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## **Piracy Off the Coast of Somalia: The Argument for Pirate Prosecutions in the National Courts of Kenya, The Seychelles, and Mauritius**

Milena Sterio  
*Cleveland State University*, [m.sterio@csuohio.edu](mailto:m.sterio@csuohio.edu)

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# Piracy Off the Coast of Somalia

The Argument for Pirate Prosecutions in the National Courts of Kenya, The Seychelles, and Mauritius

Milena Sterio\*

## Abstract

This article will argue that, in order to combat the rise of Somali piracy, major maritime nations should rely on national prosecutions of Somali pirates in the courts of stable regional partners, such as Kenya, the Seychelles and Mauritius. A systematic transfer program and prosecutions in the national courts of several regional partners would preclude the possibility of pirate catch-and-release, and could ultimately provide enough deterrence to seriously dissuade young Somali men from engaging in piracy. The Somali pirates, enemies of all mankind, may find potent foes in the form of Kenyan, Seychellois and Mauritian prosecutors, who will subject pirates to prosecutions on behalf of all mankind.

## Prelude: A Visit to the Seychelles

In December 2011 I travelled to the Seychelles, a tiny Indian Ocean nation halfway between East Africa and India. In Victoria, the capital city, I, along with Professor Michael Scharf of Case Western Reserve University School of Law and Sandra Hodgkinson, a research fellow at National Defence University and a member of the Senior Executive Service at the Department of Defence, met with the Seychelles' Attorney General and two Supreme Court justices. Our meetings focused on Somali piracy: the Seychelles has recently concluded Memoranda of Understandings with several maritime nations, pursuant to which captured pirates will be transferred to the Seychelles for prosecution in Seychellois national courts. Our three-person team represented the Piracy Working Group, an expert group formed in 2011 within the auspices of a prominent non-governmental organisation, the Public International Law and Policy Group (PILPG). The Piracy Working Group's mandate has been to "provide legal and policy advice to domestic, regional, and international counter-piracy mechanisms, with the goal of helping to create effective responses to the growing piracy threat."<sup>1</sup> Thus, it was our task in the Seychelles to explore ways of future cooperation and assistance which the Piracy Working Group will be able to provide to the Seychelles' prosecutors.

In the wake of my visit, I am persuaded that national prosecutions of Somali pirates in the courts of stable regional partners, such as the Seychelles, is the correct way forward in the global fight against piracy. Because of various problems which I explore in this article, it remains uncertain whether the international community can rely solely on Kenya for large-scale piracy prosecutions in the Kenyan courts. Kenya had been the first identified regional

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\* Associate Professor of Law, Cleveland-Marshall College of Law. J.D. & Maitrise en droit, Cornell Law School and Université Paris I-Panthéon-Sorbonne, magna cum laude; Master's degree, Private International Law, Université Paris I-Panthéon-Sorbonne, cum laude. The author would like to thank the Cleveland-Marshall College of Law library staff for excellent research assistance, and in particular, Amy Burchfield. The author would also like to thank the Cleveland-Marshall College of Law for its support in funding the trip to the Seychelles, and in thereby enhancing the research associated with this paper.

<sup>1</sup> Piracy Working Group website, at <http://publicinternationallawandpolicygroup.org/piracy/> (accessed on 22 March 2012).

partner willing and capable of prosecuting Somali pirates. While Kenya may continue to serve in its role as a powerful anti-piracy ally, the time has come to turn to additional partners, like the Seychelles.

The Seychelles' Attorney General and members of the judiciary appeared eager and willing to act as prosecuting and adjudicating agents on behalf of the world community, on a true universal jurisdiction model. This attitude may be the best available tool in the current efforts to combat Somali pirates. A systematic transfer programme and prosecutions in the national courts of several regional partners would preclude the possibility of pirate catch-and-release, and could ultimately provide enough deterrence to seriously dissuade young Somali men from engaging in piracy. The Somali pirates, enemies of all mankind, may have found a new potent foe in the form of Seychellois prosecutors, who will subject pirates to prosecutions on behalf of all mankind.

### Introduction

The rise of piracy off the coast of Somalia over the last five years has been spectacular, amounting to a true crisis in international law. During the first six months of 2011, Somali pirates attacked 163 ships and took 361 sailors hostage.<sup>2</sup> As of 30 June 2011, Somali pirates were holding 20 ships and 420 crew members, demanding millions of dollars in ransom for their release.<sup>3</sup> Moreover, pirates have been attacking larger ships, such as oil tankers, and using more potent weapons, such as rocket-propelled grenades and automatic weapons. Pirates have also been attacking during monsoon season, an otherwise risky endeavour.<sup>4</sup> According to International Maritime Bureau Director Pottengal Mukundan, "[i]n the last six months, Somali pirates attacked more vessels than ever before and they're taking higher risks."<sup>5</sup> In sum, piracy has increased shipping expenses, costing an estimated \$10 billion per year in global trade.<sup>6</sup> What has sparked this international law crisis off the coast of Somalia? Moreover, what can the international community do in order to alleviate the crisis and prevent piracy from spreading to other regions of the world? What should be the way forward?

This paper will seek to answer these difficult questions by first exploring the reasons for the proliferation of pirate attacks off the coast of Somalia in the twenty-first century, before turning to an analysis of international law on piracy in paragraph two and focusing on finding solutions for the future in the third paragraph.

This article will particularly focus on a possible solution of increased reliance on regional partners in the fight against piracy. It will identify three such regional partners, namely Kenya, the Seychelles and Mauritius, and will propose useful ways in which these countries could participate in the global fight against Somali piracy. In particular, this paper will focus on the use of national courts in Kenya, the Seychelles, and Mauritius for Somali pirate prosecutions. In the absence of an international piracy court and in the face of major maritime nations' unwillingness to participate in the prosecution of pirates on a large scale, the use of Kenyan, Seychellois and Mauritian courts may be the best tool in combating

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<sup>2</sup> ICC Commercial Crime Services, 'Pirate attacks at sea getting bigger and bolder, says IMB report', 14 July 2011, at <http://www.icc-ccs.org/news/450-pirate-attacks-at-sea-getting-bigger-and-bolder-says-imb-report> (accessed on 24 August 2011).

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> M. Nicholson, 'Spirit of Adventure: Behind the rise of the Somali pirates', *The Telegraph*, 2 February 2011, at <http://www.telegraph.co.uk/travel/travelnews/8298095/Spirit-of-Adventure-Behind-the-rise-of-the-Somali-pirates.html> (accessed on 27 August 2011).

Somali pirates. Because it appears obvious that Kenya cannot stand alone in Somali piracy prosecutions; it has become necessary for major maritime nations to identify additional partners, like the Seychelles and Mauritius, which could open their courtroom doors to additional piracy prosecutions.

Finally, this paper will also make recommendations toward the purpose of facilitating piracy prosecutions in national courts. National legislatures of piracy-prosecuting countries need to review and possibly revise the offence of piracy in their respective penal laws, in order to be able to prosecute the broadest spectrum of offenders. If national prosecutions are the way forward, they ought to be fair and balanced, but also aggressive in terms of laws that they use and the individuals that they charge. Large-scale and broad-based piracy prosecutions in national courts of stable regional partners may constitute the most satisfying tool in combating Somali piracy.

### I. Background: Proliferation of Piracy in Somalia in the 21<sup>st</sup> Century

Somalia is a failed state.<sup>7</sup> It has not had a stable government since 1991, it has been plagued by civil war and violence, and famine has been rampant over the last few years.<sup>8</sup> An average Somali person earns \$600 per year.<sup>9</sup> In this cowboy climate of violence and poverty, piracy has thrived – perhaps unexpectedly. Pirates operate out of coastal Somali towns, where they are able to dock their own skiffs freely, and where they haul back their hijacked property and hostages.<sup>10</sup> Coastal towns in Somalia benefit economically from the proceeds of piracy and thus have no incentive to participate in anti-piracy operations.<sup>11</sup> The Somali government has no effective control of the various coastal regions where pirates operate, and is unable to respond with any effective law enforcement or military operation against pirates.<sup>12</sup> Reports indicate that piracy is supported by powerful Somali warlords, who exercise control over their respective regions of influence, and who routinely finance pirate attacks and reap the benefits thereof in case of a successful hijacking and ransom payment.<sup>13</sup> As one scholar noted recently, “[p]iracy has evolved into a far-reaching enterprise, with support sometimes provided by the Somali diaspora and a ‘business model’ in which pirates receive payment based on different kinds of ‘shares.’... As a matter of everyday practice, deals with Somali pirates are often carried out in a business-like manner.”<sup>14</sup>

<sup>7</sup> M. Sterio, ‘The Somali Piracy Problem: A Global Puzzle Necessitating a Global Solution’, *American University Law Review* 2010-59, p. 1451.

<sup>8</sup> Ibid; see also J. Kraska & B. Wilson, ‘Fighting Pirates: The Pen and the Sword’, *World Policy Journal* 2009-41; J. Straziuso, ‘29,000 Somali children under 5 dead in famine’, MSNBC.COM, 5 August 2011 at [http://www.msnbc.msn.com/id/44021514/ns/world\\_news-africa/t/us-somali-children-under-dead-famine/](http://www.msnbc.msn.com/id/44021514/ns/world_news-africa/t/us-somali-children-under-dead-famine/) (noting that 29,000 Somali children have died because of drought and famine) (accessed on 25 February 2012).

