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Applying the Lockerbie Model to a Proposed Extraterritorial Somali Anti-Piracy Court

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**CASE WESTERN RESERVE UNIVERSITY
SCHOOL OF LAW**

**MEMORANDUM FOR THE
HIGH LEVEL PIRACY WORKING GROUP**

Applying the Lockerbie Model to a Proposed Extraterritorial Somali Anti-Piracy Court

PUBLIC INTERNATIONAL LAW & POLICY GROUP (PILPG)

February 26, 2013

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Table of Authorities

Statutes and Rules

Source 1: Constitution of the Somali Republic (1960), *available at* <http://www.somalilaw.org/Documents/Constitution1960.pdf>.

Source 2: Somali Penal System, http://www.mongabay.com/history/somalia/somalia-penal_system.html.

Source 3: Somaliland Penal Code & other Special Criminal Laws, http://www.somalilandlaw.com/somaliland_judicial_system.html#SLCourtsHeading.

Case Law, Domestic Orders and Statements

Source 4: Her Majesty's Advocate v. Megrahi and Fhimah (No. 2), S.C.C.R. 1003; 2000 S.L.T. 1399; 2000 G.W.D. 33-1266, *reprinted in* The Lockerbie Trial, 309 (C. Tofan ed., 2009).

Source 5: Her Majesty's Advocate v. Megrahi and Fhimah (No. 3), 2000 S.L.T. 1401; 2000 G.W.D. 33-1265, *reprinted in* The Lockerbie Trial, 314 (C. Tofan ed., 2009).

Source 6: Purity Kannana Kinoti v. Republic of Kenya, High Court of Kenya at Nairobi, Misc. Criminal Appli 752 of 2010.

Source 7: Megrahi v. Her Majesty's Advocate, 2001 S.C.C.R. 701; 2001 S.L.T. 1473; 2001 G.W.D. 26-1014, *reprinted in* The Lockerbie Trial, 295 The Lockerbie Trial: A Documentary History, 295 (John P. Grant ed., 2004).

Source 8: Megrahi v. Her Majesty's Advocate, Appeal Judgment, 2002 J.C. 99; 2002 S.C.C.R. 509; 2002 S.L.T. 1433; 2002 G.W.D. 1-335, ¶¶368-70 *reprinted in* The Lockerbie Trial: A Documentary History, 299 at 433 (John P. Grant ed., 2004).

Source 9: The Netherlands-UK Agreement, 38 I.L.M. 926 (1999), *reprinted in* The Lockerbie Trial: A Documentary History, 149-162 (John P. Grant ed., 2004).

Source 10: Note of Appeal: Megrahi v. Her Majesty's Advocate, *reprinted in* The Lockerbie Trial, 408-18. (C. Tofan ed., 2009).

Source 11: Order in Council, S.I. No. 1998/2251, (Sept. 16, 1998).

Source 12: Petition unto the Sheriff of South Strathclyde, Dumfries and Galloway to charge Abdelbaset Ali Mohamed Al Megrari and Al Amin Krafifa Fhimar, (1991), *reprinted in* The Lockerbie Trial, 89 (C. Tofan ed., 2009).

Source 13: Preliminary Diet (1999): Her Majesty's Advocate v. Megrahi and Fhimah (No. 1), 2000 J.C. 555; S.C.C.R. 177; 2000 S.L.T. 1393; 2000 G.W.D. 5-183, *reprinted in* The Lockerbie Trial, 303, 306-08 (C. Tofan ed., 2009).

Source 14: Queen v. 7 Named Accused, Trials No. 1-55/03, [2004] PNSC 1; SC 04-04-19 at ¶220 (Apr. 19, 2004).

Source 15: The Right of the Honourable The Lord Hardie, Her Majesty's Advocate v. Abdelbaset Ali Mohamed al Megrahi and Al Amin Khalifa Fhima, Revised Indictment (Jan. 11, 2001), *reprinted in* The Lockerbie Trial: A Documentary History, 222 (John P. Grant ed., 2004).

Source 16: Republic v. Abdi Ali et al., Judgment, Crim. Side No. 14 (2010), Republic v. Mohamed Aweys Sayid et al., Judgment, Crim. Side No. 19 (2010) Republic v. Mohamed Ahmed Dahir & Ten (10) Others, Judgment, Crim. Side No. 51 (2009), Grotian Moment: The International War Crimes Trial Blog, *available at* <http://law.case.edu/grotian-moment-blog>.

Source 17: U.S. v. Abdel Basset Ali Al-Megrahi, a/k/k Abdelbaset Ali Mohamed, a/k/a Ali Mohamed Al Megrahi, a/k/a Mr. Baset, a/k/a Ahmed Khalif Abdusamad and Lamen Rhalifa Fhimah, a/k/a Al Amin Khalifa Fhimah, a/k/a Mr. Lamin, (1991), *reprinted in* the Lockerbie Trial, 108 (C. Tofan ed., 2009).

U.N. Documents

Source 18: Contact Group on Piracy off the Coast of Somalia, *Report to the Secretary-General on Possible Options to Further the Aim of Prosecuting and Imprisoning Persons Responsible for Acts of Piracy and Armed Robbery at Sea*, S/2010/394 (July 26, 2010).

Source 19: Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 27 I.L.M. 668 (Mar. 10, 1988).

Source 20: Joint Declaration Letter from the Permanent Representatives of France, the United Kingdom of Great Britain and Northern Ireland, and the United States of America to the United Nations Addressed to the Secretary General (Dec. 20, 1991), *reprinted in* The Lockerbie Trial, 129-34 (C. Tofan ed., 2009).

Source 21: International Covenant on Civil and Political Rights, Art. 15(2) (Dec. 16, 1966) *available at* <http://www2.ohchr.org/english/law/ccpr.htm#art15>.

Source 22: Letter from the Permanent Mission of Socialist People's Libyan Arab Jamahiriya to the United Nations: The Question of the Lockerbie Position Paper, (December 1997), *reprinted in* The Lockerbie Trial, 181 (C. Tofan ed., 2009).

Source 23: S.C. Res. 731, U.N. Doc. S/RES/731 (Jan. 21, 1992).

Source 24: S.C. Res. 748, U.N. Doc. S/RES/748 (Mar. 31, 1992).

Source 25: S.C. Res. 883, U.N. Doc. S/RES/883 (Nov. 11, 1993).

Source 26: S.C. Res. 977, U.N. Doc. S/RES/977 (Feb. 22, 1995).

Source 27: S.C. Res. 1192, U.N. Doc. S/RES/1192 (August 27, 1998).

Source 28: S.C. Res. 1506, U.N. Doc. S/RES/1506 (Sept. 12, 2003).

Source 29: S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008).

Source 30: S.C. Res. 1976, U.N. Doc. S/RES/1976 (Apr. 11, 2011).

Source 31: Statement by the Lockerbie Suspects Defense Group to the Secretary-General, U.N. Doc S/D1997/1015 (Dec. 25, 1997), *reprinted in* The Lockerbie Trial, 178-80 (C. Tofan ed., 2009).

Source 32: Statement by the President of the Security Council, U.N. Doc. S/PRST/1999/10 (Apr. 8, 1999).

Source 33: United Nations Convention on the Law of the Sea, Arts. 100, 105 (Dec. 10, 1982)

Source 34: U.N. Secretary-General, *Report by Dr. Enoch Dumbutshena and Professor Henry G. Schermers on the Scottish Judicial System*, U.N. Doc. S/1997/991 Annex (Dec. 18, 1997), *reprinted in* The Lockerbie Trial, 163-77 (C. Tofan ed., 2009).

Books

Source 35: Martin R. Ganzglass, *The Penal Code of the Somali Democratic Republic* (1971).

Source 36: Nicholas J. Healy, David J. Sharpe, and David B. Sharpe, *Cases and Material on Admiralty* (4th ed., 2006).

Source 37: *The Lockerbie Trial* (C. Tofan ed., 2009).

Source 38: *The Lockerbie Trial: A Documentary History* (John P. Grant ed., 2004).

Source 39: Kathy Marks, *Lost Paradise: From Mutiny on the Bounty to a Modern-Day Legacy of Sexual Mayhem, the Dark Secrets of Pitcairn Island Revealed* (2009) available at <http://www.npr.org/templates/story/story.php?storyId=103569364>, last accessed Mar. 11, 2012.

Source 40: Annemarie Middelburg, *Piracy in a Legal Context: Prosecution of Pirates Operating off the Somali Coast* (2011).

Source 41: Haji N.A. Noor Muhammed, Legal Systems of Africa Series: Somali Democratic Republic (1972).

Source 42: Michael A. Newton and Michael P. Scharf, Enemy of the State: The Trial and Execution of Saddam Hussein (2008).

Law Review Articles

Source 43: David R. Andrews, *"Terrorism on Trial": A Thorn on the Tulip - A Scottish Trial in the Netherlands: The Story Behind the Lockerbie Trial*, 37 Case W. Res. J. Int'l L. 307 (2005).

Source 44: Joseph Anzalone, *Extraordinary Times Demand Extraordinary Measures: A Proposal to Establish an International Court for the Prosecution of Global Terrorists*, 16 U.C. Davis J. Int'l. L. & Pol'y 273 (2010).

Source 45: Daniele Archbugi and Marina Chiarugi, *Looking for a Jurisdiction*, 82 Pol. Q. 231 (2010).

Source 46: Donna E. Arzt, *The Lockerbie "Extradition by Analogy" Agreement: "Exceptional Measure" or Template for Transnational Criminal Justice?*, 18 Am. U. Int'l L. Rev. 163 (2002).

Source 47: Robert Beckman, Malvina Halberstam, J. Ashley Roach, Alfred P. Rubin, and Katharine Shepherd, Panel: *"Piracy off Somalia: the Challenges for International Law,"* at the Annual Meeting – American Society of International Law, Mar. 26, 2009.

Source 48: Lucas Bento, *Toward an International Law of Piracy Sui Generis: How the Dual Nature of maritime Piracy Law Enables Piracy to Flourish*, 29 Berkeley J. Int'l L. 399 (2011).

Source 49: Jarret Berg, Note, *"You're Gonna Need a Bigger Boat": Somali Piracy and the Erosion of Customary Piracy Suppression*, 44 New Engl. L. Rev 343 (2010).

Source 50: Robert Black, *War Crimes Research Symposium: "Terrorism on Trial": Lockerbie: A Satisfactory Process But a Flawed Result*, 37 Case W. Res. J. Int'l L. 443 (2005).

Source 51: Daan Braverman, *SYMPOSIUM: International Terrorism, Victims' Rights and the Lockerbie Criminal Trial* at Syracuse University College of Law (April 27, 2001) 29 Syracuse J. Int'l L & Com. 1 (2001).

Source 52: William W. Burke-White, *Regionalization of International Criminal Law Enforcement: A preliminary Exploration*, 38 Tex. Int'l L. J. 729 (2003).

Source 53: Simon Chesterman, *An International Rule of Law?*, 56 Am. J. Comp. L 331 (2008).

Source 54: Adam C. Clanton, *How to Transfer Venue When You Only Have One: The Problem of High Profile Criminal Jury Trials in American Samoa*, 29 Hawaii L. Rev. 325 (2007).

Source 55: Erin Creegan, *Permanent Hybrid Court for Terrorism*, 26 Am. U. Int'l L. Rev. 237 (2011).

Source 56: Michael Davey, *A Pirate Looks at the Twenty-First Century: the Legal Status of Somali Pirates in an Age of Sovereign Seas and Human Rights*, 85 Notre Dame L.Rev. 1197 (2010).

Source 57: Leticia M. Diaz and Barry Hart Dubner, *On the Evolution of the Law of International Sea Piracy: How Property Trumped Human Rights, the Environment and Sovereign Rights of States in the Areas of the Creation and Enforcement of Jurisdiction*, 13 Barry L. Rev. 175 (2009).

Source 58: Barry Hart Dubner, *On the Definitions of the Crime of Sea Piracy Revisited: Customary vs. Treaty Law and the Jurisdiction Implications Thereof*, 42 J. Marit. Law Commer. 71 (2011).

Source 59: Barry Hart Dubner and Karen Greene, *On the Creation of a New Legal Regime to Try Sea Pirates*, 41 J. Mar. L. & Com. 439 (2010).

Source 60: Yvonne M. Dutton, *Bringing Pirates to Justice: A Case for Including Piracy within the Jurisdiction of the International Criminal Court*, 11 Chi. J. Int'l L. 197 (2010).

Source 61: Yvonne M. Dutton, *Pirates and Impunity: Is the Threat of Asylum Claims a Reason to Allow Pirates to Escape Justice?*, 34 Fordham Int'l L.J. 236 (2011).

Source 62: Steve Emerson, *Terrorism on Trial: the Lockerbie Terrorist Attack and Libya: A retrospective Analysis*, 37 Case W. Res. J. Int'l L. 487 (2005).

Source 63: Michael Gagain, *Neglected Waters: Territorial Maritime Piracy and Developing States: Somalia, Nigeria, and Indonesia*, 16 New Eng. J. Int'l & Comp. L. 169 (2010).

Source 64: John P. Grant, *War Crimes Research Symposium: "Terrorism on Trial": Beyond the Montreal Convention*, 37 Case W. Res. J. Int'l L. 453 (2005).

Source 65: Justice Richard Goldstone, *Executive Presentation on the Trial of Saddam Hussein: What Kind of Court Should Prosecute Saddam Hussein and Others for Human Rights Abuses?* 27 Fordham Int'l L.J. 1490 (2004).

Source 66: Judge Christopher Greenwood, *The Role of the International Court of Justice in the Global Community*, 17 U.C. Davis J. Int'l L. & Pol'y 233 (2011).

Source 67: Eugene Kontorovich, *"A Guantanamo on the Sea": The Difficulty of Prosecuting Pirates and Terrorists*, 98 Calif. L. Rev 243 (2010).

Source 68: James Kraska and Brian Wilson, *Maritime Piracy in East Africa*, 62 J. Int'l. Affairs 55 (2009).

Source 69: Daniel A. Lavrisha, Note & Comment, *Pirates, Ye Be Warned: A Comparative Analysis of National Piracy Laws*, 42 U. Tol. Rev 255 (2010).

Source 70: Bernd Martenczuk, *The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?* 10 Eur. J. Int'l L. 517 (1999).

Source 71: Ved P. Nanda, *Maritime Piracy: How Can International Law and Policy Address The Growing Global Menace*, 39 Denv. J. Int'l. L. & Pol'y 177 (2011).

Source 72: Michael H. Passman, *Protections Afforded to Captured Pirates Under the Law of War and International Law*, 33 Tul. Mar. L.J. 1 (2008).

Source 73: J. Peter Pham, *The Arab Spring: Revolution and Shifting Geopolitics: Somalia: Where a State isn't a State*, 35 Fletcher F. World Aff. 133 (2011).

Source 74: Stefano Piedimonte Bodini, *Fighting Maritime Piracy under the European Convention on Human Rights*, 22 Eur. J. Int'l. L. 829 (2011).

Source 75: Amy Powell, Note: *Three Angry Men: Juries in International Criminal Adjudication*, 79 N.Y.U.L. Rev. 2341 (2004).

Source 76: J. Ashley Roach, *Agora: Piracy Prosecutions: Countering Piracy Off Somalia: International Law and International Institutions*, 104 Am. J. Int'l. L. 397 (2010).

Source 77: Michael P. Scharf and Amy E. Miller, *War Crimes Research Symposium: "Terrorism on Trial": Foreword: Terrorism on Trial*, 37 Case W. Res. J. Int'l L. 287 (2005).

Source 78: Jared Schott, *Chapter VII as an Exception: Security Council Action and the Regulative Ideal of Emergency*, 6 Nw. U. J. Int'l Hum. Rts. 24 (2007).

Source 79: Maro Silva, *Somalia: State Failure, Piracy, and the Challenge to International Law*, 50 Va. J. Int'l L. 553 (2010).

Source 80: Milena Sterio, *Fighting Piracy in Somalia (and Elsewhere): Why More is Needed*, 33 Fordham Int'l L.J. 372 (2010).

Source 81: Milena Sterio, *Troubled Waters: Combating Maritime Piracy with the Rule of Law: the Somali Piracy Problem: A Global Puzzle Necessitating a Global Solution*, 59 Am. U.L. Rev. 1449 (2010).

Source 82: Peter Stockburger, *The Responsibility to Protect Doctrine: Customary International Law, an Emerging Legal Norm or Just Wishful Thinking?*, 5 Intercultural Hum. Rts. L. Rev. 365 (2010).

Source 83: Helmut Tuerk, *The Resurgence of Piracy: A Phenomenon of Modern Times*, 17 U. Miami Int'l & Comp. L. Rev. 1 (2009).

News Articles and Miscellaneous

Source 84: Ian Black, *Lockerbie Suspects Surrendered to Scots*, The Guardian, Apr. 6, 1999, available at <http://www.guardian.co.uk/uk/1999/apr/06/lockerbie.ianblack1k/1999/apr/06/lockerbie.ianblack1>.

Source 85: Black-Legwell (al-Ghouil) Compromise of January 1994 (1994) *reprinted in* The Lockerbie Trial: A Documentary History, 119 (John P. Grant ed., 2004).

Source 86: Davide de Bernardin, *If Piracy is illegal, why don't we fight it?* Piracy – Crime and Punishment (June 8, 2011) <http://www.oceanuslive.org/main/viewnews.aspx?uid=00000276>, last accessed Mar. 3, 2012.

Source 87: Hanibal Goitom, *Somalia: Puntland State Approves New Constitution* (July 6, 2009) http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205401404_text.

Source 88: Hanibal Goitom, *Somalia: Puntland Establishes Piracy Courts and Prisons* (Apr. 19, 2011) http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205402633_text.

Source 89: Damien Helly, *Seminar Reports: Lessons from Atalanta* and EU Counter-Piracy Policies, European Union Institute for Security Studies (June 2011).

Source 90: Mohamed Farah Hersi, Research Guide to the Somaliland Legal System, Hauser Global Law School Program, New York University School of Law, (Feb. 2009).

Source 91: ICTR Newsletter, 2, 5, 8, 10 (Feb.-Mar 2004).

Source 92: *The Importance of Customary Law – xeer – in Somalia*, Idatar Maritime, (Apr. 2011) <http://www.idaratmaritime.com/wordpress/?p=334>.

Source 93: *Italian-Flagged MV Rosalia D'Amato Released by Somali Pirates*, gCaptain (Nov. 27, 2011) <http://gcaptain.com/italian-flagged-rosalia-damato/?34324>, last accessed Mar.3, 2012.

Source 94: Dr. Hans Kochler, Report on and evaluation of the *Lockerbie Trial* conducted by the special Scottish Court in the Netherlands at Kamp van Zeist by Dr. Hans Köchler, University Professor, international observer of the International Progress Organization nominated by United Nations Secretary-General Kofi Annan on the basis of Security Council Resolution 1192 (1998), *available at* <http://www.i-p-o.org/lockerbie-report.htm>.

Source 95: James Kraska and Brian Wilson, *Combatting Pirates of the Gulf of Aden: The Djibouti Code and the Somali Coast Guard*, Ocean and Coastal Management (2009), doi:10.1016/j.ocecoaman.2009.07.002.

Source 96: Letter from Sgd. Ibrahim al-Ghouli (Legwell) to Robert Black (Jan. 12 1994), *reprinted in* The Lockerbie Trial: A Documentary History, 121 (John P. Grant ed., 2004).

Source 97: Paul Lewis, *Libya Sets Date for Turning Over 2 Suspects in Lockerbie Bombing*, New York Times, Mar. 20 1999, *available at* <http://www.nytimes.com/1999/03/20/world/libya-sets-date-for-turning-over-2-suspects-in-lockerbie-bombing.html>.

Source 98: Loide A.N. Lungameni, UNODC Counter-Piracy Programme, “Message from the Regional Representative (June 2011).

Source 99: Hussein Ali Noor, *Somali pirates want prisoner swap for ship*, Reuters (Mar. 6, 2012) *available at* <http://www.reuters.com/article/2012/03/06/somalia-piracy-idUSL5E8E63PI20120306>.

Source 100: Ronald J. Ostrow, *Libya Implicated in Pan Am Bomb Indictments*, Los Angeles Times (Nov. 15, 1991) *available at* http://articles.latimes.com/1991-11-15/news/mn-1317_1_bomb-indictments.

Source 101: Alex Perry and Mohamed Dahir, *A Famine We Made?* Time, Sept. 5, 2011, at 38.

Source 102: Pitcairn Islands Bill Introduced (Oct. 14, 2002), *available at* <http://www.beehive.govt.nz/sites/all/files/PitcairnTrialsBill.pdf>.

Source 103: *Protection of Vital Shipping Lanes*, International Maritime Bureau, ¶11 C 102/14 (Apr. 3, 2009).

