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International Law in Crisis: Seeking the Best Prosecution Model for Somali Pirates

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**INTERNATIONAL LAW IN CRISIS: SEEKING THE BEST PROSECUTION
MODEL FOR SOMALI PIRATES**

*Sandra L. Hodgkinson**

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I. INTRODUCTION

The recent surge in piracy cases off of the coast of Somalia¹ has resulted in the need for effective new approaches to prosecuting pirates. Somali courts have attempted to prosecute these cases,² but have largely failed to stop this growing phenomenon.³ The growth in piracy has not only in-

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¹ In 2008 and 2009, pirates attacked roughly 145 vessels; in 2010, the number had increased to 160 vessel attacks, and 53 ships were captured. The potential economic gains of a successful pirate attack, \$10,000 for the yeoman pirate, which is more money than he could earn in five years in Somalia, and much more for the higher-ups in the piracy organization, ensure that the risks of possible prosecution are still outweighed by the financial benefit. See James Kraska, *Coalition Strategy and the Pirates of the Gulf of Aden and the Red Sea*, 28 COMP. STRATEGY 197, 197–99 (2009) (claiming that in 2008, Somali pirates attacked 141 vessels, and that a single capture was worth up to \$10,000 to a low ranking pirate); see also Jim Michaels, *Pirates' New Tactics Make Navies' Job Harder*, USA TODAY, Jan. 6, 2011, at A6 (claiming 145 attacked ships in 2009 and 160 in 2010).

² See Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia, *Rep. of the Special Adviser to the Secretary-General*, ¶ 42, U.N. Doc. S/2011/30 (Jan. 25, 2011) [hereinafter Jack Lang Report] (at the time of the letter, 338 Somalis were detained in Somalia for piracy).

³ In the first six months of this year, there were about 177 attacks, including 18 successful ones. U.N. Secretary-General, *Rep. of the Secretary-General on the Modalities for the Estab-*

creased the current instability in Somalia,⁴ but has also increased costs at ports throughout Africa and undermined fishing and tourism, threatening the livelihood of many African states.⁵ As of June 2011, more than one thousand pirates were being held in twenty countries.⁶ To address this growing trend, on October 25, 2011, the U.N. Security Council unanimously passed a new resolution calling for international cooperation on information-sharing for law enforcement and prosecution, and emphasizing the need to create specialized anti-piracy courts in Somalia and other courts in the region.⁷

This article will address some of the efforts to date to successfully prosecute piracy cases. States like Kenya and the Seychelles have entered into bilateral or multilateral agreements to prosecute pirates in their national court systems, with international funding and support, using universal jurisdiction.⁸ Wealthier, more distant states, such as the U.S.,⁹ Netherlands,¹⁰ and

lishment of Specialized Somali Anti-Piracy Courts, Annex I, ¶ 1, U.N. Doc. S/2011/360 (June 15, 2011) [hereinafter *Rep. of the Secretary-General*].

⁴ *Background Note: Somalia*, U.S. DEP'T STATE (Sept. 26, 2011), <http://www.state.gov/r/pa/ei/bgn/2863.htm> (discussing how the lack of governance in Somalia has led to instability and maritime piracy in the state).

⁵ Victor Erofev, Op-Ed., *Save the Seychelles From Pirates*, N.Y. TIMES (Jan. 11, 2011), <http://www.nytimes.com/2011/01/12/opinion/12iht-ederofev12.html>; *U.S. Expresses Concern About Maritime Piracy*, NEPTUNE MAR. SECURITY (Feb. 15, 2011), <http://www.neptune.maritimesecurity.posterous.com/us-expresses-concern-about-maritime-piracy> (statement of U.S. counter-piracy official, Donna L. Hopkins) ("We are very concerned that pirate ransom money is actually undermining the development of sustainable legitimate economic activity such as fisheries and normal maritime trade.").

⁶ *Rep. of the Secretary-General*, *supra* note 3, Annex I, ¶ 4 (discussing how prosecution of piracy acts has doubled since July 2010); *Somalia for Anti-Piracy Court Inside Country*, DAWN.COM (June 22, 2011), <http://www.dawn.com/2011/06/22/somalia-for-anti-piracy-court-inside-country.html>.

⁷ *UN Security Council Adopts India-Co-Sponsored Resolution on Piracy*, ECON. TIMES (Oct. 25, 2011), http://articles.economictimes.indiatimes.com/2011-10-25/news/30320119_1_anti-piracy-piracy-operations-resolution.

⁸ See Memorandum of Understanding Concerning the Conditions of Transfer of Suspected Pirates and Armed Robbers and Seized Property in the Western Indian Ocean, the Gulf of Aden, and the Red Sea, U.S.-Kenya (Jan. 16, 2009) [Memorandum of Understanding U.S.-Kenya] (on file with author); Memorandum of Understanding on the Conditions of Transfer of Suspected Pirates and the Armed Robbers and Seized Property To The Republic of Kenya, U.K.-Kenya (Dec. 11, 2008) [hereinafter Memorandum of Understanding U.K.-Kenya] (on file with author); Exchange of Letters Between the European Union and the Republic of Seychelles on the Conditions and Modalities for the Transfer of Suspected Pirates and Armed Robbers from EUNAVFOR to the Republic of Seychelles and for Their Treatment After Such Transfer, EU-Seychelles (Aug. 21, 2009) [hereinafter Exchange of Letters] (on file with author).