<sup>9</sup> Sterio 2010, supra note 7, p. 1451.

<sup>10</sup> Ibid.

<sup>11</sup> See M. Ahmed, ‘Pirate Stock Exchange Helps Fund Hijackings’, *Financial Post (Canada)*, 1 December 2009 at <http://www.financialpost.com/news-sectors/story.html?id=2289558> (accessed on 25 August 2011) (describing that pirates have set up “maritime companies” in coastal villages).

<sup>12</sup> See, e.g., Kraska & Wilson 2009, supra note 8; see also E. Kontorovich, ‘International Legal Responses to Piracy off the Coast of Somalia’, *ASIL Insights*, 6 February 2009 at <http://www.asil.org/insights090206.cfm> (accessed on 24 February 2012).

<sup>13</sup> See Ahmed 2009, supra note 11 (describing pirate exchanges, where local Somalis can invest in the piracy industry by contributing money or weapons to pirates; the investor then receives a share of ransom money in case of a successful pirate attack); see also *Neptune Maritime Security*, ‘The spoils of piracy’, 8 May 2011, at <http://neptunemaritimensecurity.posterous.com/the-spoils-of-piracy> (accessed on 28 August 2011) (noting that among people benefiting from the proceeds of piracy are government officials).

<sup>14</sup> M. Taussig-Rubbo, ‘Pirate Trials, the International Criminal Court, and Mob Justice: Reflections on Postcolonial Sovereignty in Kenya’, *Humanity: An International Journal of Human Rights, Humanitarianism and Development*, 2010-1, p. 56.

Until recently, international patrol ships sailing through the Indian Ocean had no authority to enter the Somali territorial waters in pursuit of pirates, and no authority to penetrate the Somali land.<sup>15</sup> Thus, until recently, pirates operated with impunity within Somalia, and unless they were captured in the Indian Ocean, were able to complete their hijacking operation and, in many instances, demand and obtain multi-million dollar ransoms. It was not until 2008 that the United Nations' involvement with anti-piracy efforts ended the Somali pirates' ability to operate with almost no repercussions.

The pirate *modus operandi* has been relatively simple. Pirates congregate on a mother ship, and launch attacks using tiny skiffs from there.<sup>16</sup> Armed with AK-47's and rocket-propelled grenades (and in some instances, primitive weapons such as knives and small guns), pirates hijack victim vessels, and then sail them back to Somali ports.<sup>17</sup> Pirates often demand millions of dollars from shipping companies and even the victims' home states for their hostages.<sup>18</sup> A single successful pirate attack can yield an individual pirate thousands of dollars.<sup>19</sup> Compared to the meagre yearly income that average Somalis earn, it is understandable why the prospects of successful pirate attacks attract many young Somali men. The latest reports on piracy indicate that pirates are driven primarily by financial gain, and that pirates and the warlords that often finance their operations have been prospering noticeably.<sup>20</sup>

It should also be noted that Somali pirates' motivation lies primarily in the prospect of such a significant financial gain, and that no solid links have ever been established between Somali piracy and any terrorist groups. While some speculation existed that the al-Shabaab terrorist group has profited from piracy, no form of structured and long-term cooperation between the pirates and members of al-Shabaab has ever been confirmed.<sup>21</sup> The Somali government has been unable to spread the proliferation of piracy off its coast, but the government itself does not support pirates directly either, because no capable central government exists in Somalia. "[T]here is no internationally recognised Somali sovereign with the capacity to license or authorise the pirates, much less to transform their private violence into the public violence of the privateer or the navy."<sup>22</sup>

In light of such pirate prosperity in Somalia, and in light of the significant security and financial concerns caused by Somali piracy, the international community became involved in major anti-piracy operations starting in 2008. Thus, an international naval fleet consisting of American, French, Russian, Indian and British warships has formed off the coast of East

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<sup>15</sup> Under international law, littoral states' territorial waters, which stretch out 12 nautical miles, are a sovereign part of the littoral state, and no other state has the authority to penetrate the littoral state's territorial sea. See, e.g., United Nations Convention on the Law of the Sea art. 2 and 3, Oct. 7, 1982, 1833 U.N.T.S. 41-42 [hereinafter UNCLOS]. Article 2 of UNCLOS states that "the sovereignty of a coastal state extends...to an adjacent belt of sea, described as the territorial sea." UNCLOS, art. 2. Article 3 of UNCLOS limits the breadth of coastal states' territorial seas to 12 nautical miles. UNCLOS, art 3.

<sup>16</sup> T. Pitman, 'Ending Somali Piracy: Few Options for US Forces', *ABC News*, 14 April 2009 at <http://abcnews.go.com/International/wireStory?id=7337114> (accessed on 25 August 2011).

<sup>17</sup> 'Suspected Pirates Rescued in Gulf of Aden', *CNN.com*, 5 December 2008 at <http://www.cnn.com/2008/WORLD/africa/12/04/yemen.pirates/index.html> (accessed on 26 February 2012).

<sup>18</sup> Kontorovich 2009, *supra* note 12.

<sup>19</sup> See Ahmed, *supra* note 13 (noting that a single successful pirate attack can earn an individual pirate up to \$150,000).

<sup>20</sup> C. Copley, 'Somali piracy becoming "criminal enterprise,"' *Reuters*, 16 February 2011 at <http://af.reuters.com/article/somaliaNews/idAFLDE71F27E20110216> (accessed on 26 August 2011).

<sup>21</sup> Taussig-Rubbo 2010, *supra* note 14, p. 56.

<sup>22</sup> *Ibid.*

Africa. In addition, Chinese naval ships were seen in these waters for the first time since the middle ages!<sup>23</sup> However, combating piracy poses several difficult international law issues. For example, while apprehending and capturing pirates caught in the act of piracy seems like a relatively simple task for the above-mentioned flotillas, determining what to do with captured pirates appears much more daunting. Some pirates have been released back to Somalia without any sort of prosecution – a truly undesirable outcome in the context of the global fight against piracy. International law, somewhat strangely, can be interpreted as posing hurdles in the process of prosecuting pirates. Some of these difficult issues will be explored in the section below.

## II. International Law and Piracy

The above-described piracy crisis has sparked a response by the international community. Major maritime nations, when faced with the economic harm and the security threat posed by Somali pirates over the last decade, began anti-piracy operations on several fronts. Some of these operations required a modification of traditional international law rules, in order to enable piracy-fighting nations to catch and prosecute pirates effectively.

First, major maritime nations created several patrolling fleets, which routinely sail through the Gulf of Aden and which have succeeded in warding off numerous attempted pirate attacks.<sup>24</sup> International law in its traditional incarnation created a hurdle for the patrolling nations. Under the international rule of the law of the seas, every nation has the right to capture pirates on the high seas.<sup>25</sup> The high seas are defined as the body of water stretching beyond the 12-nautical mile territorial sea of littoral states.<sup>26</sup> Patrolling nations do not have the right to enter any nation's territorial sea under international law.<sup>27</sup> Thus, if Somali pirates hijacked a victim vessel on the high seas but then quickly retreated into Somali territorial waters, patrolling nations were powerless to chase and stop them. Geography immensely helped pirates and undermined anti-piracy operations. In fact, the Gulf of Aden, where most pirate attacks took place at the beginning of the Somali piracy surge, is a narrow body of water, enabling pirates to speedily reach Somali territorial waters after a successful attack.<sup>28</sup> In order to remedy this problem, the United Nations Security Council passed several resolutions, beginning in 2008, which authorised patrolling nations to enter Somali territorial waters, to chase pirates after the original piracy encounter, and to even enter Somali land.<sup>29</sup> These Security Council resolutions modified existing international law rules with respect to Somalia, and have contributed tremendously toward the success of anti-piracy operations.<sup>30</sup>

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<sup>23</sup> *Idem*, p. 57.

<sup>24</sup> Sterio 2010, *supra* note 7, p. 1479.

<sup>25</sup> UNCLOS, *supra* note 15, art. 105 (“[o]n the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship . . . and arrest the persons and seize the property on board.”).

<sup>26</sup> *Idem*, art. 3.

<sup>27</sup> *Idem*, art. 2.

<sup>28</sup> Kontorovich 2009, *supra* note 12.

<sup>29</sup> S.C. Res. 1581, U.N. Doc. S/RES/1851 (Dec. 16, 2008); S.C. Res. 1846, U.N. Doc. (Dec. 2, 2008); S.C. Res. 1844, U.N. Doc. S/RES/1844 (Nov. 20, 2008) S.C. Res. 1838, U.N. Doc S/RES/1838 (Oct. 7, 2008); S.C. Res. 1818, U.N. Doc. S/RES/1816 (June 2, 2008). In addition, the Security Council has passed an additional six resolutions on Somali piracy after 2008. See S. C. Res. 1897, U.N. Doc. S/RES/1897 (Nov. 30, 2009); S.C. Res. 1918, U.N. Doc. S/RES/1918 (Apr. 27, 2010); S.C. Res. 1950, U.N. Doc. S/RES/1950 (Nov. 23, 2010); S.C. Res. 1976, U.N. Doc. S/RES/1976 (Apr. 11, 2011); S. C. Res. 2015, U.N. Doc. S/RES/2015 (Oct. 24, 2011); S. C. Res. 2020, U.N. Doc. S/RES/2020 (Nov. 22, 2011).

