its piracy laws, almost all of the pirate trials had commenced before the change.

The definition of piracy was not the only problem with the legal prosecution of pirates in Kenya. Section 49 of the Constitution of Kenya states that:

An arrested person has the right—
   . . . (f) to be brought before a court as soon as reasonably possible,
   but not later than—
   (i) twenty-four hours after being arrested; or
   (ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day.

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215 Papastavridis, supra note 11, at 143.
216 See The Merchant Shipping Act, supra note 214.
Producing pirates at a court can take much longer than twenty-four hours, a violation of the Kenyan Constitution. A large time between when the suspected pirates are apprehended and when they are produced in court can also be a violation of international human rights laws if the length of time is unreasonable. Despite the steps that Kenya has taken to solve the legal woes, more still needs to be accomplished.

b. Not a Permanent Solution

Although Kenya trying pirates for itself and other countries is mutually beneficial, it is not the ultimate solution. The relationship between the countries is extremely vulnerable. Once Kenya began trying pirates for other countries, those countries began trying to "fix" Kenya's judicial system, which could potentially be viewed as other countries imposing their way of life on Kenya. Another problem is that either side, Kenya or the countries on whose behalf it acts, can opt out of the agreement at any time. In late 2010, Kenya withdrew from its agreement with the European Union to try Somali pirates. The country felt it was taking on a substantial burden and had done its duty. Lastly, Kenya already has a strained relationship with Somalia, and having Kenya permanently hold trials for Somali pirates apprehended by other states may exacerbate the relationship between the two countries. Somalia is not keen on other countries holding piracy trials for Somalis outside of its country.

D. Courts in Somalia

Despite the lack of a functioning government, Somalia is trying to figure out how to deal with its piracy problems. It plans on creating

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218 See The Merchant Shipping Act, supra note 214.
219 Papastavridis, supra note 11, at 145.
220 Walker, supra note 197.
222 Id.
223 Id.
224 Somalia, supra note 29. Kenya is worried about Somali refugees going into Kenya and never returning to Somalia. Although it originally appeared to be a mutual decision between the two countries to have Kenya's military enter Somalia to help with insurgents, the Somali official Ahmed spoke out against the Kenyan military offensive.
225 Dunn, supra note 169.
special prisons and courts to try suspected pirates, and it plans to have pirates transferred from Seychelles once the new prisons are completed. To create specialized courts in Somalia, there needs to be an up-to-date legal system to prosecute pirates including laws, legal staff, and prisons. The UN Development Programme (UNDP) and UN Office on Drugs and Crime (UNODC) are working towards creating courts to try pirates in Puntland and Somaliland within the next three years. Once the courts reach international standards, then pirates can be transferred and prosecuted. Prisons will be improved within the next two years and will also be brought up to international standards. Having courts in Somalia would allow not only the pirates to be tried, but the people financing and helping pirates.

1. Cost

The cost to try a single pirate case is astronomical. A UN study determined that it would cost over twenty-four million dollars over three years to create courts in Somalia to prosecute pirates. The study looked at creating courts in Somaliland and Puntland, but it also discusses setting up a Somali court outside the territorial boundaries and in another country to try pirates. The greatest number of pirates is in Somalia in both Puntland and Somaliland. The total cost of the changes that need to be made in order to prosecute and house pirates in Somalia is $24,434,720. The large number of pirate cases to be tried will make the cost to Somalia substantial and virtually impossible without the funding and resources of other nations.
2. Legal Problems

Somalia has a limited ability to effectively prosecute pirates because it is a failed state and has jurisdictional problems, lack of uniform anti-piracy laws, and inadequate court systems.\textsuperscript{236} The country is broken up into sections and part of it, Puntland, has piracy laws and another section, Somaliland, does not.\textsuperscript{237} Another problem is that the jurisdiction is complex because Somaliland is limited to suspected pirates from Somaliland or offenses that occur within the region.\textsuperscript{238} Puntland’s jurisdiction, on the other hand, is more far reaching, and it would be able to take cases that are not directly connected to it.\textsuperscript{239} If a new court was established to try Somali pirates, the scope of its jurisdiction would need definition before the establishment of the court in order for it to prosecute pirates effectively and efficiently.\textsuperscript{240} Also, if new piracy courts were made, it may require creating new laws and would result in changing the 2004 Transitional Charter and the 1960 Constitution of the Somali Republic, which would be burdensome.\textsuperscript{241}

