

NOTE

Applying Lessons from the Golden Age of Piracy: How to Use Specialized U.S. Tribunals to Prosecute Pirates in the Modern Era

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ABSTRACT

Maritime piracy, far from being a quaint historical relic of the eighteenth century, is alive and well in the modern world. Because of the considerable effects of piracy on international trade and security, the fight against piracy extends into the courtroom, but actual prosecutions are few. Any effective strategy for reducing maritime piracy must include the prosecution of suspected pirates because prosecution, conviction, and prison sentences would impose additional costs on pirates, thereby deterring their activity.

Given the threat posed by modern maritime piracy, there is a broad recognition in the United States at all levels of government that piracy is a national security threat. U.S. antipiracy laws are over 100 years old, however, and the realities of modern piracy have exposed flaws in a system originally created to deal with pirates in the age of sail. Although trials for piracy are ongoing in the federal courts, there are far too few prosecutions by American authorities given the scale of modern maritime piracy and America's position as the world's leading naval power.

This Note will argue that the United States is not currently using one historically successful model of piracy prosecutions. In the eighteenth century, Great Britain established special antipiracy courts that could be convened anywhere in the world and that were composed of British naval officers or colo-

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nial government officials. This Note proposes adapting that model to the twenty-first century by amending the Military Commissions Act of 2009 to add piracy to the list of crimes subject to trial by military commission.

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INTRODUCTION

In 2010, when pirates attacked the Sierra Leone-flagged tanker *MV Evita* off the coast of Somalia using rocket-propelled grenades and automatic rifles, the captain took evasive action and radioed for help.¹ An American warship on patrol in the area, the guided missile frigate *U.S.S. Farragut*, responded.² Cooperating with a Swedish Navy patrol aircraft, the Americans monitored the pirates until the *Farragut*

¹ Dana Hughes & Kirit Radia, *U.S. Navy Ship Grabs More Pirates, Lets Them Go*, ABC NEWS (Apr. 2, 2010), <http://abcnews.go.com/WN/pirates-captured-released/story?id=10270726>; see also Press Release, U.S. Navy, Combined Maritime Forces Flagship Intercepts Somali Pirates (Apr. 2, 2010), available at http://www.navy.mil/submit/display.asp?story_id=52370.

² See Hughes & Radia, *supra* note 1.

could arrive.³ The pilots of the aircraft watched as the pirates threw their ladders and weapons overboard.⁴ Upon arrival, the American captain of the *Farragut* made sure the pirates had no means to conduct further attacks and then destroyed their vessel.⁵ In the absence of a clear legal regime for prosecuting piracy, the captain released all eleven pirates in two small skiffs—shallow, flat-bottomed open boats.⁶

The captain's decision to release the pirates might seem odd at first blush, but there are many obstacles to a successful prosecution. If there were to be a trial, it would by no means be clear where it might be held: In the non-functioning Somali courts, home of the pirates? In Sierra Leone courts, home of the attacked vessel? In American courts, home of the interdicting vessel? In the courts of a third country, such as Kenya? Moreover, if the captain did take the pirates into custody, where should he keep them? In the ship's brig until he returned to the United States? Should they be transferred to prison in Somalia? In Sierra Leone? In a third state? In any event, transporting the pirates to prison would mean taking the *Farragut* off station and would make her unavailable to disrupt other pirate attacks.

The eleven pirates who launched grenades and fired their rifles at the *MV Evita* in an attempt to hijack the vessel were never prosecuted.⁷ The failure lies not with the behavior of the captain of the *MV Evita*, who adhered to maritime security best practices and called for help. The failure lies not in an absence of military force to protect shipping. The failure was not a lack of cooperation between the United States and other international actors. Nor was the failure one of judgment on the part of the *Farragut*'s captain. Rather, the fundamental failure resulting in the release of the eleven pirates is a failure of law to provide a system of courts and prosecutors to enforce long-standing laws against piracy.

Given the leniency with which they are treated, perhaps it is not surprising that pirates operating off the coast of Somalia appear in the world's headlines with alarming frequency.⁸ In recent years, they have

³ See *id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ The American Navy has on occasion put pirates into life jackets, ferried them to the Somali coast, and then let them wade safely ashore after stopping an attempted attack. C.J. Chivers, *Seized Pirates in High-Seas Legal Limbo, with No Formula for Trials*, N.Y. TIMES, Jan. 28, 2012, at A9. The United States is not the only country to catch and release pirates. See, e.g., *Navy Must Still 'Catch and Release' Somali Pirates*, CBCNEWS, Jan. 24 2012, <http://www.cbc.ca/>

disrupted trade in some of the world's most important and hazardous products. In 2008, Somali pirates captured and held for ransom a super tanker full of crude oil, the *Sirius Star*.⁹ A year later, Somali pirates caused an international crisis when they hijacked the *MV Faina*, a Ukrainian ship packed with weapons, including over thirty modern tanks.¹⁰

Not even American-flagged vessels, protected by the most powerful navy in the history of the world, escape attack. In 2009, Somali pirates hijacked an American vessel, the *Maersk Alabama*, carrying food to Somalia for the U.N. World Food Programme and held her captain, Richard Phillips, hostage for five days on the open sea.¹¹ This brought pirates into conflict with U.S. Navy SEALs, who, acting on orders from the White House, rescued Phillips.¹² Pirates have even twice mistakenly attacked American naval vessels.¹³

Maritime piracy, far from being a quaint historical relic of the eighteenth century, is alive and well in the modern world. In 2012 alone, maritime pirates launched 297 attacks and successfully hijacked twenty-eight vessels.¹⁴ In Somalia, where pirates benefit from the two-decades' absence of a functioning government, pirates held ap-

news/politics/navy-must-still-catch-and-release-somali-pirates-1.1210954 (detailing the practices of the Canadian Navy); *Russia Says Pirates Who Held Oil Tanker Off the Coast of Somalia Have Been Released*, FOXNEWS.COM, May 7, 2010, <http://www.foxnews.com/world/2010/05/07/russia-says-pirates-held-oil-tanker-released/?test=latestnews> (detailing the practices of the Russian Navy).