<sup>30</sup> These resolutions specify themselves that they are not supposed to modify existing customary rules in general, but rather, only apply to Somalia and only give broader use of force rights to the patrolling nations

Second, major maritime nations faced hurdles caused by international law's narrow definition of piracy. Under the major law of the seas convention, the infamous United Nations Convention on the Law of the Sea (UNCLOS), piracy is defined as

“[a]ny illegal act of violence, detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft (b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State.”<sup>31</sup>

This definition has been widely accepted as representing customary law.<sup>32</sup> Unfortunately, its approach and definition of piracy is narrow. First, piracy must occur on the high seas. If Somali pirates hijack a vessel in the Somali territorial sea, this act would not qualify as piracy under UNCLOS.<sup>33</sup> Thus, although patrolling nations may have the right to enter Somali territorial waters for the purpose of preventing pirate attacks, if attacks take place in such waters, they would not even amount to piracy under international law. Second, a pirate attack must involve two vessels: a victim and an aggressor vessel. This could be problematic should pirates attempt to board the victim vessel in its last port of entry and then hijack it on the high seas.<sup>34</sup> In such a case, although the hijacking strongly resembles piracy, it would not qualify as such under traditional international law. Third, the act of piracy must be committed for private aims. Should pirates be linked to a political cause or should they operate on behalf of a state entity, their acts would not qualify as piracy under international law.<sup>35</sup> The latter two limitations on the definition of piracy have not been particularly problematic in the Somali context, as most pirate attacks have involved an aggressor ‘skiff,’ and because pirates seem to be driven by pure financial gain.<sup>36</sup> However, should their *modus operandi* or their motivation change, the UNCLOS definition could pose hurdles in the anti-piracy operations by excluding numerous violent acts from this treaty's coverage.

In order to broaden the scope of anti-piracy operations, maritime nations involved herein have been forced to resort to other sources of international law. First, nations that are members of the Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention or SUA) have been relying on this treaty's more expansive coverage of maritime violence.<sup>37</sup> Under SUA, piracy is not defined as such, but rather, it is viewed as one of many different possible acts of maritime violence which are prohibited by this convention.<sup>38</sup> Examples of acts of maritime violence prohibited by SUA include, *inter alia*, the seizing or exercising “control over a ship by force or threat thereof or

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operating in the Gulf of Aden. Sterio 2010, *supra* note 7, p. 1474. Thus, no general modification of international law rules can be implied from these Security Council resolutions.

<sup>31</sup> UNCLOS, *supra* note 15, art. 101.

<sup>32</sup> See, e.g., J. D. Peppetti, ‘Building the Global Maritime Security Network: A Multinational Legal Structure to Combat Transnational Threats’, *Naval Law Review* 2008-55, p. 92.

<sup>33</sup> *Idem*, pp. 92-93.

<sup>34</sup> Sterio 2010, *supra* note 7, p. 1468.

<sup>35</sup> Many scholars believe that the “private aims” requirement in UNCLOS disqualifies acts committed for political, religious, ideological, or ethnic reasons from the definition of piracy. See, e.g., Peppetti 2008, *supra* note 32, p. 92; see also L. Azubuike, ‘International Law Regime Against Piracy’, *Annual Survey of International and Comparative Law* 2009-15, p. 52. But see M. Bahar, ‘Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations’, *Vanderbilt Journal of Transnational Law* 2007-40, p. 27 (arguing that terrorist acts can qualify as piracy if the terrorists are not commissioned by a specific state).

<sup>36</sup> See *supra* Part I.

<sup>37</sup> Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221 [hereinafter SUA Convention].

<sup>38</sup> *Idem*, art. 3 (defining the ‘offence’ as a number of different acts that could be terrorism or piracy, and not limiting the offence to the customary definition of piracy).

any other form of intimidation,” performing “an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship,” destroying a ship or causing “damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship,” or “injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).”<sup>39</sup> SUA criminalises the acts of aiding and abetting anybody in the commission of the previously mentioned offences.<sup>40</sup> In addition, such acts of prohibited maritime violence can take place anywhere, as long as the victim vessel is in some form of international transit.<sup>41</sup> Moreover, such prohibited acts can involve only one vessel, and they can be committed for any aim, including political and state-sponsored violence. In fact, “[t]he SUA Convention illustrates the modern-day approach to piracy and the need to broaden its definition to encompass maritime aggression and terrorism, as opposed to confining its definition to the out-dated scope of sea robbery.”<sup>42</sup> The Security Council has repeatedly called for member states of this convention to fully implement it and to rely on it extensively when fighting Somali piracy.<sup>43</sup>

Second, piracy-fighting nations could in the future rely on other anti-terrorist conventions, such as the International Convention Against the Taking of Hostages, the International Convention for the Suppression of the Financing of Terrorism, and the United Nations Convention Against Transnational Organized Crime.<sup>44</sup> These options may become indispensable when dealing with the third hurdle caused by traditional international law: the non-matching jurisdictional rules for the capture and prosecution of pirates.

Under UNCLOS, any nation has the right to capture pirates on the high seas.<sup>45</sup> The capturing nation also has the right, under this convention, to prosecute pirates.<sup>46</sup> However, UNCLOS does not specifically condone the right for capturing nations to transfer pirates to third states for prosecution purposes. Many scholars have written on this issue: some have concluded that UNCLOS precludes pirate transfers to third states for prosecution, while some have argued that nothing in UNCLOS specifically prohibits such transfers, and that such transfers ought to be permitted in order to broaden the scope of anti-piracy measures.<sup>47</sup> This point is particularly important because while many nations have been willing to capture pirates, most are not willing to prosecute them in their domestic courts. Piracy prosecutions are generally viewed as politically and logistically challenging and costly, and most nations have been

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<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> SUA Convention, *supra* note 37, art. 3.

<sup>42</sup> Sterio 2010, *supra* note 7, p. 1462.

<sup>43</sup> Resolution 1846, §15, *supra* note 29; Resolution 1851, *supra* note 29, preamble; S. Res. 1950, S/RES/1950, 23 Nov. 2010 §19.

<sup>44</sup> International Convention Against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 205; International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 39 I.L.M. 270 (2000); United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, 2225 U.N.T.S. 209.

<sup>45</sup> UNCLOS, *supra* note 15, art. 105.

<sup>46</sup> Ibid. (“The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property....”).

<sup>47</sup> For the view that UNCLOS prohibits the transfer of pirates by the capturing state to third states for prosecution purposes, see Kontorovich 2009, *supra* note 12. This view also follows from a strict, narrow interpretation of UNCLOS article 105. For the opposite view, that UNCLOS does not specifically preclude the transfer of pirates to third states, see, e.g., Azubuike 2009, *supra* note 35, pp. 54-55 (arguing that the jurisdiction of the capturing state is merely permissive because under customary law, jurisdiction over pirates was universal and UNCLOS codified customary law); see also J.A. Roach, ‘Countering Piracy Off Somalia: International Law and International Institutions’, *American Journal of International Law* 2010-104, p. 404 (arguing that UNCLOS does not specifically prohibit the transfer of pirates to third states for prosecution).

unwilling to spend time and money on such burdensome investigative and prosecutorial efforts.<sup>48</sup> Some pirates have been tried in domestic courts of the capturing nation, but most of those prosecutions occurred after pirates directly threatened the national interests of the prosecuting state by attempting to attack one of its vessels or to kidnap one of its nationals.<sup>49</sup> Instances of Somali pirates' prosecutions based on true universal jurisdiction have been extremely rare.<sup>50</sup>

In fact, piracy in its modern application in Somalia seems like a truly universal crime involving many different states. Merchant ships often fly flags of convenience, incorporating in countries such as Panama, Liberia or the Bahamas, which offer lenient requirements with respect to labour and safety regulations on board, and thus lower incorporation and operating costs.<sup>51</sup> Such merchant ships are often owned by wealthy individuals or corporations originating from wealthy, developed states. Moreover, ship captains and crew members may come from a variety of different states, often migrating toward less developed, poorer states.<sup>52</sup> The pirates themselves are from Somalia, and they may be caught by a naval ship from yet another, typically powerful maritime nation. With such a mixture of nationalities and states involved, the state which captures the pirates may only exercise universal jurisdiction, and must act as an agent on behalf of the global community in the latter's fight against Somali piracy. Alas, capturing states have been reluctant to exercise universal jurisdiction over Somali pirates in these instances. After all, why should a country like the United Kingdom, if it captures Somali pirates, pay for the exercise of universal jurisdiction on behalf of a Liberian vessel owned by a Dutch corporation and employing a Philippine crew? "Universal jurisdiction in this context might appear more like a burden, a kind of self-sacrifice for a global public good."<sup>53</sup> As two prominent scholars have noted recently, despite the conception of pirates as enemies of all mankind, "we cannot assume we are at war with pirates."<sup>54</sup>

Thus, capturing states have been facing a difficult issue: what to do with captured pirates, in instances where the capturing state is unwilling to prosecute them in its own courts? In addition, even if the capturing nation can find a third state which is willing to prosecute pirates, international law may prohibit such a transfer to a third state. States which are signatory to major human rights treaties, like the European Convention on Human Rights and the International Covenant for Civil and Political Rights, have a so-called non-réfoulement obligation not to transfer anyone to a place where he or she may be mistreated.<sup>55</sup> In light of these legal difficulties, some NATO countries have routinely released captured pirates, resulting in a 'catch-and-release' attitude which has only exacerbated the piracy problem in Somalia.<sup>56</sup> Some nations, like Russia, have even resorted to drastic measures: after a Russian ship captured Somali pirates, the latter were released on a tiny boat in the middle of the Indian Ocean, with no food, water, or navigation devices.<sup>57</sup>

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<sup>48</sup> Kontorovich 2009, supra note 12.