The current court systems are terribly inadequate and unprepared to prosecute piracy cases. Prosecutors and other legal staff need to be trained since less than 10\% have had any kind of formal training.\textsuperscript{242} Even judges do not have a thorough understanding of the law and procedures and are not competent to deal with piracy cases.\textsuperscript{243} Training is currently underway, but could be sped up with the help of the international community; otherwise it could take a very long time before Somalia is prepared to try cases.\textsuperscript{244}

Somaliland and Puntland need not only better legal systems to combat pirates, but also better prisons. The UNODC is building two new prisons that will house pirates that were convicted outside of Somalia, but it will take about two years to complete.\textsuperscript{245} The UNODC already built a new prison in Somaliland and is constructing another in
Puntland, but these are for prisoners that have already been convicted and are currently being detained in subpar conditions.\textsuperscript{246}

Although there are many problems with trying piracy cases in Somalia, there are also benefits. Nations have come together in the fight against piracy.\textsuperscript{247} Countries are aiding the prosecution of pirates by helping to gather evidence, an essential and difficult part of prosecuting pirates.\textsuperscript{248} Somalia itself is trying to provide legitimate solutions to some of the main problems such as the problem of housing convicted pirates.\textsuperscript{249} In Somaliland there is a new prison in Hargesia that can accommodate up to 450 prisoners and is a maximum security facility.\textsuperscript{250} Although there are some benefits of having viable piracy courts in Somalia, it will be a long process before the idea will come to fruition and it will take a lot of money and help from other nations.

3. Conclusion of Courts in Somalia

The development of courts in Somalia to try Somali pirates is a step in the right direction because it gets at the root of the problem. It is an effort to get Somalia involved in the process, to strengthen their laws, create new and improved prisons, and courts with the help of other countries. It is not a solution that will have an effect overnight, but it is a part of a permanent solution to eradicating piracy off the coast of Somalia and in the Gulf of Aden.\textsuperscript{251}

Despite all the benefits of conducting Somali piracy trials in Somalia, there are also problems. Communities and clan governments may not be participating in acts of piracy, but they may benefit.\textsuperscript{252} The local leaders of areas may receive money from local pirates as a friendly gesture.\textsuperscript{253} Since they may have an interest in piracy, there may be problems of prosecuting suspected pirates to the fullest extent of the law.

\textsuperscript{246} Id. ¶ 31.
\textsuperscript{248} Id.
\textsuperscript{249} Id.
\textsuperscript{250} Id.
\textsuperscript{251} Id.
\textsuperscript{252} Id.
\textsuperscript{253} Global Trade, supra note 28, at 5.
IV. OTHER PROBLEMS WITH PROSECUTION

Even countries that have the legal framework to prosecute pirates are not exempt from the difficulties associated with piracy trials. Many problems with the prosecution of pirates have less to do with jurisdiction and more to do with lack of evidence, no national piracy laws or inadequate ones, and trial location or imprisonment concerns.\textsuperscript{254} Not only can securing witnesses be a problem, but obtaining physical evidence can be too because pirates can easily get rid of weapons, boarding ladders, and navigational equipment by tossing them overboard before authorities can collect them for trial.\textsuperscript{255} With the costs and difficulties associated with trying pirates, many prosecutors are not willing to prosecute a case with only circumstantial evidence. If a ship that captures pirates is unable or unwilling to prosecute the pirates, then their only option would be to transfer the prosecutions to another nation that can, but agreements will have to be in place for this to take place.\textsuperscript{256}