⁹ See, e.g., *The United States Response to Piracy off the Coast of Somalia*, U.S. DEP'T STATE (Nov. 10, 2011), <http://www.state.gov/t/pm/ppa/piracy/c32662.htm> (providing information on U.S. action in countering piracy through governmental groups international coop-

Germany,¹¹ have prosecuted pirates in their home territories most often when their state's flagged-vessel has been pirated and/or their citizens taken hostage or killed through the act of piracy as a victim state. A separate recent proposal, commissioned by the U.N. Secretary General and authored by Jack Lang, the Secretary General's Special Advisor on legal issues related to piracy, now proposes establishing specialized piracy tribunals in Somalia and Tanzania.¹² After assessing the State-led prosecution efforts, this article will also examine this new proposal for specialized piracy courts, and offer additional recommendations for successful prosecutions.

II. REGIONAL PROSECUTIONS: KENYA, SEYCHELLES, MAURITIUS, AND OTHERS

There exists sufficient legal authority under international law via the U.N. Convention on the Law of the Sea for nations to exercise criminal jurisdiction over pirates captured on the High Seas.¹³ In addition, a series of U.N. Security Council Resolutions have set forth legal authorities for nations to exercise criminal jurisdiction over pirates captured in the territorial waters of Somalia.¹⁴ Kenya was the first third-country nation to actively begin prosecuting pirates picked up by other countries using universal jurisdiction, developing a Memorandum of Agreement with the U.S., and a Memorandum of Understanding with the U.K., to take on these responsibilities in late 2008 and early 2009.¹⁵ Under these agreements, Kenya would

eration); *United States v. Abduwali Abdukhadir Muse*, No. 1:09-cr-00512-LAP (S.D.N.Y. May 19, 2009) (resulting in a guilty plea for hijacking, kidnapping, and hostage-taking but the piracy charges were dropped as part of the plea deal); *United States v. Hasan*, 747 F. Supp. 2d 599 (E.D. Va. 2010) (ruling on numerous pretrial motions in a trial where defendants were charged with piracy and related crimes); *United States v. Said*, 757 F. Supp. 2d 554 (E.D. Va. 2010) (dismissing piracy charge for defendants who fired on a U.S. Navy vessel).

¹⁰ See Spencer Swartz, *Somali Pirates Face Trial in Dutch Court*, WALL ST. J., May 29, 2010, at A9.

¹¹ See Martin Schlicht, *Somalis on Trial in Germany's First Modern Piracy Case*, REUTERS (Nov. 22, 2010), <http://www.reuters.com/article/2010/11/22/us-germany-pirates-idUSTRE6AL2EA20101122>.

¹² Jack Lang Report, *supra* note 2, at 3.

¹³ See United Nations Convention on the Law of the Sea, art. 105, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNLCOS]. The U.S. is a signatory to the Convention, but the U.S. Senate has not yet ratified the Convention. *Id.* at 397.

¹⁴ See S.C. Res. 1816, U.N. Doc. S/RES/1816 (June 2, 2008) (condemning piracy and armed robbery against vessels off the coast of Somalia); S.C. Res. 1846, U.N. Doc. S/RES/1846 (Dec. 2, 2008) (renewing the authority of UN Security Council Resolution 1816); S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008) (encouraging states to coordinate their efforts in combating piracy); S.C. Res. 1897, U.N. Doc. S/RES/1897 (Nov. 30, 2009) (renewing prior Chapter VII language for another 12 months).

¹⁵ Memorandum of Understanding U.S.-Kenya, *supra* note 8; Memorandum of Understanding U.K.-Kenya, *supra* note 8.

agree to conduct the investigations and prosecute the cases, using support and evidence from the U.S. or the U.K.¹⁶ Kenya was able to successfully prosecute a significant number of piracy cases,¹⁷ however, in 2010 the government formally announced its plan to stop prosecuting pirates unless other countries increased their burden of prosecutions, and to cancel its agreements with their countries due to overcrowding in the Kenyan prison system and burdening of the criminal justice system.¹⁸ Nonetheless, the Kenyan government has continued to prosecute piracy cases,¹⁹ and as of June 2011, had 119 pirates in custody awaiting trial, and fifty convictions.²⁰ The long-term viability for Kenya to prosecute large numbers of additional pirates, however, remains very much in question.²¹

The Republic of Seychelles signed a similar Exchange of Letters, but with the European Union, in August 2009, allowing the E.U. Naval Force (EUNAVFOR) to transfer to it pirates captured in Seychelles' exclusive economic zone, territorial sea, archipelagic waters and internal waters.²² In support of piracy prosecutions in both Kenya and the Seychelles, in May 2009, the U.N. Office of Drugs and Crime (UNODC)²³ provided

¹⁶ *Id.*

¹⁷ Mike Pflanz, *At Last, a Court to Try Somali Pirates*, CHRISTIAN SCI. MONITOR (July 8, 2010), <http://www.csmonitor.com/World/Africa/2010/0708/At-last-a-court-to-try-Somali-pirates> (noting that as of July 2010, the Kenyan government had convicted 18 pirates).

