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PIRACY LAWS AND THE EFFECTIVE PROSECUTION OF PIRATES

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Abstract: This Note analyzes the current international legal framework for the punishment and prosecution of maritime piracy. Piracy is an international problem that disrupts global maritime trade and endangers the safety and security of crewmen and ship owners. Although it is a well-recognized principle that each state has universal jurisdiction to prosecute pirates, the conflicting international definitions of piracy and the preponderance of attacks near states that lack resources to effectively prosecute pirates create a gap in enforcement within the international legal framework. This Note proposes that cooperating states should establish regional international piracy tribunals that can apply an appropriate, uniform definition of piracy while providing the judicial resources to enforce international piracy laws.

INTRODUCTION

Maritime piracy is a continuing international problem that disrupts shipping lanes, the world economy, and the safety and security of crewmen and ship owners.¹ In the first nine months of 2009, there were 294 reported pirate attacks from all over the world.² These attacks included thirty-four successful hijackings and 559 hostages.³ The majority of these reported attacks occur in Southeast Asia, off the Horn of Africa, and along the West Coast of Africa, with a few attacks scattered along the coast of South America.⁴

Within international law there is a well-recognized principle that each state has universal jurisdiction to prosecute pirates.⁵ Nevertheless,

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¹ James Kraska & Brian Wilson, *Fighting Piracy*, *ARMED FORCES J.*, Feb. 2009, at 10.

² ICC COM. CRIME SERVS., INT'L MAR. BUREAU, *Piracy Figures for 2009 Surpass Those for Previous Year*, Sept. 23, 2009, http://www.icc-ccs.org/index.php?option=com_content&view=article&id=374.

³ *Id.*

⁴ ICC COM. CRIME SERVS., INT'L MAR. BUREAU, *IMB Live Piracy Map 2009*, <http://www.icc-ccs.org> (follow "View Live Piracy Map" hyperlink; then follow "Piracy Map 2009" hyperlink) (last visited Apr. 20, 2010).

⁵ See DAVID J. BEDERMAN, *INTERNATIONAL LAW FRAMEWORK* 76 (2006).

the current legal framework creates a problem of “catch and release” because pirates are often released shortly after their capture due to lax domestic laws that do not adequately punish the offenders, or due to a state’s unwillingness to prosecute the offenders for various political reasons.⁶

Part I of this Note outlines the current international and regional legal framework for the prosecution of pirates. It discusses the applicable international treaties and organizations that relate to maritime security and how these treaties and organizations affect states on a regional and domestic level. Part II identifies problems with the existing international legal framework, specifically, the lack of uniformity in the prosecution and punishment of pirates. Part III suggests that the variety of domestic laws creates a confusing patchwork of penalties and procedures that could be resolved with the creation of regional piracy tribunals.

I. BACKGROUND

A. *International Legal Framework Governing the Safety of Maritime Navigation*

Piracy is an international crime that falls under every state’s jurisdiction under customary international law.⁷ Universal jurisdiction endows every state with the right to prosecute and punish piracy regardless of where the attack occurs.⁸ Because of universal jurisdiction, each state has the responsibility to prosecute pirates under its own domestic laws irrespective of a pirate’s original nationality, the registry of the ship, or the destination of the cargo.⁹

The United Nations Convention on the Law of the Sea (UNCLOS) codified the customary international law on piracy in Articles 100 to 107.¹⁰ Given that UNCLOS is a codification of customary international law, it is binding on every state including non-parties to the convention.¹¹ Articles 100 to 107 of UNCLOS govern the provisions relating to

⁶ *International Efforts to Combat Maritime Piracy: Hearing Before the Subcomm. on International Organizations, Human Rights and Oversight of the Comm. on Foreign Affairs H.R.*, 111th Cong. 6 (2009) (statement of Rep. William D. Delahunt, Chairman of Subcommittee).

⁷ BEDERMAN, *supra* note 5, at 76.

⁸ *Id.*; Lawrence Azubuike, *International Law Regime Against Piracy*, 15 ANN. SURV. INT’L & COMP. L. 43, 44 (2009).

⁹ MARTIN N. MURPHY, *SMALL BOATS, WEAK STATES, DIRTY MONEY: THE CHALLENGE OF PIRACY* 12 (2009); *see* BEDERMAN, *supra* note 5, at 189.

¹⁰ United Nations Convention on the Law of the Sea arts. 100–107, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]; MURPHY, *supra* note 9, at 13–16.

¹¹ Azubuike, *supra* note 8, at 49.

the definition, jurisdiction, and obligations of member states seeking to pursue, capture, and prosecute maritime pirates.¹² Under UNCLOS, there are four essential elements to the definition of piracy: 1) an illegal act involving violence, detention, or depredation 2) committed for private ends 3) on the high seas 4) involving at least two ships.¹³ UNCLOS also reaffirms the idea of universal jurisdiction because it gives every state jurisdiction to seize and prosecute pirates according to that state's domestic laws.¹⁴

By contrast, the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA) expands the types of activity that may be prosecuted while limiting the jurisdictional requirements necessary to prosecute.¹⁵ This treaty defines an offense as 1) intentionally seizing or damaging a ship or 2) attempting to seize or damage a ship.¹⁶ The SUA definition eliminates the motive requirements that UNCLOS contains in its "for private ends" element.¹⁷ The convention also expands the UNCLOS definition of piracy because it applies to any ship navigating to, through, or from the territorial seas.¹⁸ Under SUA, a state has jurisdiction over an offense only if it is committed against a ship flying that state's flag, in that state's territory, or committed against a national of that state.¹⁹

SUA also imposes an obligation on member states to extradite or prosecute the suspected offender.²⁰ If the capturing state cannot establish jurisdiction, SUA requires that it extradite the offender to a state that has successfully established jurisdiction.²¹ Thus far, there are 134 countries that have subscribed to SUA, but the mandatory extradite or prosecute requirement deters many Southeast Asian states from ratifying it.²²

¹² UNCLOS, *supra* note 10, arts. 100–107.