<sup>49</sup> For a detailed examination of jurisdictional basis exercised over Somali pirates by different countries, see E. Kontorovich & S. Art, 'An Empirical Examination of Universal Jurisdiction for Piracy', *American Journal of International Law* 2010-104, p. 436.

<sup>50</sup> Idem, p. 445 (concluding that universal jurisdiction prosecution rates were at only 1.47% from 1998-2009).

<sup>51</sup> Taussig-Rubbo 2010, supra note 14, p. 57.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

<sup>54</sup> D. Guilfoyle & A. Murdoch, 'The Use of Lethal Force in Counter-Piracy Operations off Somalia' (forthcoming).

<sup>55</sup> See, e.g., Kontorovich 2009, supra note 12.

<sup>56</sup> Ibid.

<sup>57</sup> *BBC News*, 'Freed Somali pirates 'probably died' – Russian source', 11 May 2010 at <http://news.bbc.co.uk/2/hi/8675978.stm> (accessed on 27 August 2011).

The fate of these pirates remains unknown, but even Russian authorities have acknowledged that these Somalis probably died.<sup>58</sup> This attitude is far from desirable in international law, but nonetheless illustrates the frustration that some piracy-fighting nations have experienced when dealing with captured pirates.

Possible solutions to this issue include either a broader interpretation of UNCLOS and customary law, arguing that international law does not specifically prohibit capturing states from transferring pirates to third states for prosecution, or reliance on other conventions, such as SUA and other anti-terrorism treaties, which do not limit capturing states to prosecution in their own courts. Most piracy-fighting nations have preferred to transfer pirates to third states for prosecution purposes, and have creatively circumvented the restraints of international law by relying on broader definitions of piracy described above. In addition, major maritime nations have begun to increasingly rely on stable regional partners, like Kenya and the Seychelles, which have offered the use of their national courts for the purposes of prosecuting captured Somali pirates. Mauritius may become yet another regional partner willing to offer its courts for piracy prosecutions. This model will be explored in the section below.

### III. The Way Forward: Using Kenyan, Seychellois, and Mauritian Courts to Prosecute Somali Pirates

“Some countries provide a navy, others can help with prosecution.”<sup>59</sup>

The preferred approach of many piracy-fighting nations has been to use regional partners, such as Kenya, the Seychelles, and potentially Mauritius, and to transfer captured pirates to the national courts of these states.<sup>60</sup> All three nations have been remotely affected by piracy because of their geographic location and because of the potential harm to these nations' tourism revenues brought about by pirate attacks. Major maritime nations have been capitalising on their position in East Africa and the Indian Ocean to persuade them to extend their national courts to Somali piracy prosecutions. While Kenya has the potential to operate successful piracy prosecutions in its national courts, problems related to Kenyan politics and corruption allegations have plagued the Kenyan transfer programme, prompting maritime nations to identify other regional partners, like the Seychelles and Mauritius.

#### III.1 Kenya

As early as 2006, Kenya began prosecuting Somali pirates in a specialised piracy court in Mombasa.<sup>61</sup> Pursuant to various secret and public Memoranda of Understanding (MOU) which Kenya has signed with the United States, the United Kingdom, as well as with the European Union, Kenyan courts have been asserting jurisdiction over Somali pirates captured by naval ships of other countries. Some of these MOU's are secret, and allow executive branch officials to act with no direct oversight by anyone.<sup>62</sup> It is thus unclear how and why such MOU's bestow jurisdiction on Kenyan courts, in light of international law's

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<sup>58</sup> Ibid.

<sup>59</sup> C. Houreld, 'Warships Fill Up with Pirates after Kenya Bails', *Associated Press*, 15 April 2010, at <http://abcnews.go.com/International/wirestory?id=10384342&page:eq1> (accessed on 24 February 2012).

<sup>60</sup> J. T. Gathii, 'Kenya's Piracy Prosecutions', *American Journal of International Law* 2010-104, p. 416 (describing the Kenyan prosecution model and noting that Kenya has concluded agreements on the prosecution of suspected pirates with the United Kingdom, the United States, the European Union, and Denmark).

<sup>61</sup> Gathii 2010, *supra* note 58, p. 417.

<sup>62</sup> Taussig-Rubbo 2010, *supra* note 14, p. 59.

possible prohibition on pirate transfers, discussed above.<sup>63</sup> Either Kenyan courts are exercising universal jurisdiction on behalf of the capturing state, or international law should be read more broadly, to authorise non-capturing states to prosecute pirates as well. Regardless of this jurisdictional issue, Kenyan judges at first appeared willing to take on Somali piracy prosecutions. In a 2006 appellate decision by the High Court of Kenya, which affirmed jurisdiction over the initial group of Somalis delivered to Kenya by the United States in 2006, the High Court determined that even if Kenya had not ratified UNCLOS and had not provided for an offence of piracy in its domestic criminal law, the lower trial court was “bound to apply international norms and instruments since Kenya is a member of the civilised world and not expected to act in contradiction to expectations of member states of the United Nations.”<sup>64</sup>

Similarly, the Kenyan government initially approved the use of Kenyan courts for Somali piracy prosecutions, despite the fact that most of these pirates have never harmed Kenya. In exchange for such governmental and prosecutorial cooperation, Kenya demanded and enjoyed substantial financial support by wealthy donor states.<sup>65</sup> In its first few years, the transfer programme operated somewhat smoothly, resulting in the prosecution and conviction of numerous pirates. However, recently problems have been surfacing in Kenya. Donor states became concerned with the treatment of pirates in Kenyan courts and prisons. Corruption issues plagued the programme, with allegations that money donated to support piracy trials was going elsewhere. Kenyan officials became concerned that Kenya was being exploited as a dumping ground by wealthy maritime nations, uncomfortable with simply killing pirates yet unwilling to employ their own courts to try them. Thus, the rapport between Kenya and the major maritime nations, which sought to donate money to Kenya in exchange for Kenya’s acceptance to prosecute Somali pirates, quickly turned sour.

Donor states thus transfer pirates to Kenya yet seem unable to let them go, concerned about Kenyan standards and equipment. And the Kenyans, understandably, are unwilling to let the foreign donors depart without offering some aid. That these awkward transactions are ambivalently situated as benevolent gifts, reciprocal exchanges, or unseemly transfers nicely articulates the complexity and variability of the bonds between Kenya and the donors.<sup>66</sup>

Additionally, in 2009 Kenya became the subject of an International Criminal Court (ICC) investigation, focused on post-election violence of 2007 and allegations that groups operating in Kenya committed crimes against humanity.<sup>67</sup> It is thus possible that Kenya, in a *quid pro quo*, decided to rebel against the international community, because of the latter’s determination that Kenya should be subjected to ICC scrutiny, by halting piracy trials in Mombasa.

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<sup>63</sup> See the discussion of UNCLOS and its possibly non-matching jurisdictional rules for the capture and prosecution of pirates; supra Part II.

<sup>64</sup> *Hassan M. Ahmed v. Republic*, Crim. App. No. 198, 12 May 2009, High Court of Kenya at Mombasa. It should be noted that at least one scholar has questioned whether Kenya’s lowest level trial courts, magistrate’s courts, are actually empowered to exercise universal jurisdiction. J. T. Gathii, ‘Jurisdiction to Prosecute Non-National Pirates Captured by Third States Under Kenyan and International Law’, *Loyola Los Angeles International and Comparative Law Review* 2009-31, p. 363.

<sup>65</sup> Taussig-Rubbo 2010, supra note 14, p. 60 (discussing issues related to donations by wealthy states to Kenya for piracy prosecutions).

<sup>66</sup> *Ibid.*

<sup>67</sup> On 26 November 2009, the ICC Prosecutor requested authorisation from the court to open an investigation into violence that occurred in 2007 in Kenya, in the aftermath of presidential elections, because of allegations that such violence constituted crimes against humanity. See, e.g., *The International Criminal Court Kenya Monitor*, ‘How the ICC Became Involved in Kenya’, at <http://www.icckenya.org/background/> (accessed on 1 March 2012).