¹⁸ *Seychelles to Set Up Courts to Fight Piracy: UN*, STARAFRICA.COM (May 5, 2010), <http://www.starafrika.com/en/news/detail-news/view/seychelles-to-set-up-courts-to-fight-pir-46805.html> (stating Kenya's announcement that it may cancel agreements with several nations to prosecute piracy suspects); Mohamed Yusuf, *UNODC Praises Kenyan Anti-Piracy Actions*, SOMALIA REPORT (Mar. 28, 2011), http://www.somaliareport.com/index.php/post/407/UNODC_Praises_Kenyan_Anti-Piracy_Actions (reporting over-crowded prisons as a reason Kenya had ceased prosecuting piracy suspects); see also Abdi Muhumed Abdikarim, *Questions over Anti-Piracy Court in Kenya*, ALSHAHID (June 29, 2010), <http://www.english.alshahid.net/archives/8328> (discussing Kenya's burdens in the prosecution of piracy suspects).

¹⁹ *See Kenya Opens Fast-Track Piracy Court in Mombasa*, BBC NEWS (June 24, 2010), <http://www.bbc.co.uk/news/10401413> (reporting on-going efforts of the Kenya government to prosecute suspected pirates). Kenya has not formally indicated whether or not this means they will follow through with the MOUs. *Id.* (stating that although "negotiations are ongoing," suspected pirates would "get a fair trial in Kenya.").

²⁰ *Somalia for Anti-Piracy Court Inside Country*, *supra* note 6.

²¹ *See* TIFFANY BASCIANO, CONTEMPORARY PIRACY: CONSEQUENCES AND CURES 14 (2009) (discussing the views of legal experts from various corners regarding maritime policy in the Gulf of Aden and how to address Somali piracy).

²² Exchange of Letters, *supra* note 8.

²³ *See* U.N. Office on Drugs and Crime, Counter Piracy Programme, 2–3 (Nov. 2009), http://www.unodc.org/documents/easternafrika/piracy/UNODC_Counter_Piracy_Programme.pdf, at 2–3 (describing the full range of UNODC's efforts to enhance judicial capacity consistent with U.N. Security Council Resolution 1851).

\$2.3 million to cover 18 months.²⁴ In July 2010, the Seychelles successfully completed their first piracy case, resulting in a ten year sentence for eleven pirates who tried to pirate and hijack the *Topaz* patrol boat.²⁵ The Seychelles government has expressed concern about its capacity to imprison new convicts, and has passed a law facilitating transfers back to Somalia.²⁶ Long-term, given the size of the Seychelles judicial system, and its concerns over detention capacity, the capacity of the Seychelles to take on a large load of these cases is questionable.

Similar to both Kenya and the Seychelles, the European Union and UNODC have recently looked to Mauritius for additional support for piracy prosecutions. In July 2011, Mauritius and the European Union entered into an agreement for the transfer of suspected pirates for investigation, prosecution, trial and detention in Mauritius.²⁷ The agreement includes a new court and prison for these piracy cases, and the government must pass new legislation.²⁸ The Maldives are another possible forum for prosecuting piracy cases, and as of June 2011, had 34 pirates in detention awaiting trial.²⁹ The UNODC Counter Piracy Programme as a whole aims to provide assistance to nations exercising universal jurisdiction to try Somali pirates captured off of the coast of Africa, in support of U.N. Security Council Resolution 1851 by: providing funding (such as the funding provided to Kenya and the Seychelles); training for police, judges and prosecutors; and improvements to prison systems (including refurbishments, health and educational services, and training for staff).³⁰ While many states have resisted turning pirates over to Somalia, due to both capability and humane treatment concerns,³¹ the UNODC Counter Piracy Program has been supporting transfer arrangements from third countries prosecuting Somali nationals back to Somalia's prison system so they can be closer to their homes and to alleviate the bur-

²⁴ David B. Rivkin Jr. & Carlos Ramos-Mrosovsky, *A Better Way to Deal with Pirates*, WASH. POST, Dec. 9, 2010, at A27 (discussing the UNODC's efforts to counteract piracy in Kenya, the Seychelles and Somalia).

²⁵ *Somali Pirates Sentenced to 10 Years in Seychelles*, BBC NEWS AFRICA (July 26, 2010), <http://www.bbc.co.uk/news/world-africa-10763605> (presenting news of the conviction of eight Somali pirates for piracy and three others for aiding and abetting piracy for trying to hijack the *Topaz* patrol boat).