Source 104: Public International Law & Policy Group, *Legal Memorandum on Reintegration of Former Pirates*, 10-24, (February 2012).

Source 105: *Red Cross Banned from al-Shabaab Controlled Areas in Somalia*, Mail and Guardian (Feb. 1, 2012) *available at* <http://mg.co.za/article/2012-02-01-red-cross-banned-from-alshabaab-controlled-areas-in-somalia>.

Source 106: Mark Rowbotham, *Piracy: A Problem Out of Control*, 13 Logistics and Transport Focus 28 (July 2011).

Source 107: *Somalia anti-piracy law: MPs block law banning 'heroes'*, BBC (Jan. 20, 2011) *available at* <http://www.bbc.co.uk/news/world-africa-12214940>.

Source 108: Ray Takeyh, *The Rogue Who Came in From the Cold*. 3 Foreign Affairs 62-72 (2001), as reprinted at the Peterson Institute for International Economics, *available at* <http://www.piie.com/research/topics/sanctions/libya3.cfm>

I. Introduction and Summary of Conclusions

A. Issue¹

The Secretary-General of the United Nations has presented the Security Council with seven options toward “prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia.”² Option 2 is “the establishment of a Somali court sitting in the territory of a third State in the region, either with or without United Nations participation.”³ The proposal calls for a tribunal modeled on the Lockerbie Court, where the Scottish High Court of Justiciary, temporarily located a court, applying Scots law, in the Netherlands in order to prosecute the two Libyan nationals accused of the bombing of PanAm Flight 103 in 1988. Under Option 2, a special Somali court would apply Somali law in prosecuting those accused of piracy and robbery at sea within Somali territorial waters. In addition, the current ICTR courthouse in Arusha, Tanzania, has been suggested as a potential location for the third State. The following analyzes Option 2, highlighting the parallels and differences between the UN proposed Somali court and the Lockerbie tribunal and makes

* The current UN proposal for a regional piracy tribunal at the ICTR building would be based on the Lockerbie (PanAm 103) bombing tribunal model. There, a Scottish court, with three judges, temporarily relocated to a courtroom at a former US airbase known as Camp Ziest in the Netherlands, and applied Scottish law to the proceedings. The Appeal was to the ordinary Scottish Court of Appeals. Prison terms were served in the UK. The piracy proposal envisions a special Somali court exercising extraterritorial jurisdiction sitting at the ICTR Courthouse in Tanzania and applying Somali law. On behalf of the High Level Piracy Working Group, CWRU should prepare a memo for the UN that analyzes the parallels and differences between the UN proposal and the Lockerbie tribunal. The memo should recommend how the Lockerbie approach would need to be modified for the prosecution of Somali pirates in Arusha.

² Contact Group on Piracy off the Coast of Somalia, *Report to the Secretary-General on Possible Options to Further the Aim of Prosecuting and Imprisoning Persons Responsible for Acts of Piracy and Armed Robbery at Sea*, S/2010/394 (July 26, 2010) [electronic copy provided in accompanying USB flash drive as Source 18].

³ *Id.* at ¶ 2.

recommendations for modifications that would be required to adapt the Lockerbie Model for the prosecution of Somali pirates.

B. Summary of Conclusions –

1. Can the Lockerbie Model be adapted?

From the outset, the Lockerbie Model cannot be a wholesale import. There are a number of significant differences between the nature of the two courts that inhibit a direct overlay. However, with modifications, the Model can be applied and can be an efficient path to justice if the appropriate resources are provided. Those resources will have to be external to Somalia. Thus, the ultimate question of whether or not to use a modified version of the Model is answered by the level of international commitment of resources – particularly financial.

2. What does Somali law provide?

Somalia is considered a failed state. As such, it has little to offer in the way of applicable laws. Further, it provides little in the way of government services to the Somalia people, and is currently not capable of diverting its people from participating in piracy. In recent efforts to pass new legislation, it has been unsuccessful and continues to be unable to control major sections of the nation.⁴ Two Somalia jurisdictions, the states of Puntland and Somaliland, have had success in trying piracy cases. Anything beyond these will require international commitment to address.

3. Is Arusha, Tanzania, feasible?

The physical structure will be available. It meets the international requirements for a courthouse in terms of safety, security, jail cells, and high-tech courtrooms. Further, the local workforce has been conducting international trials and operating a courthouse for about a decade.

⁴ *Somalia anti-piracy law: MPs block law banning 'heroes'*, BBC (Jan. 20, 2011) available at <http://www.bbc.co.uk/news/world-africa-12214940>, last accessed Mar. 14, 2012 [electronic copy provided in accompanying USB flash drive as Source 107].

However, the location is problematic for Somalis to access. Transportation is difficult: the defendants will be quite distant from their homeland; evidence and witnesses must be transported; and the sentences will most likely be served back in Somalia, requiring high security transportation. Any judicial workforce development will occur outside Somalia, not allowing the Somali people to participate in or benefit from the rebuilding.

II. Factual Background

A. In Brief: Somalia

1. Somalia

Somalia is often referred to as a “failed” state.⁵ Present-day Somalia was once the three separate geographic areas under colonial rule by British and Italian authorities.⁶ In 1960, the British and Italian colonies ceased and sovereignty was granted to the United Republic of Somali under parliamentary power.⁷ In 1969, the Republic was overthrown by a military coup led by Major General Mohamed Siad Barre.⁸ Barre was then overthrown in 1991, spiraling Somalia into civil war with multiple clan-based regions.⁹ Since then, Somalia has been under no fewer than fifteen different transitional governments; none of which have been able to unite the nation.¹⁰ Currently, the Transitional Federal Government (TFG) is recognized by the U.N. as the

⁵ Annemarie Middelburg, Piracy in a Legal Context: Prosecution of Pirates Operating off the Somali Coast at 17 (2011) [electronic copy provided in accompanying USB flash drive as Source 40].

⁶ *Id.* at 18.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ J. Peter Pham, *The Arab Spring: Revolution and Shifting Geopolitics: Somalia: Where a State isn't a State*, 35 Fletcher F. World Aff. 133 (2011) [electronic copy provided in accompanying USB flash drive as Source 73]. Dr.

government in power, but most believe that it lacks the ability to build a sustainable foundation to unite Somalia and provide the basic necessities for the Somali people.¹¹

2. Rise of Piracy as an Economic Alternative

Prior to and during the various civil wars, the Somali people had a gross national product based heavily on agriculture and fishing.¹² In 1971, nearly two-thirds of Somalis were nomadic herders, although banana plantations were also cultivated depending upon rainfall.¹³ That has changed significantly as long-term drought and subsequent famine have lead an estimated half a million Somalis to abandon their fields in search of a better life in Mogadishu.¹⁴ Illegal off-shore toxic dumping and over-fishing have signaled an end to the fishing industry.¹⁵ Somali fishing vessels were also targeted and destroyed by foreign vessels operating illegally in the Somali

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¹¹ Alex Perry and Mohamed Dahir, *A Famine We Made?*, Time, Sept. 5, 2011, 38 [electronic copy provided in accompanying USB flash drive as Source 101].

¹² Maro Silva, *Somalia: State Failure, Piracy, and the Challenge to International Law*, 50 Va. J. Int'l L. 553, 556 (2010) [electronic copy provided in accompanying USB flash drive as Source 79]. M. Silvo is a PhD Candidate at National University of Ireland, Galway.

¹³ Haji N.A. Noor Muhammed, *Legal Systems of Africa Series: Somali Democratic Republic* at 17-19 (1972) [electronic copy provided in accompanying USB flash drive as Source 41].

¹⁴ Alex Perry and Mohamed Dahir, *A Famine We Made?*, Time, Sept. 5, 2011 at 38 [electronic copy provided in accompanying USB flash drive as Source 101].

¹⁵ James Kraska and Brian Wilson, *Maritime Piracy in East Africa*, 62 J. Int'l. Affairs 55, 62 (2009) [electronic copy provided in accompanying USB flash drive as Source 68]; and Mark Rowbotham, *Piracy: A Problem Out of Control*, Focus, 13 Logistics and Transport 28, 30 (July 2011) [electronic copy provided in accompanying USB flash drive as Source 106]. Mr. Kraska is a member of the faculty of the International Law Department at the Naval War College and previously served as Oceans Policy Adviser for the Joint Staff in the Pentagon. Mr. Wilson heads a Navy legal office in Washington, D.C and previously served as Oceans Policy Adviser in the Office of the Under Secretary of Defense for Policy. Mr. Rowbotham is a writer and lecturer on international shipping trade.

exclusive economic zone.¹⁶ Out of the desperation and lack of consequences, an estimated 1,400 Somalis have turned to piracy as an economic avenue.¹⁷ Reports indicate that a single ransom paid may provide each pirate with anywhere from \$10,000 to as much as \$150,000 U.S.¹⁸ Also, community elders are believed to receive about 30 percent of the ransom.¹⁹ The Somali “government’s inability to regulate its seas” has allowed piracy to thrive.²⁰

As such, piracy has grown exponentially, with the attacks being both more frequent and more bold. Piracy effects “freedom of navigation[,] the free flow of commerce, and undermines regional stability.”²¹ With a limited federal government and few functioning courts, Somalia has not been able to police, arrest, and try alleged piracy cases on the scale necessary. Instead, neighboring Kenya and somewhat distant Seychelles have exercised universal jurisdiction over piracy to try cases within their domestic courts. As those dockets and accompanying prison cells fill, capacity becomes an issue. Kenya has stopped accepting cases. Option 2, the current U.N. proposal, is for a domestic Somalia court to try these piracy cases.

B. In Brief: Lockerbie

¹⁶ Michael Davey, *A Pirate Looks at the Twenty-First Century: the Legal Status of Somali Pirates in an Age of Sovereign Seas and Human Rights*, 85 Notre Dame L.Rev. 1197, 1202-03 (2010) [electronic copy provided in accompanying USB flash drive as Source 56].

¹⁷ James Kraska and Brian Wilson, *Maritime Piracy in East Africa*, 62 J. Int’l. Affairs at 57 [electronic copy provided in accompanying USB flash drive as Source 68].

¹⁸ James Kraska and Brian Wilson, *Maritime Piracy in East Africa*, 62 J. Int’l. Affairs at 57 [electronic copy provided in accompanying USB flash drive as Source 68]; and CIA World Factbook, Somalia, *available at* <https://www.cia.gov/library/publications/the-world-factbook/geos/so.html>.

¹⁹ Mark Rowbotham, *Piracy: A Problem Out of Control*, 13 Logistics and Transport Focus at 29 [electronic copy provided in accompanying USB flash drive as Source 106].

²⁰ Michael Davey, *A Pirate Looks at the Twenty-First Century: the Legal Status of Somali Pirates in an Age of Sovereign Seas and Human Rights*, 85 Notre Dame L.Rev. at 1209 [electronic copy provided in accompanying USB flash drive as Source 56].

²¹ James Kraska and Brian Wilson, *Maritime Piracy in East Africa*, 62 J. Int’l. Affairs at 58 [electronic copy provided in accompanying USB flash drive as Source 68].

Shortly after take-off from London's Heathrow Airport on December 21, 1988, a bomb exploded onboard PanAm Flight 103. The jet-plane was en route to New York's JFK Airport. The explosion occurred over the small Scottish town of Lockerbie. In total, 259 passengers and crew and 11 on the ground were killed. The United States (U.S.) and the United Kingdom (U.K.) both attempted to exercise jurisdiction over the investigation and subsequent trial on grounds of nexus, origin and location, and citizenship of victims.²²

The investigation into the bombing took many years before the indictments were made public in 1991.²³ The two accused were Libyan nationals, employed at one time as intelligence officers for the State.²⁴ Libya refused to agree to extradition to either the U.S. or U.K. International pressure was applied to Libya through UN Security Council Resolutions 731 (1992), 748 (1992), 883 (1993), and 1192 (1998), placing limits on air transportation and trade with Libya.²⁵ While some member-nations may have continued to trade with Libya,²⁶ the

²² Paul Lewis, *Libya Sets Date for Turning Over 2 Suspects in Lockerbie Bombing*, New York Times, Mar. 20 1999, available at <http://www.nytimes.com/1999/03/20/world/libya-sets-date-for-turning-over-2-suspects-in-lockerbie-bombing.html>. [electronic copy provided in accompanying USB flash drive as Source 97]; and *The Lockerbie Trial: A Documentary History* at 88 (John P. Grant ed., 2004) [electronic copy provided in accompanying USB flash drive as Source 38].

²³ *The Right of the Honourable The Lord Hardie, Her Majesty's Advocate v. Abdelbaset Ali Mohamed al Megrahi and Al Amin Khalifa Fhima*, Revised Indictment (Jan. 11, 2001), reprinted in *The Lockerbie Trial: A Documentary History*, 222 (John P. Grant ed., 2004) [electronic copy provided in accompanying USB flash drive as Source 15].

²⁴ *Id.*

²⁵ S.C. Res. 731, U.N. Doc. S/RES/731 (Jan. 21, 1992); S.C. Res. 748, U.N. Doc. S/RES/748 (Mar. 31, 1992); S.C. Res. 883, U.N. Doc. S/RES/883 (Nov. 11, 1993); and S.C. Res. 1192, U.N. Doc. S/RES/1192 (August 27, 1998) [electronic copy provided in accompanying USB flash drive as Sources 23, 24, 25, and 27].

²⁶ Steve Emerson, *Terrorism on Trial: the Lockerbie Terrorist Attack and Libya: A Retrospective Analysis*, 37 Case W. Res. J. Int'l L. 487 (2005) [electronic copy provided in accompanying USB flash drive as Source 62]. Emerson is a terrorism and national security expert, with special authority in Islamic extremist networks.

majority respected and enforced the sanctions. Libya estimates that during the decade of sanctions it lost nearly \$33 billion in trade.²⁷

The U.S., U.K., and Libya negotiated a compromise: an extraterritorial tribunal sitting in a neutral third nation. Scottish law would govern in a neutral location that all parties could agree to. The court would be comprised of a panel of three Scottish judges in lieu of a jury. The Netherlands agreed to host the court at Camp Zeist, a former U.S. Air Force Base outside of Utrecht. The U.K. agreed to reimburse all costs, as well as provide for post-trial confinement, if necessary. Libya eventually agreed to extradite the two accused to the Netherlands who then turned them over to the Scots for trial. The trial lasted nearly a year. In the end, Abdelbaset Ali Mohamed al Megrahi (Megrahi) was convicted, while Al Amin Khalifa Fhimah (Fhimah) was found not guilty. The Lockerbie Trial is the “longest and single most expensive criminal trial[] in Scottish legal history.”²⁸

C. U.N. Proposal

Somali piracy is a symptom of the economic condition of Somalia.²⁹ In 2010, the U.N. Contact Group on Piracy off the Coast of Somalia released a proposal that identified seven possible strategies to address it.³⁰ As time passes the pirates have become more bold, and the

²⁷ Ray Takeyh, *The Rogue Who Came in From the Cold*, 3 Foreign Affairs 62-72 (2001), as reprinted at the Peterson Institute for International Economics, available at <http://www.piie.com/research/topics/sanctions/libya3.cfm> last accessed Apr. 6, 2012 [electronic copy is provided in accompanying USB flash drive as Source 108].

²⁸ John P. Grant, “*Terrorism on Trial: Beyond the Montreal Convention*,” 37 Case W. Res. J. Int’l L. 453 (2005) [electronic copy provided in accompanying USB flash drive as Source 64]. Professor Grant is a former Dean at the University of Glasgow School of Law, and he oversaw the Lockerbie Trial Briefing Unit during the trial.

²⁹ Piracy Problem Inseparable from Overall Somali Crisis, Ban Warns, UN News Service, Dec. 16, 2008, *quoted in* Maro Silva, *Somalia: State Failure, Piracy, and the Challenge to International Law*, 50 Va. J. Int’l L. at 553 [electronic copy provided in accompanying USB flash drive as Source 79].

³⁰ Contact Group on Piracy off the Coast of Somalia, *Report to the Secretary-General on Possible Options to Further the Aim of Prosecuting and Imprisoning Persons Responsible for Acts of Piracy and Armed Robbery at Sea*, S/2010/394 [electronic copy provided in accompanying USB flash drive as Source 18].

death toll is rising. In addition, international trade is suffering. Option 2 asks whether the Lockerbie Model can be tailored to the unique needs of the Somali Piracy cases.³¹

The U.N. Security Council adopted Resolution 1976 (2011) with specific instruction to assess whether or not “an extraterritorial Somali specialized anti-piracy court” is feasible.³² The baseline model is the Lockerbie trial. In theory, the Somali tribunal would hear a specialized case docket of piracy and robbery at sea with Somali waters. The tribunal would apply Somali criminal law with reverence for human rights and international laws. The U.N. proposal situates the tribunal outside of Somalia. The U.N.-owned ICTR Courthouse in Arusha, Tanzania, has been recommended.³³ Further, the tribunal may or may not have U.N. participation.³⁴

III. Discussion of the Model and Application to Somalia

A. The Lockerbie Model: A National Court Sitting in a Third Nation

The PanAm Flight 103/Lockerbie Bombing (Lockerbie) was a singular incident. It struck an emotional chord with many who demanded justice. In fact, Scottish investigators continued to search for evidence for years, including turning up a critical piece of minute evidence from the fields surrounding Lockerbie. The critical piece of evidence was a thumbnail-sized microchip that was traced to the manufacturer and ultimately back to Libya.³⁵ For years, the political leaders of the three states disagreed on how to proceed. Under complementarity, Libya vowed

³¹ *Id.* at ¶ 2.

³² S.C. Res. 1976, ¶ 26 U.N. Doc. S/RES/1976 (Apr. 11, 2011) [electronic copy provided in accompanying USB flash drive as Source 30].

³³ *Id.*

³⁴ Contract Group on Piracy off the Coast of Somalia, *Report to the Secretary-General*, ¶ 2 S/2010/394 [electronic copy provided in accompanying USB flash drive as Source 17].

³⁵ Emerson, 37 Case W. Res. J. Int’l L. at 487 [electronic copy provided in accompanying USB flash drive as Source 62].

that it had sovereign authority over its people. The U.K. claimed jurisdiction as the site of the aerial incident and subsequent crash. The U.S. had the weaker claim as the flag and destination state, but since many of those on-board were U.S. citizens, credence was extended.

1. Investigation and First Indictments

Investigation is the first stage in any criminal proceeding. Without it, the need for everything subsequent is moot. However, the Lockerbie investigation was quite extensive, stretching across three years, twenty countries, 15,000 interviews, and more than 180,000 pieces of evidence.³⁶ Not to give short shrift to the importance, the focus here is on a process that can be duplicated. Each investigation will be unique and the factors will vary greatly. Each case requires direct and full attention in producing the evidence to lead to next steps. Investigations ought to occur without reference to the tribunal that will decide the case.

Similarly, the indictments are based in the domestic law of the issuing state. Here they came as a series of evolving indictments. The Scottish petition for arrest and the grand jury indictment by the U.S. District Court in D.C., both charged the two Libyan nationals with murder and were issued in late 1991, shortly after the conclusion of the investigation.³⁷ The U.S. appeared less than optimistic that anything would come of the indictments and released them

³⁶ David R. Andrews, *"Terrorism on Trial": A Thorn on the Tulip - A Scottish Trial in the Netherlands: The Story Behind the Lockerbie Trial*, 37 Case W. Res. J. Int'l L. 307, 308 (2005) [electronic copy provided in accompanying USB flash drive as Source 43]. Andrews served as the 19th Legal Advisory to the U.S. Department of State, as the Ambassador and special Negotiator for Iran/U.S. Claims, and received the Distinguished Service Award (highest civilian honor) from the U.S. State Department in part for his lead role in establishing the Scottish Court in the Netherlands for the trial of the Lockerbie Bombing.