¹³ *Id.* art. 101; Rosemary Collins & Daud Hassan, *Applications and Shortcomings of the Law of the Sea in Combating Piracy: A South East Asian Perspective*, 40 J. MAR. L. & COM. 89, 94 (2009).

¹⁴ *See* UNCLOS, *supra* note 10, art. 105.

¹⁵ Suppression of Unlawful Acts Against the Safety of Maritime Navigation arts. 3, 6, Mar. 10, 1988, 1678 U.N.T.S. 221 [hereinafter SUA]; Collins & Hassan, *supra* note 13, at 89, 106–08.

¹⁶ SUA, *supra* note 15, art. 3.

¹⁷ Collins & Hassan, *supra* note 13, at 107.

¹⁸ SUA, *supra* note 15, art. 4.

¹⁹ *Id.* art. 6.

²⁰ *Id.* art. 10; Collins & Hassan, *supra* note 13, at 108.

²¹ SUA, *supra* note 15, art. 10.

²² Collins & Hassan, *supra* note 13, at 108; U.S. DEP'T OF STATE, INTERNATIONAL CONVENTIONS AND PROTOCOLS ON TERRORISM, <http://www.state.gov/s/ct/rls/crt/2006/83238.htm> (last visited Apr. 20, 2010).

In addition to multilateral treaties, there are several international organizations such as the International Chamber of Commerce's International Maritime Bureau (IMB) and the International Maritime Organization (IMO) that seek to ensure the safe navigation of ships.²³ The IMB is a non-profit organization whose stated goal is to fight maritime crime, such as piracy.²⁴ The IMB established its Piracy Reporting Centre in Kuala Lumpur, Malaysia to monitor and provide advice on the growing piracy problem worldwide.²⁵ The Piracy Reporting Centre is funded through voluntary contributions.²⁶ The Centre's stated purpose is to provide a centralized information center on pirate attacks and to educate and warn shippers and traders about high-risk areas.²⁷ The IMB also performs other functions such as investigation services and litigation support.²⁸ Additionally, it has the capability to track hijacked and phantom ships.²⁹

For statistical purposes, the IMB adopts a broad definition of piracy that includes actual and attempted attacks both when the ship is at anchor or at sea.³⁰ Thus, the IMB defines "piracy and armed robbery" as "an act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in the furtherance of that act."³¹ The IMB's expansive definition affects the number of attacks that the IMB will track.³² Since this definition differs from the UNCLOS and SUA

²³ See ICC COM. CRIME SERVS., INT'L MAR. BUREAU, IMB Piracy Reporting Centre, <http://www.icc-ccs.org> (follow "IMB Piracy Reporting Centre" hyperlink) (last visited Apr. 20, 2010) [hereinafter IMB Piracy Reporting Centre]; Int'l Maritime Org., Introduction to IMO, http://www.imo.org/About/mainframe.asp?topic_id=3 (last visited Apr. 20, 2010) [hereinafter Introduction to IMO].

²⁴ ICC COM. CRIME SERVS., INT'L MAR. BUREAU, http://www.icc-ccs.org/index.php?option=com_content&view=article&id=27&Itemid=16 (last visited Apr. 20, 2010); see INT'L CHAMBER OF COM.'S INT'L MAR. BUREAU, PIRACY AND ARMED ROBBERY AGAINST SHIPS, REPORT FOR THE PERIOD 1 JAN. – 30 JAN. 2009 2 (2009) [hereinafter IMB REPORT].

²⁵ IMB Piracy Reporting Centre, *supra* note 23.

²⁶ *Id.*

²⁷ *Id.*

²⁸ ICC COM. CRIME SERVS., INT'L MAR. BUREAU, Investigation Services, <http://www.icc-ccs.org> (follow "International Maritime Bureau" hyperlink; then follow "Services" hyperlink) (last visited Apr. 20, 2010) [hereinafter IMB Investigation Services]; ICC COM. CRIME SERVS., INT'L MAR. BUREAU, Case Work, <http://www.icc-ccs.org> (follow "International Maritime Bureau" hyperlink; then follow "Services" hyperlink; then follow "Case Work" hyperlink) (last visited Apr. 20, 2010) [hereinafter IMB Case Work].

²⁹ IMB Investigation Services, *supra* note 28; IMB Case Work, *supra* note 28.

³⁰ IMB REPORT, *supra* note 24, at 4.