²⁶ *Id.*

²⁷ *See generally* Agreement Between the European Union and the Republic of Mauritius on the Conditions of Transfer of Suspected Pirates and Associated Seized Property from the European Union-led Naval Force to the Republic of Mauritius and on the Conditions of Suspected Pirates After Transfer, July 14, 2011, 2011 O.J. (L254).

²⁸ *Id.* art 7.

²⁹ *Somalia for Anti-Piracy Court Inside Country*, *supra* note 6.

³⁰ U.N. Office on Drugs and Crime, *supra* note 23, at 4.

³¹ *Id.* at 9

den on third states.³² Beginning in 2010, UNODC began a Somaliland and Puntland prison program to help strengthen their capacity.³³ While a continuation of the various efforts to strengthen the domestic capacity of regional host nations will result in additional prosecutions, it is unlikely that these small countries with limited judicial and corrections capacity will be sufficient to address the ever-growing numbers alone.

III. EUROPEAN AND AMERICAN STATE PROSECUTIONS: THE UNITED STATES, NETHERLANDS AND GERMANY

In addition to the various regional piracy prosecutions using universal jurisdiction (as incorporated into their domestic statutes), a few wealthier Western states have prosecuted piracy cases, primarily when they have been victimized. The first U.S. prosecution was against Abduwali Abjughadir Muse for his role in the attack on the *Maersk Alabama* and taking its captain hostage in April 2009; marking the first time a pirate was in U.S. custody for an attack on an American.³⁴ In May 2010, Muse pled guilty to the crimes of maritime hijackings, kidnappings and hostage-taking, but not to piracy itself.³⁵ The second U.S. prosecution concluded on August 27, 2010, when six Somalis pled guilty to attacking a vessel, engaging in violence against persons on a vessel, and using a firearm during a crime of violence committed against the *USS Ashland*,³⁶ after a judge had concluded that the crime of piracy could not take place unless there was a "robbery at sea."³⁷ A few months later, on November 24, 2010, the U.S. had its first jury conviction for the crime of piracy since 1820, when five Somali men were convicted of piracy and other crimes for their attack on the *USS Nicholas*.³⁸ Piracy cases continued in 2011, with the ongoing prosecution of the surviving Somalis who pirated the *Quest* yacht, killing four Americans.³⁹ To date, several have

³² *Id.*

³³ *Id.*

³⁴ See Zain Verjee et al., *Hostage Captain Rescued: Navy Snipers Kill 3 Pirates*, CNN (Apr. 12, 2009), <http://www.cnn.com/2009/WORLD/africa/04/12/somalia.pirates>.

³⁵ United States v. Abjuwali Abdughadir Muse, *supra* note 9; Ray Rivera, *Somali Man Pleads Guilty in 2009 Hijacking of Ship*, N.Y. TIMES, May 19, 2010, at A21 (noting that the prosecutor dropped the piracy charge in exchange for a guilty plea).

³⁶ United States v. Said, 757 F. Supp. 2d 554, 567 (E.D. Va. 2010); *Guilty Plea in Ashland Piracy Case*, MARINELOG (Aug. 30, 2010), <http://www.marinelog.com/DOCS/NEWSMMIX/2010aug00302.html>.

³⁷ *Guilty Plea in Ashland Piracy Case*, *supra* note 36.

³⁸ United States v. Hasan, 747 F. Supp. 2d 599 (E.D. Va. 2010); see also, U.S. Attorney's Office, Eastern District of Virginia, *Five Somalis Convicted of Piracy Against USS Nicholas*, FBI (Nov. 24, 2010), <http://www.fbi.gov/norfolk/press-releases/2010/nf112410.htm>.

³⁹ *Two More Somalis Sentenced in Piracy Cases*, RADIO NETH. WORLDWIDE (Oct. 4, 2011), <http://www.rnw.nl/africa/bulletin/two-more-somalis-sentenced-piracy-case>.

pled guilty.⁴⁰ While these cases were successfully prosecuted on U.S. soil, they were expensive,⁴¹ and demonstrated some challenges in applying the international law of piracy uniformly.

In June 2010, the Dutch government became the first European country to try and convict a case involving Somali piracy; the victim was a Turkish-owned (not Dutch) freight ship named *Samanyolu*.⁴² Of note, the judge took into account the difficult living conditions in Somalia, in deciding to sentence the pirates to only five years⁴³ (at which point, presumably, they could be released on Dutch soil). The German government followed a few months later with its first modern-day piracy case involving ten Somalis who had hijacked the German-flagged *MV Taipan* cargo ship in April, 2010.⁴⁴ The maximum sentence available under German law for these pirates, if convicted, is fifteen years for adults and ten years for juveniles.⁴⁵ Nearly a year into the trial, the case appears to still be underway.⁴⁶

While these European and American cases are helpful in moving piracy prosecutions forward, they are generally reserved for cases when the state is a victim, and in the limited European experience so far, the sentences are light. In a few years time, pirates who have served out their sentences, or pirates who are acquitted of piracy charges may be eligible to claim asylum on their soil. This may create a disincentive to large numbers of prosecutions that will only be exacerbated when the first pirate becomes a citizen of the state that agreed to prosecute him. Different legal conclusions regarding the international law of piracy (e.g., the U.S. judge determination that piracy required “robbery at sea”), and different sentence ranges all complicate the effort to increase the number of prosecutions.