In April 2010, Kenyan Attorney General Wako announced the end of the pirate programme. The Kenyan Attorney General proclaimed that foreign nations were “rubbishing our [Kenyan] judicial system.”<sup>68</sup> He also lamented that foreign nations would “dump” pirates on Kenya and that “forget about what happened.”<sup>69</sup> He argued that Kenya was standing alone and questioned why states that capture pirates are afraid to prosecute them in their own courts.<sup>70</sup> It is uncertain whether the ICC investigation into Kenyan violence prompted the Kenyan government’s sudden reversal of position with respect to piracy prosecutions, but according to one rumour, the Kenyan Attorney General himself had been on the ICC list of possible suspects.<sup>71</sup> It thus seems plausible that the Kenyan authorities were concerned with the ICC investigation and therefore decided to retaliate against the international community by halting piracy prosecutions. Ultimately, in June 2010, Kenya, in another stark change of heart, announced that it was back in the pirate transfer model. An additional promise of a financial contribution by donor states may have prompted the Kenyan reversal of position – indeed, the EU pledged more funding and paid for the building of a new courtroom in Mombasa.<sup>72</sup>

Most recently, however, it appears that piracy prosecutions in Kenya may be in jeopardy once again. The Kenya High Court at Mombasa ruled in 2009 that Kenya’s magistrate level courts, which had been the ones where all pirate prosecutions had been taking place, did not have jurisdiction over piracy offences unless the offences took place in Kenyan territorial waters.<sup>73</sup> The High Court focused on Section 5 of Kenyan penal law, which provides that “[t]he jurisdiction of the Courts of Kenya for the purpose of this Code extends to every place within Kenya, including territorial waters.”<sup>74</sup> According to the High Court, this provision, because it is the one defining all jurisdictional ability of Kenyan courts, trumps another piracy provision, Section 69(1), which provides that “[a]ny person who in territorial waters or upon the high seas, commits any act of piracy jure gentium is guilty of the offence of Piracy.”<sup>75</sup> This ruling by the Kenya High Court effectively precluded any additional piracy prosecutions in Kenyan magistrate level courts, because none of the Somali piracy incidents have taken place in the Kenyan territorial sea. Thus, this ruling, unless overturned on appeal, will effectively end the possibility of prosecuting Somali pirates in Kenyan courts. The Kenyan Attorney General has appealed this ruling, and a special five-judge panel of appellate judges was formed in Nairobi to hear this, as well as two other appeals and to sort through these difficult jurisdictional issues.<sup>76</sup>

It is unclear as of today whether this ruling has been overturned. Moreover, it is unclear what the Kenyan government’s position is. It is possible that Kenya will reaffirm its commitment to piracy prosecutions if more donations are pledged. It is also possible that we will see the end of the Kenyan transfer model. All of the uncertainty in Kenya has led major maritime nations to explore the possibility of turning toward additional regional partners.

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<sup>68</sup> F. Mukinda & A. Shiundu, ‘Kenya Laments Pirates’ Burden, *Daily Nation*, 20 March 2012 at [www.nation.co.ke/News/-/1056/889976/-/vrvw9dl/-/index.html](http://www.nation.co.ke/News/-/1056/889976/-/vrvw9dl/-/index.html) (accessed on 15 March 2012).

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

<sup>71</sup> Taussig-Rubbo 2010, *supra* note 14, p. 61.

<sup>72</sup> *Ibid.*

<sup>73</sup> M.M. Dashi et al., High Court of Kenya at Mombasa 2009 at <http://piracylaw.files.wordpress.com/2011/01/in-re-mohamud-mohamed-hashhi-et-al1.pdf> (accessed on 12 February 2012); see also R. L. Philips, ‘Kenya: No Jurisdiction to Try Piracy?’ at <http://piracy-law.com/2011/01/27/kenya-no-jurisdiction-to-try-piracy/> (accessed on 12 February 2012).

<sup>74</sup> M.M. Dashi et al. 2009, *supra* note 73.

<sup>75</sup> *Ibid.*

<sup>76</sup> M. Mudi, ‘Kenya: Special Court to Hear Mombasa Piracy Case’, *Nairobi Star*, 30 September 2011, at <http://allafrica.com/stories/201109301201.html> (accessed on 12 February 2012).

Thus, the island nations of the Seychelles and Mauritius may become viable options. However, it is clear, based on the success of initial piracy prosecutions in Mombasa, that Kenya has the potential to prosecute non-national pirates in fair and neutral trials. It is also clear that major maritime nations should continue to explore the potential of successful piracy prosecutions in Kenya, a neighbouring state to Somalia and a possible ally in global efforts against Somali piracy. Kenyan courts will hopefully remain stable players in the prosecution of Somali pirates, and the Kenyan transfer model should not be abandoned.

### III.2 The Seychelles

Similar prosecution options are being explored in the Seychelles. The Seychelles are an island nation in the Indian Ocean, consisting of 115 islands scattered over an area of 450,000 square miles.<sup>77</sup> Several pirate attacks have occurred sufficiently close to the Seychelles to alarm this nation's government and to prompt it to participate in the fight against Somali piracy.<sup>78</sup> For example, the Seychelles government has recently invited China to set up a military base on the archipelago, in order to bolster security around the islands and increase anti-piracy military measures.<sup>79</sup> In fact, the Seychelles' economy derives most of its revenue from tourism, and the prospect of Somali piracy spreading toward the Seychelles could deter tourists from visiting this beautiful nation.<sup>80</sup> The Seychelles' government, for this reason, has a direct interest in both preventing pirate attacks from taking place, and in ensuring that all detained pirates are effectively prosecuted. Thus, the Seychelles government, pursuant to the Kenyan model, has concluded several MOU's with major maritime nations.<sup>81</sup> Under the terms of these MOU's, capturing nations will deliver pirates to the Seychelles for prosecution in the Seychellois courts. In each instance, the Seychelles government will have the discretion to accept or reject the transfer.<sup>82</sup>

In order to facilitate piracy prosecutions in the Seychelles, this nation's parliament revised the offence of piracy under the Seychellois penal law in 2010.<sup>83</sup> Before 2012, the offence of piracy was defined as follows under the Seychellois penal law: "[a]ny person who is guilty of piracy or any crime connected with or akin to piracy shall be liable to be tried and punished according to the law of England for the time being in force."<sup>84</sup> The Seychellois courts had interpreted the phrase "time being in force" as referring to the common law prevailing in England as at the 29th of June 1976 (herein after referred to as the relevant time) when Seychelles attained independence from Great Britain.<sup>85</sup> Thus, the offence of piracy did not exist as an independently defined crime under the Seychelles' law, and prosecutors needed to rely on British common law as of 1976 in each piracy prosecution. In order to facilitate piracy prosecutions, the Seychelles' Parliament added a new piracy definition to this

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<sup>77</sup> *Defense News*, 'Seychelles Invites China to Set Up Anti-Piracy Base', 2 December 2011, at <http://defensenews.com/story.php?i=8450805&c=MID&s=POL> (accessed on 12 February 2012).

<sup>78</sup> *Yacht Pals*, 'Pirate Attacks on Sailing Yachts-Piracy Warnings,' at <http://yachtpals.com/pirates-yachts-4092> (reporting on several pirate attacks off the Seychelles' coast in 2009) (accessed on 14 February 2012).

<sup>79</sup> *Ibid.*

<sup>80</sup> J. Ryan, 'Seychelles president urges greater anti-piracy measures', *Jurist*, 5 December 2011 at <http://jurist.org/paperchase/2011/12/seychelles-president-urges-greater-anti-piracy-measures.php> (noting that the Seychelles yacht tourism has been harmed by pirate attacks, and that the price of shipping from the Seychelles has drastically increased) (accessed on 14 February 2012).

<sup>81</sup> Meeting with the Seychelles Attorney General, 13 December 2011 (the author was in attendance).

<sup>82</sup> *Ibid.*

<sup>83</sup> *Haaba*, 'Seychelles MPs adopt anti-piracy law', 16 March 2010 at <http://www.haaba.com/node/395898/topic/it> (accessed on 1 March 2012).

<sup>84</sup> *Republic v. Ali et al.*, Supreme Court of the Seychelles at 2, Judgment of 3 November 2010 (on file with author), citing Seychelles Penal Code, Section 65.