³¹ *Id.*

³² Zou Keyuan, *New Developments in the International Law of Piracy*, 8 CHINESE J. INT'L L. 323, ¶¶ 10–11 (2009).

definitions of piracy, not every incident reported to IMB would be considered formal piracy under international law.³³

In contrast to the IMB's stated purpose, the IMO's purpose is to develop a regulatory framework to maintain safe, secure, and efficient shipping over the high seas.³⁴ To improve security on the high seas and at port facilities, the IMO develops initiatives to combat two types of threats: piracy, as defined in UNCLOS, and armed robbery at sea.³⁵ Piracy can only occur on the high seas, while armed robbery at sea can only occur in territorial waters that are within twelve miles of a nation's coastline.³⁶

Recognizing the importance of domestic laws in the successful prosecution of pirates, the IMO passed Resolution A. 1025 (26), which encourages states to ratify enabling legislation that would codify their universal jurisdiction over piracy and establish procedures to facilitate the prosecution of pirates.³⁷ Resolution A. 1025 (26) also recommends guidelines for piracy investigation strategies.³⁸ The resolution suggests that flag states of the victimized ship should take the lead in investigations for piracy incidents; conversely, the state in whose territorial waters the incident occurs should bear the responsibility to investigate armed robbery at sea.³⁹

The IMO not only creates a technical framework to deal with piracy and armed robbery at sea, but it also aims to foster regional agreements to counter piracy.⁴⁰ It holds regional seminars and workshops in piracy-infested areas to identify measures that may diminish pirate attacks in that specific region.⁴¹ In the past decade, the IMO has held re-

³³ Azubuike, *supra* note 8, at 45.

³⁴ Introduction to IMO, *supra* note 23.

³⁵ Zou Keyuan, *supra* note 32, ¶ 8; Int'l Maritime Org., Piracy and Armed Robbery Against Ships, http://www.imo.org/Facilitation/mainframe.asp?topic_id=362#top (last visited Apr. 20, 2010) [hereinafter Piracy and Armed Robbery Against Ships].

³⁶ Azabuike, *supra* note 8, at 50; Zou Keyuan, *supra* note 32, ¶ 8.

³⁷ Int'l. Maritime Org. [IMO], *Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships*, IMO Assemb. Res. A. 1025 (26) (Dec. 2, 2009).

³⁸ See generally *id.* (describing the suggested piracy investigation guidelines for member countries).

³⁹ *Id.*

⁴⁰ Piracy and Armed Robbery Against Ships, *supra* note 35.

⁴¹ INT'L MAR. ORG., IMO Leads New Anti-Piracy Initiative, Mar. 13, 2001, <http://www.imo.org/> (follow "Newsroom" hyperlink; then follow "IMO Press Briefings" hyperlink; then follow "Archive - 2001 Press Briefings" hyperlink) [hereinafter IMO Leads Anti-Piracy Initiative]; Piracy and Armed Robbery Against Ships, *supra* note 35.

gional seminars in Southeast Asia, Brazil, and with the states in the Gulf of Aden.⁴²

B. *Regional Institutions and Domestic Developments in the Enforcement of International Laws*

In recent years, there has been a trend towards more regional approaches to solve the piracy problem.⁴³ In 2004, sixteen regional Southeast Asian states signed the Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia (ReCAAP), which was the first multilateral agreement to address piracy in Southeast Asia.⁴⁴ ReCAAP established an Information Sharing Centre in Singapore.⁴⁵ In 2009, twenty-eight nations and six international organizations formed the Contact Group on Piracy off the Coast of Somalia to address piracy problems emanating from the Horn of Africa.⁴⁶ The common stated objectives for both regional groups include promoting information exchange, supporting capacity-building efforts, and facilitating the regional operations of member states.⁴⁷

Other regional organizations aimed at maintaining maritime security include the Maritime Organization of West and Central Africa (MOWCA), which has its own sub-regional coast guard network.⁴⁸ More recently, in an IMO-sponsored meeting for East African states, nine East African states signed the Djibouti Code, which creates a network of information centers to report pirate attacks.⁴⁹ Although this agreement is

⁴² INT'L MAR. ORG., *Combatting Piracy and Armed Robbery Against Ships—Call for International Code*, May 13, 1999, <http://www.imo.org/> (follow “Newsroom” hyperlink; then follow “IMO Press Briefings” hyperlink; then follow “Archive - 1999 Press Briefings” hyperlink); IMO Leads Anti-Piracy Initiative, *supra* note 41; Piracy and Armed Robbery Against Ships, *supra* note 35.

⁴³ *International Efforts to Combat Maritime Piracy: Hearing Before the Subcomm. on International Organizations, Human Rights and Oversight of the Comm. on Foreign Affairs H.R.*, 111th Cong. 17 (2009) (testimony of William Baumgartner, Admiral, J. Advocate Gen., and Chief Counsel, U.S. Coast Guard) [hereinafter *Baumgartner Testimony—Piracy Hearing*]; Collins & Hassan, *supra* note 13, at 89.

⁴⁴ ReCAAP Info. Sharing Centre, About ReCAAP ISC, http://www.recaap.org/about/about1_2.html (last visited Apr. 20, 2010) [hereinafter About ReCAAP ISC].

⁴⁵ *Id.*

⁴⁶ Press Release, U.S. Dep't of State, The Contact Group on Piracy off the Coast of Somalia (May 18, 2009), available at <http://www.state.gov/r/pa/prs/ps/2009/05/123584.htm>.

⁴⁷ *Id.*; About ReCAAP ISC, *supra* note 44, at 3.

⁴⁸ James Kraska & Brian Wilson, *Combating Pirates of the Gulf of Aden: The Djibouti Code and the Somali Coast Guard*, 52 OCEAN & COASTAL MGMT. 516, 519 (2009).