⁴⁰ *Id.*

⁴¹ The estimated cost of piracy trials and imprisonment in 2010 is around \$31 million. OCEANS BEYOND PIRACY, THE ECONOMIC COST OF PIRACY 1 (2010), available at http://oceansbeyondpiracy.org/sites/default/files/documents_old/The_Economic_Cost_of_Piracy_Summary.pdf. For information on the U.S. prosecutions, see generally Milena Sterio, *11 Somali Pirates Brought to U.S. for Prosecution*, THOUGHTS ON INT’L LAW & POL. BLOG (Apr. 22, 2010, 6:27 PM), <http://intlbandpolitics.blogspot.com/2010/04/11-somali-pirates-brought-to-us-for.html>.

⁴² *Dutch Court Convicts Five Somalis of Piracy*, TELEGRAPH (June 17, 2010), <http://www.telegraph.co.uk/news/worldnews/piracy/7836714/Dutch-court-convicts-five-Somalis-of-piracy.html>

⁴³ *Id.* (stating that the prosecutors were only seeking a sentence of seven years).

⁴⁴ Schlicht, *supra* note 11.

⁴⁵ *Id.*

⁴⁶ Jan-Philipp Scholz, *No end in Sight for Pirate Trial in Hamburg*, DEUTSCHE WELLE (May 24, 2011), <http://www.dw-world.de/dw/article/0,,15101199,00.html>.

IV. THE JACK LANG REPORT: A SPECIALIZED COURT SYSTEM FOR PIRACY CASES

As another step in addressing this growing surge in piracy cases, on August 25, 2010, the U.N. Secretary General commissioned Jack Lang, as his Special Advisor on legal issues related to piracy off the coast of Somalia, to identify steps that could be taken to achieve and sustain results in piracy prosecutions.⁴⁷ Six months later, Jack Lang submitted a report to the Secretary General, proposing the establishment of a specialized court system to address piracy cases in two Somali jurisdictions—Somaliland and Puntland—with a separate temporary court in Arusha, Tanzania (using the facilities from the International Criminal Tribunal for Rwanda (ICTR)) to hear cases extraterritorially.⁴⁸ The Puntland and Arusha specialized courts would have universal jurisdiction under the counter-piracy law, and the Somaliland court will address acts committed by persons of Somaliland or in its territorial waters,⁴⁹ with the aim of promoting consistency in piracy prosecutions.⁵⁰ The extraterritorial Arusha court would eventually move to Mogadishu when security permits.⁵¹

These three specialized courts would use local judges and operate in the Somali language,⁵² but would require international support to create the legislative framework for the system and train judges on the new legislation.⁵³ International funding would be provided on a voluntary basis, through a UNODC Trust Fund.⁵⁴ The current cost estimates are about \$25 million over a period of three years, not including funding for international judges or lawyers who would come to help strengthen the capacity of the Somali courts, local judge salaries or court security.⁵⁵ Jack Lang believes

⁴⁷ U.N. Secretary-General, Letter dated Aug. 25, 2010 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2010/451 (Aug. 25, 2010).

⁴⁸ Jack Lang Report, *supra* note 2, at 38–39.

⁴⁹ *Id.* at 39 (“Somaliland, on the other hand, has stated that it will only accept jurisdiction limited to acts committed by persons from Somaliland . . . or in its territorial waters . . .”).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 40.

⁵³ *Id.* at 39.

⁵⁴ Jack Lang Report, *supra* note 2, at 43–45.

Funding sources are limited to a few States and the European Union, which have directly enhanced the budget of several United Nations agencies and bodies, including UNODC, and to States that have contributed to the trust fund created by the Contact Group on Piracy off the Coast of Somalia in January 2010. That fund is now a source of special funding intended to strengthen the judicial and correctional capacity of States in the region.

Id.

⁵⁵ *Id.* at 44.

that placing the extraterritorial court in Arusha, “Africa’s ‘legal capital,’” will help strengthen the rule of law in Somalia by attracting international legal experts who may not be able or willing to enter Somalia, and can leverage the existing ICTR court site to save money.⁵⁶ The proposal also includes construction of two new prisons in Puntland and Somaliland within two years, with the capacity of five hundred pirates each, to end the practice of “catch and release” that has been taking place in Somalia.⁵⁷ These prisons would receive training from UNODC on corrections and be monitored by a surveillance committee outside of the prison for human rights concerns.⁵⁸

While there is significant merit in some aspects of the Jack Lang report, there are also a few drawbacks. First, historical experience gained through establishment of war crimes tribunals has demonstrated that there is often not the spillover effect for rule of law that we intend,⁵⁹ as domestic tribunals often have international judges and/or local judges who do not go back to the regular court system, and “specialized” one-issue courts do not often integrate enough with the mainstream justice system to have the intended benefit. Second, international lawyers and judges are very expensive, and could quickly become one of the most costly aspects of the endeavor.⁶⁰ Taken together, raising the \$25 million (plus international lawyer and judge costs) through voluntary contributions will be difficult. Additionally, this sum is only projected to cover this three-year time period, and history shows that ad hoc tribunals never seem to end on time (thus requiring additional

⁵⁶ *Id.* at 40.