<sup>85</sup> *Idem*, p. 2.

country's penal law. Under the revised Section 65(4) of the Seychelles Penal code, piracy is defined as follows:

- (a) Any illegal act of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or aircraft and directed-
  - (i) on the high seas, against another ship or aircraft, or against persons or property on board such a ship or aircraft;
  - (ii) against a ship or an aircraft or a person or property in a place, outside the jurisdiction of any State;
- (b) Any act of voluntary participation in the operation of a ship or an aircraft with knowledge of facts making it pirate ship or a pirate aircraft; or
- (c) Any act described in paragraph (a) or (b) which, except for the fact that it was committed within a maritime zone of Seychelles, would have been an act of piracy under either of those paragraphs.<sup>86</sup>

Moreover, section 65(5) further provides that:

- A ship or aircraft shall be considered a pirate ship or pirate aircraft if-
- (a) It had been used to commit any of the acts referred to in subsection (4) and remains under the control of the persons who committed those acts; or
  - (b) It is intended by the person in dominant control of it to be used for the purpose of committing any of the acts referred to in subsection (4).<sup>87</sup>

The new piracy provision in the Seychelles law is modelled closely on the UNCLOS definition of piracy, and thus corresponds to customary international law. However, the new law is broader in its reach than UNCLOS in several respects. First, the revised Section 65 criminalises the offence of conspiracy to commit piracy, enabling Seychellois prosecutors to go after piracy conspirators and enablers in addition to prosecuting the executioners.<sup>88</sup> Second, Section 65(4) effectively dispenses with the "high seas" requirement of the UNCLOS definition of piracy, by stipulating that acts committed in the Seychelles' maritime zone will amount to piracy, provided that other requirements of the piracy definition are satisfied.<sup>89</sup> Finally, it should be noted that Section 23 of the Seychelles Penal Code enables prosecutors to charge several defendants with the same offence, as long as all of such defendants had a "common intention" to commit the crime in question. Thus, the Seychelles' prosecutors have been charging groups of Somali pirates, who had all participated in the same piracy incident, with the same offences under the "common intention" theory of criminal liability.<sup>90</sup> This greatly facilitates piracy prosecutions in the Seychelles' courts.

Several piracy prosecutions have already taken place in the Seychelles' courts, and in each instance pirates were successfully convicted.<sup>91</sup> The international community has assisted the Seychelles in Somali piracy prosecutions in various ways. Like Kenya, the Seychelles have benefited from financial aid by donor states as well as by assistance by the United Nations

<sup>86</sup> *Republic v. Sayid*, Supreme Court of the Seychelles at 11-12, Judgment of 5 December 2010, citing Seychelles Penal Code, Section 65(4) (on file with author).

<sup>87</sup> *Idem*, pp. 12-13, citing Seychelles Penal Code, Section 65(5) (on file with author).

<sup>88</sup> See Haaba 2010, *supra* note 83.

<sup>89</sup> Seychelles Penal Code, Section 64(4)(c).

<sup>90</sup> See, e.g., *Republic v. Sayid*, *supra* note 86; see also Seychelles Meeting, *supra* note 80, where the Seychelles' Attorney General confirmed this approach.

<sup>91</sup> Seychelles Meeting, *supra* note 80.

Office on Drugs and Crime (UNODC). Thus, a new prison wing was built to accommodate pirate detainees, and new, larger courtrooms are currently being built.<sup>92</sup> The Seychelles prosecutors and judges have also benefited from translation and interpretation assistance by skilled United Nations employees.<sup>93</sup> Finally, some donor states, like the United Kingdom, have assisted the Seychelles in piracy prosecutions by sending skilled British-trained prosecutors to work in the Seychelles' Attorney General's office; these British prosecutors devote most of their time to piracy prosecutions, but they also help in prosecuting other, non-piracy cases thereby relieving the burdensome workload of the Attorney General's small legal staff.<sup>94</sup>

It is likely that in the near future, the Seychelles may supplement or entirely replace the Kenyan transfer programme. The Seychelles government appears willing and eager to use Seychellois court for the purpose of prosecuting Somali pirates, even in instances where the Seychelles' interests have not been directly threatened by the act of piracy, on a true universal jurisdiction model. Important issues remain unanswered, particularly the ones that deal with detention capacity in such a small nation as the Seychelles. In order to address these issues, as I recently learned, the Seychelles may be looking for the possibility of transferring convicted pirates back to Somalia, so that they can serve their prison sentences in their home country.<sup>95</sup> At present time, however, this option does not seem feasible because of serious security concerns in Somalia. Moreover, because of capacity issues associated with the small island nation of the Seychelles, major maritime nations have been searching for other stable regional partners, like Mauritius.<sup>96</sup>

### III.4 Mauritius

Mauritius is another Indian Ocean island nation, located to the southeast of Somalia.<sup>97</sup> Mauritius has not been directly harmed by any piracy incidents, and the Somali pirates have not travelled as far south in their piratical endeavours. However, Mauritius has also been identified by the international community as another possible regional partner in the global fight against piracy.

In July 2011, Mauritius concluded an MOU with the European Union, pursuant to the Kenyan and Seychellois models. Under the terms of the MOU, pirates detained by European forces will be transferred to Mauritius for prosecution in this country's national courts.<sup>98</sup> In order to facilitate such piracy prosecutions, Mauritius has just revised its criminal law to

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<sup>92</sup> Ibid.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid. See also 'Somali pirates to be returned from Seychelles', *Afrol News* 11 February 2011 at <http://www.afrol.com/articles/37299> (noting that the governments of the Seychelles and Somalia have concluded a transfer agreement whereby Somali pirates convicted in Seychellois courts would be transferred to Somalia to serve their sentences in their homeland).

<sup>96</sup> It should be noted that the Seychelles recently refused to accept and prosecute a group of Somali pirates who had been detained by the Danish navy. 'Seychelles refuse to take Somali pirates held by Danes', *Businesslive* 8 January 2012, at <http://www.businesslive.co.za/africa/2012/01/18/seychelles-refuse-to-take-somali-pirates-held-by-danes> (accessed on 1 February 2012). While the Seychelles' government did not articulate reasons for the rejection, it is highly probable that capacity issues influenced the decision to reject. The Seychelles dispose of a limited number of judges, only a handful of small courtrooms, and dozens, not hundreds, of prison beds. These observations bolster the argument for identifying other strong regional partners, like Mauritius, to aid in piracy prosecutions.

<sup>97</sup> See, e.g., the official Mauritius website at [www.mauritius.net](http://www.mauritius.net) (accessed on 1 March 2012).

<sup>98</sup> 'Pirates to be prosecuted in Mauritius', 13 January 2012 at <http://www.defimedia.info/news-sunday/nos-news/item/4435-pirates-to-be-prosecuted-in-mauritius.html?tmpl=component&print=1> (accessed on 1 March 2012).

model the piracy offence on UNCLOS more closely.<sup>99</sup> Under the new Mauritian law, the piracy offence is identical to the one found in UNCLOS, thus requiring the presence of two vessels (aggressor and victim), and a violent act committed for private aims on the high seas.<sup>100</sup> In addition to the offence of piracy, the new Mauritian law also provides for the offence of a ‘maritime attack’, which is defined as follows:

“(a) an illegal act of violence or detention, or any act of depredation for private ends by the crew or the passengers of a private ship or a private aircraft, and directed –

(i) against persons or property on board a ship or aircraft, as the case may be; or

(ii) against a ship or aircraft, as the case may be; or

(b) any act of inciting or of intentionally facilitating an act described in paragraph (a), within the territorial sea or the internal, historic and archipelagic waters of Mauritius.”<sup>101</sup>

The new Mauritian law conceives of piracy in broader terms than UNCLOS, because it adds the offence of ‘maritime attack’ to criminalise acts which fall short of the traditional definition of piracy because they may be committed in the Mauritian territorial waters. Finally, the new law also criminalises acts such as the hijacking and destroying of ships, and the act of endangering safe navigation of ships.<sup>102</sup> In this respect, the Mauritian law resembles the SUA approach – it criminalises a series of different maritime offences including violence against ships or persons onboard ships. The drafters of this law seemed to have blended UNCLOS and SUA, to come up with a law that encompasses the traditional definition of piracy found in UNCLOS, and that also adopts a broader approach in its anti-piracy reach by criminalising other maritime offences falling short of piracy. Finally, the new law specifically contemplates the transfer of detained pirates to Mauritius by the authorities of the capturing state for prosecution in Mauritian courts.<sup>103</sup> By all accounts, the revision in the Mauritian penal code was dictated by European Union authorities, which promised financial and logistical assistance to the Mauritius transfer model on the condition that Mauritius pass and implement and new penal code provision on piracy.<sup>104</sup>

Upon the successful passage of the above-discussed revised piracy law, Mauritius, like Kenya and the Seychelles, has benefitted from financial assistance by the European Union, implemented through the UNODC.<sup>105</sup> It has been reported that these donations will be used for judicial and prosecutorial capacity building in Mauritius, as well as for infrastructure,

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<sup>99</sup> Ibid.

<sup>100</sup> The Piracy and Maritime Violence Bill (No. XXVIII of 2011), Art. 3 (Dec. 13, 2011) (on file with author).

<sup>101</sup> Ibid.

<sup>102</sup> Piracy and Maritime Violence Bill, supra note 100, art. 4 and 5.

<sup>103</sup> Idem, at art. 8.

<sup>104</sup> Pirates to be prosecuted in Mauritius, supra note 97 (reporting that the disbursement of EU funds was subject to Mauritius passing the above-mentioned Piracy and Maritime Violence Bill; reporting also that the bill was enacted on December 13, 2011).