⁴⁹ *Id.* at 519, 520.

not legally binding, signatories agreed to arrest and prosecute pirates and to help repatriate hostages.⁵⁰

Despite the codification of universal jurisdiction and the push for greater regional cooperation, customary international law still requires domestic legislation to prosecute the crime.⁵¹ Because states have discretion in their construction of domestic legislation on piracy, the incorporation of the full jurisdictional provisions from SUA and UNCLOS varies from state to state.⁵² For instance, China has no specific anti-piracy legislation but rather prosecutes piracy under its general Criminal Code.⁵³ China's general Criminal Code incorporates any crime that is defined in a Chinese-ratified international treaty.⁵⁴ In contrast, Australia has incorporated all of UNCLOS's piracy provisions into Part IV of its Crimes Act of 1914.⁵⁵ Similarly, the United States has enacted the majority of the provisions from the SUA in 18 U.S.C. § 2280.⁵⁶

UNCLOS and SUA themselves are silent regarding the prosecution of captured pirates, leaving such decisions to the discretion of each individual state's legal systems.⁵⁷ Consequently, it is difficult for some states to prosecute pirates because of procedural impediments that are not "forward-thinking."⁵⁸ Other states lack resources to spend on a full trial and possible imprisonment of the accused.⁵⁹

Even in states that possess the necessary resources and procedures for pirate prosecution, political reasons may prevent a pirate's prosecution.⁶⁰ For example, the United Kingdom will not prosecute pirates of certain nationalities because its asylum laws might allow the offender to

⁵⁰ *Id.* at 520.

⁵¹ *Baumgartner Testimony—Piracy Hearing*, *supra* note 43, at 27; see Collins & Hassan, *supra* note 13, at 102, 104; Niclas Dahlvang, *Thieves, Robbers, & Terrorists: Piracy in the 21st Century*, 4 REGENT J. INT'L L. 17, 39 (2006).

⁵² MURPHY, *supra* note 9, at 12.

⁵³ Collins & Hassan, *supra* note 13, at 102.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Violence Against Maritime Navigation, 18 U.S.C. § 2280 (1996); Dahlvang, *supra* note 51, at 23.

⁵⁷ See SUA, *supra* note 15, art. 10; UNCLOS, *supra* note 10, art. 105.

⁵⁸ *Baumgartner Testimony—Piracy Hearing*, *supra* note 43, at 27.

⁵⁹ Kraska & Wilson, *supra* note 1, at 3.

⁶⁰ *International Efforts to Combat Maritime Piracy: Hearing Before the Subcomm. on International Organizations, Human Rights and Oversight of the Comm. on Foreign Affairs H.R.*, 111th Cong. 27 (2009) (testimony of Ambassador Stephen Mull, Senior Advisor, Under Secretary for Political Affairs, U.S. Department of State) [hereinafter *Mull Testimony—Piracy Hearing*].

remain in the country indefinitely after trial.⁶¹ In addition, the British Foreign Office in London issued a legal opinion stating that Somalian pirates who would be subject to harsh treatment in Somalia cannot be deported because such deportation would violate the British Human Rights Act.⁶² Similarly, the Portuguese will only arrest pirates when Portuguese nationals or ships are involved.⁶³

To resolve this enforcement problem, the United States and the United Kingdom signed a Memorandum of Understanding with Kenya in 2009 to send pirates captured by their navies to Kenyan courts for prosecution.⁶⁴ Given the massive Kenyan caseload and Kenya's inexperienced legal system, there are doubts as to whether this agreement will lead to more effective prosecutions of pirates.⁶⁵

Even after offenders are successfully prosecuted, states differ in the type of punishments meted out.⁶⁶ For example, China has no word for "piracy," and thus it prosecutes pirates for armed robbery and murder instead.⁶⁷ Its punishments range from as few as ten years in prison to death.⁶⁸ Likewise, the Brazilian pirates who robbed and murdered a famous New Zealand yachtsman were sentenced to thirty-seven years for armed robbery and murder, instead of piracy.⁶⁹ When adjudicating on the charge of piracy, Indian courts sentenced fourteen Indonesian pirates to seven years of hard labor,⁷⁰ and Argentina may sentence a pirate to three to fifteen years in prison even if no one is killed during the attack.⁷¹ By contrast, Indonesian courts have been known to give pirates as little as two to four years in prison.⁷²

⁶¹ *Id.* at 28; Peter Mwaurap, Op-Ed., *Why Kenya Must Not Be Used to Dump Suspected Pirates*, DAILY NATION (Nairobi), Apr. 17, 2009, <http://www.nation.co.ke/oped/Opinion/-/440808/561166/-/459d42/-/index.html>.

⁶² Paul Reynolds, *Rules Frustrate Anti-Piracy Efforts*, BBC NEWS, Dec. 9, 2008, <http://news.bbc.co.uk/2/hi/africa/7735144.stm>.

⁶³ *Wrong Signals; Piracy. Pirates and Legal Knots*, ECONOMIST, May 9, 2009, at 1.

⁶⁴ *Baumgartner Testimony—Piracy Hearing*, *supra* note 43, at 17.

⁶⁵ *See* Mwaurap, *supra* note 61. *But see* Kraska & Wilson, *supra* note 1, at 3.

⁶⁶ *Mull Testimony—Piracy Hearing*, *supra* note 60, at 32; *see* Dahlvang, *supra* note 51, at 24–25.