⁵⁷ *Id.* at 37.

⁵⁸ *Id.*

⁵⁹ See Nsongurua J. Udombana, *Globalization of Justice and the Special Court for Sierra Leone’s War Crimes*, 17 EMORY INT’L L. REV. 55, 86 (2003) (explaining the special court was comprised of international judges removed from the local court system); Ian M. Ralby, *Joint Criminal Enterprise Liability in the Iraq High Tribunal*, 28 B.U. INT’L L. J. 281, 283–84 (2010) (explaining the Iraq High Tribunal used local judges but faced security challenges that likewise prevented some of the intended spillover effect).

⁶⁰ These international lawyers condition their arrival upon certain due process standards being achieved in the court system, which are often not achievable without the international legal assistance in the first place. This can lead to a “chicken-and-egg” issue regarding whether you need the international lawyers to create a good system, or whether the international lawyers will come to a system that is not yet good enough. The Iraq High Tribunal is a perfect example of a court that could not get adequate international lawyers from countries other than the U.S. due to concerns that their system had the death penalty and/or was not inherently fair. See generally John B. Bellinger III, Legal Adviser to the U.S. Sec’y of State, Speech on International Criminal Justice at the Fletcher School of Law and Diplomacy (Nov. 14, 2008), available at <http://www.cfr.org/international-criminal-courts-and-tribunals/bellingers-speech-international-criminal-justice/p17777> (arguing that the U.S. has stood alone in supporting the Iraq High Tribunal).

funding).⁶¹ Most importantly, to ensure its effectiveness, a specialized tribunal would require the commitment of the senior Somali government to address not only lower level piracy crimes, but also the “higher-ups,” who are fueling the continued rise in piracy. The Transitional Federal Government and regional authorities have expressed support for a court within Somalia.⁶² Recent acts, however, including Somalia’s failure to pass a piracy law out of concern that it conflicted with Shari’a law,⁶³ raise concerns about the government’s ability to do so. This latter aspect will be discussed more in depth below as part of the analysis of a viable model.

V. ASSESSING A VIABLE MODEL FOR PROSECUTIONS OF SOMALI PIRATES

The sheer volume and scale of ongoing pirate attacks off of Somalia demonstrates that prosecution efforts to date have not been effective at deterring this conduct. Accordingly, it is important to look at ways in which these prosecutions can be improved, and multiplied in a manner which results in more prosecutions, carried out in a relatively uniform way (similar sentences for similar crimes, etc.). Max Johns from the German Shipowners Association makes the argument for an international court by claiming, “It doesn’t make much sense to make lawyers and courts everywhere specialize in such a narrow subject in order to arrive at what could be very different verdicts.”⁶⁴ That said, consistent with the Rome Statute of the International Criminal Court (ICC), which is based on the fundamental principle of national court complementarity, national courts are taking the frontline in international criminal accountability.⁶⁵ For the purposes of the ICC (which

⁶¹ See Jason McClurg, *Complications with the Sierra Leone War Crimes Court Raises Questions About Effectiveness of Future Ad Hoc Tribunals*, 21 INT’L ENFORCEMENT L. REP. 506, 506 (2005) (explaining the Special Court of Sierra Leone was established in 2002); Charles Chernor Jalloh, *Special Court for Sierra Leone: Achieving Justice?*, 32 MICH. J. INT’L L. 395, 435 (2011) (explaining the Special Court of Sierra Leone had a limited three-year mandate scheduled to end in 2005).

⁶² Margaret Besheer, *Somalia Wants Piracy Courts on its Territory*, VOICE OF AMERICA (June 21, 2011), <http://www.voanews.com/english/news/africa/Somalia-Wants-Piracy-Courts-on-its-Territory-124298529.html>.

⁶³ Betwa Sharma, *UN Adviser: Piracy Tribunals Needed ASAP*, AOL NEWS (Jan. 25, 2011), <http://www.aolnews.com/2011/01/25/un-adviser-piracy-tribunals-needed-asap/>.

⁶⁴ Scholz, *supra* note 46.