³⁷ Petition unto the Sheriff of South Strathclyde, Dumfries and Galloway to charge Abdelbaset Ali Mohmed Al Megrari and Al Amin Krafifa Fhimar, (1991), *reprinted in* The Lockerbie Trial, 89 (C. Tofan ed., 2009) [electronic copy provided in accompanying USB flash drive as Source 12].; and U.S. v. Abdel Basset Ali Al-Megrahi, a/k/k Abdelbaset Ali Mohmed, a/k/a Ali Mohmed Al Megrahi, a/k/a Mr. Baset, a/k/a Ahmed Khalif Abdusamad and Lamen Rhalifa Fhimah, a/k/a Al Amin Khalifa Fhimah, a/k/a Mr. Lamin, (1991), *reprinted in* the Lockerbie Trial, 108 (C. Tofan ed., 2009) [electronic copy provided in accompanying USB flash drive as Source 17].

unsealed to apply political pressure to Libya.³⁸ Many viewed this a visible mechanism to put pressure on Libya in terms of bilateral trade with the U.S. and multilateral trade with U.N. member-states.³⁹ In the years that followed, Libya did not respond to the indictments. The two men accused stayed in Libya, and their activities during those eight years are not reported. A final revised indictment that reduced the charges was presented at the trial.⁴⁰

2. International Sanctions

In 1992, the International Court of Justice “declined to rule on the merits in provisional measures and preliminary objections.”⁴¹ This forced the U.K. and the U.S. continually to attempt to persuade Libya to turn over the two accused. Traditionally, nations are, for good reason, reluctant to extradite their nationals to another nation for prosecution. Sovereign states typically express one or more of the following:

first, the fugitive ought not be withdrawn from his natural judges; secondly the State owes to its subjects the protections of its laws, thirdly, it is impossible to have complete confidence in the justice meted out by a foreign State, especially with regard to a foreigner[;] and fourthly, it is disadvantageous to be tried in a foreign language, separated from friends, resources, and character witnesses.⁴²

³⁸ Ronald J. Ostrow, *Libya Implicated in Pan Am Bomb Indictments*, Los Angeles Times (Nov. 15, 1991) available at http://articles.latimes.com/1991-11-15/news/mn-1317_1_bomb-indictments last accessed Apr. 6, 2012 [electronic copy provided on accompanying USB flash drive as Source 100]. See also Robert Black, *War Crimes Research Symposium: "Terrorism on Trial": Lockerbie: A Satisfactory Process But a Flawed Result*, 37 Case W. Res. J. Int'l L. 443 (2005) [electronic copy provided on accompanying USB flash drive as Source 50].

³⁹ Donna E. Arzt, *The Lockerbie "Extradition by Analogy" Agreement: "Exceptional Measure" or Template for Transnational Criminal Justice?*, 18 Am. U. Int'l L. Rev. 163 (2002) [electronic copy provided in accompanying USB flash drive as Source 46].

⁴⁰ The Right of the Honourable The Lord Hardie, Her Majesty's Advocate v. Abdelbaset Ali Mohamed al Megrahi and Al Amin Khalifa Fhima, Revised Indictment (Jan. 11, 2001), *reprinted in* The Lockerbie Trial: A Documentary History, 222 (John P. Grant ed., 2004) [electronic copy provided in accompanying USB flash drive as Source 15].

⁴¹ Simon Chesterman, *An International Rule of Law?*, 56 Am. J. Comp. L. 331, 353 (2008) [electronic copy provided in accompanying USB flash drive as Source 53]. Simon Chesterman is Global Professor and Director of the New York University School of Law Singapore Programme, and holds an L.L.B (Hons) from University of Melbourne and D.Phil from University of Oxford.

⁴² Donna E. Arzt, *The Lockerbie "Extradition by Analogy" Agreement: "Exceptional Measure" or Template for Transnational Criminal Justice?*, 18 Am. U. Int'l L. Rev. at 163, drawn from Ninth United Nations Congress on the

Libya also asserted that the state's sovereign rights were violated under the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971) because it was being forced into turning over its own nationals.⁴³ International pressure was applied to the Libyan government on several occasions. No state can be compelled to extradite under the Montreal Convention; however, other states were demanded surrender.⁴⁴

The specific documents to achieve this are relevant to the ultimate structure of the Lockerbie Court. The U.K. and the U.S. released a tripartite declaration, joined by France in responding to the 1989 bombing of the French UTA Flight 772 over Chad, affirming a commitment to ending terrorism.⁴⁵ Shortly thereafter, under the Chapter VII powers of the Charter,⁴⁶ the U.N. Security Council passed Resolution 731 (1992), calling on Libya to surrender the accused and make reparations.⁴⁷ Two months later, the Security Council passed Resolution

Preservation of Crime and Treatment of Offenders, International Cooperation and Practical Technical Assistance for Strengthening the Rule of Law, U.N. ESCOR, 9th Sess. At 5, UN Doc. A/CONF.169/8 (1995) [electronic copy provided in accompanying USB flash drive as Source 46].

⁴³ Bernd Martenczuk, *The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie?* 10 Eur. J. Int'l L. 517, 518 (1999) [electronic copy provided in accompanying USB flash drive as Source 70]. Martenczuk was a research fellow at the University of Frankfurt am Main, holding a J.D. from the University and a Masters in Public Administration from Harvard University.

⁴⁴ John P. Grant, *War Crimes Research Symposium: "Terrorism on Trial": Beyond the Montreal Convention*, 37 Case W. Res. J. Int'l L. at 461 [electronic copy provided in accompanying USB flash drive as Source 64].

⁴⁵ Joint Declaration Letter from the Permanent Representatives of France, the United Kingdom of Great Britain and Northern Ireland, and the United States of America to the United Nations Addressed to the Secretary General (Dec. 20, 1991), *reprinted in* The Lockerbie Trial, 129-34 (C. Tofan ed., 2009) [electronic copy provided in accompanying USB flash drive as Source 20].

⁴⁶ Jared Schott, *Chapter VII as an Exception: Security Council Action and the Regulative Ideal of Emergency*, 6 Nw. U. J. Int'l Hum. Rts. 24, 62 (2007) [electronic copy provided in accompanying USB flash drive as Source 78]. Jared Schott is Legal Advisor for the Permanent Mission of Palau to the U.N and was completing his LLM at New York University when the article was written.

⁴⁷ S.C. Res. 731, U.N. Doc. S/RES/731 (Jan. 21, 1992) [electronic copy provided in accompanying USB flash drive as Source 23].

748 (1992) imposing sanctions on Libya that restricted air travel for military and civilians, sale of aircraft or component parts, weapons and ammunition, training or technical advice, and withdrew diplomatic agents from Libya.⁴⁸ The following year, the Security Council passed Resolution 883 (1993) demanding Libyan compliance with the previous resolutions and adding sanctions by freezing financial transactions so long as they were unrelated to petroleum or agriculture, adding deeper restrictions to international air travel, work with aircraft equipment, and limiting commercial operations by foreign nationals within Libya.⁴⁹ The Charter bound the U.N. to meet the requirements of necessary and proportional.⁵⁰ Within each of the Resolutions, Libya was given an option to allow the sanctions to be lifted. Libya's reported concern was that the two accused would not receive a fair trial. Saudi Arabia and South Africa eventually joined in the negotiations as intermediaries.⁵¹ They recognized the need to balance justice against the impact of the trade sanctions on the Libyan people. The Security Council later recognized the role of those two states, as well as the League of Arab States, the Organization for African Unity, the Organization of the Islamic Conference, and the Movement of Non-Aligned Countries.⁵²

⁴⁸ S.C. Res. 748, U.N. Doc. S/RES/748 (Mar. 31, 1992) [electronic copy provided in accompanying USB flash drive as Source 24].

⁴⁹ S.C. Res. 883, U.N. Doc. S/RES/883 (Nov. 11, 1993) [electronic copy provided in accompanying USB flash drive as Source 25].

⁵⁰ Jared Schott, *Chapter VII as an Exception: Security Council Action and the Regulative Ideal of Emergency*, 6 Nw. U. J. Int'l Hum. Rts. at 62 [electronic copy provided in accompanying USB flash drive as Source 78].

⁵¹ Paul Lewis, *Libya Sets Date for Turning Over 2 Suspects in Lockerbie Bombing*, New York Times, Mar. 20 1999, available at <http://www.nytimes.com/1999/03/20/world/libya-sets-date-for-turning-over-2-suspects-in-lockerbie-bombing.html>, last accessed on Feb. 2, 2012 [electronic copy provided in accompanying USB flash drive as Source 97].

⁵² Statement by the President of the Security Council, U.N. Doc. S/PRST/1999/10 (Apr. 8, 1999) [electronic copy provided in accompanying USB flash drive as Source 32].

Reports indicate that during the eleven years the sanctions were in place, the Libyan economy lost \$48 billion U.S.D.⁵³

3. Developing and Implementing the Court Model

Resolution 883 (1993) allowed for a trial with either U.S. or U.K. Courts and required the Libyan government to work with the French government independently on the UTA 772 bombing.⁵⁴ David Andrews, the Legal Advisor to the U.S. State Department, took the lead in developing what would become the Lockerbie Model. International human rights agreements bar extradition to a country where the accused is likely to be tortured or may face the death penalty. As such, a trial in the U.S. was “not politically acceptable,” so only a U.K. court remained as a viable option.⁵⁵ Due to the location of the crash-site, a Scottish court was the most reasonable.⁵⁶ At the time, security weighed heavily on the plan’s development and information was compartmentalized.⁵⁷ The U.K. government became involved as the framework was developed.

To build a model that the Libyans would agree to, the U.S. had to abandon its own right to prosecute the two accused and turn its sovereign claim over to another state. Similarly, the U.K. had to enforce its sovereign claim and had the added weight of carrying the U.S.

⁵³ *Id.*

⁵⁴ S.C. Res. 883, at §16 U.N. Doc. S/RES/883 [electronic copy provided in accompanying USB flash drive as Source 25].

⁵⁵ Andrews, *A Thorn on the Tulip - A Scottish Trial in the Netherlands: The Story Behind the Lockerbie Trial*, 37 Case W. Res. J. Int’l L. at 312 [electronic copy provided in accompanying USB flash drive as Source 43].

⁵⁶ *Id.*

⁵⁷ *Id.*

indictments. Further, even though the U.S. State Department determined there was no international double jeopardy, there would be only one trial.⁵⁸

a. Evaluation of Scots Law

In order to get Libya to agree to the use of a Scottish court and Scots law, an evaluation of Scots law was commissioned by the U.N. Secretary General.⁵⁹ Independently, Robert Black, a Scots lawyer and Professor at the University of Edinburgh, acted as negotiator with Dr. Ibrahim Legwell (al-Ghouil) the Libyan defense counsel for a “slightly modified” Scottish criminal procedure.⁶⁰ The Libyan, U.K., and U.S. governments were not party to this, and neither side directly accepted the recommendations immediately.⁶¹ Dr. Legwell was unsuccessful in getting the two accused to agree to the modifications.⁶²

The U.N. Report, issued in December 1997, assessed the Scots legal system to identify the likelihood of a fair trial, while meeting international standards.⁶³ Neither the U.K. nor the

⁵⁸ *Id.* at 313.

⁵⁹ U.N. Secretary-General, *Report by Dr. Enoch Dumbutshena and Professor Henry G. Schermers on the Scottish Judicial System*, ¶ 1 U.N. Doc. S/1997/991 Annex (Dec. 18, 1997), *reprinted in* The Lockerbie Trial, 163-77 (C. Tofan ed., 2009) [electronic copy provided in accompanying USB flash drive as Source 34]. Dr. Dumbutshena was the former Chief Justice of Zimbabwe. Professor Schermers was from Leiden University in the Netherlands. (Hereafter, *Report...on the Scottish Judicial System*).

⁶⁰ Black-Legwell (al-Ghouil) Compromise of January 1994 (1994) *reprinted in* The Lockerbie Trial: A Documentary History, 119 (John P. Grant ed., 2004) [electronic copy provided in accompanying USB flash drive as Source 85].

⁶¹ *Id.*

⁶² Letter from Sgd. Ibrahim al-Ghouli (Legwell) to Robert Black (Jan. 12 1994), *reprinted in* The Lockerbie Trial: A Documentary History, 121 (John P. Grant ed., 2004) [electronic copy provided in accompanying USB flash drive as Source 96].

⁶³ U.N. Secretary-General, *Report ... on the Scottish Judicial System*, §IX U.N. Doc. S/1997/991 Annex, *reprinted in* The Lockerbie Trial, 163-77 (C. Tofan ed., 2009) [electronic copy provided in accompanying USB flash drive as Source 37].

U.S. were involved in that assessment; instead a professor from the Netherlands and former Chief Justice of Zimbabwe conducted the review.⁶⁴ The factors of their review included:

- Overview of Scottish Judicial System
- The Pre-Trial procedure
 - Investigation
 - Detention
- The Trial Proceedings
 - The High Court
 - The Jury
 - The Trial
- Post-Trial Procedures
 - Sentencing
 - Imprisonment
 - Appeals
- International Obligations of the United Kingdom
- United Nations and other International Observers
- Attendant Factors
 - Civil Litigation
 - Prejudicial Publicity and the Contempt of Court
- Courts and Prison Facilities and Conditions
 - Dumfries Police Station
 - Dumfries Sheriff Court
 - HM Bairline Prison
 - High Court of Justiciary in Glasgow
 - High Court of Justiciary in Edinburgh.⁶⁵

These factors form a baseline for future replication. From the assessment, the authors found that the Scottish legal system could provide a fair trial, from the pre-trial through appeals and potential imprisonment.⁶⁶ Most notably, the assessment determined that having a jury trial, customary in Scots law, “would not prejudice the accused’s right to a free trial,” but also recommended that a jury trial not be required.⁶⁷ The U.S.-U.K. working group had already

⁶⁴ *Id.* at 163.

⁶⁵ *Id.* at 163-77.

⁶⁶ *Id.* at 177.

⁶⁷ *Id.*

identified the jury as presenting significant challenges: if the trial took more than a year as expected, the Scottish citizens on the jury would have a lengthy absence from Scotland.⁶⁸ The Lord Advocate of Scotland, as prosecutor, was “adamant [that] Scots criminal law and procedure” be followed with only one variation: the Jury.⁶⁹ Substituting the appellate level ‘panel’ of three judges, plus one alternate, was an amenable solution to the U.K.⁷⁰

In response to the evaluation, the defense group for the two accused issued a letter to the Secretary-General, expressing outrage that the Libyan justice system was not reviewed.⁷¹ Further, the defense group wanted the goal to be a fair trial, without Western media or political pressure.⁷² It made several recommendations including a neutral location for the trial and a panel of judges, “presided over by a Scottish judge.”⁷³ This wording suggests that the panel would have judges from other states, not just Scotland.

Specifically, the defense group called for the use of “Libyan Arab national law and the law of international conventions,” in particular the Montreal Convention on 1971, Article 5, paragraphs 2-3.⁷⁴ Recognizing that it may be ignored, the defense group stated that it would block the extradition unless a fair trial and the human rights principles could be upheld.⁷⁵ Lastly,

⁶⁸ Andrews, *A Thorn on the Tulip - A Scottish Trial in the Netherlands: The Story Behind the Lockerbie Trial*, 37 Case W. Res. J. Int’l L. at 313 [electronic copy provided in accompanying USB flash drive as Source 43].

⁶⁹ *Id.* at 312-13.

⁷⁰ *Id.* at 313.

⁷¹ Statement by the Lockerbie Suspects Defense Group to the Secretary-General, ¶ 1-3 U.N. Doc S/D1997/1015 (Dec. 25, 1997), *reprinted in* The Lockerbie Trial, 178-80 (C. Tofan ed., 2009) [electronic copy provided in accompanying USB flash drive as Source 31].

⁷² *Id.*

⁷³ *Id.* at ¶ 3.

⁷⁴ *Id.* at ¶ 4.

⁷⁵ *Id.* at ¶¶ 6-7.

the defense group stated that a trial at the Hague, as proposed by “the League of Arab States, the Organization for African Unity [...] the Organization of the Islamic Conference, and the Movement of Non-Aligned Countries,” would provide a fair trial.⁷⁶

The government of Libya responded that it had been following international customary law, and the Montreal Convention that requires a signatory to investigate their own nationals.⁷⁷ It had assigned two judges to investigate, who were refused cooperation by the U.S. and U.K.⁷⁸ Further, the Libyan government underscored the effect of the sanctions on its people, while the other two nations were without consequence.⁷⁹ Libya requested the U.N. intervene to provide a fair venue without “prior condemnation of the two suspects” and to stop the political exploitation of the tragedy.⁸⁰

b. A Neutral Third State

Early in the discussions, the League of Arab States suggested a neutral third as the venue. Libya was feeling the pressure of the sanctions and had indicated a willingness to consider a third state location, again, the Netherlands.⁸¹ The U.S.-U.K. approached the newly elected Dutch government in July 1998, which was immediately supportive and contributed to the process.⁸²

⁷⁶ *Id.*

⁷⁷ Letter from the Permanent Mission of Socialist People’s Libyan Arab Jamahiriya to the United Nations: The Question of the Lockerbie Position Paper, ¶ 8 (December 1997), *reprinted in* The Lockerbie Trial, 181 (C. Tofan ed., 2009) [electronic copy provided in accompanying USB flash drive as Source 22].

⁷⁸ *Id.*

⁷⁹ *Id.* at ¶¶ 29-34.

⁸⁰ *Id.*

⁸¹ Andrews, *A Thorn on the Tulip - A Scottish Trial in the Netherlands: The Story Behind the Lockerbie Trial*, 37 Case W. Res. J. Int’l L. at 310 [electronic copy provided in accompanying USB flash drive as Source 43].

⁸² *Id.* at 314-15.

Further, it became apparent that Libya would support a tribunal in the Netherlands.⁸³ Ultimately, the Security Council adopted Resolution 1192 (1998), acting under the U.N. Charter's Chapter VII powers in authorizing the Netherlands to host the Scottish Court for the express and limited purpose of the Lockerbie bombing case.⁸⁴

Originally, the Libyan government and the Arab League had suggested The Hague for the trial venue. However, given its sovereignty needs, the Scottish government would need a more specific land area, in which to establish the "island" of Scottish territory in the Netherlands.⁸⁵ The Dutch identified several sites. At the top of the list was Camp Zeist, a former U.S. air base that had been turned over to the Dutch Government.⁸⁶

Even with the U.N. authorization, the Dutch and the U.K. Governments still had to address issues related to creating the island with Scottish jurisdiction and with extradition. They entered into The Netherlands-U.K. Agreement in 1999.⁸⁷ The Agreement is the governing document, articulating the comprehensive requirements of each side and establishing boundaries. The contents are the backbone of the actual Lockerbie Model. In order, the Agreement:

- 1) references the authority of the U.N. Security Council,
- 2) limits the scope of the Agreement to the Scottish Court in the Netherlands,
- 3) limits the Scottish Court in the Netherlands to trying the criminal case of the Lockerbie Bombing,

⁸³ Letter from the Permanent Mission of Socialist People's Libyan Arab Jamahiriya to the United Nations: The Question of the Lockerbie Position Paper, ¶ 33 (December 1997), *reprinted in* The Lockerbie Trial, 181 (C. Tofan ed., 2009) [electronic copy provided in accompanying USB flash drive as Source 22].

⁸⁴ S.C. Res. 1192, ¶¶ 2-5 U.N. Doc. S/RES/1192 (August 27, 1998) [electronic copy provided in accompanying USB flash drive as Source 27].

⁸⁵ Andrews, *A Thorn on the Tulip - A Scottish Trial in the Netherlands: The Story Behind the Lockerbie Trial*, 37 Case W. Res. J. Int'l L. at 316 [electronic copy provided in accompanying USB flash drive as Source 43].

⁸⁶ *Id.*

⁸⁷ The Netherlands-UK Agreement, 38 I.L.M. 926 (1999), *reprinted in* The Lockerbie Trial: A Documentary History, 149-162 (John P. Grant ed., 2004) [electronic copy provided in accompanying USB flash drive as Source 9].

- 4) grants full juridical personality to the Scottish Court in the Netherlands,
- 5) grants inviolability of the premises of the Scottish Court, such that the site is the sacred land of Scotland who is responsible for administering and the Dutch will only enter the premises on invite or emergency,
- 6) establishes the law and authority of Scotland in the Scottish Court in the Netherlands on the Premises,
- 7) places responsibility for securing the premises on Scotland,
- 8) grants immunity to the Scottish Court,
- 9) grants inviolability to the archives,
- 10) exempts Scotland from taxes and duties,
- 11) grants the Scottish Court the right to enjoy standard diplomatic treatment of communications, including no censorship, reasonable rates, operate radio or television stations and newsprint without restriction,
- 12) requires that public services and utilities be made available to the Scottish Court in the Netherlands at comparable rates. In the event of outage, the host country gives priority to essential services, of which the Court will be included,
- 13) allows Scotland to display its flag, emblems, and markings, limited to the premises,
- 14) grants privileges and immunities to the judges and officials of the Scottish Court in the Netherlands,
- 15) grants solicitors and advocates immunity from Dutch law within their roles, and exempts them from immigration restrictions,
- 16) establishes the extradition and repatriation for the accused,
- 17) grants entrance, transfer, limited immunity, and protection to witnesses within the Netherlands,
- 18) grants entry to international observers,
- 19) requires the Scottish Court in the Netherlands to cooperate with the Dutch authorities on all levels of administration,
- 20) requires the Scottish Court in the Netherlands' Registrar to notify the Dutch of the names and status of all personnel and special notice for those permitted to carry firearms,
- 21) allows those persons so registered to have free movement in, out, and throughout the Netherlands,
- 22) allows the Registrar to issue registration cards to those persons,
- 23) allows the Dutch local and federal authorities to carry out means of safety and security,
- 24) requires the costs be borne by the United Kingdom, with quarterly reimbursement,
- 25) does not prejudice other legal agreements,
- 26) does not affect other operations within the host country,
- 27) allows for additional arrangements if both parties agree,
- 28) provides for disputes to be resolved between the parties, and
- 29) provides for the termination of the Scottish Court in the Netherlands, the Agreement, and the trial.⁸⁸

⁸⁸ *Id.*

A few items within the list warrant special attention for their role in the trial. The issue of extradition may have been one of the most contentious points. For years, Libya fought turning over the defendants. Finally, Libya agreed to extradite only to the Netherlands. The two defendants departed from Tripoli Airport with an Italian flight crew.⁸⁹ Once on the ground in the Netherlands, the Dutch then had to extradite to Scottish authorities only for the express and limited purpose of the trial of the Lockerbie Bombing and only within the territory the Scottish Court in the Netherlands.⁹⁰ The language of Article 16 is specific that the Netherlands, as host, could not exercise criminal jurisdiction, reserving that for Scotland.⁹¹ The Agreement carefully includes an obligation on the defendants to leave the host nation upon either a discontinuance of the trial or their acquittal.⁹²

Articles 14, 15, 17, 18, 20, 21, and 22 address important issues for participants and observers of the trial. These are structured in a way to balance security and ensure participants would have the same freedoms of movement they would ordinarily have in the actual territory of Scotland.⁹³ Civilians and the press corps are not included.