⁶⁷ Zou Keyuan, *supra* note 32, ¶ 55.

⁶⁸ *Id.*

⁶⁹ Kathy Marks, *Amazon Pirates Who Killed Yachting Hero Get 37 Years*, INDEPENDENT (London), June 21, 2002, <http://www.independent.co.uk/news/world/americas/amazon-pirates-who-killed-yachting-hero-get-37-years-645993.html>.

⁷⁰ Dahlvang, *supra* note 51, at 25.

⁷¹ Joshua Michael Goodwin, *Universal Jurisdiction and the Pirate: Time for an Old Couple to Part*, 39 VAND. J. TRANSNAT'L L. 973, 1005 (2006).

⁷² *Id.* at 40.

The variations of legal frameworks within the international community and among states creates a variety of definitions and penalties for piracy.⁷³ This lack of uniformity in piracy laws interferes with the effective prosecution of pirates.⁷⁴

II. DISCUSSION

The current international legal framework on piracy is flawed because it does not provide a universally applicable definition of piracy, and because it does not create uniform guidelines for the prosecution and punishment of pirates.⁷⁵ There is a discrepancy between the offense of piracy under international law and how the offense is actually prosecuted and punished under each state's domestic laws.⁷⁶

The UNCLOS definition of piracy has four elements: 1) an illegal act involving violence, detention, or depredation 2) committed for private ends 3) on the high seas 4) involving at least two ships.⁷⁷ Scholars criticize the first element because it categorically excludes all attempted hijackings or clandestine attacks, where attackers board at night and steal cargo without the knowledge of the crew.⁷⁸ Thus, while this definition adequately describes Somali pirate attacks in which pirates are generally armed with AK-47s and rocket-propelled grenades,⁷⁹ it does not adequately describe pirate attacks in Southeast Asia and Brazil that may include clandestine robberies of ships at anchor.⁸⁰

Moreover, the "private ends" element in the UNCLOS definition is heavily criticized because it incorporates a motive requirement that excludes political terrorism and not-for-profit attacks.⁸¹ For example, an armed attack meant to bring international attention to a group's struggle for independence is not executed for "private ends" because it is not performed to profit the attackers.⁸² In similar fashion, hijacking

⁷³ See generally Dahlvang, *supra* note 51; Zou Keyuan, *supra* note 32.

⁷⁴ Baumgartner Testimony—Piracy Hearing, *supra* note 43, at 27.

⁷⁵ Collins & Hassan, *supra* note 13, at 97–98, 108–09.

⁷⁶ *Id.* at 112.

⁷⁷ See UNCLOS, *supra* note 10, art. 101.

⁷⁸ Collins & Hassan, *supra* note 13, at 96–97.

⁷⁹ James Kraska & Brian Wilson, *Piracy Repression, Partnering and the Law*, 40 J. MAR. L. & COM. 43, 44 (2009).

⁸⁰ Collins & Hassan, *supra* note 13, at 97; ICC COM. CRIME SERVS., INT'L MAR. BUREAU, *IMB PIRACY INCIDENT REPORT 2009*, <http://www.icc-ccs.org> (follow "View Live Piracy Map" hyperlink; then follow "Piracy Map 2009" hyperlink; then click on map pin over Brazil) (last visited Apr. 20, 2010) [hereinafter *IMB Piracy Incident Report*].

⁸¹ John Kavanagh, *The Law of Contemporary Sea Piracy*, 1999 AUSTL. INT'L L.J. 127, 137–38.

⁸² Collins & Hassan, *supra* note 13, at 99.

done for a political motive is also not piracy under the UNCLOS definition.⁸³ Accordingly, political motivation becomes a legitimate defense to piracy under this definition.⁸⁴

Furthermore, the “two-ship” requirement excludes mutiny as an act of piracy because the internal seizure of a ship does not involve two separate ships.⁸⁵ Scholars have often debated whether to add political terrorism and mutiny to the UNCLOS definition of piracy.⁸⁶ Political terrorism and mutiny, however, have different root causes and different solutions than piracy does.⁸⁷ Terrorists typically seek to draw attention to a cause regardless of whether the offenders profit from the attack, while pirates are solely motivated by profit and seek to avoid attention.⁸⁸ For this reason, expanding the UNCLOS definition of piracy is not constructive in building an effective international legal framework for the prosecution and punishment of modern day piracy because piracy and terrorism require different solutions.⁸⁹

Finally, the “high seas” element of the UNCLOS definition of piracy may apply best to Somali piracy, but it is a severe limitation on Southeast Asian piracy.⁹⁰ In the Gulf of Aden, the coordinated naval presence of an international fleet has driven pirates to attack up to 700 miles from the coastline, an area that is well past the twelve-mile territorial seas.⁹¹ Conversely, most attacks in Southeast Asia occur in narrow straits that fall within a nation’s territorial seas.⁹² Therefore, in Southeast Asia, even if caught, the attackers cannot be prosecuted for “piracy” because their acts would not fall within the UNCLOS definition of piracy.⁹³

While the SUA attempts to fill the legal gaps within the UNCLOS provisions, it is in no way a complete solution to the piracy problem.⁹⁴ On the one hand, SUA creates a more comprehensive legal framework because it eliminates the private ends requirement, broadens the geo-

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Dahlvang, *supra* note 51, at 28.

⁸⁶ See Kavanagh, *supra* note 81, at 128.

⁸⁷ See Collins & Hassan, *supra* note 13, at 100.