⁹ *Pirates Capture Saudi Oil Tanker*, BBC NEWS (Nov. 18, 2008), <http://news.bbc.co.uk/2/hi/africa/7733482.stm>.

¹⁰ *Somali Pirates 'Free Arms Ship'*, BBC NEWS (Feb. 5, 2009), <http://news.bbc.co.uk/2/hi/africa/7871510.stm> (detailing the payment by the ship's owner of an estimated \$3.2 million ransom and the subsequent release of the vessel and its crew by the pirates). This capture sparked a diplomatic row between Sudan, which believed the arms were headed for forces in now-independent South Sudan, and Kenya, which steadfastly maintained the arms were destined for its own military and not for transshipment to the South Sudanese. *Pirates Reveal Sudan's Precarious Peace*, BBC NEWS (Oct. 7, 2008), <http://news.bbc.co.uk/2/hi/africa/7657359.stm>.

¹¹ U.S. media covered this story extensively. See, e.g., Stephanie McCrummen & Ann Scott Tyson, *Navy Kills 3 Pirates, Rescues Ship Captain*, WASHINGTON POST, Apr. 13, 2009, at A1; *U.N.: Piracy Threatens Food Aid to Somalia*, NBCNEWS.COM, Apr. 15, 2009, http://www.nbcnews.com/id/30231035/ns/world_news-united_nations/t/un-piracy-threatens-food-aid-somalia/#.U0_TZdwl1JA.

¹² McCrummen & Tyson, *supra* note 11, at A1.

¹³ See *United States v. Hasan*, 747 F. Supp. 2d 599, 601 (E.D. Va. 2010) (pirates attacked the frigate *U.S.S. Nicholas*), *aff'd sub nom.* *United States v. Dire*, 680 F.3d 446 (4th Cir. 2012); *United States v. Said*, 757 F. Supp. 2d 554, 556–57 (E.D. Va. 2010) (pirates attacked the amphibious landing ship *U.S.S. Ashland*), *vacated*, 680 F.3d 374 (4th Cir. 2012).

¹⁴ INT'L CHAMBER OF COMMERCE INT'L MAR. BUREAU, *PIRACY AND ARMED ROBBERY AGAINST SHIPS: REPORT FOR THE PERIOD 1 JANUARY–31 DECEMBER 2012*, at 8, 11 (2013) (on file with author).

proximately fifty-seven hostages as recently as August 2013.¹⁵ The modern world, unlike the eighteenth century, lacks the legal tools to successfully prosecute pirates.

Because of the considerable effects of piracy on international trade and security, many nations and organizations are attempting to address the problem. Solutions range from new shipping security best-practice models,¹⁶ to the deployment of significant naval assets to pirate-infested waters,¹⁷ to nation- and institution-building in the coastal states where pirates have their bases.¹⁸ An ad hoc coalition including the United Nations, the European Union, the North Atlantic Treaty Organization (“NATO”), the International Maritime Bureau of the International Chamber of Commerce, and others is engaged in reducing the effects of piracy.¹⁹

The fight against piracy extends into the courtroom, but prosecutions are few.²⁰ Any effective strategy for reducing maritime piracy must include the prosecution of suspected pirates because prosecution, conviction, and prison sentences would impose additional costs on pirates, thereby deterring their activity. A Pakistani Admiral who once commanded the regional anti-piracy naval force responsible for patrolling the waters off the Somali coast observed that “[i]f there is no effective legislation that makes sure these pirates are taken to a court of law and punished . . . they will come back again and hijack other ships.”²¹ Differing prosecutorial models operate simultaneously in multiple locations: trials in the pirates’ country of origin,²² trials in

¹⁵ Stavros Kairis, *Maritime Piracy Monthly Report*, OFFICER WATCH 2 (Aug. 2013), <http://officerofthewatch.files.wordpress.com/2013/09/oow-piracy-monthly-report-2013-081.pdf>.

¹⁶ See BMP4: BEST MANAGEMENT PRACTICES FOR PROTECTION AGAINST SOMALIA BASED PIRACY (4th version 2011), available at <http://www.icc-ccs.org/images/stories/pdfs/bmp4.pdf> (see Annex H at pages 72–85 for institutional authors).

¹⁷ See COMBINED MAR. FORCES, <http://combinedmaritimeforces.com> (last visited Sept. 5, 2014) (website of the U.S.-led naval coalition); EU NAVFOR SOM., <http://www.eunavfor.eu> (last visited Sept. 5, 2014) (website of the European Union antipiracy force); NATO COUNTER-PIRACY OPERATIONS, http://www.nato.int/cps/en/natolive/topics_48815.htm (last visited Sept. 5, 2014) (website of the NATO mission).

¹⁸ See, e.g., U.N. Secretary-General, *Report of the Secretary-General on Specialized Anti-Piracy Courts in Somalia and Other States in the Region*, U.N. Doc. S/2012/50 (Jan. 20, 2012) [hereinafter U.N. Secretary-General, *Report on Anti-Piracy Courts*], available at http://www.un.org/ga/search/view_doc.asp?symbol=S/2012/50 (outlining various proposals for the establishment of specialized courts to try pirates).

¹⁹ See *supra* notes 16–18.

²⁰ See U.N. Secretary-General, *Report on Anti-Piracy Courts*, *supra* note 18, ¶¶ 8–10.

²¹ Chivers, *supra* note 8, at A9 (quoting Rear Admiral Kaleem Shaukat of the Pakistani Combined Task Force 151).

²² For example, pirate trials were held in Puntland and Somaliland, autonomous self-gov-

the courts of the country that captured the pirates,²³ trials in the courts of the victim nation,²⁴ and the export of pirates for trial in third states.²⁵

Despite these options, the number of piracy prosecutions relative to the number of pirate attacks remains unacceptably low. From 2006 to 2012, there were 932 pirate attacks off the coast of Somalia,²⁶ each attack involving as many as ten pirates,²⁷ but in the same timeframe there were only approximately 600 convictions for piracy.²⁸ In a period of just six months in 2010, naval forces released around 700 apprehended piracy suspects.²⁹ This relative paucity of prosecutions means that a crucial deterrent is not being used to discourage piracy.