Many times pirates do not have identification on them when they are captured and are authorities are unable to identify them or to find out if they have criminal backgrounds.\textsuperscript{257} Other difficulties include pirates being apprehended outside of the prosecuting countries' territory, and many piracy laws are outdated and therefore ineffective.\textsuperscript{258}

Since many times countries other than the ones prosecuting the pirates initially apprehend them, the other countries take statements and interview witnesses.\textsuperscript{259} Only Kenya and Seychelles have made guides for countries apprehending pirates that they will then prosecute.\textsuperscript{260} Sometimes the people collecting the evidence are unaware of the evidence needed for prosecution in a specific country; sometimes even the police collecting the evidence are not familiar with collecting evidence for a trial.\textsuperscript{261} The witnesses are from all around the world and there is rarely an opportunity to take an additional statement from witnesses after the initial statement.\textsuperscript{262} When witnesses are foreigners,

\begin{itemize}
  \item \textsuperscript{254} Guilfoyle, supra note 108, at 97.
  \item \textsuperscript{255} Id.
  \item \textsuperscript{256} Id.
  \item \textsuperscript{257} Cole, supra note 164, at 107.
  \item \textsuperscript{258} Id.
  \item \textsuperscript{259} Id. at 108.
  \item \textsuperscript{260} Id.
  \item \textsuperscript{261} Id.
  \item \textsuperscript{262} Cole, supra note 164, at 108.
\end{itemize}
they are not obligated to participate in trials.\textsuperscript{263} Often, if the witness is a military member, his country arranges for his participation.\textsuperscript{264} Other difficulties include obtaining translators and providing defense attorneys for suspects.\textsuperscript{265} There are times multiple translators need to be used for the same case, which not only complicates the proceedings, but also increases the cost of the case.\textsuperscript{266} Not all countries provide the necessary defense attorneys, especially for those pirates that are transferred to third party countries.\textsuperscript{267} Ultimately, it is essential to have the legal framework to handle piracy cases which includes national laws that criminalize not only acts of piracy, but attempted piracy, and conspiracy to commit piracy, jurisdiction to try cases that occur on the high sea, and ability to detain pirates at sea.\textsuperscript{268}

\textbf{CONCLUSION}

Somali piracy was not caused by a single problem, and likely will not be fixed with a single solution, but rather a combination of solutions implemented by many States in a common effort to fight an international crime. There needs to be a multi-pronged solution that focuses on more than just military solutions.\textsuperscript{269} From a practical standpoint, Somalia will need to create a stable government, dispatch law enforcement to patrol the Somali coastline, and work to improve the economy. On the legal side, in order to prosecute piracy more effectively and efficiently, several of the proposed solutions should be implemented permanently. First, all nations should have laws criminalizing piracy and the laws should be updated in order to reflect the changing times. Definitions need to be clear and include the elements necessary to be able to prosecute successful pirates, and also the unsuccessful. Second, setting up courts to try suspected pirates in regional countries including Somalia should be implemented. Seychelles is a good example of a regional country that is taking the necessary steps to fight piracy from multiple angles. Other nations will also have to be willing to help shoulder the burden by providing resources and funds to the States that will be prosecuting pirates regionally. Third, piracy also needs to be fought on land in Somalia. The people financing the

\textsuperscript{263} Id. at 109.
\textsuperscript{264} Id.
\textsuperscript{265} Id.
\textsuperscript{266} Id.
\textsuperscript{267} Cole, supra note 164, at 109.
\textsuperscript{268} Id.
\textsuperscript{269} Abdi, supra note 71, at 33.
piracy expeditions need to be held accountable for their actions. Additionally, the townspeople and others who are profit from piracy need to be held responsible. The riskier it is for people to be involved in piracy, the less likely people will get involved in it.

Any solution offered in the fight against piracy is going to take time, effort, and money before results are seen. Piracy is a global problem and needs to be fought all around the world by every country, not only those that are located near the problem.