Camp Zeist needed to be a self-sustained, operating jurisdiction of the Scottish government. By establishing Camp Zeist as the sovereign premises of the Scottish Court in the Netherlands, the U.K. bore all the duties and responsibilities of running a government within

⁸⁹ Ian Black, *Lockerbie Suspects Surrendered to Scots*, The Guardian, Apr. 6, 1999, available at <http://www.guardian.co.uk/uk/1999/apr/06/lockerbie.ianblack1k/1999/apr/06/lockerbie.ianblack1>, last accessed Feb. 19, 2012 [electronic copy provided in accompanying USB flash drive as Source 84].

⁹⁰ The Netherlands-U.K. Agreement, 38 I.L.M. 926 at Article 16: The Accused, *reprinted in* The Lockerbie Trial: A Documentary History, 158 (John P. Grant ed., 2004) [electronic copy provided in accompanying USB flash drive as Source 9].

⁹¹ *Id.* at ¶ 3.

⁹² *Id.* at ¶ 4.

⁹³ *Id.* at Articles 14, 15, 17, 18, 20, 21, and 22.

another state, but also reaped the benefits. It was responsible for reimbursing all the costs of the trial. Figures indicate the cost was upwards of £74.5 million (\$106 million).⁹⁴ At the very least, the site preparations alone were reported at £12 million in transforming Camp Zeist into a secure, high-tech courtroom with adequate space and technology for court functions, media, victims, and confinement cells for the defendants.⁹⁵ The U.K. was also responsible for providing for the physical security of the Scottish Court premises, just as it would have been in Scotland.

The U.K. also had the benefit of being sovereign within the premises of Camp Zeist. Its law applied. The Scottish Court of the Netherlands exercised full autonomy within the host nation without threat of the host nation usurping authority.⁹⁶ The Netherlands was directly barred from exercising jurisdiction over the defendants and agreed to offer immunity to the trial participants.⁹⁷ Further, the Netherlands extended traditional diplomatic amenities to the guest court in the forms of public utilities, access to and by the media, and provided tax-exempt status, as it did for other official envoys.⁹⁸ Altogether, the Dutch were gracious hosts, recognizing that they had ceded control of the political island of Camp Zeist over to the Scottish. Nothing in the record indicates that the Agreement was anything less than successful in establishing boundaries.

⁹⁴ Donna E. Arzt, *The Lockerbie "Extradition by Analogy" Agreement: "Exceptional Measure" or Template for Transnational Criminal Justice?* 18 Am. U. Int'l L. Rev. at 211 [electronic copy provided in accompanying USB flash drive as Source 46].

⁹⁵ *The Lockerbie Trial: A Documentary History*, 149 (John P. Grant ed., 2004) [electronic copy provided in accompanying USB flash drive as Source 38].

⁹⁶ *The Netherlands-UK Agreement*, 38 I.L.M. 926 at Art. 3-5, *reprinted in* *The Lockerbie Trial: A Documentary History*, at Articles 3-5 (John P. Grant ed., 2004) [electronic copy provided in accompanying USB flash drive as Source 9].

⁹⁷ *Id.* at Articles 16 and 6-8.

⁹⁸ *Id.* at Article 10-12.

Under the law of the U.K., enabling legislation still had to be enacted to allow the Scottish High Court of Justiciary to sit in the Netherlands and to make the other necessary adaptations to Scots law.⁹⁹ Particular attention should be paid to the fact that the Order allowed for the substitution of the panel of Scottish judges with one alternate in lieu of a jury.¹⁰⁰ It authorized the Scottish Court in the Netherlands “to issue warrants for any witnesses within the [U.K.] who would not voluntarily appear in the court,” and had the “power to cite ... and serve to process” but not arrest those outside the U.K.¹⁰¹ It modified the Scottish Prisons Act of 1989, as necessary for the temporary jail at Camp Zeist.¹⁰² Lastly, it reserved authority to the panel of judges to modify the laws, if a majority of the judges found it necessary.¹⁰³

4. Camp Zeist Conversion

Once granted the “island” within the Netherlands, the U.K. had to make significant conversions to the former air base in order to meet international standards. For example, medical facilities were constructed in case one of the defendants became ill.¹⁰⁴ Secured jail cells were also added. Under the Agreement with the Netherlands, the U.K. was wholly responsible for the security of the grounds.

⁹⁹ Order in Council, S.I. No. 1998/2251, (Sept. 16, 1998) [electronic copy provided in accompanying USB flash drive as Source 11].

¹⁰⁰ *Id.* at Articles 5 and 7.

¹⁰¹ *Id.* at Article 12, as referenced in Donna E. Arzt, *The Lockerbie "Extradition by Analogy" Agreement: "Exceptional Measure" or Template for Transnational Criminal Justice?*, 18 Am. U. Int'l L. Rev. at 213 [electronic copy provided in accompanying USB flash drive as Source 46].

¹⁰² *Id.* at Articles 15-16.

¹⁰³ *Id.* at Article 6.

¹⁰⁴ *The Lockerbie Trial: A Documentary History*, 149 (John P. Grant ed., 2004) [electronic copy provided in accompanying USB flash drive as Source 38].

Security was an early consideration. The courtroom needed to have full-length, bullet resistant glass dividing the court from the gallery.¹⁰⁵ Witnesses were afforded the protection of voice distortion and physical concealment. This required that the courtroom be soundproof with audio technology available so that members of the public could listen through the provided headsets, as well as the capacity to cordon off the witness stand, if need be.¹⁰⁶ Transcriptionists were also listening, producing near real-time recordings.¹⁰⁷

To address the volume of evidence in the form of pictures, maps, and scanned documents, the Court room was equipped with advanced data storage technology, that members of the court could access without having all of the cumbersome evidence present.¹⁰⁸ As a result, the judges permitted either the prosecution or the defense the ‘right to object’ to evidence presented that would then be evaluated by the judges for admissibility.¹⁰⁹ In large part the evidence presented electronically allowed for ease of access. It could be updated daily and was portable for the defense and prosecution. Also, it allowed for grid overlays to be incorporated in the photos, making identification easier.¹¹⁰

In addition to the standard needs of a courtroom, this one also needed to have closed circuit television to allow both for broadcast to other parts of the Camp but also for real-time

¹⁰⁵ Norman McFayden, comments at Symposium, reprinted in Daan Braverman, *SYMPOSIUM: International Terrorism, Victims’ Rights and the Lockerbie Criminal Trial* at Syracuse University College of Law (April 27, 2001) 29 *Syracuse J. Int’l L & Com.* 1, 33 (2001)[electronic copy provided in accompanying USB flash drive as Source 51].

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 35

¹⁰⁸ *Id.* at 36.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 37.

remote witness testimony.¹¹¹ During planning, the Scottish Court in the Netherlands made arrangements for the victims' families, international observers, and the media to have requisite space on the grounds of Camp Zeist. The former gymnasium was converted to a media center.¹¹² The trial was not broadcast, despite two petitions by the BBC, out of concern for the "administration of justice."¹¹³ Private space was allocated so that victims' families could be isolated and watch the trial through closed circuit television.¹¹⁴

Additional considerations were made for the translation or interpretation of evidence. No fewer than fourteen languages were represented in the witnesses and evidence, forcing the Court to provide "multiple simultaneous interpretations."¹¹⁵ Three interpreters booths were built. During the trial, a spoken speed limit was invoked to ensure that the interpreters could keep up.¹¹⁶

5. The Criminal Proceeding

a. Jurisdictional Challenge

The defendants were originally indicted years earlier in 1991.¹¹⁷ When they arrived in the Netherlands, both were "transferred" through extradition to the Scottish government at Camp

¹¹¹ *Id.* at 31-32.

¹¹² The Lockerbie Trial: A Documentary History, 149 (John P. Grant ed., 2004) [electronic copy provided in accompanying USB flash drive as Source 38].

¹¹³ *Id.* at 185.

¹¹⁴ Norman McFayden, comments at Symposium, 29 Syracuse J. Int'l L & Com. at 31-32 [electronic copy provided in accompanying USB flash drive as Source 51].

¹¹⁵ *Id.* at 33-34.

¹¹⁶ *Id.* at 35.

¹¹⁷ The Right of the Honourable The Lord Hardie, Her Majesty's Advocate v. Abdelbaset Ali Mohamed al Megrahi and Al Amin Khalifa Fhima, Revised Indictment (Jan. 11, 2001), *reprinted in* The Lockerbie Trial: A Documentary History, 222 (John P. Grant ed., 2004) [electronic copy provided in accompanying USB flash drive as Source 15].

Zeist on April 5, 1999.¹¹⁸ Both defendants waived their right to contest extradition to the Scottish Court.¹¹⁹ Defense attorneys filed a challenge to the conspiracy charge, citing that the defendants had not conducted the alleged activity within Scotland and that Scots law did not have jurisdiction.¹²⁰ The Scottish Court of the Netherlands reviewed the matter and determined that given the “gravity” of the crime and the “long drawn out and complex conspiracy” directed toward the U.K., and ultimately effecting Scotland, did grant that Scotland the “interest” in a fair trial.¹²¹

b. Evidentiary Challenges

Presenting evidence under Scots law caused unique challenges.¹²² The evidence had to be in English for the Court and in Arabic for the defendants. Given the volume of evidence, both written and verbal translation was required for nearly 1,300 witnesses and 2,400 documents.¹²³ Evidence ranged from microchip to fuselage, some of which could not be transported to the Netherlands, so television links were permitted.¹²⁴ Scots law required the prosecution and defense to admit evidence that was not in dispute in a Statement of Uncontroversial Evidence.¹²⁵

¹¹⁸ Donna E. Arzt, *The Lockerbie "Extradition by Analogy" Agreement: "Exceptional Measure" or Template for Transnational Criminal Justice?*, 18 Am. U. Int'l L. Rev. at 178 [electronic copy provided in accompanying USB flash drive as Source 46].

¹¹⁹ *Id.* at 178-79.

¹²⁰ *The Lockerbie Trial: A Documentary History*, 203 (John P. Grant ed., 2004) [electronic copy provided in accompanying USB flash drive as Source 38].

¹²¹ Preliminary Diet (1999): *Her Majesty's Advocate v. Megrahi and Fhimah* (No. 1), 2000 J.C. 555; S.C.C.R. 177; 2000 S.L.T. 1393; 2000 G.W.D. 5-183, *reprinted in* *The Lockerbie Trial*, 303, 306-08 (C. Tofan ed., 2009) [electronic copy provided in accompanying USB flash drive as Source 13].

¹²² Norman McFayden, comments at Symposium, 29 Syracuse J. Int'l L & Com. 29, 31 [electronic copy provided in accompanying USB flash drive as Source 51].

¹²³ *Id.* 29-30.

¹²⁴ *Id.*

The defense attorneys also challenged certain evidence. In one instance, a witness made a statement to the Maltese Magistrate during the investigation process. The defendants challenged it as undermining a fair trial. The Scottish Court of the Netherlands held that so long as the witness was in court, the evidence could be admitted.¹²⁶ Further, the Court held that defendant Fhimah's diary was admissible, despite a challenge on the grounds that the Scottish investigators had seized it in Malta without following Maltese criminal law.¹²⁷ Maltese law provides three ways to conduct an on-site investigation; the Court was satisfied that Scottish investigators had complied.¹²⁸

c. Summary of the Trial

The Lockerbie Trial was the single most expensive trial the U.K. ever conducted. It lasted for more than nine months, presented "230 witnesses whose testimony extended to 10,332 pages of transcripts," and presented evidence for "84 days."¹²⁹ In January 2001, the Scottish Court in the Netherlands found Megrahi guilty and Fhimah not guilty.¹³⁰ Megrahi was sentenced to life in

¹²⁵ *Id.* at 31.

¹²⁶ *Her Majesty's Advocate v. Megrahi and Fhimah (No. 2)*, S.C.C.R. 1003; 2000 S.L.T. 1399; 2000 G.W.D. 33-1266, *reprinted in* *The Lockerbie Trial*, 309 at 313 (C. Tofan ed., 2009) [electronic copy provided in accompanying USB flash drive as Source 4].

¹²⁷ *Her Majesty's Advocate v. Megrahi and Fhimah (No. 3)*, 2000 S.L.T. 1401; 2000 G.W.D. 33-1265, *reprinted in* *The Lockerbie Trial*, 314-15, 317 (C. Tofan ed., 2009) [electronic copy provided in accompanying USB flash drive as Source 5].

¹²⁸ *Id.* at 319.

¹²⁹ *The Lockerbie Trial: A Documentary History*, 225 (John P. Grant ed., 2004) [electronic copy provided in accompanying USB flash drive as Source 38].

¹³⁰ *Id.* at 226.

prison, minimum 20 years, to be served in Scotland, per The Netherlands/UK Agreement.¹³¹ Fhimah was released to Libya.

d. Defendant Megrahi's Appeal

Defendant Megrahi exercised his right to an appeal, citing a "miscarriage of justice."¹³² Specifically, the defense argued that the several critical pieces evidence were faulty, as were sworn statements and testimony by witnesses.¹³³ Further, the defense argued that the Scottish practice of trial judges submitting a report to the court of appeals was in contravention of the European Convention on the Human Rights.¹³⁴ The Appeal Court, High Court of Justiciary, chose to follow established Scottish law¹³⁵ and held that the requirements of the Convention were not breached since that Court was an "independent, impartial tribunal."¹³⁶ In March 2002, the Appeal Court concluded that trial court had found evidence "real and convincing."¹³⁷ Based on the appeal presented, "none of the grounds of appeal is well founded."¹³⁸ A year and a half

¹³¹ *Id.* at 227, 228.

¹³² Note of Appeal: Megrahi v. Her Majesty's Advocate, *reprinted in* The Lockerbie Trial, 408-18. (C. Tofan ed., 2009) [electronic copy provided in accompanying USB flash drive as Source 10].

¹³³ *Id.*

¹³⁴ Megrahi v. Her Majesty's Advocate, 2001 S.C.C.R. 701; 2001 S.L.T. 1473; 2001 G.W.D. 26-1014, *reprinted in* The Lockerbie Trial, 295 *The Lockerbie Trial: A Documentary History*, 295 (John P. Grant ed., 2004) [electronic copy provided in accompanying USB flash drive as Source 7].

¹³⁵ *Id.*

¹³⁶ *Id.* at 297.

¹³⁷ Megrahi v. Her Majesty's Advocate, Appeal Judgment, 2002 J.C. 99; 2002 S.C.C.R. 509; 2002 S.L.T. 1433; 2002 G.W.D. 1-335, ¶¶368-70 *reprinted in* The Lockerbie Trial: A Documentary History, 299 at 433 (John P. Grant ed., 2004) [electronic copy provided in accompanying USB flash drive as Source 8].

¹³⁸ *Id.*

after the appeal decision, the Security Council adopted Resolution 1506 (2003), immediately lifting the 1991 sanctions.¹³⁹

6. International Observer's Reports

Per U.N. Security Council Resolution 1192 (1998), five international observers were appointed. Dr. Hans Kochler produced two unsolicited reports, following each the trial and the appeal.¹⁴⁰ He expressed concern for the fairness of the trial and that it had not met basic requirements of due process. Dr. Kochler wrote that “[r]egrettably, through the conduct of the Court, disservice has been done to the important cause of international criminal justice.”¹⁴¹ He focused particular attention on the use of language by the judges in reaching their split verdicts. Dr. Kochler explained in his analysis that the trial was more of a political than of a legal nature.¹⁴²

7. An Application of a modified Lockerbie Model

The Lockerbie Model for extraterritoriality courts was, in a sense, tested in 2004. On the remote island chain of the Pitcairn Islands,¹⁴³ some islands have too few inhabitants to comprise

¹³⁹ S.C. Res. 1506, U.N. Doc. S/RES/1506 (Sept. 12, 2003) [electronic copy provided in accompanying USB flash drive as Source 28].

¹⁴⁰ Dr. Hans Kochler, Report on and evaluation of the *Lockerbie Trial* conducted by the special Scottish Court in the Netherlands at Kamp van Zeist by Dr. Hans Köchler, University Professor, international observer of the International Progress Organization nominated by United Nations Secretary-General Kofi Annan on the basis of Security Council resolution 1192 (1998) (“Kochler Report No. 1 and No.2”) available at <http://www.i-p-o.org/lockerbie-report.htm> last accessed Mar. 11, 2012 [electronic copy provided in accompanying USB flash drive as Source 94].

¹⁴¹ *Id.* at ¶ 18.

¹⁴² *Id.* at ¶ 3, 6-7, 14-15, 17-18. Dr. Kochler expressed concerns about the length of the detention of the suspects, due process concerns stemming from the interrogation of witnesses, and lack of transparency on the part of the defense, who claimed national security privacy.

¹⁴³ The same islands as from the HMS Bounty and Fletcher Christian lore.

a normal jury pool.¹⁴⁴ In a criminal case involving seven defendants accused of raping young girls, the problem was exacerbated when the small island only had forty-five inhabitants.¹⁴⁵ Local officials wanted to try the case on Pitcairn soil.¹⁴⁶ However, most felt, given the nature of the crime and publicity surrounding it, removal to a Pitcairn court sitting in New Zealand would be best. Additionally, a trial in the Pitcairn Islands would require bringing in judges, prosecutors, defense attorneys, who would be limited by lack of air service, the 8-day boat trip to New Zealand, poor communications, and general lack of infrastructure.¹⁴⁷ The Pitcairn Islands Supreme Court, modeled in the common law, ruled:

For reasons also traversed in this judgment, we: uphold the legal impartiality of the committing Magistrate, and the validity of the committal proceedings; confirm that Pitcairn courts may sit in New Zealand, in accordance with the correct application of the provisions of the law of both jurisdictions; and hold that, under Pitcairn law, trial without a jury is not a breach of the rights of residents, and that the Sexual Offences Act 1956 (UK) applies as part of the law of Pitcairn Island.¹⁴⁸

Similar to Lockerbie, the Pitcairn government was structuring an extraterritorial court, applying Pitcairn law, in another sovereign state. It needed to make certain accommodations. Legislative permission was required, and the Governor signed off in 2003, allowing Magistrates

¹⁴⁴ Adam C. Clanton, *How to Transfer Venue When You Only Have One: The Problem of High Profile Criminal Jury Trials in American Samoa*, 29 Hawaii L. Rev. 325, 356 (2007) [electronic copy provided in accompanying USB flash drive as Source 54]. Mr. Clanton is a former law clerk to the High Court of American Samoa and is a current litigation associate at Williams, Kastner & Gibbs in Portland, Oregon.

¹⁴⁵ *Id.* at 356.

¹⁴⁶ *Id.* at 356-57.

¹⁴⁷ Pitcairn Islands Bill Introduced (Oct. 14, 2002), available at <http://www.beehive.govt.nz/sites/all/files/PitcairnTrialsBill.pdf> last accessed Mar. 2, 2012 [electronic copy provided in accompanying USB flash drive as Source 102].