Peace and tranquility on the world's oceans are key to national security interests of the United States for three reasons.³⁰ First, ninety percent of world trade involves travel across oceans.³¹ Second, "[t]he vast majority of the world's population lives within a few hundred

erning regions of Somalia. U.N. Secretary-General, *Report on Anti-Piracy Courts*, *supra* note 18, ¶¶ 15, 26.

²³ U.N. Secretary-General, *Report of the Secretary-General on Possible Options to Further the Aim of Prosecuting and Imprisoning Persons Responsible for Acts of Piracy and Armed Robbery at Sea off the Coast of Somalia*, ¶ 19, U.N. Doc. S/2010/394 (July 26, 2010) [hereinafter U.N. Secretary-General, *Report on Prosecutions*], available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2010/394 (providing a series of recommendations designed to improve prosecutions of pirates).

²⁴ See, e.g., *United States v. Hasan*, 747 F. Supp. 2d 599, 601, 606–07, (E.D. Va. 2010) (attack on Navy frigate *U.S.S. Nicholas*), *aff'd sub nom. United States v. Dire*, 680 F.3d 446 (4th Cir. 2012).

²⁵ This model is applied in the export of pirate suspects for trial in specialized Kenyan tribunals. U.N. Secretary-General, *Report on Anti-Piracy Courts*, *supra* note 18, ¶¶ 60, 78.

²⁶ This number of total pirate attacks is drawn from the figures in the annual International Maritime Bureau piracy reports. The annual reports from 2010 to 2012 are on file with the author and may be requested free of charge from the International Maritime Bureau. INT'L CHAMBER OF COMMERCE INT'L MAR. BUREAU, *supra* note 14, at 5–6 tbl.1; INT'L CHAMBER OF COMMERCE INT'L MAR. BUREAU, *PIRACY AND ARMED ROBBERY AGAINST SHIPS: REPORT FOR THE PERIOD 1 JANUARY–31 DECEMBER 2011*, at 5–6 tbl.1 (2012) [hereinafter INT'L CHAMBER OF COMMERCE INT'L MAR. BUREAU, 2011 REPORT] (on file with author); INT'L CHAMBER OF COMMERCE INT'L MAR. BUREAU, *PIRACY AND ARMED ROBBERY AGAINST SHIPS: REPORT FOR THE PERIOD 1 JANUARY–31 DECEMBER 2010*, at 5–6 tbl.1 (2011) [hereinafter INT'L CHAMBER OF COMMERCE INT'L MAR. BUREAU, 2010 REPORT] (on file with author).

²⁷ See U.N. OFFICE ON DRUGS & CRIME, *THE GLOBALIZATION OF CRIME: A TRANSNATIONAL ORGANIZED CRIME THREAT ASSESSMENT*, at 199, U.N. Sales No. E.10.IV.6 (2010), available at http://www.unodc.org/documents/data-and-analysis/tocta/TOCTA_Report_2010_low_res.pdf.

²⁸ U.N. Secretary-General, *Report on Anti-Piracy Courts*, *supra* note 18, at 5 tbl.

²⁹ U.N. Secretary-General, *Report on Prosecutions*, *supra* note 23, ¶ 20.

³⁰ U.S. DEP'T OF THE NAVY ET AL., *A COOPERATIVE STRATEGY FOR 21ST CENTURY SEAPOW* (2007), available at <http://www.navy.mil/maritime/Maritimestrategy.pdf>.

³¹ *Id.* at 2.

miles of the oceans.”³² Finally, water covers nearly three-quarters of the earth’s surface.³³ The U.S. Navy is committed to preventing or containing local disruptions “before they impact the global system” and specifically considers piracy as such a disruption.³⁴ Given the power of the U.S. Navy and importance of global seaborne trade, the United States is well positioned to take a more assertive role in the fight against modern piracy.

This Note will argue that the United States is not using one historically successful model of piracy prosecutions in the fight against piracy. In the eighteenth century, Great Britain established special antipiracy courts that could be convened anywhere in the world and that were composed of British naval officers or colonial government officials.³⁵ This Note proposes adapting that model to the twenty-first century by amending the Military Commissions Act of 2009³⁶ to add piracy to the list of crimes subject to trial by military commission.

Part I of this Note frames the challenges posed by modern maritime piracy and explores various efforts currently underway to combat pirates. Piracy imposes strategic costs, commercial costs, and human costs on all those who use the world’s oceans. A wide array of actors is working to address the piracy problem, including the United Nations, the private sector, and various coalitions of nation-states. Part II summarizes the existing state of U.S. law on the subject and highlights how poorly adapted these nineteenth-century statutes are to the prosecution of modern pirates. Part III highlights the parallels between modern piracy and modern terrorism and proposes amendments to the military commission system that would allow the commissions to be used to prosecute pirates. This approach of specialized, quasi-military tribunals was a key ingredient in the successful eighteenth-century campaign against piracy and should, if implemented today, allow for the more frequent prosecution of pirates. Part IV addresses potential objections to the proposed statutory changes.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 11–12.

³⁵ An Act for the More Effectual Suppression of Piracy, 11 Will. 3, c. 7 (1698), *reprinted in* 7 THE STATUTES OF THE REALM 590 (1820).

³⁶ Military Commissions Act of 2009, 10 U.S.C. §§ 948a–950t (2012).

I. THE CHALLENGES OF CONTEMPORARY MARITIME PIRACY

Although the word “pirate” is likely to conjure the image of a historical rogue, like Blackbeard or Hollywood’s Johnny Depp as the comedic Captain Jack Sparrow of *Pirates of the Caribbean* fame, maritime pirates and the threat they pose to the modern world are very much alive and real today.

The activities of pirates are costly. Pirate attacks result in strategic uncertainty, increased transportation costs for global commerce, and significant numbers of human victims. Because pirates can do such damage, their activity has prompted an international response, including actions from international civil society, from the United Nations, and from coalitions of nation-states. These international efforts are bolstered by the recognition under international law that piracy is a crime. The current global legal regime, however, lacks clarity as to what should be done, or may be done, to prosecute captured suspected pirates.