⁶⁵ Rome Statute of the International Criminal Court art. 17, July 17, 1998, 2187 U.N.T.S. 90 (providing that the ICC should be a court of last resort); see also OFFICE OF THE PROSECUTOR, PAPER ON SOME POLICY ISSUES BEFORE THE OFFICE OF THE PROSECUTOR 4–5 (2003), available at http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy-Paper.pdf (describing the Office’s understanding of Article 17 of the Rome Statute); Sandra Hodgkinson, *Are Ad Hoc Tribunals an Effective Tool for Prosecuting International Terrorism Case?*, 24 EMORY INT’L L. REV. 515, 521–22 (exploring the growing preference for national courts in cases of war crimes and crimes of terrorism over ad hoc tribunals).

does not have jurisdiction over piracy cases, but other certain other international crimes), this principle of complementarity has increased the expectation that, for these crimes at least, national courts should be capable of addressing them.⁶⁶ Applying this principle to Somalia piracy cases would lead one to conclude that a Somalia which is *willing* and *able* to prosecute piracy cases effectively should do so. While it is broadly recognized that Somalia does not have this capacity at present, and until such time as it does, capacity-building efforts are helpful as long as the international community supporting them can reasonably expect that the Somali government will be *willing* politically to prosecute these cases when it is able. That is to say that the Somali government could prosecute piracy effectively as long as the beneficiaries of pirate attacks and/or higher-ups in the piracy ranks⁶⁷ are not closely linked with the Somali government in such a way as to influence the judicial system and its ability to function effectively. On this latter issue, however, reasonable minds differ.

In this context, it would be helpful to now examine Jack Lang's proposal. Does it make sense to establish specialized courts in Somalia, with one extraterritorially? Some degree of capacity-building in Somalia, whether it is a specialized court, or enhanced training to the existing criminal justice system, makes sense if one believes that the Somali government will allow prosecutions of pirates go forward. Similarly, transfers of prisoners back to Somalia to serve out sentences adjudged in third countries also makes sense if you believe that the Somali government will honor these sentences and keep convicted pirates incarcerated. On these two latter points, there are differing views, and the lack of stability in Somalia brings greater uncertainty to either view.

Assuming for the sake of argument that the Somali government can be trusted to faithfully carry out prosecutions and convictions reached for piracy cases if their capacity is strengthened, then it worth examining whether Jack Lang's proposal to establish "specialized" courts is preferable to something more akin to enhanced training for the regular court system.⁶⁸

⁶⁶ William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT'L L.J. 53, 53–54 (2008); see also Hodgkinson, *supra* note 65, at 521 (noting the trend towards using national courts to prosecute international crimes).

⁶⁷ According to the U.N., the Somalian pirate network consists of 10–20 financiers, 50 main pirate leaders, 300 leaders of pirate attack groups, and approximately 2,500 lower level foot soldiers. *Rep. of the Secretary-General*, *supra* note 3. Some reports indicate that Somali officials have been complicit in acts of piracy. U.N. Secretary-General, *Rep. of the Secretary-General Pursuant to Security Council Resolution 1846 (2008)*, ¶ 7, U.N. Doc. S/2009/146 (March 16, 2009) (noting reports of Puntland officials complicit in piracy, in particular the discharge of several Somali officials for such activities).

⁶⁸ Press Release, Security Council, In Race Between Pirates and International Community, Pirates Clearly Winning, Secretary-General's Top Legal Adviser on Piracy Warns Security

Given that piracy is one of many regular crimes that could be committed in Somalia,⁶⁹ it might be worth examining the success of several African states to specifically train prosecutors, judges and other court personnel (for specialized “panels” versus “courts”) within the regular court system to address violence against women and children. South Africa is among countries who have specially trained judges and prosecutors to handle cases of violence against women and children, but they handle them within the regular court system rather than through a separately established court with singular jurisdiction.⁷⁰ Following this example would support mainstreaming piracy prosecutions into the regular Somali court system using specially trained judges and prosecutors. By mainstreaming the enhanced capacity, it is more likely that you would attain the “spillover” effect to the regular justice system so often being sought, even if and when piracy cases start to wind down. Furthermore, the cost of implementation in the regular courts would probably be significantly less than \$25 million. This all tracks, if one believes that the Somali government is willing to take on these cases and see them through the entire justice process, including prison sentences.

If one does not believe that the Somali government is willing to take on piracy cases, and in either event, until such time as they achieve the capacity to do so, other national courts remain a critical stopgap measure to ensuring that these cases continue to move forward. In this vein, efforts to strengthen other countries’ effectiveness are helpful through efforts such as the UNODC Counter Piracy Programme and U.N. Contact Group on Piracy are paramount and should be continued. While the capacity of any one regional state, such as the Seychelles or Kenya, is limited, and the political will of other states with more capacity may be limited due to concerns over asylum⁷¹ and/or resources,⁷² continuing efforts to encourage all states to

Council, U.N. Press Release SC/10164 (Jan. 25, 2011) (describing Lang’s proposal to establish two specialized courts in Puntland and Somaliland to try captured pirates).

⁶⁹ Albeit of universal condemnation and accordingly universal jurisdiction. See *At Sea: Piracy Off the Coast of Somalia is Getting Worse. Time to Act*, ECONOMIST, Feb. 3, 2011, at 16 (providing a detailed accounting of the pirate attacks in 2010 and the resulting financial and prisoner casualties).