⁸⁸ *Id.*

⁸⁹ *Id.*; see Kraska & Wilson, *supra* note 79, at 45.

⁹⁰ Collins & Hassan, *supra* note 13, at 97–98; *Somali Pirates Seize Chinese Ship*, CBS NEWS, Oct. 19, 2009, <http://www.cbsnews.com/stories/2009/10/19/world/main5396746.shtml>.

⁹¹ See *Somali Pirates Seize Chinese Ship*, *supra* note 90 (noting that pirates boarded a Chinese cargo ship 700 miles east of the Somali coastline).

⁹² Collins & Hassan, *supra* note 13, at 97.

⁹³ See *id.*

⁹⁴ *Id.* at 107–08.

graphical limits of the crime, and imposes a strict prosecute or extradite requirement on its members.⁹⁵ On the other hand, SUA limits the idea of universal jurisdiction by restricting jurisdiction to states that have some connection to the offense.⁹⁶ Moreover, SUA provisions are only binding on states that are parties to the convention.⁹⁷

Additional confusion ensues among international and regional organizations when determining which definition of piracy to enforce.⁹⁸ The IMB ignores both the UNCLOS and SUA definitions, and instead defines piracy as boarding a vessel with the intent to commit a crime.⁹⁹ By contrast, the IMO recognizes two international maritime crimes: piracy, as defined by UNCLOS, and armed robbery at sea.¹⁰⁰ The divide is further exacerbated at the regional cooperative level.¹⁰¹ ReCAAP follows the IMO bipartite definition of piracy¹⁰² while the U.S.-led naval forces off the coast of Somalia promote the SUA definition.¹⁰³

If the diversity of definitions for piracy were not problematic enough, it is compounded by the fact that no international legal framework exists that establishes clear guidelines for the prosecution and punishment of pirates.¹⁰⁴ UNCLOS does not establish a practical framework to prosecute and punish pirates¹⁰⁵ because it allows the individual seizing state to “decide upon the penalties.”¹⁰⁶ UNCLOS only defines the circumstances under which universal jurisdiction applies but does not set a universal penalty or empower a single tribunal to hear the charge of piracy.¹⁰⁷ Similarly, SUA does not mention trial procedures or establish penalties for its defined offenses.¹⁰⁸ The lack of uniformity on an international level results in various punishments for piracy that range

⁹⁵ *Id.*; Zou Keyuan, *supra* note 32, ¶ 21.

⁹⁶ SUA, *supra* note 15, art. 6 (listing situations in which a state party can establish its jurisdiction); *see* Collins & Hassan, *supra* note 13, at 108.

⁹⁷ Azubuike, *supra* note 8, at 56.

⁹⁸ Compare Piracy and Armed Robbery Against Ships, *supra* note 35, with IMB REPORT, *supra* note 24, at 4.

⁹⁹ Dahlvang, *supra* note 51, at 21; Zou Keyuan, *supra* note 32, ¶ 10.

¹⁰⁰ Piracy and Armed Robbery Against Ships, *supra* note 35.

¹⁰¹ Compare About ReCAAP ISC, *supra* note 44, with Baumgartner Testimony—Piracy Hearing, *supra* note 43, at 17.

¹⁰² Zou Keyuan, *supra* note 32, ¶ 9.

¹⁰³ *See* Baumgartner Testimony—Piracy Hearing, *supra* note 43, at 17.

¹⁰⁴ *See* Zou Keyuan, *supra* note 32, ¶¶ 53–55.

¹⁰⁵ Kavanagh, *supra* note 81, at 145.

¹⁰⁶ UNCLOS, *supra* note 10, art 105.

¹⁰⁷ *Id.*

¹⁰⁸ Collins & Hassan, *supra* note 13, at 108.

from three years to life in prison.¹⁰⁹ Additionally, a pirate will likely have no familiarity with the domestic criminal procedures of the prosecuting state.¹¹⁰

This variety in prosecution and punishment can also lead to tense international relations when certain states are unwilling to expend their own resources to capture and prosecute pirates.¹¹¹ UNCLOS leaves the prosecution of captured pirates to the discretion of each state, some of which are unwilling to prosecute pirates at all.¹¹² Consequently, the enforcement of international piracy laws is only as effective as the domestic legal institutions that are willing and able to prosecute the crime.¹¹³ Thus, powerful countries with developed legal systems, which incorporate the international definitions of piracy, are more likely to punish pirates than less developed countries.¹¹⁴ This phenomenon has the unintended side-effect of imposing a Western view of retribution and punishment on pirates from developing countries.¹¹⁵ Furthermore, the uncertainty as to whether a pirate will be successfully prosecuted may decrease a state's willingness to cooperate in the pursuit and capture of pirates altogether.¹¹⁶

Universal jurisdiction is ineffective in successfully punishing piracy because it creates a patchwork of domestic legal frameworks for the prosecution and punishment of piracy which is inadequate to effectively address the modern piracy concern.¹¹⁷

III. ANALYSIS

To address the issue of effective piracy prosecution, scholars have proposed three categories of solutions: 1) change the existing international definition to a uniform definition of piracy followed by uniform domestic legislation; 2) supplement existing international treaties with multilateral and bilateral treaties; and 3) allow international courts to

¹⁰⁹ *Baumgartner Testimony—Piracy Hearing*, *supra* note 43, at 32; *Mull Testimony—Piracy Hearing*, *supra* note 60, at 32; Goodwin, *supra* note 71, at 1005.