A. *Modern Piracy Is Ongoing, Costly, and Dangerous*

Piracy is hardly a novel phenomenon in the twenty-first century. According to the United Nations, modern piracy off the coast of Somalia, where there has been no functioning government since the end of 1991, is frequent, complex, and adaptable.³⁷ Recent increases in the number of pirate attacks are mostly the result of pirate activity off the coast of Somalia.³⁸ The number of attacks off the coast of Somalia has increased steadily since the collapse of the last functioning government there in 1991.³⁹

Pirate operations are complex and adaptable. Pirates launch into the Indian Ocean from around seventy camps on Somali beaches, taking advantage of the difficulty of monitoring and controlling a 1,800-mile coastline.⁴⁰ The pirates use large, often previously hijacked, vessels as “mother ships” which can be loaded with fuel, water, food, and heavier weapons and use small, faster skiffs to operate farther out into the ocean.⁴¹ AK-47s and shoulder-fired rocket-propelled grenades are the modern pirate’s weapons of choice.⁴² Once pirates target a ship,

³⁷ See U.N. OFFICE ON DRUGS & CRIME, *supra* note 27, at 198–99; U.N. Secretary-General, *Report on Prosecutions*, *supra* note 23, ¶ 4.

³⁸ U.N. OFFICE ON DRUGS & CRIME, *supra* note 27, at 193.

³⁹ U.N. Secretary-General, *Report on Prosecutions*, *supra* note 23, ¶ 7.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² U.N. OFFICE ON DRUGS & CRIME, *supra* note 27, at 199.

skiffs will attack from multiple directions, increasing the odds that one can come alongside the target vessel unnoticed to disgorge its armed passengers.⁴³ Attacks rarely take longer than half an hour from targeting to boarding.⁴⁴ The consequences of the success of these methods are threefold: strategic, in that they disrupt global trade; commercial, in that the shipping industry bears increased costs; and human, in that the victims of pirate attacks are innocent seamen and civilians.

1. *Piracy's Strategic Costs Result from the Disruption of Global Trade*

Because more than ninety percent of global trade is carried by sea, piracy creates strategic uncertainty by disrupting trade across the world's oceans.⁴⁵ In 2010, seaborne trade saw 8.4 billion tons loaded onto ships.⁴⁶ If the trends in world trade of the past 150 years hold steady, the volume of world trade in 2060 will reach twenty-three billion tons of goods loaded.⁴⁷

Although all nations have a stake in seaborne trade, the United States has a particular interest in preserving the free navigation of the oceans.⁴⁸ The United States is the world's largest importer⁴⁹ and its second largest exporter.⁵⁰ As the world's largest oil importer, the United States also has an interest in ensuring the safety of routes used

⁴³ *Id.* at 198.

⁴⁴ *Id.*

⁴⁵ See MAR. KNOWLEDGE CTR., INT'L MAR. ORG., INTERNATIONAL SHIPPING FACTS AND FIGURES—INFORMATION RESOURCES ON TRADE, SAFETY, SECURITY, AND ENVIRONMENT 7 (2012), [hereinafter INTERNATIONAL SHIPPING FACTS AND FIGURES] available at <http://www.imo.org/KnowledgeCentre/ShipsAndShippingFactsAndFigures/TheRoleandImportanceofInternationalShipping/Documents/International%20Shipping%20-%20Facts%20and%20Figures.pdf>.

⁴⁶ *Id.*

⁴⁷ Martin Stopford, Clarkson Research Servs. Ltd., How Shipping Has Changed the World and the Social Impact of Shipping, Address at the Global Maritime Environmental Congress 6 (Sept. 7, 2010), available at [http://www.imo.org/KnowledgeCentre/ShipsAndShippingFactsAndFigures/Statisticalresources/MaritimeTransport/Documents/How%20shipping%20has%20changed%20the%20world%20\(M.%20Stopford,%202010\).pdf](http://www.imo.org/KnowledgeCentre/ShipsAndShippingFactsAndFigures/Statisticalresources/MaritimeTransport/Documents/How%20shipping%20has%20changed%20the%20world%20(M.%20Stopford,%202010).pdf).

⁴⁸ See U.S. DEP'T OF THE NAVY ET AL., *supra* note 30, at 4 (“The oceans connect the nations of the world, even those countries that are landlocked. Because the maritime domain—the world's oceans, seas, bays, estuaries, islands, coastal areas, littorals, and the airspace above them—supports 90% of the world's trade, it carries the lifeblood of a global system that links every country on earth.”).

⁴⁹ See *World Factbook Country Comparison (Imports)*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2087rank.html> (last visited Sept. 5, 2014).

⁵⁰ See *World Factbook Country Comparison (Exports)*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2078rank.html> (last visited Sept. 5, 2014).

to move oil.⁵¹ In 2011, as many as 3.4 million barrels of oil *per day* transited the pirate-infested waters of the Bab el-Mandab strait between the Gulf of Aden and the Red Sea where Somali pirates are most active.⁵² The United Nations warns that if shipping continues to avoid the region because of the threat of piracy, as many ship owners do today, the world may see price increases in commodities and energy exported from the Middle East and Asia.⁵³

2. *Pirate Attacks Negatively Impact the World's Commercial Shipping Industry*

Piracy incidents off the coast of Somalia in 2011 alone cost the world almost \$7 billion.⁵⁴ The global shipping industry bore about eighty percent of those costs, driven by increased spending by the industry on insurance, security equipment and guards, rerouting of ships to longer and less efficient routes, increased speeds requiring increased fuel consumption, and increased labor costs.⁵⁵ Maersk Line, a Danish company, and one of the largest shipping corporations in the world, estimates that its piracy-related costs doubled over the course of 2011, and as a result, it has increased its piracy-risk surcharges to customers by almost fifty-five percent.⁵⁶

Ocean trade is vast and so too is the world's shipping fleet. There are over 100,000 seagoing merchant ships of more than 100 gross tons, registered in 150 nations, and manned by crews of almost every nationality.⁵⁷ Ships themselves are valuable, with the larger ones costing upwards of \$100 million to construct.⁵⁸ The costs of piracy borne by the U.S. shipping industry can be significant simply because of the industry's size. The United States has the world's seventeenth largest flagged merchant shipping fleet, and U.S. corporations control the

⁵¹ See *World Factbook Country Comparison (Crude Oil Imports)*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2243rank.html> (last visited Sept. 5, 2014); *World Factbook Country Comparison (Refined Petroleum Products)*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2248rank.html> (last visited Sept. 5, 2014).