⁷⁰ Nicole Itano, *S. Africa Finds ‘Rape Courts’ Work*, CHRISTIAN SCI. MONITOR (Jan. 29, 2003), <http://www.csmonitor.com/2003/0129/p01s04-woaf.html> (discussing South Africa’s expansion of “rape courts” in order to reduce the wait time for trial). See generally *16 Days of No Violence Against Women Campaign*, PARLIAMENT REPUBLIC S. AFRICA, http://www.parliament.gov.za/live/content.php?Item_ID=667 (last visited Nov. 10, 2011) (describing the international 16 Days of No Violence Against Women Campaign and South Africa’s addition of violence against children to their parallel version of the campaign).

⁷¹ Rivkin & Ramos-Mrosofsky, *supra* note 24.

⁷² States may be inclined to focus primarily on those cases in which their flagged-vessel or nationals are victimized. See Andrew J. Shapiro, Assistant Sec’y, Bureau of Political-Military Affairs, *Remarks to International Institute for Strategic Studies: U.S. Approaches to Counter-Piracy*, U.S. DEP’T STATE (Mar. 30, 2011), available at <http://www.state.gov/t/pm/>

prosecute acts of piracy is essential. In this regard, efforts to increase prosecutions and to ensure more uniform sentences and uniform application of the law are extremely helpful. The new U.N. Security Council resolution focuses efforts on the financiers (“higher-ups”) in the piracy organizations.⁷³ Focusing prosecutions on the “higher-ups,” who finance piracy and provide the equipment and training to the young, unemployed pirates, is essential to any effort to deter acts of piracy.

Lastly, there are many who argue that prosecutions are not really the answer to the Somali piracy problem, and that stability in Somalia, and accordingly some prosperity, will alleviate the current piracy problem.⁷⁴ It is hard to argue with the principle that a more stable Somalia would likely reduce the volume of pirate attacks. Conversely, however, given the number of ransoms being paid, and the amount, piracy is likely becoming a key part of the local economy when compared with other prospects for future employment, and deterring the conduct through prosecutions will be difficult. Furthermore, while Somali piracy may be unique to this region and linked to local instability, acts of piracy in West Africa, the South China Sea, and elsewhere, continue. Solutions which are more portable in nature—such as strengthening laws and capacity on a more global scale—may be preferable to investing large amounts of money in a specialized court for Somalia alone.

VI. CONCLUSION

Piracy is still probably the most lucrative business in Somalia,⁷⁵ and the percentage of pirates who are convicted of a crime is still relatively small. Any effort to strengthen the capacity of nations who will bring pirates to justice is helpful, whether it be through assisting them with domestic leg-

rls/rm/159419.htm (discussing piracy and the inability of many countries affected by piracy to prosecute piracy cases due to lack of capacity and/or political will).

⁷³ *UN Security Council Resolution Adopts India Co-Sponsored Response on Piracy*, *supra* note 7.

⁷⁴ See Michael Shank, *Poverty, Political Instability and Somali Piracy: Letter Response to Financial Times Editorial on Piracy*, E. AFRICA FORUM (Nov. 14, 2008), <http://www.east-africaforum.net/2008/11/17/poverty-political-instability-and-somali-piracy>. One scholar noted that throughout history, nothing was “so inimical to piracy as settled peace and good government,” and “nothing [was] so encouraging to piracy as prolonged unsettlement in international affairs and weak administration.” Sandra L Hodgkinson, Kevin Kelly et al., *Piracy: New Efforts in Addressing this Enduring Problem*, 36 TULANE MARITIME L. J. 65 (2011) (citing E. KEBLE CHATTERTON, *THE ROMANCE OF PIRACY: THE STORY OF THE ADVENTURES, FIGHTS & DEEDS OF DARING PARTIES, FILIBUSTERS & BUCCANEERS FROM THE EARLIEST TIMES TO THE PRESENT DAY* 22 (1914)).

⁷⁵ Ransoms increased from an average of approximately \$150,000 in 2005 to an average of \$5.4 million in 2010, bringing the 2010 total for ransoms to \$238 million. OCEANS BEYOND PIRACY, *supra* note 41.

isolation, training or courtroom and prison capacity. Since these programs will often dovetail other efforts to strengthen the rule of law, there may be an unintended benefit to the assistance, particularly if the capacity-building effort is not limited to a standalone piracy court. These capacity-building efforts should be coupled with efforts to make penalties more uniform, and efforts to ensure that prosecutions are focused primarily at higher-ups in the organizations.

Some version of a “specialized” court in Somalia can be helpful if the international community believes that the Somali government will support the outcome. This author, however, would encourage a model more akin to a specialized “panel” within the regular court system than a separate, specialized “court,” for the reasons stated above. Until we begin to get ahead of the crime of piracy, the more prosecutions, and available fora, the better.