¹⁴⁸ *Queen v. 7 Named Accused*, Trials No. 1-55/03, [2004] PNSC 1; SC 04-04-19 at ¶1220 (Apr. 19, 2004) [electronic copy provided in accompanying USB flash drive as Source 14].

and Supreme Courts to sit in New Zealand but limited to the “current trials.”¹⁴⁹ Next, it needed the permission of New Zealand to allow the court and provide for the jurisdictional island within New Zealand in order to apply Pitcairn law.¹⁵⁰ Members of the New Zealand legislature were slow to approve, based on a number of factors. The agreement finally allowed the transfer of *venue only*, with no application of New Zealand law or legal process.¹⁵¹ Similar immunities are granted to members of the court, as seen in the Netherlands-U.K. Agreement, yet New Zealand did agree to provide jail and prison space, if necessary.¹⁵²

In consideration of extraterritorial courts, David Andrews, architect of the Lockerbie Model, hesitates to recommend the use of a third country model.¹⁵³ The amount of time and resources was significant. The political nature of the crime and the nations involved dictated such measures. He recommends that in future situations, the Model not be taken lightly.¹⁵⁴

For a brief time, the Lockerbie Model was seen as the future of international terrorism trials for the U.S.¹⁵⁵ That was short-lived. However, there are “lessons” to be learned from the

¹⁴⁹ Pitcairn Islands Bill Introduced (Oct. 14, 2002), available at <http://www.beehive.govt.nz/sites/all/files/PitcairnTrialsBill.pdf> last accessed Mar. 2, 2012 [electronic copy provided in accompanying USB flash drive as Source 102].

¹⁵⁰ Adam C. Clanton, How to Transfer Venue When You Only Have One, 29 Hawaii L. Rev. at 358 [electronic copy provided in accompanying USB flash drive as Source 54].

¹⁵¹ *Id.*

¹⁵² Pitcairn Islands Bill Introduced (Oct. 14, 2002), available at <http://www.beehive.govt.nz/sites/all/files/PitcairnTrialsBill.pdf> last accessed Mar. 2, 2012 [electronic copy provided in accompanying USB flash drive as Source 102].

¹⁵³ Andrews, *A Thorn on the Tulip - A Scottish Trial in the Netherlands: The Story Behind the Lockerbie Trial*, 37 Case W. Res. J. Int'l L. at 318 [electronic copy provided in accompanying USB flash drive as Source 43].

¹⁵⁴ *Id.*

¹⁵⁵ Michael P. Scharf and Amy E. Miller, *War Crimes Research Symposium: "Terrorism on Trial": Foreword: Terrorism on Trial*, 37 Case W. Res. J. Int'l L. 287, 289 (2005) [electronic copy provided in accompanying USB flash drive as Source 77].

Lockerbie Model,¹⁵⁶ and they are not restricted to terrorism. The ultimate lesson of Lockerbie Trial, according to John Grant, is that “the international community needs to adopt a multi-faceted approach to ... a multi-faceted problem.”¹⁵⁷ Though he was referring to the war on terror, the concept applies to the growing challenge of piracy off the coast of Somalia: piracy is but a symptom of a broader problem of a failed state, but a symptom that cannot be ignored.

B. The Proposed Extraterritorial Somali Anti-Piracy Court

1. Somalia Today

Somali piracy continues to grow. “Piracy is a low-risk criminal activity that pays well. It occurs for one overriding reason: opportunity.”¹⁵⁸ The increase in piracy was a direct result of the failed state of Somalia. The current regime is the Transnational Federal Government (TFG), but it is a bit deceptive as other regimes have used the same title.¹⁵⁹ It is worth noting that “[n]ot every member of the Security Council recognizes the TFG.”¹⁶⁰ In addition, the TFG faces persistent opposition from al-Shabab, a group at times aligned with al-Qaeda, that has been

¹⁵⁶ *Id.*

¹⁵⁷ John P. Grant, *War Crimes Research Symposium: "Terrorism on Trial": Beyond the Montreal Convention*, 37 Case W. Res. J. Int'l L. at 472 [electronic copy provided in accompanying USB flash drive as Source 64].

¹⁵⁸ *Id.* at 133, quoting Martin N. Murphy, *Small boats, Weak States, Dirty Money: Piracy and Maritime Terrorism in the Modern World* (2009), 24.

¹⁵⁹ J. Peter Pham, *The Arab Spring: Revolution and Shifting Geopolitics: Somalia: Where a State isn't a State*, 35 Fletcher F. World Aff. at 133 [electronic copy provided in accompanying USB flash drive as Source 73].

¹⁶⁰ J. Ashley Roach, *Agora: Piracy Prosecutions: Countering Piracy Off Somalia: International Law and International Institutions*, 104 Am. J. Int'l. L. 397, 401 (2010) [electronic copy provided in accompanying USB flash drive as Source 76]. J. Ashley Judge is a former Captain, Judge Advocate General's Corps, United States Navy (retired) and Legal Adviser, U.S. Department of State (retired).

accused of stealing international food aid.¹⁶¹ At times, the TFG has been forced out of the capital city and the country, altogether.¹⁶² Al-Shabab has advocated for shari'a law, but it remains in the minority unable to enforce such law within Somali borders.¹⁶³

Prior to 1960, Somalia existed as the British Protectorate of Somaliland and the Italian Protectorate of Somaliland. Today, there are three main subdivisions or states: Somaliland, Puntland, and Somalia. To the northwest, Somaliland actually declared its independence in 1960 as the Republic of Somaliland; however, it has yet to be recognized as an independent state.¹⁶⁴ Somaliland has its own constitution and has been relatively stable. To the northeast, Puntland has also been relatively stable in terms of state government, with functioning administration, services, and legal system.¹⁶⁵ It recognizes the TFG, but reserves its own right to negotiate with it.¹⁶⁶ With its active seacoast and port towns, Puntland quickly became a hotbed for piracy activities, including corruption within the state leadership.¹⁶⁷

The central and southern Somalia regional subdivision is essentially the same as the TFG, if there was a real government. Instead, it has devolved into “clans, sub-clans, criminals,

¹⁶¹ Alex Perry and Mohamed Dahir, *A Famine We Made?*, Time, Sept. 5, 2011 at 38 [electronic copy provided in accompanying USB flash drive as Source 101].

¹⁶² J. Peter Pham, *The Arab Spring: Revolution and Shifting Geopolitics: Somalia: Where a State isn't a State*, 35 Fletcher F. World Aff. at 137 [electronic copy provided in accompanying USB flash drive as Source 73].

¹⁶³ *Id.* at 136.

¹⁶⁴ Somaliland Penal Code and Other Special Criminal Laws, Somalilandlaw.com/Somaliland_judicial_system.html#SLCourtsHeading, last accessed Jan. 24, 2012 [electronic copy provided in accompanying USB flash drive as Source 3].

¹⁶⁵ J. Peter Pham, *The Arab Spring: Revolution and Shifting Geopolitics: Somalia: Where a State isn't a State*, 35 Fletcher F. World Aff. at 143-44 [electronic copy provided in accompanying USB flash drive as Source 73].

¹⁶⁶ *Id.* at 144.

¹⁶⁷ *Id.*

nationalists, warlords, military entities, and Islamists.”¹⁶⁸ The TFG appears to have a working cabinet, but no administrative services are provided, including legal services.¹⁶⁹ The lack of central government allowed the rise of small fiefdoms, that in some areas like Somaliland have a stabilizing effect, but in other areas in central and southern Somalia the factions have degenerated into a dysfunctional rivalry.¹⁷⁰

The Somali infrastructure cannot meet the requirements for the trials of the accused pirates and there are “no responsible local authorities.”¹⁷¹ The current international counter-piracy practices include “catch and release,” returning pirates to the seizing state’s jurisdiction, turning over pirates to other states for prosecution, and in some instances, setting pirates adrift.¹⁷² Focusing on the capture of pirates off the coast of Somalia, some nations have employed a “catch and release” program, not wanting to bear the burden of a trial or not being certain they have jurisdiction.¹⁷³ The failure of nations to prosecute pirates breeds a “culture of impunity.”¹⁷⁴ It has given rise to the current debate of what ought to be done. There are two schools of thought

¹⁶⁸ Maro Silva, *Somalia: State Failure, Piracy, and the Challenge to International Law*, 50 Va. J. Int’l L. at 557 [electronic copy provided in accompanying USB flash drive as Source 79].

¹⁶⁹ *Id.* at 558.

¹⁷⁰ *Id.* at 563.

¹⁷¹ James Kraska and Brian Wilson, *Combatting Pirates of the Gulf of Aden: The Djibouti Code and the Somali Coast Guard*, Ocean and Coastal Management 1, 2 (2009), doi:10.1016/j.ocecoaman.2009.07.002 [electronic copy provided in accompanying USB flash drive as Source 95].

¹⁷² *Id.* at 2-3; and Stefano Piedimonte Bodini, *Fighting Maritime Piracy under the European Convention on Human Rights*, 22 Eur. J. Int’l. L. 829 (2011) [electronic copy provided in accompanying USB flash drive as Source 74].

¹⁷³ Yvonne M. Dutton, *Bringing Pirates to Justice: A Case for Including Piracy within the Jurisdiction of the International Criminal Court*, 11 Chi. J. Int’l L. 197, 216-17 (2010) [electronic copy provided in accompanying USB flash drive as Source 60]. Professor Dutton is a faculty member at the University of San Diego School of Law, holds a JD from Columbia University, and is a PhD candidate in Political Science at the University of Colorado at Boulder.

¹⁷⁴ *Id.* at 217.

about how best to try criminal cases: in domestic courts or international courts.¹⁷⁵ Generally speaking, the domestic courts are closer to the people, the evidence, the witnesses, and usually conduct trials in the native language of the defendant.¹⁷⁶ However, the international community has expressed concern about the ability of the Somali state to bring a fair trial and administer effective justice.¹⁷⁷

The international community is drawn in by the very nature of the crimes. While tangential, the Responsibility to Protect (R2P) Doctrine may apply. Typically reserved for more violent, national crimes, the doctrine recognizes “a long-standing commitment ... to protect citizens from universally condemned crimes.”¹⁷⁸ R2P has not been formally integrated, but has historically been invoked when “a state fails to protect its own citizenry from mass atrocity.”¹⁷⁹ More importantly, R2P includes “responsibility to prevent” and “responsibility to rebuild.”¹⁸⁰ These are only triggered when “the state is unable or unwilling” to do so itself, or “is itself the perpetrator.”¹⁸¹ Starvation of children has been included under the R2P doctrine.¹⁸²

In the case of Somalia, piracy is a universally condemned crime, and its children and adult population have suffered from starvation. *Time* Magazine recently reported that in

¹⁷⁵ *Id.* at 223.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ Peter Stockburger, *The Responsibility to Protect Doctrine: Customary International Law, an Emerging Legal Norm or Just Wishful Thinking?*, 5 Intercultural Hum. Rts. L. Rev. 365, 405 (2010) [electronic copy provided in accompanying USB flash drive as Source 82]. Mr. Stockburger is a recent graduate of the University of San Diego and a member of the national Order of Banisters.

¹⁷⁹ *Id.* at 369, 405.

¹⁸⁰ *Id.* at 375.

¹⁸¹ *Id.* at 380.

¹⁸² *Id.*

Southern Somalia nearly two-thirds of the population, 2.8 million people, are either starving or are at risk of starvation.¹⁸³ In January 2012, international food aid was suspended due to militants blocking delivery as well as rising violence.¹⁸⁴ Arguably, the doctrine applies as Somalia is incapable of its affirmative responsibility to protect its citizens. Without external support, Somalia lacks the resources today to both bring justice and to rebuild a permanent government structure to prevent future harm.

“Ideally Somalia should try and imprison its own nationals, but since it does not have the judicial capacity ... alternative means have to be found.”¹⁸⁵ Because of Somalia’s inability, other states have stepped up. Cases are pending before or have been heard by the Seychelles, Mauritius, the Netherlands, Puntland, and Somaliland courts.¹⁸⁶ Kenya already reached its capacity.¹⁸⁷ The international community has expressed a commitment to the symptom of piracy. Estimates hold that piracy costs between \$7-12 billion annually.¹⁸⁸ Beyond that, pirates regularly hold ships for longer periods of time, averaging 150 days out of commission.¹⁸⁹ The

¹⁸³ Alex Perry and Mohamed Dahir, *A Famine We Made?*, Time, Sept. 5, 2011 at 38 [electronic copy provided in accompanying USB flash drive as Source 101].

¹⁸⁴ *Red Cross Banned from al-Shabaab Controlled Areas in Somalia*, Mail and Guardian (Feb. 1, 2012) available at <http://mg.co.za/article/2012-02-01-red-cross-banned-from-alshabaab-controlled-areas-in-somalia> last accessed Apr. 6, 2012 [electronic copy provided in accompanying USB flash drive as Source 105].

¹⁸⁵ Ved P. Nanda, *Maritime Piracy: How Can International Law and Policy Address The Growing Global Menace*, 39 Denv. J. Int’l. L. & Pol’y 177, 204 (2011) [electronic copy provided in accompanying USB flash drive as Source 71]. Mr. Nanda is the John Evans University Professor, University of Denver; Thompson G. Marsh Professor of Law and Director, International and Comparative Law Program, University of Denver Sturm College of Law.

¹⁸⁶ *Id.* at 189, 196-97.

¹⁸⁷ Yvonne M. Dutton, *Bringing Pirates to Justice: A Case for Including Piracy within the Jurisdiction of the International Criminal Court*, 11 Chi. J. Int’l L. at 216-17 [electronic copy provided in accompanying USB flash drive as Source 60].

¹⁸⁸ Ved P. Nanda, *Maritime Piracy: How Can International Law and Policy Address The Growing Global Menace*, 39 Denv. J. Int’l. L. & Pol’y at 206 [electronic copy provided in accompanying USB flash drive as Source 71].

¹⁸⁹ *Id.*

majority of the pirates are only interested in the ransom and take or kill hostages as a message to the insurers. “[T]he sheer dominance of piracy in Somalia[‘s ...] territorial waters”¹⁹⁰ may actually lead to dependence on it. Coupled with the “de facto immunity for criminals,”¹⁹¹ international intervention is necessary. In building the Somali legal system, the Somali defendants and the Somali people must be at the center of all discussions.

2. Application of the Lockerbie Model¹⁹²

a. Investigation and indictments

Unlike the Lockerbie Court, the front-line accused pirates are not likely to have protracted negotiations over their surrender. So long as the Somali federal government is cooperating in some form, the location of the tribunal for those cases is less important. Since the accused will stand trial subject to the laws of his own country, there is no need for a state to surrender its nationals. If the court is physically located outside the borders of Somalia, the Somalia domestic law will still be applied. If the extraterritorial court is intended to focus exclusively on the “kingpins” or the executive apparatus of piracy, there may be increased concern for hosting the trials outside of Somalia. The lack of law enforcement within the Somali system¹⁹³ coupled with the potential that existing government officials may be investigated is cause for concern. Mogadishu is often described as lawless, and Somalia has virtually no sea

¹⁹⁰ Michael Gagain, Note, *Neglected Waters: Territorial Maritime Piracy and Developing States: Somalia, Nigeria, and Indonesia*, 16 New Eng. J. Int’l & Comp. L. 169, 196 (2010) [electronic copy provided in accompanying USB flash drive as Source 63].

¹⁹¹ *Id.* at 186.

¹⁹² The Somali court model is presented in the same order as the Lockerbie Model for ease of comparison, despite the need for modifications.

¹⁹³ Yvonne M. Dutton, *Bringing Pirates to Justice: A Case for Including Piracy within the Jurisdiction of the International Criminal Court*, 11 Chi. J. Int’l L. at 218 [electronic copy provided in accompanying USB flash drive as Source 60].

presence despite have the longest coastline in Africa. If the Somali government cannot ensure the effectiveness of trials within its borders, the extraterritorial court with international support may be the only operative venue, particularly if key defendants hold significant authority or are well insulated within the borders.

b. International Sanctions (and Support)

In order to ensure the long-term support of the Somali federal government, the international community must be involved. Somalia lacks the resources to go it alone. It is unclear the extent to which Somalis are “living off the ransoms,” but it is reasonable to assume that the spin-off economy, particularly in port towns, will discourage cooperation. With no recognizable central government and allegations of rampant corruption due to the influx of piracy ransoms, the international community may ultimately resort to sanctions or even the highly controversial limitations in aid, in order to have cooperation.

Of greater concern is the utter lack of any central government from which to draw court personnel. In preparation for the ICTY’s *Tadic* case, the American Bar Association asked the Chief Prosecutor how it could best help the Prosecutor, who responded with “to provide an adequate defense for the defendants.”¹⁹⁴ A fair trial requires independent, competent judges, “meticulous preparation by the prosecution and competent defense counsel.”¹⁹⁵ This underscores the need for international support in developing a Somali Court. Like the Iraqi High Tribunal (IHT), following decades of authoritarianism there were few independent courts and few trained

¹⁹⁴ Justice Richard Goldstone, *Executive Presentation on the Trial of Saddam Hussein: What Kind of Court Should Prosecute Saddam Hussein and Others for Human Rights Abuses?* 27 Fordham Int’l L.J. 1490, 1505 (2004) [electronic copy provided in accompanying USB flash drive as Source 65]. Justice Goldstone was appointed Judge of the Transvaal Supreme Court, then to the Appellate Division of the South African Supreme Court in 1989. He chaired the Commission of Inquiry regarding Public Violence and Intimidation, investigating apartheid era violence. He served as the Chief Prosecutor for the ICTY. At the time of the writing, he was the William Hughes Mulligan Chair in International Legal Studies at Fordham Law School.

¹⁹⁵ *Id.* at 1504.

judges remained alive and able to practice.¹⁹⁶ At least, this was the prevailing perception, though reports indicate that there were some judges who had remained free from Saddam Hussein's influence, remained committed to justice within the then-Iraqi system, and were critical to the IHT.¹⁹⁷ Further, like, Somalia, they had practiced in a civil law system.¹⁹⁸ Either way, international attorneys were necessary to assist the court and both sides' attorneys in producing a fair trial.¹⁹⁹ "Kenya does not appear to have the legal expertise and capacity to try large numbers of piracy cases ... and ensure the respect for human rights."²⁰⁰ Somalia likely needs even more fundamental support in developing the court personnel. Accordingly, Somalia also lacks the resources to provide for the transportation of defendants, witnesses, evidence, and court personnel.

c. Developing the Somali Court and Negotiating to Apply It

i. Evaluation of Somali Law

Early on, the U.N. ordered the evaluation of Scots law as it would apply to foreign nationals at the Scottish Court in the Netherlands. In the Somali court, Somali law will be applied to its own nationals; therefore, it does not have the same requirements that the Scottish High Court had to ensure that the very law by which the defendants were tried was fair and just.

¹⁹⁶ *Id.* at 1506.

¹⁹⁷ Michael A. Newton and Michael P. Scharf, *Enemy of the State: The Trial and Execution of Saddam Hussein* 50-54 (2008) [electronic copy provided in accompanying USB flash drive as Source 42].

¹⁹⁸ *Id.* at 37.

¹⁹⁹ Justice Richard Goldstone, *Executive Presentation on the Trial of Saddam Hussein: What Kind of Court Should Prosecute Saddam Hussein and Others for Human Rights Abuses?* 27 *Fordham Int'l L.J.* at 1506-07 (2004) [electronic copy provided in accompanying USB flash drive as Source 65].

²⁰⁰ Yvonne M. Dutton, *Bringing Pirates to Justice: A Case for Including Piracy within the Jurisdiction of the International Criminal Court*, 11 *Chi. J. Int'l L.* at 225 [electronic copy provided in accompanying USB flash drive as Source 60].

At this point, only accused pirates who are Somali nationals are considered. There is no need to evaluate the “foreign” law aspect, as each defendant will be tried under his own laws. The state of those laws, however, does raise some concerns.

The status of Somali Law and Penal Code is best characterized as in flux. In-fighting and a failed federal government have left the state without clear, recognized law. Looking back, Somalia was colonized, and both civil code and common law systems were imposed in various parts.²⁰¹ The original colonial criminal law was based on the 1860 Indian Penal Code, which was later revised to the Italian Penal Code in the portions under of the Italian Protectorate of Somaliland.²⁰² The 1960 Somalia Penal Code is almost a whole-sale translation of the Italian Penal Code, with the accommodations for Islam law in governing matters of “marriage, divorce, and inheritance.”²⁰³ Since that time, the Barre coup did not replace the Code, but other transitional governments have not been enforcing it. Somalia’s legal system is widely considered to have “no national system” and to be “a mixture of English common law, Italian law, Islamic sharia, and Somali customary law.”²⁰⁴

Even if the Somali Penal Code were still in force, there is another issue. In November 2011, the Italian cargo ship the *M/V Rosalia D’Amato* was released by pirates after seven month in capture.²⁰⁵ It was then discovered that the Italian Penal Code lacked any provisions for

²⁰¹ Constitution of the Somali Republic (1960), *available at* <http://www.somalilaw.org/Documents/Constitution1960.pdf> last accessed Apr. 7, 2012 [electronic copy provided in accompanying USB flash drive as Source 1].