⁵² See U.S. ENERGY INFO. ADMIN., *WORLD OIL TRANSIT CHOKEPOINTS 9–10* (2012), http://www.eia.gov/countries/analysisbriefs/World_Oil_Transit_Chokepoints/wotc.pdf. This amount is down considerably from a high of 4.5 billion barrels per day in 2008. *Id.* Piracy is cited as a major threat to the safe passage of oil through the strait. *Id.*

⁵³ U.N. OFFICE ON DRUGS & CRIME, *supra* note 27, at 198.

⁵⁴ Anna Bowden & Shikha Basnet, *The Economic Cost of Somali Piracy 2011*, at 1 (One Earth Future Found., Working Paper, 2011), available at http://oceansbeyondpiracy.org/sites/default/files/economic_cost_of_piracy_2011.pdf.

⁵⁵ *Id.* at 1–2.

⁵⁶ INTERNATIONAL SHIPPING FACTS AND FIGURES, *supra* note 45, at 22–23.

⁵⁷ *Id.* at 9.

⁵⁸ *Id.* at 11 tbl.2.

fifth largest shipping fleet in the world, behind only the Japanese, Germans, Greeks, and Chinese.⁵⁹

3. *Piracy Also Imposes Significant Human Costs on Its Victims*

In addition to the strategic and commercial costs of piracy, there are also substantial human costs. Most of the available data on the subject relates to piracy off the Somali coast, where researchers estimate that over 4,000 seafarers were subject to assault with firearms and over 1,000 were taken hostage during the course of 2010.⁶⁰ Of those seafarers taken hostage, pirates subjected as many as fifty-nine percent to forms of abuse, including use as human shields and torture.⁶¹ Pirate hostages are at a risk of violence, malnutrition, a lack of access to medicine or healthcare, torture, suicide, and being caught in crossfire between pirates and would-be rescuers.⁶² Following the ordeal of capture and captivity, victims of Somali pirates are at increased risk for substance abuse, depression, and post-traumatic stress disorder.⁶³

Modern piracy occurs with disturbing frequency, creating strategic difficulties for all nations by interrupting world trade. Commercial disruptions caused by piracy unnecessarily raise the cost of global shipping. The human and economic effects of piracy—on both seafarers and land-based civilian populations—demand a response.

B. *The Global Response to Modern Piracy Is Inadequate*

Because piracy is a threat to one of the earth's major commons, international intergovernmental organizations, the United Nations, and nation-states, both in coalitions and individually, have formulated various responses. These responses are generally targeted in one of three areas: (1) reporting and monitoring of pirate activities led by intergovernmental organizations, (2) capacity and institution building in regional states led mostly by the United Nations, and (3) military

⁵⁹ *Id.* at 12 tbls.4 & 5. Between 2010 and 2012, eleven U.S.-flagged ships were attacked by pirates. INT'L CHAMBER OF COMMERCE INT'L MAR. BUREAU, *supra* note 14, at 15–16 tbl.12. Additionally, twenty-two ships owned or managed by U.S. companies were attacked during that time period. *Id.* at 18 tbl.13; INT'L CHAMBER OF COMMERCE INT'L MAR. BUREAU, 2011 REPORT, *supra* note 26, at 18 tbl.13; INT'L CHAMBER OF COMMERCE INT'L MAR. BUREAU, 2010 REPORT, *supra* note 26, at 17–18 tbl.13.

⁶⁰ KAJIA HURLBURT, OCEANS BEYOND PIRACY, THE HUMAN COST OF SOMALI PIRACY 3 (2011), available at http://oceansbeyondpiracy.org/sites/default/files/attachments/View%20Full%20Report_2.pdf.

⁶¹ *Id.* at 8.

⁶² *Id.* at 16–19.

⁶³ *Id.* at 19–20.

operations to protect shipping, disrupt pirate attacks, and rescue hostages led by nation-states or coalitions thereof.

1. Reporting and Monitoring of Pirate Activities Led by Intergovernmental Organizations

The International Chamber of Commerce's International Maritime Bureau ("IMB"), an international business association, and the International Maritime Organization ("IMO"), a specialized United Nations agency, have led civil society efforts against piracy in recent years. Both organizations focus on collecting data on piracy and developing best practices for shipping. The IMB runs the Piracy Reporting Centre, which not only collects and publishes data on the number and location of pirate attacks, but also runs a 24-hour helpline for shipmasters to call if they are under attack.⁶⁴ Calls to this line begin mobilizing a response by international naval forces and broadcast the location of pirates to other ships in the area.⁶⁵

The IMB also facilitated the promulgation of a manual of anti-piracy best practices for shipmasters.⁶⁶ This manual focuses on accurate reporting of the location of the ship and prompt notification to military authorities if pirates are observed.⁶⁷ The manual also recommends basic preventative measures that can be taken onboard ships—such as maintaining vigilant lookouts, enhanced bridge protection, physical barriers, alarms, and citadels—to protect the crew and make a successful pirate attack more difficult.⁶⁸

The IMO's mission is to work for safe, secure, and clean oceans; this includes preventing piracy.⁶⁹ In 2009, the IMO convened a meeting of regional Indian Ocean states to discuss and coordinate anti-piracy efforts.⁷⁰ This meeting adopted the "Djibouti Code of

⁶⁴ *Piracy & Armed Robbery News & Figures*, INT'L CHAMBER OF COMMERCE COMMERCIAL CRIME SERVICES, <http://www.icc-ccs.org/piracy-reporting-centre/piracynewsfigures> (last updated Aug. 18, 2014).

⁶⁵ *See id.*

⁶⁶ *See generally* BMP4: BEST MANAGEMENT PRACTICES FOR PROTECTION AGAINST SOMALIA BASED PIRACY, *supra* note 16 (outlining a series of steps ship owners and masters can take to reduce the risk of a successful pirate attack).