¹¹⁰ Gabriel Bottini, *Universal Jurisdiction After the Creation of the International Criminal Court*, 36 N.Y.U.J. INT'L L. & POL. 503, 550–51 (2004).

¹¹¹ Collins & Hassan, *supra* note 13, at 103, 109; Goodwin, *supra* note 71, at 1003.

¹¹² See Kavanagh, *supra* note 81, at 145.

¹¹³ See M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 19 (2003).

¹¹⁴ *Id.* at 556.

¹¹⁵ *Id.*

¹¹⁶ Collins & Hassan, *supra* note 13, at 109.

¹¹⁷ See Collins & Hassan, *supra* note 13, at 109; Kavanagh, *supra* note 81, at 145.

enforce international piracy laws.¹¹⁸ Of these three solutions, the establishment of regional international courts is the only option that can be accomplished without infringing on the territorial sovereignty of states and without creating a superfluous number of treaties.¹¹⁹

Regional piracy tribunals could enforce an applicable regional definition of piracy and create a uniform criminal procedure and punishment.¹²⁰ They could apply a uniform definition of piracy applicable to each region.¹²¹ Therefore, instead of states applying their own definition of piracy, regional piracy tribunals would apply a common definition of piracy to each region.¹²² Regional piracy tribunals could provide “uniformity in treatment”¹²³ that would remove the problems created by the variety of punishments and procedures that currently exist and could result in the more effective prosecution of piracy.¹²⁴

Regional piracy tribunals can be created from the regional cooperative arrangements that currently exist and could mimic the treaty-based foundation of the International Criminal Court.¹²⁵ For example, ReCAAP in Southeast Asia could establish its own regional piracy tribunal within one member state, MOWCA could sponsor its own regional tribunal for West Africa, while the signatory states of the Djibouti Code could create one for East Africa.¹²⁶ Furthermore, each regional piracy tribunal could derive its jurisdiction from a modified territorial jurisdiction principle, through which member states would establish a geographic scope that falls within the tribunal’s power.¹²⁷ Such a geo-

¹¹⁸ See MURPHY, *supra* note 9, at 19–20 (suggesting uniform definition and legislation); Collins & Hassan, *supra* note 13, at 90 (suggesting the creation of regional piracy tribunals); Kraska & Wilson, *supra* note 79, at 53 (suggesting supplementing international law with multilateral and bilateral agreements).

¹¹⁹ See Collins & Hassan, *supra* note 13, at 108 (discussing the problem with extradition treaties); Catherine Zara Raymond, *Piracy and Armed Robbery in the Malacca Strait*, 62 NAVAL WAR COLL. REV. 31, 35 (2009) (discussing Malaysia and Indonesia’s territorial sovereignty concerns).

¹²⁰ See Azubuike, *supra* note 8, at 54 (noting that states may define and punish piracy according to their own laws).

¹²¹ See Collins & Hassan, *supra* note 13, at 92; Kraska & Wilson, *supra* note 79, at 44; Zou Keyuan, *supra* note 32, ¶¶ 16–19 (discussing the deficiencies of the UNCLOS definition of piracy); see also IMB Piracy Incident Report 2009, *supra* note 80.

¹²² See MURPHY, *supra* note 9, at 19.

¹²³ Collins & Hassan, *supra* note 13, at 109.

¹²⁴ See *id.* at 103.

¹²⁵ See BASSIOUNI, *supra* note 113, at 499.

¹²⁶ See Kraska & Wilson, *supra* note 48, at 519; About ReCAAP ISC, *supra* note 44.

¹²⁷ See Bottini, *supra* note 110, at 511 (describing territorial jurisdiction).

graphic scope could include both territorial seas and the high seas,¹²⁸ and it would clarify jurisdiction and eliminate the problems associated with establishing *post hoc* jurisdiction after a pirate attack occurs.¹²⁹

Because the regional piracy tribunals would be treaty-based, they would complement domestic criminal justice systems rather than replace them.¹³⁰ The regional piracy tribunal would offer an alternative forum for both member states and non-member states that are unable or unwilling to prosecute pirates.¹³¹ Like the International Criminal Court, regional piracy tribunals would not infringe on a state's national sovereignty or domestic legal system.¹³²

In contrast, changing the existing international definition of piracy would not be as effective in the prosecution of pirates because the type of pirate attacks in each region vary due to their diverse geography.¹³³ There is no single international definition of piracy that can successfully incorporate the many different regional variations in attacks that exist.¹³⁴ In addition, since international definitions of piracy still require domestic enabling legislation to prosecute piracy, creating a uniform definition will not ensure that individual states take the necessary measures to pass legislation that applies the new definition.¹³⁵

Moreover, regional piracy tribunals can prevent the disputes over jurisdiction that individual states must negotiate under the current le-

¹²⁸ See UNCLOS, *supra* note 10, art. 101 (stating that an essential element of piracy includes the high seas); MURPHY, *supra* note 9, at 8 (explaining that armed robbery at sea can only take place in territorial seas).

¹²⁹ Dr. Azubuike stated:

A classic illustration of the universality principle in relation to piracy is offered by the Alondra Rainbow incident and prosecutions. The Alondra Rainbow was a Japanese owned tanker with a Filipino crew under the command of two Japanese officers. The tanker was sailing from Indonesia to Japan when pirates hijacked the ship. The Indian Navy later captured the pirates and towed the vessel to India. The pirates were tried and convicted by an Indian court.