<sup>105</sup> Ibid (reporting that the European Union donated over 4 million Euros to Mauritius to assist in piracy prosecutions). For a detailed discussion of UNODC efforts in Kenya, the Seychelles and Mauritius, see UNODC, Counter-Piracy Programme, Issue 7, September-October 2011, at [http://www.unodc.org/documents/Piracy/UNODC\\_Brochure\\_Issue\\_7\\_WV.pdf](http://www.unodc.org/documents/Piracy/UNODC_Brochure_Issue_7_WV.pdf) (accessed on 1 March 2012).

such as the building or upgrading of prisons, courthouses and police headquarters.<sup>106</sup> Finally, like the Seychelles, Mauritius is apparently exploring post-prosecution transfer options with the federal government of Somalia, as well as with Puntland and Somaliland, two of the more stable regions in Somalia.<sup>107</sup> The revised Mauritian penal law, described above, specifically contemplates the possibility of transfer of pirates convicted in Mauritius to third states for detention purposes.<sup>108</sup> Mauritius, like the Seychelles, may face prison capacity issues and may thus wish to explore the possibility of repatriating convicted pirates to their homeland, for prolonged detention purposes. Whether this model can function in the future will depend on conditions in Somalia, but like in the case of the Seychelles, it is an important step for a small country like Mauritius to at least explore other detention options.

Thus, it appears likely that Mauritius will follow in the Seychelles' footsteps and join global anti-piracy efforts by opening its courtroom doors to piracy prosecutions. It would seem advisable for Mauritius, should its government decide to prosecute non-national pirates, to cooperate with the Seychelles and collaborate on law enforcement, prosecutorial, and detention strategies.<sup>109</sup>

### III.5 Other Prosecution Options and International Efforts

In addition to prosecutions of Somali pirates in the national courts of regional partners, other prosecutorial options have been discussed in academic and political circles. Some scholars have advocated the creation of an ad hoc international piracy tribunal, which would try all captured pirates.<sup>110</sup> Others have explored the possibility of extending the jurisdiction of the International Criminal Court to include piracy.<sup>111</sup> Finally, the International Tribunal for the Law of the Sea has been discussed as a possible forum for Somali pirate prosecutions.<sup>112</sup> None of these options have gained much academic, political or practical interest as of now, and whether they will in the future remains doubtful in light of high transactional costs associated with the establishment of a new international forum, or with the revision of jurisdictional rules of an existing tribunal.

The United Nations has been involved in the piracy crisis as well, and it will likely continue to play an important role in the future. As mentioned above, the Security Council has passed several resolutions addressing piracy in Somalia.<sup>113</sup> Lately, the United Nations have been specifically concerned with determining the best prosecution venue for captured pirates. Toward this end, the United Nations summoned Jack Lang, a French politician, to study the issue and produce a report, which was published in January 2011.<sup>114</sup> The Jack Lang report recommended the creation of a Somali extra-territorial court.<sup>115</sup> In other words, the report

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<sup>106</sup> Pirates to be prosecuted in Mauritius, supra note 94; see also Counter-Piracy Programme, supra note 105.

<sup>107</sup> Ibid.

<sup>108</sup> Piracy and Maritime Violence Bill, supra note 100, at art. 8.

<sup>109</sup> It appears that Mauritius officials are eager to learn from the Seychellois experience. See, e.g., Counter-Piracy Programme, supra note 105, at 12 (noting that “[l]essons learned in the Seychelles are well received in Mauritius.”).

<sup>110</sup> M. Sterio, ‘Fighting Piracy in Somalia (and Elsewhere): Why More is Needed’, *Fordham Journal of International Law* 2010-33, p. 396; Peppetti 2007, supra note 32, p. 148.

<sup>111</sup> Taussig-Rubbo 2010, supra note 14, p. 58.

<sup>112</sup> See, e.g., Kraska & Wilson 2009, supra note 8, p. 176 (discussing and rejecting ITLOS as a possible forum for piracy prosecutions because ITLOS is a civil, not criminal law jurisdiction).

<sup>113</sup> See supra note 29.

<sup>114</sup> France at the United Nations, Somalia- report by Jack Lang on the legal issues related to piracy off the coast of Somalia – statement by the spokesperson of the Ministry of Foreign and European affairs, 26 January 2011 at <http://www.franceonu.org/spip.php?article5354> (accessed on 28 August 2011).

<sup>115</sup> Ibid.

advocated for a Somali national prosecution of Somali pirates, while recognising the difficulty of establishing a functioning tribunal in war-torn Somalia.<sup>116</sup> Thus, the report recommended that the tribunal be established in the neighbouring country of Tanzania.<sup>117</sup> This tribunal would apply Somali law and function as a purely national jurisdiction, but its headquarters would be located outside of Somalia for obvious security reasons.<sup>118</sup> While this solution initially appeared attractive, it has faced resistance from Somalia, and without Somali support for the establishment of a Somali court, it seems that this option will not be feasible in the future.<sup>119</sup> Moreover, some of the most powerful maritime nations, such as the United States and the United Kingdom, have consistently opposed the Jack Lang recommendation of establishing an extra-territorial Somali court. For example, at a June 2011 Security Council Meeting on Somalia, the United States Ambassador David Dunn clearly stated the American opposition to this idea: “it is clear to us that an extraterritorial Somali piracy court is not a viable option, due to opposition to the idea from Somalia itself and the host of constitutional, procedural, security, financial and logistical issues identified in the report.”<sup>120</sup> Moreover, in a recent British House of Commons Foreign Affairs Committee report on Somali piracy of 5 January 2012, the idea of establishing either an international piracy court or a Somali extra-territorial court is strongly rejected; instead, the report supports “recent proposals for specialised anti-piracy courts established within regional states under ordinary national laws.”<sup>121</sup> It is thus possible that piracy-fighting nations will turn more intently toward identifying stable regional partners, in addition to Kenya, which could handle large-scale piracy prosecutions. It is probable that the Seychelles’ and possibly also Mauritius’ courts will play a prominent role in Somali piracy prosecutions in the future.

Moreover, in another anti-piracy initiative, the United Nations established the Contact Group on Piracy off the Coast of Somalia, a group of state representatives of various specialties which meets several times a year and which has been working on promoting solutions for the Somali piracy crisis.<sup>122</sup> It is possible that the Contact Group will work more closely with shipping industry representatives toward identifying the best anti-piracy measures in the future.<sup>123</sup> The best possible solution may be to proliferate patrols in the Indian Ocean, to encourage all patrolling nations to capture pirates whenever possible, and to prosecute all captured pirates in the national courts of identified regional partners, who

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<sup>116</sup> The Jack Lang Report recommends the creation of one extra-territorial Somali court, possibly headquartered in Arusha, Tanzania, as well as the creation of two Somali courts in Puntland and in Somaliland. The Report also calls for supplementing Somali law with the inclusion of the offence of piracy.

<sup>117</sup> *Ibid.*

<sup>118</sup> *Ibid.*

<sup>119</sup> ‘UN Outlines Judicial Options to Fight Piracy off Somalia’, *Scoop.com*, 22 June 2011 at <http://www.scoop.co.nz/stories/WO1106/S00508/un-outlines-judicial-options-to-fight-piracy-off-somalia.htm> (accessed on 27 August 2011) (noting that the Somali Transitional Government does not support the establishment of a Somali court outside of Somalia, and that it prefers the establishment of any piracy court within Somalia).

<sup>120</sup> United States Mission to the United Nations, remarks by Ambassador David Dunn, U.S. Alternate Representative for Special Political Affairs to the United Nations, at a Security Council Meeting on Somalia, 21 June 2011 at <http://usun.state.gov/briefing/statements/2011/166707.htm> (accessed on 1 March 2012).

<sup>121</sup> Foreign Affairs Committee, Tenth Report, Piracy off the coast of Somalia, § 89, 92, 5 January 2012 at <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmaff/1318/131802.htm> (accessed on 2 March 2012). The Report also notes continuous US and British opposition to the idea of establishing a Somali extra-territorial court.

<sup>122</sup> ‘Contact Group on Piracy off the Coast of Somalia Meets in New York’, *Bureau of Public Affairs*, 9 November 2010 at <http://www.state.gov/r/pa/prs/ps/2010/11/150695.htm> (accessed on 27 August 2011).

<sup>123</sup> *Ibid.* The Contact Group has already worked with the shipping industry to develop measures which merchant ships can undertake to deter or delay pirate attacks.

could, in turn, receive monetary assistance from major maritime states, as well as from the shipping industry itself.

#### IV. Recommendations for Successful National Prosecutions

The way forward in the global fight against piracy may very well consist of an increased use of regional partners, such as Kenya, the Seychelles, and Mauritius, for the purpose of prosecuting Somali pirates in these nations' domestic tribunals. Such prosecutions in national courts could be facilitated through the adoption of the following measures.

First, the prevalent approach by prosecuting nations has been to revise their national penal laws and to model the piracy offence on the definition of piracy in UNCLOS. This approach has been followed presumably because most of the international community considers UNCLOS as representative of customary international law on piracy. However, this approach is not necessary and may be overly restrictive. As discussed above, the definition of piracy in UNCLOS is narrow, and may pose hurdles in piracy prosecutions.<sup>124</sup> Instead, in order to facilitate piracy prosecutions, Kenya, the Seychelles and Mauritius should redefine piracy in their penal codes based on the approach of the SUA Convention. As discussed above, the SUA Convention does not specifically mention piracy, but rather, it prohibits a series of different acts of maritime violence.<sup>125</sup> This approach allows for the prosecution of acts that may fall short of piracy under UNCLOS, such as when the piratical act does not take place on the high seas, or when the act is committed for other than private aims. Thus, SUA may prove to be a more useful model for the prosecution of pirates than UNCLOS.