⁶⁷ *Id.* at 11–12, 49–50.

⁶⁸ *Id.* at 23–40.

⁶⁹ INT'L MAR. ORG., IMO—WHAT IT IS 2, 7 (2013), available at http://www.imo.org/About/Documents/What%20it%20is%20Oct%202013_Web.pdf.

⁷⁰ Secretary-General of the Int'l Mar. Org., *Protection of Vital Shipping Lanes: Sub-Regional Meeting to Conclude Agreements on Maritime Security, Piracy and Armed Robbery Against Ships for States from the Western Indian Ocean, Gulf of Aden and Red Sea Areas*, ¶ 4, IMO Doc. C 102/14 (Apr. 3, 2009), available at <http://www.imo.org/OurWork/Security/PIU/Documents/DCoC%20English.pdf>.

Conduct,” applicable to each participating state and concerning the repression of piracy in the region.⁷¹ The signatories agreed to cooperate in the investigation, arrest, and prosecution of pirates.⁷² The regional states party to the Code further agreed to enhance technical cooperation and to establish a regional training center to assist states in implementing the Code, including its provision on the prosecution of pirates.⁷³ After three years, and with the support of a multimillion-dollar trust fund, the signatories have established three information sharing centers, are building a regional antipiracy training center, and have held multiple workshops and training sessions on topics ranging from legal education to database management.⁷⁴

2. *Capacity and Institution Building in Regional States Led Mostly by the United Nations*

Although international civil society engagement in antipiracy efforts is a necessary part of any successful strategy, piracy is also on the agenda of the main United Nations bodies. The Security Council has passed twelve resolutions concerning piracy since 2008, each calling for U.N. engagement in the fight against piracy.⁷⁵ The Security Council has also unanimously called for the effective prosecution of suspected pirates.⁷⁶ With this Security Council mandate, the U.N. Secretary-General has worked to further the aim of prosecuting pi-

⁷¹ *Id.* ¶¶ 7–11. The states that have signed the code of conduct are Djibouti, Ethiopia, Kenya, Madagascar, Maldives, Seychelles, Somalia, the United Republic of Tanzania, Yemen, Comoros, Egypt, Eritrea, Jordan, Mauritius, Mozambique, Oman, Saudi Arabia, South Africa, Sudan, the United Arab Emirates, and France. *Id.* at annex 5.

⁷² *Id.* ¶ 9 (“In particular, the signatories to the Code have agreed to co-operate, in a manner consistent with international law, in: (a) the investigation, arrest and prosecution of persons, who are reasonably suspected of having committed acts of piracy and armed robbery against ships, including those inciting or intentionally facilitating such acts . . .”).

⁷³ *Id.* ¶ 12.

⁷⁴ PROJECT IMPLEMENTATION UNIT, INT’L MAR. ORG., DJIBOUTI CODE OF CONDUCT (2d ed. 2012), available at http://www.imo.org/OurWork/Security/PIU/Documents/PIU_Brochure_2nd_Edition.pdf.

⁷⁵ S.C. Res. 2039, U.N. Doc. S/RES/2039 (Feb. 29, 2012); S.C. Res. 2020, U.N. Doc. S/RES/2020 (Nov. 22, 2011); S.C. Res. 2018, U.N. Doc. S/RES/2018 (Oct. 31, 2011); S.C. Res. 2015, U.N. Doc. S/RES/2015 (Oct. 24, 2011); S.C. Res. 1976, U.N. Doc. S/RES/1976 (Apr. 11, 2011); S.C. Res. 1950, U.N. Doc. S/RES/1950 (Nov. 23, 2010); S.C. Res. 1918, U.N. Doc. S/RES/1918 (Apr. 27, 2010); S.C. Res. 1897, U.N. Doc. S/RES/1897 (Nov. 30, 2009); S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008); S.C. Res. 1846, U.N. Doc. S/RES/1846 (Dec. 2, 2008); S.C. Res. 1838, U.N. Doc. S/RES/1838 (Oct. 7, 2008); S.C. Res. 1816, U.N. Doc. S/RES/1816 (June 2, 2008). All of these resolutions are available at http://www.un.org/Depts/los/piracy/piracy_documents.htm.

⁷⁶ See S.C. Res. 1918, ¶¶ 1–2, U.N. Doc. S/RES/1918 (Apr. 27, 2010) (calling on all states to criminalize piracy and to prosecute pirates).

rates, with a particular focus on those originating in the lawless regions of Somalia.⁷⁷ In 2010, the Secretary-General presented the Security Council with a report detailing seven options available to the international community for the prosecution of suspected pirates.⁷⁸ Although attempts were made at both the state and regional levels to implement several of these options, a subsequent report detailed the significant barriers to implementation, delays, and lack of resources, which diminished the efficacy of the new courts.⁷⁹

3. *Military Operations to Protect Shipping, Disrupt Pirate Attacks, and Rescue Hostages Led by Nation-States*

Although monitoring by non-governmental organizations can help mariners avoid pirate attacks and although efforts by the United Nations to institute national programs to prosecute pirates are making some limited progress, the multinational naval force patrolling the Indian Ocean is perhaps the most effective deterrent to piracy in that region. Naval forces patrol the water of the Gulf of Aden and off the coast of Somalia under the command of the European Union's Operation Atalanta, NATO's Operation Ocean Shield, and a thirty-nation coalition headed by the United States, Combined Task Force 151.⁸⁰

Generally, these naval forces have a combined total of between ten and sixteen vessels on antipiracy duty on any given day.⁸¹ In 2011, the cost of these naval operations was estimated to be at least \$1.27 billion per year, a sizeable financial commitment given the fiscal health of many EU and NATO member-states.⁸² The EU naval force alone has disrupted 129 pirate attacks since 2009.⁸³ Other naval forces have participated in several high-profile hostage rescues such as

⁷⁷ U.N. Secretary-General, *Report on Anti-Piracy Courts*, *supra* note 18, ¶ 1; U.N. Secretary-General, *Report on Prosecutions*, *supra* note 23, at 1–5.