²⁰² *Id.*

²⁰³ Martin R. Ganzglass, The Penal Code of the Somali Democratic Republic at xiii-xiv (1971) [electronic copy provided in accompanying USB flash drive as Source 35].

²⁰⁴ Somali Penal System, http://www.mongabay.com/history/somalia/somalia-penal_system.html last accessed Mar. 14, 2012 [electronic copy provided in accompanying USB flash drive as Source 2].

²⁰⁵ *Italian-Flagged MV Rosalia D’Amato Released by Somali Pirates*, gCaptain (Nov. 27, 2011)

prosecuting piracy under criminal law.²⁰⁶ As the very model of the Somali Penal Code, this emphasizes Code's lacks reference to piracy. Other nations in similar situations have revised their laws to include a definition and elements for the crime. Somalia would need to do so as well, or be forced to attempt to shoehorn the crimes under categories of general theft, endangering the general safety, or against the national economy, industry, and commerce.²⁰⁷ While piracy is not a crime under the Somali Penal Code, other, tangential crimes may be charged. The Penal Code contains criminal statutes for:

- Article 187: Hostile Acts against a Foreign State which Expose the Somali State to Danger of War
- Article 222: Devastation, Pillage, and Slaughter
- Article 244: Extortion by a Public Officer
- Article 245: Corruption for Performing an Official Act
- Article 246: Corruption for Performing an Act Contrary to the Duties of the Office
- Article 247: Corruption of a Person Entrusted with a Public Service
- Article 248: Punishment of Persons Giving or Promising Money or Other Benefit
- Article 322: Association for Purpose of Committing Crimes
- Article 387: Destruction of Raw Materials or Agriculture or Industrial Products or Means of Production
- Article 434: Murder
- Article 439: Assault (no actual physical or mental injury)
- Article 440: Hurt (actual physical or mental injury)
- Article 459: Crimes Abroad (against Somali nationals)
- Article 462: Abuse of Authority toward a Person Arrested or Detained
- Article 463: Arbitrary Personal Search and Inspection
- Article 480: Theft (of any moveable property of another)

<http://gcaptain.com/italian-flagged-rosalia-damato/?34324>, last accessed Mar. 3, 2012 [electronic copy provided in accompanying USB flash drive as Source 93].

²⁰⁶ Davide de Bernardin, *If Piracy is illegal, why don't we fight it?* Piracy – Crime and Punishment (June 8, 2011) <http://www.oceanuslive.org/main/viewnews.aspx?uid=00000276>, last accessed Mar. 3, 2012 [electronic copy provided in accompanying USB flash drive as Source 86]. Mr. de Bernardin is a freelance researcher and analyst on maritime economics and international security. He has worked for the Italian Trade Commission in Israel and has studied International Science, Diplomatic Relations, Logistics and Transport in universities in Italy. He is a contributor to publications on international economic ties between Italy, Libya and Tunisia.

²⁰⁷ Martin R. Ganzglass, *The Penal Code of the Somali Democratic Republic at Code Parts II & VIII (1971)* [electronic copy provided in accompanying USB flash drive as Source 35]. Mr. Ganzglass was a member of the Peace Corps stationed in Somalia, when he translated the Penal Code to English.

Article 484: Robbery
Article 487: Trespass (limited to the immoveable property of another)
Article 491: Damage to Property (moveable or immoveable)
Article 504: Receiving (stolen goods, money or property)
Article 506: Refusal to Give Particulars Regarding One's Personal Identity²⁰⁸

Depending on the specific case, several of these criminal statutes could allow for some rough justice, but not specific piracy charges. The Penal Code also carries criminal provisions that if the Somali legislature were to modernize the Code would have to be reconciled:

Article 217: Attempts against the Order Established by the Constitution
Article 237: Time of War ... shall include the period of imminent danger of war²⁰⁹

Given the current status of the federal government in Somalia, these criminal statutes could have additional consequences for government officials who are trying to revise the Code and bring the rule of law.

Of important note, “the Somali Penal Code embodies the cardinal principles enshrined in the Universal Declaration of Human Rights for the protection of liberty...no one shall be punished for an act that is not expressly made an offense by law.”²¹⁰ It also upholds that the offense must be a crime at the time of the act, not retroactive.²¹¹ Taken together, this essentially forces the federal Somalia government to either pass new laws and not prosecute existing defendants, or to charge defendant pirates with other crimes under Somali Penal Code law.

In other regions of Somalia, some trials on piracy have been held. However, the most recent information available indicates that there are still no “comprehensive legal research

²⁰⁸ *Id.* at 205, 247, 270-77, 363, 430, 480, 489-93, 516, 520-22, 544, 553-554, 560, 564-65, 583, 587.

²⁰⁹ *Id.* at 242, 262.

²¹⁰ Haji N.A. Noor Muhammed, Legal Systems of Africa Series: Somali Democratic Republic at 308-09 [electronic copy provided in accompanying USB flash drive as Source 41].

²¹¹ *Id.* at 309.

libraries, ... websites, bar associations, legal information guides, Supreme Court libraries, or law databases.”²¹² The Somaliland legal system abandoned the common law when it became a protectorate of Italy, therefore case law is “neither published nor significant to future legal decisions.”²¹³ Somaliland has been successful in prosecuting some of the cases, but again “lack[s] both financial and human resources.”²¹⁴ Recently, Somaliland passed new legislation establishing the crime of piracy – replacing armed robbery at sea – and to reduce the maximum sentence for piracy to twenty-five years.²¹⁵

Puntland, like Somaliland, has prosecuted some piracy cases with success. Puntland is still seen as having corruption in the legal system and government. While less sophisticated than Somaliland, Puntland approved a new constitution in 2009.²¹⁶ By Spring 2011, Puntland was prepared to take repatriated prisoners from the Seychelles and conduct its own trials.²¹⁷

²¹² Mohamed Farah Hersi, Hauser Global Law School Program: Research Guide to the Somaliland Legal System (Feb. 2009) <http://www.nyulawglobal.org/Globalex/Somaliland.htm>, last accessed Mar. 3 2012 [electronic copy provided in accompanying USB flash drive as Source 90]. Mohamed Farah Hersi is an attorney and human rights researcher. He holds an LL.B (Bachelor of Laws) from the University of Hargeisa in Somalia, an LL.M (Master of Laws) from the University of Pretoria in South Africa, and is currently a Ph.D. candidate.

²¹³ *Id.* at § 4.

²¹⁴ *Id.* at §2.2

²¹⁵ Hussein Ali Noor, *Somali pirates want prisoner swap for ship*, Reuters (Mar. 6, 2012) available at <http://www.reuters.com/article/2012/03/06/somalia-piracy-idUSL5E8E63PI20120306> last accessed Mar. 14, 2012 [electronic copy provided in accompanying USB flash drive as Source 99].

²¹⁶ Hanibal Goitom, *Somalia: Puntland State Approves New Constitution* (July 6, 2009) http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205401404_text, last accessed on Mar. 3, 2012 [electronic copy provided in accompanying USB flash drive as Source 87].

²¹⁷ Hanibal Goitom, *Somalia: Puntland Establishes Piracy Courts and Prisons* (Apr. 19, 2011) http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205402633_text, last accessed on Mar. 3, 2012 [electronic copy provided in accompanying USB flash drive as Source 88].

Other African nations have applied customary law to certain offenses. Somali customary law is *xeer*.²¹⁸ It is a collective system, led by clan elders. As a fundamental premise, each person is responsible for and to the whole group, not the individual.²¹⁹ It is reported that defendants who were convicted have a difficult time understanding that individual punishment is due to them.²²⁰ As such, *xeer* is not an applicable form of law for the proposed tribunal. It does not comport to international standards of justice. Additionally, clan elders are reported to receive as much as 30 percent of the ransom, making the likelihood of corruption high.

Before moving on to international law, it is worth pausing for a moment to consider if Somalia does not have a strong enough central government to update the laws to define the crime of piracy and if Somalia does not have a strong enough pool of qualified court personnel to prosecute piracy then why establish a Somali court applying Somali law. Existing accused defendants who are being detained likely cannot be brought to fair trial under a Penal Code with express provisions that it must have been a crime at the time it was committed.

ii. Use of International Law

Somalia may seek assistance from international law in developing its own penal code, but there are currently no piracy statutes on which to prosecute today. Piracy has been identified as a breach of *jus cogens* and is subject to universal jurisdiction. Somalia may have to bolster its weak penal code with an exercise of universal jurisdiction. Customary law may guide Somalia in developing a more comprehensive penal code. The challenge then is that no fewer than six

²¹⁸ *The Importance of Customary Law – xeer – in Somalia* Idatar Maritime, (Apr. 2011) <http://www.idaratmaritime.com/wordpress/?p=334>, last accessed Mar. 3, 2012 [electronic copy provided in accompanying USB flash drive as Source 92].

²¹⁹ *Id.*

²²⁰ *Id.*

definitions of piracy exist in the international context.²²¹ For the purposes here, piracy can be defined by international treaties, customary international law, or domestic law of interdicting states.”²²²

During much of the last two hundred years, piracy was a quiet problem, dealt with by afflicted states. According to some interpretations of the Harvard Draft Convention on Piracy (1932), piracy fell under the rubric of the law of nations. As private individuals, however, pirates were outside of the jurisdiction of the law of nations.²²³ The definition was “both too broad and too narrow” to allow nations to enforce.²²⁴ *Hostis humani generis* – the enemy of all mankind – is more widely accepted, providing “special jurisdictional treatment” for pirates due to their indiscriminate targeting of vessels, the danger to all shipping trade, and lack of endorsement by their native states.²²⁵ Yet, ultimately, piracy is a crime under domestic laws. Unless a truly international piracy court is established, all piracy prosecutions must apply some nation’s domestic law. The U.N. Security Council adopted Resolution 1851 calling on member-

²²¹ Alfred P. Rubin, *The Law of Piracy* 1 (2nd Ed. 1988), as quoted in Lucas Bento, *Toward an International Law of Piracy Sui Generis: How the Dual Nature of maritime Piracy Law Enables Piracy to Flourish*, 29 Berkeley J. Int’l L. 399, 414 (2011) [electronic copy provided in accompanying USB flash drive as Source 48]. Mr. Bento holds a LLB (1st Class Hons), LL.M. PGDip (Dist.) and is a Senior Consultant at EcoEnergy.

²²² *Id.*

²²³ Leticia M. Diaz and Barry Hart Dubner, *On the Evolution of the Law of International Sea Piracy: How Property Trumped Human Rights, the Environment and Sovereign Rights of States in the Areas of the Creation and Enforcement of Jurisdiction*, 13 Barry L. Rev. 175,201 (2009) [electronic copy provided in accompanying USB flash drive as Source 57]. Leticia M. Diaz is a Professor of Law, and Dean, Barry University School of Law; J.D., Rutgers University School of Law, Newark (1994); Ph.D. (Organic Chemistry), Rutgers University, Newark (1988). Barry Hart Dubner is a Professor of Law, Barry University, Andreas School of Law, Orlando, Florida; J.D., New York Law School; LL.M., University of Miami, School of Law; LL.M., New York University School of Law; J.S.D., New York University School of Law.

²²⁴ Barry Hart Dubner, *On the Definitions of the Crime of Sea Piracy Revisited: Customary vs. Treaty Law and the Jurisdiction Implications Thereof*, 42 J. Marit. Law Commer. 71, 78 (2011) [electronic copy provided in accompanying USB flash drive as Source 58].

²²⁵ Eugene Kontorovich, “A Guantanamo on the Sea”: *The Difficulty of Prosecuting Pirates and Terrorists*, 98 Calif. L. Rev 243, 251-52 (2010) [electronic copy provided in accompanying USB flash drive as Source 67].

states to modernize their criminal piracy statutes, but not all have done so.²²⁶ There are many national piracy laws Somalia could borrow from to build its legal framework, and Somalia could replicate the provisions that are in the United Nations Convention on Law of the Sea (UNCLOS) or the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA).

UNCLOS codified the customary international law of piracy, specifically allowing for intervention in suspected piracy under Article 110 and prosecution before either “the domestic courts of the interdicting state, a regional state, or a third state.”²²⁷ UNCLOS defines piracy somewhat narrowly, requiring the actions be in pursuit of “private ends” on board “private vessels” on “the high seas.”²²⁸ UNCLOS also led to changes in customary international law that increased coastal State’s claims “on the seabed and the area above them,” while also establishing the shared areas, or *res communis*, which are the property of no state.²²⁹

Prior to the collapse of the national government, Somalia recognized its territorial sea as extending 200 nautical miles; however, when “Somalia ratified the Law of the Sea Convention” in 1989 under Major General Barre’s regime, it agreed to reduce the territorial sea to 12 nautical

²²⁶ *Id.*; S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008) [electronic copy provided in accompanying USB flash drive as Source 29].

²²⁷ Robert Beckman, Malvina Halberstam, J. Ashley Roach, Alfred P. Rubin, and Katharine Shepherd, *Panel: “Piracy off Somalia: the Challenges for International Law,”* at 6, at the Annual Meeting – American Society of International Law, Mar. 26, 2009 [electronic copy provided in accompanying USB flash drive as Source 47].

²²⁸ United Nations Convention on the Law of the Sea, Arts. 100, 105 (Dec. 10, 1982) [electronic copy provided in accompanying USB flash drive as Source 33].

²²⁹ Judge Christopher Greenwood, *The Role of the International Court of Justice in the Global Community*, 17 U.C. Davis J. Int’l L. & Pol’y 233 at 251 [electronic copy provided in accompanying USB flash drive as Source 66].

miles, with a 200 nautical mile Exclusive Economic Zone (EEZ).²³⁰ This deliberate act is important in applying, at a minimum, the UNCLOS definition to the Somali legal structure. It also has given rise to the domestic crime “armed robbery at sea,” meaning piracy within Somali territorial waters.²³¹

UNCLOS may create an additional problem: the practice of trials in third-states is neither expressly permitted nor prohibited.²³² It has been argued that the subsequent UNCLOS III Article 5 indicates that the capturing state is required to prosecute.²³³ Yet, as a practical matter, most states have elected to interpret the silence in UNCLOS as permissive, allowing first Kenya, and now the Seychelles and Mauritius, to prosecute where they were reluctant.²³⁴

Under UNCLOS, any tribunal willing to hear the case must be presented a “package of evidence admissible in their courts,” meeting their domestic laws for witnesses, search and

²³⁰ J. Ashley Roach, *Agora: Piracy Prosecutions: Countering Piracy Off Somalia: International Law and International Institutions*, 104 Am. J. Int’l. L. 327, 402 (2010) [electronic copy provided in accompanying USB flash drive as Source 76].

Under UNCLOS Article 55(a) each state has “sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone.”

²³¹ Barry Hart Dubner, *On the Definitions of the Crime of Sea Piracy Revisited: Customary vs. Treaty Law and the Jurisdiction Implications Thereof*, 42 J. Marit. Law Commer. at 78 [electronic copy provided in accompanying USB flash drive as Source 58].

²³² Eugene Kontorovich, “A Guantanamo on the Sea”: *The Difficulty of Prosecuting Pirates and Terrorists*, 98 Calif. L. Rev. at 271 [electronic copy provided in accompanying USB flash drive as Source 67].

²³³ Jarret Berg, Note, “You’re Gonna Need a Bigger Boat”: *Somali Piracy and the Erosion of Customary Piracy Suppression*, 44 New Engl. L. Rev 343, 379 (2010) [electronic copy provided in accompanying USB flash drive as Source 49].

²³⁴ Republic v. Abdi Ali et al., Judgment, Crim. Side No. 14 (2010), Republic v. Mohamed Aweys Sayid et al., Judgment, Crim. Side No. 19 (2010) Republic v. Mohamed Ahmed Dahir & Ten (10) Others, Judgment, Crim. Side No. 51 (2009), Grotian Moment: The International War Crimes Trial Blog, *available at* <http://law.case.edu/grotian-moment-blog> last accessed Apr. 6, 2012 [electronic copy provided in accompanying USB flash drive as Source 16].

seizure, and physical evidence.²³⁵ This has been particularly challenging for oral evidence. The Somali people speak many dialects of the Somali language, and may or may not speak Italian, Arabic or English.²³⁶ Any court proceeding requires interpreters.²³⁷

SUA provides an alternate mechanism and definition of piracy for Somalia to take guidance despite not being a signatory.²³⁸ SUA was a direct result of the *Achille Lauro* incident, where the Palestine Liberation Organization hijacked an Italian cruise ship and committed acts of violence.²³⁹ “At the time, states lacked adequate criminal statutes to prosecute for vessel hijacking.”²⁴⁰ By 1992, SUA was in force and has been adaptive to the needs of international law.²⁴¹ Parties to SUA are required to “prosecute or extradite” maritime attacks.²⁴²

²³⁵ Robert Beckman, Malvina Halberstam, J. Ashley Roach, Alfred P. Rubin, and Katharine Shepherd, *Panel: “Piracy off Somalia: the Challenges for International Law,”* at 7, at the Annual Meeting – American Society of International Law, Mar. 26, 2009 [electronic copy provided in accompanying USB flash drive as Source 47].

²³⁶ Haji N.A. Noor Muhammed, *Legal Systems of Africa Series: Somali Democratic Republic* at 32 (1972) [electronic copy provided in accompanying USB flash drive as Source 41].

²³⁷ Robert Beckman, Malvina Halberstam, J. Ashley Roach, Alfred P. Rubin, and Katharine Shepherd, *Panel: “Piracy off Somalia: the Challenges for International Law,”* at 7, at the Annual Meeting – American Society of International Law, Mar. 26, 2009 [electronic copy provided in accompanying USB flash drive as Source 47].

²³⁸ Lucas Bento, *Toward an International Law of Piracy Sui Generis: How the Dual Nature of maritime Piracy Law Enables Piracy to Flourish*, 29 Berkeley J. Int’l L. at 424 [electronic copy provided in accompanying USB flash drive as Source 48].

²³⁹ James Kraska and Brian Wilson, *Combatting Pirates of the Gulf of Aden: The Djibouti Code and the Somali Coast Guard*, *Ocean and Coastal Management* at 3, doi:10.1016/j.ocecoaman.2009.07.002 [electronic copy provided in accompanying USB flash drive as Source 95].

²⁴⁰ *Id.*

²⁴¹ *Id.* at 4.

²⁴² Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Mar. 10, 1988, 27 I.L.M. 668, at Art. 3(1) [electronic copy provided in accompanying USB flash drive as Source 19].

SUA was an initiative of the International Maritime Organization (IMO). The IMO is a specialized agency of the U.N., based in London, and charged with maritime matter.²⁴³ With regard to piracy, the IMO has been active in anti-piracy training and developing a procedure for investigation of piracy and armed robbery at sea.²⁴⁴ As such, the Somalia Court will likely have to work with the IMO on evidence and prisoner transfer protocols. Some evidence may be large ships that are beyond presentation, but audio, video, and renderings may be admissible. Also, some evidence may be the multinational crew members overtaken by the pirates. By the time of trial, those crew “may be scattered around the world.”²⁴⁵

Despite not being a signatory to SUA, Somalia has agreed to other non-binding acts of the IMO.²⁴⁶ In January 2009, the IMO convened twenty-one states in Djibouti to work with East African states to combat piracy off the Horn of Africa.²⁴⁷ The result was the Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden, or the “Djibouti Code.”²⁴⁸ Among others, Somalia, the Seychelles,

²⁴³ James Kraska and Brian Wilson, *Maritime Piracy in East Africa*, 62 J. Int’l. Affairs at 56, 57, 59 [electronic copy provided in accompanying USB flash drive as Source 68].

²⁴⁴ *Id.* at 60.

²⁴⁵ Barry Hart Dubner and Karen Greene, *On the Creation of a New Legal Regime to Try Sea Pirates*, 41 J. Mar. L. & Com. 439, 454 (2010)[electronic copy provided in accompanying USB flash drive as Source 59]. Ms. Greene, ALB, Harvard University Extension School, J.D., Barry University School of Law, Orlando, Florida; LL.M. Candidate (2011), University of Florida School of Law.

²⁴⁶ Lucas Bento, *Toward an International Law of Piracy Sui Generis: How the Dual Nature of maritime Piracy Law Enables Piracy to Flourish*, 29 Berkeley J. Int’l L. 399, 427 (2011) [electronic copy provided in accompanying USB flash drive as Source 48].

²⁴⁷ James Kraska and Brian Wilson, *Combatting Pirates of the Gulf of Aden: The Djibouti Code and the Somali Coast Guard*, Ocean and Coastal Management at 1, doi:10.1016/j.ocecoaman.2009.07.002 [electronic copy provided in accompanying USB flash drive as Source 95].