See Azubuike, *supra* note 8, at 55.

¹³⁰ See BASSIOUNI, *supra* note 113, at 499–500 (noting that the International Criminal Court does not supplant or substitute national criminal justice systems).

¹³¹ See Azubuike, *supra* note 8, at 58.

¹³² See BASSIOUNI, *supra* note 113, at 500.

¹³³ See Collins & Hassan, *supra* note 13, at 92. For an example of the different types of attacks in different regions, see IMB Live Piracy Map, *supra* note 4.

¹³⁴ See Collins & Hassan, *supra* note 13, at 106–108 (discussing the deficiencies of SUA's definition of piracy); Zou Keyuan, *supra* note 32, ¶¶ 16–19 (discussing the deficiencies of UNCLOS's definition of piracy).

¹³⁵ See Baumgartner Testimony—Piracy Hearing, *supra* note 43, at 27.

gal regime.¹³⁶ By creating a single court that has jurisdiction over all incidents of piracy, irrespective of the states and nationalities involved, pirates can be prosecuted faster without the political wrangling that usually follows a pirate attack.¹³⁷ Regional piracy tribunals can also operate despite the existence of states that are unable or unwilling to prosecute pirates in their own courts.¹³⁸ These tribunals provide an alternative forum for states that lack the resources to prosecute pirates themselves.¹³⁹

On the contrary, the creation of more multilateral and bilateral treaties to supplement UNCLOS and SUA would not be as effective for the prosecution of pirates because most treaties only create binding obligations their member states.¹⁴⁰ Thus, creating networks of mutual assistance through multilateral and bilateral treaties is only effective when every affected country is a party to that treaty.¹⁴¹ Although bilateral and multilateral treaties may help solve jurisdictional and prosecutorial issues,¹⁴² they are only effective when the seizing state has a treaty with all states possessing any interest in the specific attack.¹⁴³ For example, if the seizing state does not have an extradition treaty with the particular states involved, the captured pirates may go unpunished.¹⁴⁴

Given the current international trend towards regional coordination in the fight against piracy, there already exists a basic foundation for coordination on which to create regional piracy tribunals.¹⁴⁵ Regional coordination such as ReCAAP can set a uniform definition of piracy for all member states.¹⁴⁶ Additionally, the IMB already has the capability to investigate international maritime crimes and to provide litigation support for countries seeking to prosecute international mari-

¹³⁶ See Dahlvang, *supra* note 51, at 23; Kavanagh, *supra* note 81, at 156 (discussing jurisdiction in territorial waters).

¹³⁷ See Kraska & Wilson, *supra* note 79, at 51 (discussing the difficulties of determining who will assume jurisdiction immediately after capturing a pirate).

¹³⁸ See Azubuike, *supra* note 8, at 55, 58; Kraska & Wilson, *supra* note 1, at 3.

¹³⁹ See Azubuike, *supra* note 8, at 55, 58.

¹⁴⁰ IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 627 (7th ed. 2008).

¹⁴¹ See Collins & Hassan, *supra* note 13, at 108 (discussing an example in which offenders go unpunished because no extradition treaty exists); Dahlvang, *supra* note 51, at 23 (discussing the problem with jurisdiction when extradition treaties exist).

¹⁴² See Kavanagh, *supra* note 81, at 157; Kraska & Wilson, *supra* note 79, at 53.

¹⁴³ See Collins & Hassan, *supra* note 13, at 108.

¹⁴⁴ *Id.*

¹⁴⁵ See Baumgartner Testimony—Piracy Hearing, *supra* note 43, at 17; Kraska & Wilson, *supra* note 1, at 1. See generally Int'l Maritime Org. [IMO], *Piracy and Armed Robbery Against Ships in Waters Off the Coast of Somalia*, IMO Assemb. Res. A. 1026(26) (Dec. 2, 2009) (suggesting investigation strategies to promote coordination between states).

¹⁴⁶ See Zou Keyuan, *supra* note 32, ¶ 9.

time offenders.¹⁴⁷ Thus, international organizations such as the United Nations or the IMO could easily combine the existing regional networks of cooperation with the IMB's investigative capabilities as a foundation for the creation of regional piracy tribunals.¹⁴⁸

CONCLUSION

Piracy is an international crime that is subject to universal jurisdiction, which gives every state the right to prosecute and punish pirates. Because of differences in geography and types of attacks, the international definitions of piracy as defined in UNCLOS and SUA are both under and over-inclusive. In addition, because each state has discretion regarding whether and how they choose to prosecute and punish pirates, there is no firm international legal framework by which to prosecute pirates. The best solution to this patchwork of criminal prosecutions is to place universal jurisdiction in the hands of regional piracy tribunals. Each tribunal could enforce a definition of piracy that is more applicable to each specific region, provide uniform procedures and penalties, and offer an alternative forum for prosecution to states that lack the resources to prosecute themselves.

¹⁴⁷ IMB Investigation Services, *supra* note 28.

¹⁴⁸ For discussions concerning strengthening regional cooperation, see generally *Hearing on International Efforts to Combat Maritime Piracy*, *supra* note 6, at 17 (statement of Admiral William Baumgartner, J. Advocate Gen. and Chief Counsel, U.S. Coast Guard). For the ICC-IMB's investigative capabilities, see IMB Investigation Services, *supra* note 28.