⁷⁸ The general frameworks for prosecution are the establishment of an extraterritorial Somali anti-piracy court, a specialized anti-piracy court in a regional state, a regional anti-piracy tribunal, and an international anti-piracy tribunal. U.N. Secretary-General, *Report on Prosecutions*, *supra* note 23, at 1–5. These options will be discussed in greater detail in Part IV.

⁷⁹ See generally U.N. Secretary-General, *Report on Anti-Piracy Courts*, *supra* note 18 (detailing on a country-by-country basis the system attempted, the results, barriers to success, and future prognosis).

⁸⁰ See *About CMF*, COMBINED MAR. FORCES, <http://combinedmaritimeforces.com/about/> (last visited Sept. 6, 2014) (website of the U.S.-led naval coalition); EU NAVFOR SOM., *supra* note 17; NATO COUNTER-PIRACY OPERATIONS, *supra* note 17.

⁸¹ Bowden & Basnet, *supra* note 54, at 25.

⁸² *Id.* at 25–27.

⁸³ *Key Facts and Figures*, EU NAVFOR SOM., <http://eunavfor.eu/key-facts-and-figures/> (last updated Apr. 9, 2014).

the Navy SEAL rescue of Captain Phillips of the *Maersk Alabama*⁸⁴ and the French commando raid to rescue French hostages kidnapped from their yacht in 2009.⁸⁵

As impressive as these various intergovernmental, United Nations, and military efforts may be, there were still twenty-eight successful hijackings in 2012.⁸⁶ As recently as August 2013, Somali pirates still held fifty-seven hostages.⁸⁷ Pirate attacks continue. The strategic uncertainty, threat to shipping, and costs of military operations are as high as ever. More must be done.

C. *International Law Has Long Criminalized Piracy*

The various states and organizations fighting against piracy have the law on their side. Unlike international efforts against polluters in the climate change debate or hackers in the quest for greater cyber security, international law has long recognized the crime of piracy.⁸⁸ Today, piracy is a crime under customary international law⁸⁹ as well as under the dominant international treaties governing the law of the sea.⁹⁰

Piracy is perhaps the most ancient recognized crime against nations.⁹¹ Because of the particular transnational nature of piracy, customary international law has for centuries provided every state with

⁸⁴ See McCrummen & Tyson, *supra* note 11 (discussing the rescue of Captain Phillips).

⁸⁵ *France Frees Sailors from Pirates*, BBC News (Sept. 16, 2008), <http://news.bbc.co.uk/2/hi/africa/7618142.stm>.

⁸⁶ INT'L CHAMBER OF COMMERCE INT'L MAR. BUREAU, *supra* note 14, at 11.

⁸⁷ Kairis, *supra* note 15, at 2.

⁸⁸ International law is defined in the *Restatement of the Foreign Relations Law of the United States (Third)* as law accepted by the international community of states in the form of customary law or by international agreement. 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(1) (1987). Customary international law “results from a general and consistent practice of states followed by them from a sense of legal obligation.” *Id.* § 102(2). International agreements “create law for the states parties thereto and may lead to the creation of customary international law.” *Id.* § 102(3). Piracy is a crime under *both* customary international law as defined in § 102(2) and under treaty law as defined in § 102(3). See generally *United States v. Hasan*, 747 F. Supp. 2d 599 (E.D. Va. 2010), *aff'd sub nom.* *United States v. Dire*, 680 F.3d 446 (4th Cir. 2012). In a practical sense, the international law pertaining to pirates, both customary and treaty, is codified in the United Nations Convention on the Law of the Sea. United Nations Convention on the Law of the Sea arts. 100 & 101, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS] (entered into force Nov. 16, 1994).

⁸⁹ 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 88, § 404 (providing states with universal jurisdiction to try the crime of piracy as the offense is “recognized by the community of nations as of universal concern”).

⁹⁰ E.g., UNCLOS, *supra* note 88, arts. 100 & 101.

⁹¹ Daniel Pines, *Maritime Piracy: Changes in U.S. Law Needed to Combat This Critical National Security Concern*, 36 SEATTLE U. L. REV. 69, 75 (2012).

jurisdiction to capture, try, and punish pirates.⁹² The treatment under customary international law of pirates as criminals subject to universal jurisdiction is rooted in the view of pirates as *hostis humani generis*—enemies of all mankind.⁹³ Pirates of today, like the pirates of the Roman world or of the eighteenth century, have no loyalty to any particular state and prey indiscriminately on vessels of all nations.⁹⁴

Piracy is also a crime under international treaty law. The Convention on the High Seas of 1958 and its successor treaty, the 1982 United Nations Convention on the Law of the Sea (“UNCLOS”), contain almost identical definitions and prohibitions of piracy.⁹⁵ Article 100 of UNCLOS provides that “[a]ll States shall co-operate to the fullest possible extent in the repression of piracy on the high seas”⁹⁶ The treaty codifies the customary international law approach of criminalizing violence, detention, and depredations for “private ends” by the crew or passengers of a “private ship.”⁹⁷ Every state is empowered to seize pirate ships and every state’s courts are given the power to try pirates seized by that state.⁹⁸ Other treaties also criminalize acts defined by UNCLOS as piracy. These treaties include the 2000 United Nations Convention against Transnational Organized Crime,⁹⁹ the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation,¹⁰⁰ and the 1979 International Convention Against the Taking of Hostages.¹⁰¹

⁹² *Id.* at 88–90 (noting the UNCLOS “permits any state to ‘seize a pirate ship . . . , and arrest the persons and seize the property on board.’ The seizing nation can then decide what penalties to impose on the pirates and what action to take with regard to the seized property.” (footnote omitted) (quoting UNCLOS, *supra* note 88, art. 105)).

⁹³ *Id.* at 88–89; *Hasan*, 747 F. Supp. 2d at 602.

⁹⁴ Pines, *supra* note 91, at 88–90.

⁹⁵ Compare Convention on the High Seas arts. 14 & 15, *opened for signature* Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82 (entered into force Sept. 30, 1962), with UNCLOS, *supra* note 88, arts. 100 & 101. Because of the similarity in the language of the two treaties, only the UNCLOS will be referenced in detail in this Note. The United States has not ratified UNCLOS; however, it has ratified the 1958 Convention. For the purposes of piracy, the United States’ international obligations are the same as if it had ratified UNCLOS.