²⁴⁸ Robert Beckman, Malvina Halberstam, J. Ashley Roach, Alfred P. Rubin, and Katharine Shepherd, *Panel: “Piracy off Somalia: the Challenges for International Law,”* at 5, at the Annual Meeting – American Society of International Law, Mar. 26, 2009. [electronic copy provided in accompanying USB flash drive as Source 47].

and Kenya signed on the first day.²⁴⁹ By design, the Djibouti Code facilitates “cooperation between regional forces and regional countries.”²⁵⁰ Specifically, the Code requires signatories to report on suspected piracy through national information centers, interdict, arrest, prosecute, and protect and return hostages.²⁵¹ Again, the Djibouti Code does not offer direct law for prosecution, but requires signatories to modify their domestic laws accordingly.²⁵² A Somali Court will still have to build its own framework, and supplement with international law. Somalia may want to look to foreign states as models for how to define piracy. In Belgium, the legislature passed a series of measures using elements like illegal acts or threats of violence or depredation and expanded the maritime zone to reflect international law.²⁵³

iii. A Neutral Third State: Tanzania

1. The Courthouse

In the U.N. proposal, the proposed site is Arusha, Tanzania, at the Courthouse currently owned and operated by the International Criminal Tribunal for Rwanda (ICTR). Specifics related to the Tanzania location are included, but generalizations may be drawn for any courthouse and grounds. In terms of a site assessment, ICTR Courthouse itself will be mostly vacant at the close of the Tribunal. Trials comporting with international requirements in pursuing justice have already been held here successfully. The ICTR Courthouse has already

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Protection of Vital Shipping Lanes*, International Maritime Bureau, ¶11 C 102/14 (Apr. 3, 2009)[electronic copy provided in accompanying USB flash drive as Source 103].

²⁵³ Barry Hart Dubner and Karen Greene, *On the Creation of a New Legal Regime to Try Sea Pirates*, 41 J. Mar. L. & Com. 439, 456 (2010)[electronic copy provided in accompanying USB flash drive as Source 59].

housed war crimes trials, so the specialized courtrooms, offices, meeting space, jail space, along with the technological requirements of an international trial are in place.²⁵⁴ For example, Witness/Victim support and protection programs were part of the ICTR and can be structured for a Somali court, if the expertise is still present.²⁵⁵ This is far easier than the costly Camp Zeist conversion.

The next question, however, is one of capacity. Without a better understanding of the number of trials that will be conducted by the extraterritorial tribunal, it is unclear if the ICTR Courthouse can meet the volume needs. More than 1,000 piracy cases have been tried in more than twenty nations. An estimated 6,300 attacks have been reported, of which only a large number have had “catch and release” practiced. Yet, there are still more than 1,000 Somalis awaiting trial in those twenty nations.²⁵⁶ It has been suggested that the extraterritorial court would concentrate on the piracy kingpins, whose fair trials within Somalia are difficult, if not impossible. Similar to the approach used in the Ivory Coast, the Somali domestic courts – if properly supported – would try the low-level, front-line pirates, whereas the kingpins would be tried with international presence to ensure fairness and justice.

By far the biggest challenge to the Courthouse is its physical proximity to Somalia. Tanzania lies southwest of Somalia. Arusha is roughly 1460 km (900 miles) from Mogadishu, Somalia.²⁵⁷ By car, travel is nearly 24 hours. Air travel is accessible but information is limited

²⁵⁴ ICTR Newsletter, 2, 5, 8, 10 (Feb.-Mar 2004) [electronic copy provided on accompanying USB flash drive as Source 91].

²⁵⁵ *Id.* at 8.

²⁵⁶ Loide A.N. Lungameni, UNODC Counter-Piracy Programme, “Message from the Regional Representative (June 2011) [electronic copy provided in accompanying USB flash drive as Source 98]. Ms. Lungameni is the UNODC Representative, Regional Office of Eastern Africa.

²⁵⁷ Google Maps, Search Arusha, Tanzania to Mogadishu, Somalia, <http://maps.google.com/>, last accessed Feb. 21, 2012.

as to the cost and frequency. The nearest large airport to Arusha is Kilimanjaro Airport, which is about 45 minutes' drive from the ICTR. The small Arusha airport mostly flies to safari locations. Although cited as having four airlines offering service out of Arusha, the actual service is intermittent.²⁵⁸ Often, pirates are taken into custody in the northern portions of Somalia or at significant distance out on the high seas. No tribunal is in close proximity.²⁵⁹ Somalia and Tanzania may need to work with third states to allow the delivery of detained, accused pirates direct to Arusha, rather than by way of Somalia. If the focus of the extraterritorial court is exclusively the Kingpin-level, such transportation should be easier.

2. Bilateral Treaty to Host an Extraterritorial Somali Anti-Piracy Court

Tanzania is currently the host nation for the International Criminal Tribunal Rwanda (ICTR). Established by U.N. Resolution 977 (1995), the Tribunal was created in response to serious international crimes.²⁶⁰ Arusha, Tanzania was named the seat for the Tribunal.²⁶¹ Supplemental agreements between Tanzania and the UN were negotiated. For Somalia and Tanzania, the agreements may be different, particularly if the U.N does not participate. The Netherlands-U.K. Agreement from the Lockerbie Model is a good starting point to establish an Extraterritorial Somali Anti-Piracy Court. There, two sophisticated nations with a need to retain sovereignty found a middle ground for a temporary, limited jurisdiction tribunal. One key difference here is that the tribunal will last beyond the purposes of one isolated trial and appeal.

²⁵⁸ Farecompare.com, *Arusha, Tanzania* (Mar. 16, 2012).

²⁵⁹ Yvonne M. Dutton, *Bringing Pirates to Justice: A Case for Including Piracy within the Jurisdiction of the International Criminal Court*, 11 Chi. J. Int'l L. at 226 [electronic copy provided in accompanying USB flash drive as Source 60].

²⁶⁰ S.C. Res. 977, U.N. Doc. S/RES/977, at ¶13 (Feb. 22, 1995) [electronic copy provided in accompanying USB flash drive as Source 26].

²⁶¹ *Id.*

The Somali extraterritorial court could try potentially hundreds of low-level piracy cases but is more likely to be limited to the high-profile piracy kingpin cases due the high costs and the difficulty in ensuring justice within the Somali borders. The language needs to be broad enough to include piracy and the potential attempted piracy, should international law or Somali law ever recognize possession of piracy tools as a crime. At the same time, the scope of the tribunal will be limited by capacity, which in turn will be limited by resources.

In lieu of dissecting each article of the Netherlands-U.K. Agreement, a few items are relevant for both nations. Somalia needs to ensure that there is a designated area over which it has exclusive jurisdiction to apply its laws to the exclusion of Tanzania's laws. Like the Dutch, Tanzania may not exercise criminal jurisdiction over the defendants. Tanzania could exercise universal jurisdiction, unless a bilateral agreement bars that. Unique here, the cumbersome process of extradition does not apply at this point but may in the future. If the extraterritorial court focuses on piracy kingpins, they may not be Somali nationals. Extradition may, indeed, become a factor, in which case the Lockerbie Model provides a template that also required heavy political influence and a great deal of time. A hybrid or international court may be more adept at handling such cases.

The Lockerbie Model was successful because of the cooperation between the Netherlands, U.K, and the U.S. The Somali Model poses a different set of concerns, due mainly to the current state of federal government. The creation of a juridical island of Somalia within Tanzania may not be as easy as Lockerbie. In the Pitcairn Islands case, the New Zealand legislature was extremely reluctant to allow the case to move forward, and eventually granted just limited jurisdiction without granting a sovereign area. The crimes involved in those cases were not under universal jurisdiction and occurred within the Pitcairn Islands, so New Zealand

could not have exercised jurisdiction even if it had wanted to. Tanzania's willingness to host may be directly influenced by the international community's commitment to assist.

Some questions will need to be answered. Somalia and Tanzania need to determine where any potential sentences will be served. If they are to be served in Somalia, their agreement must indicate the timeframe in which defendants may remain in Tanzania, and upon what events they must leave Tanzania. In the Lockerbie Model, the Dutch were careful to require the defendants to leave the host nation upon either a discontinuance of the trial or their acquittal, and included a provision for any sentence to be served in the U.K. Similarly, that Agreement also granted witnesses and court personnel temporary immunity within the Netherlands, but required both to return to their own states when their services were complete. Tanzania should consider these as well, to allow for fair trials. It is important that defendants not be able to claim political asylum.

At the forefront of structuring a tribunal is how to ensure sustainable funding. In the Lockerbie Model, the U.K. covered the entire cost, including renovations and security on the Camp Zeist grounds. Somalia does not have a robust economy. Add the accelerated costs for long-distance travel of defendants, court personnel, evidence, witnesses, translation and interpretation, and jail time²⁶² and Somalia may be foreclosed from pursuing this tribunal. If international support were provided, through both public and private funding, the tribunal is possible. Estimates suggest between \$10 - 20 million are required to adequately structure a "dedicated and specialized piracy team of experienced administrative, prosecutorial, and judicial

²⁶² Yvonne M. Dutton, *Bringing Pirates to Justice: A Case for Including Piracy within the Jurisdiction of the International Criminal Court*, 11 Chi. J. Int'l L. at 227 [electronic copy provided in accompanying USB flash drive as Source 60].

staff.”²⁶³ These costs require stakeholders to make significant investments because the tribunal needs funding, as do repatriation programs and basic economic stabilization programs. A cost-sharing structure was advanced for patrolling the targeted waters, whereby major exporters, shipping companies, and insurance clubs would contribute along with the national navies.²⁶⁴ Yet, no such recommendation has been made for financing an anti-piracy tribunal. Annually, piracy is estimated to cost between \$13-15 billion.²⁶⁵

Among the other imperative elements, Tanzania and Somalia must agree to an exit strategy. Some event or series of events must trigger the end of the court. That could be anything from the stabilization of the Somalia judicial system to the end of the extraterritorial anti-piracy docket. Either way, the two states must agree, and if international support is provided, the triggering event ought to be something fairly universally acceptable. Unlike Lockerbie, the tribunal here could last indefinitely, until the end of piracy as a threat. With no foreseeable end in sight, piracy will continue, and those who arrest pirates will seek a tribunal to turn the accused over to. Somalia should also be prepared with an implementation strategy for addressing piracy within a court inside Somali borders.

In addition, the principle of non-refoulement may apply, forbidding “the expulsion of a refugee into an area where the person might again be subject to persecution” and “general repatriation ...to war zones and other disaster areas.”²⁶⁶ Therefore, Tanzania should be

²⁶³ *Id.* at 227-28.

²⁶⁴ Milena Sterio, *Troubled Waters: Combating Maritime Piracy with the Rule of Law: the Somali Piracy Problem: A Global Puzzle Necessitating a Global Solution*, 59 Am. U.L. Rev. 1449, 1495-96 (2010) [electronic copy provided in accompanying USB flash drive as Source 81]. Ms. Sterio is an Assistant Professor of Law, Cleveland-Marshall College of Law.

²⁶⁵ *Id.* at 1455.

²⁶⁶ Barry Hart Dubner and Karen Greene, *On the Creation of a New Legal Regime to Try Sea Pirates*, 41 J. Mar. L. & Com. at 455 [electronic copy provided in accompanying USB flash drive as Source 59].

especially cautious, as it may be the state that would be responsible. International law protects asylum seekers. While it does not force nations to grant the request, the leeway is very restricted, prohibiting refoulement for a “risk of torture.”²⁶⁷ Pirates may have a difficult time claiming they are refugees and have been recommended as a subgroup to be denied refugee status.²⁶⁸ Either way, the sending state is required to have “effective post-removal monitoring system.”²⁶⁹ The bilateral agreement should address these concerns.

iv. A Fair Trial

Regardless of where the tribunal is physically located, certain design elements are required to ensure a fair trial. The first step is identifying the status of pirates at the moment they are taken into custody. Western nations have struggled with identifying the status of pirates, who are not enemy combatants and claim they are just fishermen.²⁷⁰ In addition, those detained usually do not carry identification, and sometimes their nationality may be in question.²⁷¹

Under Article 5 of the Third Geneva “everyone has a right to liberty and security of person.”²⁷² Determining whether an arrest is lawful requires the capturing state to hold a hearing

²⁶⁷ Yvonne M. Dutton, *Pirates and Impunity: Is the Threat of Asylum Claims a Reason to Allow Pirates to Escape Justice?*, 34 Fordham Int’l L.J. 236, 254-56, 259-61, (2011) [electronic copy provided in accompanying USB flash drive as Source 61].

²⁶⁸ *Id.* at 272-75.

²⁶⁹ *Id.* at 292.

²⁷⁰ Eugene Kontorovich, “A Guantanamo on the Sea”: *The Difficulty of Prosecuting Pirates and Terrorists*, 98 Calif. L. Rev. at 263 [electronic copy provided in accompanying USB flash drive as Source 67].

²⁷¹ *Id.*

²⁷² Stefano Piedimonte Bodini, *Fighting Maritime Piracy under the European Convention on Human Rights*, 22 Eur. J. Int’l. L. at 831 [electronic copy provided in accompanying USB flash drive as Source 74].

to determine the status of the detainee.²⁷³ Some Somalis have argued that they are the “volunteer Somali Coast Guard.”²⁷⁴ If they had state sanction, capturing states may be forced to hold them as enemy combatants. However, for the most part, these are fishermen turned “part-time” pirates.²⁷⁵ From a practical standpoint, “very few captured suspected pirates” are enemy combatants,²⁷⁶ since there is no armed conflict and the periodic pirate attacks do not meet the threshold requirements for duration and intensity. If there is, the hearings are required.²⁷⁷ These hearings must be conducted in the Somali language for the accused to understand.²⁷⁸

Pirates are considered the “enemies of all mankind.”²⁷⁹ Customary international law provides universal jurisdiction. As discussed above, Somalia may exercise jurisdiction under the international framework and under its existing legal structure. The inherent weaknesses in the existing Somali legal structure must be addressed and may only be used to prosecute crimes that were indeed a crime at the time of commission. Otherwise, Somali law may not be applied in either an extraterritorial court in Tanzania or in domestic courts in Somalia.

²⁷³ Michael H. Passman, *Protections Afforded to Captured Pirates Under the Law of War and International Law*, 33 Tul. Mar. L.J. 1, 29 (2008) [electronic copy provided in accompanying USB flash drive as Source 72]. Michael H. Passman is an associate at Cassidy Schade LLP in Chicago.

²⁷⁴ *Id.*

²⁷⁵ Barry Hart Dubner and Karen Greene, *On the Creation of a New Legal Regime to Try Sea Pirates*, 41 J. Mar. L. & Com. at 453 [electronic copy provided in accompanying USB flash drive as Source 59].

²⁷⁶ Michael H. Passman, *Protections Afforded to Captured Pirates Under the Law of War and International Law*, 33 Tul. Mar. L.J. at 29 [electronic copy provided in accompanying USB flash drive as Source 72].

²⁷⁷ *Id.*

²⁷⁸ Stefano Piedimonte Bodini, *Fighting Maritime Piracy under the European Convention on Human Rights*, 22 Eur. J. Int'l. L. at 839 [electronic copy provided in accompanying USB flash drive as Source 74].

²⁷⁹ Michael Davey, *A Pirate Looks at the Twenty-First Century: the Legal Status of Somali Pirates in an Age of Sovereign Seas and Human Rights*, 85 Notre Dame L.Rev. at 1201 [electronic copy provided in accompanying USB flash drive as Source 56].

From a Human Rights Perspective, the international community has a responsibility to ensure that any tribunal produces fair trials. Allegations swirl about the treatment of Somali pirates within Kenya's judicial system.²⁸⁰ Reports indicate that with its own domestic convicts, Kenya is operating at two times the capacity of its prisons, and that the dockets awaiting trial are nearing the million case point.²⁸¹ The system is burdened by older rules of evidence²⁸² that may or may not hinder Somali's defense.

1. Debate over Regional or Domestic Court

In the evaluation of the Somali piracy problem, there is debate between an international court, a regional international court, and a domestic court. Here the bounds are a domestic court, but it is helpful to understand the context. The series of concerns regarding domestic courts stem from the lack of "legal capacity, judicial resources and expertise" in piracy matters.²⁸³ Domestic prosecutions "lack protocol or precedent."²⁸⁴ The domestic courts are not comprised of "administrative personnel, prosecutors, and judges [who were] chosen based upon their competence in international criminal law."²⁸⁵ International courts are also seen as "less subject

²⁸⁰ Daniele Archbugi and Marina Chiarugi, *Looking for a Jurisdiction*, 82 Pol. Q. 8 (2011) [electronic copy provided in accompanying USB flash drive as Source 45]. D. Archbugi is the Professor of Innovation, Governance and Public Policy at Birkbeck College, London, and a director at the Italian National Research Council; M. Chiarugi is a doctoral student at the Faculty of Political Science of Sapienza University of Rome.

²⁸¹ Yvonne M. Dutton, *Bringing Pirates to Justice: A Case for Including Piracy within the Jurisdiction of the International Criminal Court*, 11 Chi. J. Int'l L. at 197 [electronic copy provided in accompanying USB flash drive as Source 60].

²⁸² *Id.* at 219.

²⁸³ *Id.* at 229.

²⁸⁴ Joseph Anzalone, *Extraordinary Times Demand Extraordinary Measures: A Proposal to Establish an International Court for the Prosecution of Global Terrorists*, 16 U.C. Davis J. Int'l. L. & Pol'y 273, 301 (2010) [electronic copy provided in accompanying USB flash drive as Source 44].

²⁸⁵ *Id.* at 228.

to political manipulation.”²⁸⁶ This is particularly important in an area like Somalia that has not been able to stabilize government and is perceived to be susceptible to political manipulation.

By contrast, international tribunals have historically lacked the features like long-term prison facilities, thus requiring cooperation from other states.²⁸⁷ Also, tribunals need a “residual mechanism” for the safety of witnesses, enforcement of sentences, including monitoring, and preservation of archives.²⁸⁸ International tribunals run the risk of “pirates as refugees,” seeking asylum under non-refoulement.²⁸⁹ The Yugoslavia and Rwanda Tribunals “could not sit in the countries where those crimes were committed” due mostly security, but also to staffing and other ancillary concerns.²⁹⁰ The basic perception is that Somalia cannot provide a corruption-free judicial system. Or, maybe it is the concern that the state is in disarray and cannot provide basic services, let alone the security required for such an undertaking.²⁹¹ Further language barriers are reduced when the court already functions in the defendant’s native language.²⁹²

²⁸⁶ *Id.* at 229.

²⁸⁷ Helmut Tuerk, *The Resurgence of Piracy: A Phenomenon of Modern Times*, 17 U. Miami Int’l & Comp. L. Rev. 1, 40 (2009) [electronic copy provided in accompanying USB flash drive as Source 83]. Helmut Tuerk is a judge of the International Tribunal for the Law of the Sea in Hamburg. He served as a member of the Austrian delegation to the Third United Nations Conference on the Law of the Sea.

²⁸⁸ *Id.* at 40-41.

²⁸⁹ Eugene Kontorovich, “*A Guantanamo on the Sea*”: *The Difficulty of Prosecuting Pirates and Terrorists*, 98 Calif. L. Rev. at 267-68 [electronic copy provided in accompanying USB flash drive as Source 67].

²⁹⁰ Justice Richard Goldstone, *Executive Presentation on the Trial of Saddam Hussein: What Kind of Court Should Prosecute Saddam Hussein and Others for Human Rights Abuses?* 27 Fordham Int’l L.J. at 1496 [electronic copy provided in accompanying USB flash drive as Source 65].

²⁹¹ Daniele Archbugi and Marina Chiarugi, *Looking for a Jurisdiction*, 82 Pol. Q. 8 (2011) [electronic copy provided in accompanying USB flash drive as Source 45].

²⁹² Eugene Kontorovich, “*A Guantanamo on the Sea*”: *The Difficulty of Prosecuting Pirates and Terrorists*, 98 Calif. L. Rev. at 265 [electronic copy provided in accompanying USB flash drive as Source 67].

“States do not want to lose control over national prosecutions.”²⁹³ Typically, this is directed toward the prosecution of terrorists; however, for Somalia, this has direct application since the majority if not all of the defendants are Somalia nationals. A Somalia judicial system may be more just toward them, understanding what lead to the desperate rise of piracy. This is especially true given that under current international practice, capturing nations have been reluctant to prosecute within their domestic courts due to costs, potential prison sentencing, and a limited interest in the geographic area targeted by Somali pirates.²⁹⁴

Physical proximity to alleged crimes is important to justice.²⁹⁵ A criticism of the International Tribunal for the Former Yugoslavia (ICTY) is that justice took place distant to the crimes without connecting back to the people and the land that were harmed.²⁹⁶ Regional trials allow for greater “judicial reconstruction.”²⁹⁷ In the Somali situation, the closer to Somalia the trial are, the better off justice will be.