Second, prosecuting nations may choose to move beyond customary international law in their domestic statutes' definition of piracy. Nothing precludes prosecuting nations, like Kenya, the Seychelles and Mauritius, from defining piracy to include attempts at piracy, the conspiracy to commit piracy, or preparatory offences, such as the planning of a piratical attack.<sup>126</sup> Under UNCLOS, if naval forces of a capturing nation detain a group of young Somali men who happened to sail on a small skiff armed with AK-47's and equipped with ladders, but lacking in any fishing gear, these men cannot be treated as pirates because the definition of piracy under UNCLOS requires the commission of an illegal act of violence. However, if prosecuting states had domestic statutes which criminalised preparatory offences, then capturing nations could transfer pirates for potentially successful prosecutions under such domestic law, without regard to UNCLOS.

Third, prosecuting nations may also wish to expand their domestic criminal statutes to enable the prosecution of piracy financiers and enablers. Most commentators agree that piracy has become a form of organised crime, with low-level executioners at the bottom and powerful financiers and bosses at the top.<sup>127</sup> The most harm that can be inflicted on this successful operation is if piracy enablers can also be prosecuted. Financing and enabling piracy does not qualify as the act of piracy itself under UNCLOS. Thus, prosecuting nations

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<sup>124</sup> See supra Part II.

<sup>125</sup> Ibid.

<sup>126</sup> It should be noted that the new definition of piracy in the Seychelles penal code includes the offence of conspiracy to commit piracy. See supra note 83 and accompanying text. However, none of the penal codes discussed above (Kenya, Seychelles and Mauritius) criminalise preparatory offences. Thus, criminalising such preparatory offences may prove as a powerful tool in piracy prosecutions in the future.

<sup>127</sup> 'Awash with money – organized crime and its financial links to Somali piracy', *United Nations Office on Drugs and Crime* at <http://www.unodc.org/unodc/en/frontpage/2011/May/awash-with-money---organized-crime-and-its-financial-links-to-somali-piracy.html> ("[p]iracy in the region has increased so much that it is now considered a form of transnational organized crime, complete with established procedures, a successful business model and well-organized and well-funded backing.") (accessed on 2 March 2012).

may need to also move beyond customary international law in this respect and to adopt more aggressive domestic statutes which would criminalise investments in pirate attacks and the organisation of such attacks.

Fourth, prosecuting nations should conclude transfer MOU's with as many capturing nations as possible, to ensure that the largest number of captured pirates by a wide array of capturing nations is transferred to the prosecuting nation. The higher the number of prosecutions in the courts of a willing prosecuting nation like the Seychelles, the higher the deterrent effect that such prosecutions will have on potential Somali pirates. It is possible that prosecutions of Somali pirates in non-Somali courts thousands of miles away from Somalia will produce insignificant deterrent effect on young Somali men contemplating the career of piracy. However, it is equally possible that if some of those who engage in piracy do not return to Somalia because they are caught and prosecuted by a foreign nation, this in itself will produce some deterrent effect on all Somalis determining whether to join the ranks of pirates. Finally, it is possible that the potential financial gain that Somalis can derive from the proceeds of piracy will be outweighed by a substantial risk of getting caught and prosecuted in a foreign nation. If many nations engage in Somali pirate prosecutions, the risk of capture and prosecution will increase, and this in turn may dissuade young Somali men from engaging in piracy in the first place.

Moreover, prosecuting nations should ensure that they have extradition treaties in place with as many nations as possible. Extradition treaties can supplement MOU's and can also replace MOU's in situations where the prosecuting nation does not have a MOU in place with a particular capturing nation, but where the prosecuting nation has an extradition treaty in place with the same capturing nation. Extradition treaties may be relevant in the post-prosecution detention paradigm as well. Small nations like the Seychelles should conclude extradition treaties with nations willing to imprison convicted pirates. In this manner, states like the Seychelles could still accomplish their prosecutorial function while outsourcing to another nation the post-conviction detention. Both the Seychelles and Mauritius have been exploring the possibility of extraditing convicted Somali pirates back to Somalia, where they could serve their sentence. Because of security concerns in Somalia, it is unlikely that such extraditions will take place in the near future, but this model may be worthy of further discussion for the long-term future. Possibly, additional nations will offer to provide their detention facilities for convicted pirates, and will help in the global fight against piracy in this manner.

Fifth, major maritime nations should continue to rely on existing regional partners such as Kenya, the Seychelles and Mauritius, but should also seek to expand the spectrum of possible prosecutorial venues. Thus, maritime nations should look for additional regional or non-regional partners which would be willing to extend their courts toward piracy prosecutions. Developing countries with solid infrastructure and a respectable reputation as law-abiding global citizens may prove as interested partners in the global fight against Somali piracy. Also, nations in Southeast Asia, in the Malacca Straits geographic region, have already expanded significant efforts to thwart piracy locally; they may be interested in lending their courts and prosecutorial expertise toward prosecuting Somali pirates. In addition to looking for more partners which could prosecute Somali pirates in their national courts, major maritime nations should also reconsider the idea of creating a regional or international piracy tribunal.<sup>128</sup> In light of limited capacity which any prosecuting nation will likely face, major

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<sup>128</sup> It appears that the United States may be reversing its policy of opposing an international piracy court. In a recent news article, Andrew J. Shapiro, the United States Assistant Secretary of State, was quoted saying that the United States would support a regional 'piracy chamber'. C.J. Chivers, 'Seized Pirates in High-Seas Legal Limbo, With No Formula for Trials', *N.Y. Times*, 27 January 2011, at

maritime states should seriously turn toward the long-term goal of establishing a standing piracy chamber. A global piracy court may ultimately turn out to be the best prosecutorial tool and strategy in combating piracy in Somalia. Such a court would have the advantage of being capable of prosecuting pirates caught in other areas of the world and could thus contribute toward ensuring that piracy does not spread to other lawless regions of the world.

Finally, all prosecuting nations should ensure that they appear as law-abiding citizens to the rest of the world. In other words, prosecuting nations need to continuously demonstrate to the international community that they are willing to respect the defendants' due process rights, and that their piracy trials will remain fair and neutral. Otherwise, capturing nations may resist entering into MOU's with these prosecuting nations, and may decide to rethink the entire transfer programme. Kenya has faced criticism over its treatment of Somali pirates, prompting some donor nations to question their commitment to Kenya.<sup>129</sup> The Seychelles have so far demonstrated a willingness to respect the pirates' procedural rights. As Mauritius has not yet prosecuted any pirates, it is unclear how it will treat pirate defendants, but so far, nothing indicates that Mauritius would be anything but a fair and balanced adjudicator.

The above recommendations may contribute to transnational anti-piracy initiatives by facilitating national prosecutions of Somali pirates and by enhancing the existing pirate transfer mechanisms.

## Conclusion

Everyone agrees that piracy in Somalia is here to stay. Instead of hoping that piracy will disappear on its own, the global community should focus on finding the most adequate solutions to lower the number of pirate attacks. The discussion above highlights some of the legal and practical steps that have already been undertaken. Such steps include increased maritime patrols in the Indian Ocean, routine arrests of apprehended pirates, and a concerted effort among patrolling nations to find the most adequate tribunal to prosecute such pirates. Some of the best prosecutorial options may consist of reliance upon national courts of stable regional partners, such as Kenya, and in particular, the Seychelles and Mauritius, coupled with the potential establishment of an international piracy tribunal. If all of these steps are routinely exercised by piracy-fighting countries, piracy incidents will most likely be reduced in number, frequency and scope. Moreover, serious anti-piracy efforts in Somalia may be effective in preventing the proliferation of piracy in other regions in Africa or elsewhere. Major maritime nations should ensure that pirates do not become *hostis humani generi* in the twenty-first century.

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[http://www.nytimes.com/2012/01/28/world/africa/seized-pirates-in-legal-limbo-with-no-formula-for-trials.html?pagewanted=1&sq=andrew shapiro&st=cse&scp=1](http://www.nytimes.com/2012/01/28/world/africa/seized-pirates-in-legal-limbo-with-no-formula-for-trials.html?pagewanted=1&sq=andrew%20shapiro&st=cse&scp=1) (noting that "[o]ne proposal is to form a regional legal center that would be able to apply its own laws to the cases, interact with foreign navies, and have the capacity to incarcerate convicted pirates in a prison system and to return others safely to their home nations" and that the United States would support such a proposal) (accessed on 2 March 2012). It is unclear what is driving the American apparent reversal of policy, but lack-of-capacity issues in the Seychelles and all other potential regional partners could be a vital factor in influencing the decision to support the establishment of a piracy court.

<sup>129</sup> See, e.g., Taussig-Rubbo 2010, *supra* note 14, p. 60 (describing how after Kenyan courts started prosecuting Somali pirates, a group of international lawyers from Lawyers of the World, a prominent not-for-profit organisation, traveled to Mombasa "and condemned the transfer programme for depriving the pirates of their rights.").