2. Requirements

Under international law, defendants have rights to:

²⁹³ Erin Creegan, *Permanent Hybrid Court for Terrorism*, 26 Am. U. Int'l L. Rev. 237, 264 (2011) [electronic copy provided in accompanying USB flash drive as Source 55]. Ms. Creegan is a Trial Attorney, U.S. Department of Justice, National Security Division, Counterterrorism Section and an Adjunct Professor of International Criminal Law at the University of Maryland-College Park.

²⁹⁴ Milena Sterio, *Fighting Piracy in Somalia (and Elsewhere): Why More is Needed*, 33 Fordham Int'l L.J. 372, 394-95 (2010) [electronic copy provided in accompanying USB flash drive as Source 80].

²⁹⁵ William W. Burke-White, *Regionalization of International Criminal Law Enforcement: A preliminary Exploration*, 38 Tex. Int'l L. J. 729, 734 (2003) [electronic copy provided in accompanying USB flash drive as Source 52]. Mr. Burke-White holds a M.Phil. from Cambridge, a J.D. from Harvard Law School, a PhD from Cambridge, and was serving as the Special Assistant to the Dean, Woodrow Wilson School of Public and International Affairs, Princeton University.

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 735.

equality before the law; a fair trial; a presumption of innocence; a trial before a competent, independent, and impartial court; a public hearing; the right to put on a defense in person or by legal counsel; confidential communication with counsel; adequate time and facilities to prepare a defense; summon and examine witnesses; an appeal; and to refuse to confess or testify against oneself.²⁹⁸

In addition, the defendant must have “access to legal assistance” and the prosecution must present “admissibl[e] criminal evidence.”²⁹⁹ Punishment must be free from torture.³⁰⁰ As Somalia structures its domestic law, each of these international requirements must be built in to the new or revised penal code.

Somalia must determine who will be the finder of fact. In the Lockerbie Model, significant attention was paid to the use of a panel of three Scottish judges as the finder of fact and the denial of the right to a jury trial. Scots law even had to be altered for this singular application in order to allow a judge panel to substitute for a jury. Under international law the norm is to use a panel of judges in lieu of a jury. For example, the International Criminal Court is a panel of three judges, and usually one alternate, who make secret deliberations and submit a final written decision.³⁰¹ The existing Somali Penal Code is based on Italian law, a civil law state. In the civil law system, there is no essential jury system, requiring the judge or panel to serve as

²⁹⁸ Universal Declaration on Human Rights, G.A. Res 217A(III), U.N. Doc. A/810 at 71 (Dec. 10, 1948), as quoted in Joseph Anzalone, *Extraordinary Times Demand Extraordinary Measures: A Proposal to Establish an International Court for the Prosecution of Global Terrorists*, 16 U.C. Davis J. Int'l. L. & Pol'y at 301 [electronic copy provided in accompanying USB flash drive as Source 44]. Mr. Anzalone was working toward an LLM from George Washington at the time the article was written and holds a J.D. from American University.

²⁹⁹ Stefano Piedimonte Bodini, *Fighting Maritime Piracy under the European Convention on Human Rights*, 22 Eur. J. Int'l. L. at 840 [electronic copy provided in accompanying USB flash drive as Source 74].

³⁰⁰ Michael Davey, *A Pirate Looks at the Twenty-First Century: the Legal Status of Somali Pirates in an Age of Sovereign Seas and Human Rights*, 85 Notre Dame L.Rev. at 1224 [electronic copy provided in accompanying USB flash drive as Source 56].

³⁰¹ Amy Powell, Note: *Three Angry Men: Juries in International Criminal Adjudication*, 79 N.Y.U.L. Rev. 2341, 2347-48 (2004) [electronic copy provided in accompanying USB flash drive as Source 75].

fact finder.³⁰² Additionally, under traditional admiralty and maritime law in the common law system, there is no right to a jury.³⁰³ As such, it may be important to use both Somali and foreign judges, or international judges appointed by the U.N. as implemented in the Bosnian War Crimes Court Model, East Timor, the Special Court for Sierra Leone, and the Extraordinary Chambers of the Court of Cambodia.

As the Somali government modernizes its penal code, it may adopt elements from the common law system. If so, the right to a jury may be among them. Like Lockerbie, it would be extremely difficult to empanel a jury to serve in a third state. It would add the costs of travel, lodging, food, and care for each juror on each trial. Lockerbie also raised concerns about the length of the trial requiring Scottish citizens to be absent from home for about a year. The trials in the extraterritorial court are not likely to be that long, but the jurors would still be required to be away from home for a length of time that may cause hardship. Despite the many benefits of a jury, it recommended that the extraterritorial court plan for judges as fact finders. Further, alternate judges have played pivotal, trial-saving roles when one of the main judges can no longer proceed. That may not be required if a single judge conducts the trial rather than a panel.

Somalia must determine how to address the *ex post facto* rule of the Somali Penal Code, prohibiting charging a person with a crime that was not a codified crime at the moment the act was committed. Article 15(2) of the International Covenant on Civil and Political Rights (ICCPR) will permit the Somali court to exercise subject matter jurisdiction of the *ex post facto* law if the action “was criminal according to the general principles of law recognized by the

³⁰² *Id.* at 2348.

³⁰³ Nicholas J. Healy, David J. Sharpe, and David B. Sharpe, *Cases and Material on Admiralty*, 594 (4th ed., 2006) [electronic copy provided in accompanying USB flash drive as Source 36].

community of nations.”³⁰⁴ Also, if criminal procedure is revised to include a mandatory arraignment before a judge within 24 hours of the arrest, such as is found in the Kenyan judicial system,³⁰⁵ the Somali tribunal will need to determine a process for those arraignments. This can be particularly tricky given the amount of sea travel and time that may be required. Floating tribunals have been suggested.³⁰⁶ If Somalia adopts such a domestic policy, it may consider the use of the arraignment at a second extraterritorial site, on sea.

International human right laws require concrete evidence to arrest and to convict.³⁰⁷ When pirates sense they are about to be intercepted, they throw the weapons and overboard.³⁰⁸ The evidence sinks to the ocean floor, and their financiers provide replacements weapons.³⁰⁹ In at least one instance, in defending themselves against pirates, military personnel were ordered to dump the weapons in the sea for safety, making prosecution that much more difficult.³¹⁰ When

³⁰⁴ International Covenant on Civil and Political Rights, Art. 15(2) (Dec. 16, 1966) available at <http://www2.ohchr.org/english/law/ccpr.htm#art15>, last accessed Apr. 6, 2012 [electronic copy provided in accompanying USB flash drive as Source 21].

³⁰⁵ *Purity Kannana Kinoti v. Republic of Kenya*, High Court of Kenya at Nairobi, Misc. Criminal Appli 752 of 2010, 5 citing Constitution of Kenya, Art. 49(1)(h) “[a]n arrested person has the right (1)(h) 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 the ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day.” [electronic copy provided in accompanying USB flash drive as Source 6].

³⁰⁶ Damien Helly, *Seminar Reports: Lessons from Atalanta* and EU Counter-Piracy Policies, European Union Institute for Security Studies 7 (June 2011) [electronic copy provided in accompanying USB flash drive as Source 89].

³⁰⁷ Mark Rowbotham, *Piracy: A Problem Out of Control*, 13 Logistics and Transport Focus at 29 [electronic copy provided in accompanying USB flash drive as Source 106].

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ Eugene Kontorovich, “A Guantanamo on the Sea”: The Difficulty of Prosecuting Pirates and Terrorists, 98 Calif. L. Rev at 265 [electronic copy provided in accompanying USB flash drive as Source 67].

evidence is successfully seized, it may be in the form of a ship that was captured and converted to a mother ship.³¹¹

C. Issues Somalia Must Consider

Under proposed Option 2, “Somalia [may] play a role in the solution to the problem of piracy and engineer the capacity building of the Somali judicial system.”³¹² If Somalia were to convene an extraterritorial court, it would divert significant resources and impact the Somali people and their government. The costs have not yet been assigned to any state or organization. If Somalia could spare its judges, there may not be enough remaining in Somalia to hear non-piracy cases. This will cause delays in the justice system and the civil actions.

U.N. Office of Drugs and Crime (UNODC) has made investment within Somalia. First, it is working on judicial capacity within East African states. It has sponsored the construction of a new prison in each Puntland and Somaliland. It has established a presence of “international staff in local jails” to deter abuses against prisoners.³¹³ Transferring prisoners out of Somalia “will not contribute to improving local capacity building in legal proceeding.”³¹⁴ Further, “the proper way to sort out the problem [is] not to repress crime [on the] high seas, but to recreate a Somali state able to control its coasts, preventing the departure of expeditions and harboring

³¹¹ Mark Rowbotham, *Piracy: A Problem Out of Control*, 13 Logistics and Transport Focus at 29 [electronic copy provided in accompanying USB flash drive as Source 106].

³¹² Lucas Bento, *Toward an International Law of Piracy Sui Generis: How the Dual Nature of maritime Piracy Law Enables Piracy to Flourish*, 29 Berkeley J. Int’l L. at 444 [electronic copy provided in accompanying USB flash drive as Source 48].

³¹³ Daniele Archbugi and Marina Chiarugi, *Looking for a Jurisdiction*, 82 Pol. Q. at 9 (2011) [electronic copy provided in accompanying USB flash drive as Source 45].

³¹⁴ *Id.* at 10.

hijacked ships.”³¹⁵ Arguably, the fact that the extraterritorial court is applying Somali law does contribute to the some capacity building, but the extraterritorial aspect may hinder the stabilization of Somalia. Without “rebuilding the institutions able to administer justice and social policies on the Somali territory” piracy continues.³¹⁶ The organized “lords of piracy” will continue to oversee criminal activity from within the safe boundaries of Somalia.³¹⁷

The tribunals will not continue indefinitely, and Somalia will need to modernize its laws at some point. When doing so, Somalia must pay careful attention to how piracy and armed robbery at sea are defined. Provisions should include a definition of the intended waters and the confinement of any crew members (not restricted to the officers).³¹⁸ The punishments must also be evaluated³¹⁹ to ensure they are a deterrent to piracy and retribution for the crime, but also not too cumbersome on the fragile prison system.

Prisoner re-entry and repatriation from other nations must also be addressed. Current practices for reintegration of ex-combatants into other nations include a variety of resources.³²⁰ Social programs have been implements throughout many parts of Africa, with specific design to provide stabilizing cash payments for individuals’ safety, job readiness and preparation, entrepreneurial training matching the relevant local markets, and psychological counseling. Social programming can only do so much. The broader community also requires investment to

³¹⁵ *Id.* at 11.

³¹⁶ *Id.* at 12.

³¹⁷ *Id.*

³¹⁸ Daniel A. Lavrish, Note & Comment, *Pirates, Ye Be Warned: A Comparative Analysis of National Piracy Laws*, 42 U. Tol. Rev 255, 280 (2010) [electronic copy provided in accompanying USB flash drive as Source 69].

³¹⁹ *Id.*

³²⁰ Public International Law & Policy Group, *Legal Memorandum on Reintegration of Former Pirates*, 10-24, (February 2012) [electronic copy provided in accompanying USB flash drive as Source 104].

provide solid and sustainable alternatives to crime. Somalia may not be as affected by the re-entry of youth, but it needs to be prepared for at least a few youth offenders who may be returned rather than tried under an adult court.

Of little concern to Somalia but of certain concern to Tanzania, Arusha's economy is affected by the closing of the ICTR courthouse. Workers are displaced from probably well-paying and somewhat stable employment. That economic impact may be offset by a tribunal there housed. Wherever the tribunals are located, workforce development and economic spin-off will occur. The courthouse needs staff to run it beyond just the court personnel. For convenience, local labor would likely be used, meaning that if it is in Arusha, Tanzania's citizens and government benefit. Likewise, if it is in Mogadishu, its citizens and government benefit.

Somalia should give due consideration to the impacts of a tribunal outside its borders on the people within its borders. After all, "the surest way to create peace at sea is to impose the rule of law on the lands where pirates hid."³²¹ With essentially no central government, Somalia currently is not in a position to apply the rule of law. Further, by removing the court to an external site, Somalia does not have the opportunity to build government, establish the rule of law, stabilize the poverty and starvation, and provide an alternative for its people. Reports indicate that Somali pirates have savvy technologies like "satellite phones, global positioning systems, automatic tank weapons, ... and rocket-propelled grenades."³²² Somehow, pirates have

³²¹Max Boot, *Pirates, Then and Now: How Piracy was Defeated in the Past and Can be Again*, 88 Foreign Aff. 94, 99 (2009), as quoted in Lucas Bento, *Toward an International Law of Piracy Sui Generis: How the Dual Nature of maritime Piracy Law Enables Piracy to Flourish*, 29 Berkeley J. Int'l L. at 450 [electronic copy provided in accompanying USB flash drive as Source 48].

³²²Lucas Bento, *Toward an International Law of Piracy Sui Generis: How the Dual Nature of maritime Piracy Law Enables Piracy to Flourish*, 29 Berkeley J. Int'l L. at 406 [electronic copy provided in accompanying USB flash drive as Source 48].

also been able to gain advance schematics for ships, know the value of the cargo, and know the intended shipping route.³²³ The rule of law has no current bearing in Somalia.

The Lockerbie Model of an extraterritorial court can only be successful if it is properly funded. For Somalia, that requires international financial support, because it simply does not have the resources. By providing the funding, the international community naturally has more control over the proceedings. That can be both good and bad, in that it ensures fair trials but may limit Somalia's sense of ownership of the legal process.

The Lockerbie Model was used in the trial of ten defendants in the Pitcairn Islands. However, this example is different than Somalia because Pitcairn Islands remain an overseas territory of the U.K. government.³²⁴ When serious allegations surfaced about generational molestation and rape, the U.K. government instituted legal proceedings under British law.³²⁵ Also two trials were held for each of the accused, one on Pitcairn Islands and one in New Zealand.³²⁶ Somalia lacks both a foreign protectorate to aid with trials and the resources for two trials. Even if Somalia cannot benefit from the direct aid, it can still learn from the lessons of the Pitcairn Island trials. The defendants were unprepared to stand trial in a different culture and

³²³ *Id.*

³²⁴ Kathy Marks, *Lost Paradise: From Mutiny on the Bounty to a Modern-Day Legacy of Sexual Mayhem, the Dark Secrets of Pitcairn Island Revealed, Prologue* (2009) *available at* <http://www.npr.org/templates/story/story.php?storyId=103569364>, last accessed Mar. 11, 2012 [electronic copy provided in accompanying USB flash drive as Source 39].

³²⁵ *Id.*

³²⁶ *Id.*

needed to have better practical advice to know things such as appropriate attire.³²⁷ Further, the isolation from the Pitcairn Island culture had a lasting impact on all the residents of the Island.³²⁸

A concern from the Lockerbie trial was that Libya and others believed that Scotland could not deliver a fair trial.³²⁹ Political factors such as “foreign policy, national security, [and] trade policy...factor[] into any transnational prosecution.” It has the potential to go two ways: 1) new governments could be seen as cooperative with the international community, or 2) unable to handle justice within its borders and setting potentially dangerous precedent.³³⁰ Somalia has to decide its role in the international community. Will it continue to both accept and shun aid?

If the federal government of Somalia is to stand on its own, it must build a legal system where the rule of law is paramount. Somalia lacks the resources independent of the international community to design and implement such a structure. Rule of law inside or outside of Somalia cannot be achieved by the failed state alone. Piracy rose for this very reason. Somalia needs the international support and must balance that against appearances as a puppet. Justice cannot be compromised. As the surrendering state, Somalia has to trust the system.³³¹ Since this model requires Somalis to be turned over to fellow Somalis, extradition is not a strong factor. However, the care and safety during transport and a fair trial will remain primary concerns for the Somalia government.

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ Donna E. Arzt, *The Lockerbie "Extradition by Analogy" Agreement: "Exceptional Measure" or Template for Transnational Criminal Justice?*, 18 Am. U. Int'l L. Rev. at 214 [electronic copy provided in accompanying USB flash drive as Source 46].

³³⁰ *Id.*

³³¹ *Id.* 216.

IV. Recommendations and Conclusions

Somalia cannot address the piracy symptom entirely alone. The international community has to aid Somalia. And, they have. International investments are being made. For examples, more than six hundred piracy trials have been held outside of Somalia and in Mombasa, Kenya, “the UN Office on Drugs and Crime’s Counter-Piracy Program built a high security courtroom...in June 2010.”³³² What also needs to be mentioned is that about forty percent of the trials have occurred within Somali borders.³³³ By focusing the intervention and resources within the Somali borders, the government and its people have a better chance at building a stronger federal government to control the piracy cycle and stabilize the economy of Somalia. However, if the international community insists on apply an extraterritorial court model, it can be accomplished but requires a significant investment of resources: financial, technical expertise, and human capital.

A. Critical Areas:

Somalia cannot proceed without additional technical support in developing its legal code. Even though Somalia has made efforts to modernize, the failures of the federal government are still undermining the rule of law. Somalia must strengthen its federal government enough to ratify either a new penal code or revisions to the Somali Democratic Republic Penal Code such that the Somali people will be willing to recognize and respect the law propagated. Unless it uses Somaliland or Puntland regional law, a court cannot prosecute pirates without violating

³³² Lucas Bento, *Toward an International Law of Piracy Sui Generis: How the Dual Nature of maritime Piracy Law Enables Piracy to Flourish*, 29 Berkeley J. Int’l L. at 412 [electronic copy provided in accompanying USB flash drive as Source 48].

³³³ Public International Law & Policy Group, *Legal Memorandum on Reintegration of Former Pirates*, 3, (February 2012) [electronic copy provided in accompanying USB flash drive as Source 104].

both the existing Penal Code and international law which both require the crime to be a crime at the time of the act.

Financial and technical resources are required from international sources, as Somalia has too few resources to be successful. Without outside financial support, a domestic Somali law piracy tribunal will fail. International technical support is required regardless of location. Further, if the resources are being allocated to the symptom, Somalia ought to be able to assert an argument for the domestic needs and how that will start the process of stabilizing the federal government.

B. Highly Recommended:

Court locations within Somalia are more appropriate if the U.N. chooses to not support the piracy tribunal. If an extraterritorial court is selected, the lessons from Lockerbie are valuable. Many should be implemented as best practices, with due consideration for the unique circumstances of this tribunal. For example, the Netherlands-U.K. Agreement is robust, establishing the very foundation for the tribunal. Tanzania may not be willing to enter into an agreement that grants a sovereign island for the Somalia Court. The ultimate host nation and Somalia would have to reach agreement as to the actual boundaries of Somalia law within its territory.

These are not war criminals; these crimes are piracy. Removing suspected pirates from their homelands and potentially conducting a trial in a different language is unfair to the defendant and may violate international standards. This is the approach implemented in Kenya, Seychelles, and Mauritius, yet have not resulted in allegations of such violations. However, trials in other nations have raised questions related to the human rights of the accused defendants and convicted pirates. To date more than one thousand cases have been handled. Lockerbie was

one trial with two defendants and one appeal with one defendant. The Pitcairn Islands had one trial for nine defendants, and their subsequent appeals. Ultimately, both were the most expensive trials their nations ever financed. Somalia cannot afford that scale of trial, especially considering that pirates are continuing to commit acts of piracy and robbery at sea. Even if the extraterritorial court only hears cases related to the accused kingpins, there are likely to be a sufficient number of trials required.

Again, regardless of the location of the trial, the judicial process has to be defendant-centric: providing for a fair trial, for safe confines for pre-trial detention and, if applicable, post-sentencing detention, and for repatriation and re-entry services. Like in Lockerbie, most nations want any relevant sentence to be served in Somalia, or perhaps just not in their prison systems. This gives Somalia the opportunity to build infrastructure. Even if it is the prison system, there are still stable jobs associated in everything from construction to maintenance to administration. UNDOC has already made investments in Somalia prisons. If the international community does not trust the competence of Somalia for the trials, it should at the very least, Somalia ought to be able to house those convicted.

One critical element is the connection to the Somali people. Piracy's primary victims are external to the state. Part of establishing a federal government with a judicial system is to establish respect for the rule of law. After more than twenty years without a stable government, that has eroded. Stabilizing Somalia includes a direct demonstration of justice. Ideally, that should be within its borders. The underlying cause of Somali piracy remains the failure of the Somali state. Without fortifying the Somali economy, the pirates will just continue to be more and more brazen. Ultimately, piracy will continue until there are strategic investments from

effected nations and the international community to recreate “a stable and peaceful Somali society.”³³⁴

³³⁴ Milena Sterio, *Fighting Piracy in Somalia (and Elsewhere): Why More is Needed*, 33 Fordham Int’l L.J. at 405-06 [electronic copy provided in accompanying USB flash drive as Source 80].