⁹⁶ UNCLOS, *supra* note 88, art. 100.

⁹⁷ *Id.* art. 101.

⁹⁸ *Id.* art. 105.

⁹⁹ United Nations Convention Against Transnational Organized Crime art. 5, *opened for signature* Nov. 15, 2000, 2225 U.N.T.S. 209 (entered into force Sept. 29, 2003), *available at* <https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>.

¹⁰⁰ United Nations Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation art. 3, *opened for signature* Mar. 10, 1988, 1678 U.N.T.S. 201 (entered into force Mar. 1, 1992), *available at* <http://treaties.un.org/doc/db/Terrorism/Conv8-english.pdf>.

¹⁰¹ United Nations International Convention Against the Taking of Hostages art. 1, *opened*

When states act to fight piracy on the high seas, international law is clear that states have the power to seize both pirates and their vessels and then to prosecute them.¹⁰² Despite empowering states to act, international law still leaves the burden of fighting piracy up to the individual states. Applying the straightforward powers provided by international law to the complexity and fluidity of the twenty-first century is a challenge. Given the capabilities of modern blue water navies, capturing suspected pirates is the easy part. Deciding what to do with them once in custody is far more difficult.

II. THE INADEQUACY OF U.S. ANTIPIRACY LAWS

Given the threat posed by modern maritime piracy, there is a broad recognition in the United States at all levels of government that piracy is a national security threat.¹⁰³ Under both Democratic and Republican presidents and in both the Executive Branch and in Congress, policymakers recognize the necessity of prosecutions to successful antipiracy efforts.¹⁰⁴ However, U.S. antipiracy laws are over 100 years old and have long been the subject of criticism as obsolete and ineffective.¹⁰⁵ The first modern piracy trials in the United States demonstrate the difficulties of prosecuting pirates under current U.S. laws and highlight the need to think about alternative prosecutorial models.¹⁰⁶

A. *The United States Recognizes That Modern Maritime Piracy Is a National Security Threat*

U.S. policymakers are not oblivious to the dangers posed by modern maritime piracy.¹⁰⁷ In announcing the first modern policy for the repression of piracy, President George W. Bush recognized that “[p]iracy threatens U.S. national security interests and the freedom and safety of maritime navigation throughout the world, undermines economic security, and contributes to the destabilization of weak or failed state governance.”¹⁰⁸ The Bush-era piracy policy specifically

for signature Dec. 17, 1979, 1316 U.N.T.S. 205 (entered into force June 3, 1983), available at <http://www.unodc.org/documents/treaties/Special/1979%20International%20Convention%20against%20the%20Taking%20of%20Hostages.pdf>.

¹⁰² See UNCLOS, *supra* note 88, art. 105 (empowering “every State” to seize pirate ships or aircraft).

¹⁰³ See *infra* notes 108–18 and accompanying text.

¹⁰⁴ See *infra* Part II.A.

¹⁰⁵ See *infra* Part II.B.

¹⁰⁶ See *infra* Part II.C.

¹⁰⁷ See *infra* notes 116–18.

¹⁰⁸ Memorandum from President George W. Bush for the Vice President et al. annex B

emphasized the prosecution of pirates¹⁰⁹ and called for a review of existing U.S. law to “enhance” the ability to prosecute pirates in U.S. courts.¹¹⁰

The National Security Council formalized the piracy policy in a “Partnership and Action Plan” (“Action Plan”) released in December of 2008.¹¹¹ One of the three main objectives of the Action Plan is ensuring “that those who commit acts of piracy are held accountable for their actions by facilitating the prosecution of suspected pirates.”¹¹² In the words of the National Security Council, “[e]stablishing an effective consequence delivery system is essential to the success of any counter-piracy operations.”¹¹³ U.S. pro-prosecution initiatives under the Action Plan include encouraging states to invoke jurisdiction over pirates under applicable international treaties and customary international law, signing custody and prosecution agreements with other nations, and capacity-building in regional states.¹¹⁴

Although the Action Plan was issued in the last weeks of the Bush Administration, President Barack Obama’s administration has also acknowledged maritime piracy as a continued national security threat.¹¹⁵ Piracy was mentioned in all of the major national security strategy documents of the Obama Administration, including the National Security Strategy,¹¹⁶ the Quadrennial Defense Review,¹¹⁷ and the inaugural Quadrennial Diplomacy and Development Review.¹¹⁸ Secretary of State Hillary Clinton declared at the beginning of her

(June 14, 2007) (Policy for the Repression of Piracy and Other Criminal Acts of Violence at Sea), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2007/06/20070614-3.html>.

¹⁰⁹ *Id.* (“It is the policy of the United States to repress piracy . . . through the following actions: . . . Ensure that those who commit acts of piracy are held accountable for their actions by facilitating the prosecution of suspected pirates . . . by flag and littoral states and, in appropriate cases, the United States . . .”).

¹¹⁰ *Id.* The policy also orders a task force to “[r]eview existing U.S. laws against or relating to piracy and prepare for consideration such amendments as may be necessary to enhance our ability to prosecute pirates in U.S. Courts.” *Id.*

¹¹¹ U.S. NAT’L SEC. COUNCIL, COUNTERING PIRACY OFF THE HORN OF AFRICA: PARTNERSHIP & ACTION PLAN (2008).

¹¹² *Id.* at 12.

¹¹³ *Id.* at 12–13.

¹¹⁴ *Id.* at 13–14.

¹¹⁵ See *infra* notes 116–18, 121.

¹¹⁶ THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 42 (2010), available at http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

¹¹⁷ U.S. DEP’T OF DEF., QUADRENNIAL DEFENSE REVIEW REPORT 8, 60–61 (2010), available at http://www.defense.gov/qdr/images/QDR_as_of_12Feb10_1000.pdf.

¹¹⁸ U.S. DEP’T OF STATE, LEADING THROUGH CIVILIAN POWER: THE FIRST QUADRENNIAL DIPLOMACY AND DEVELOPMENT REVIEW 122 (2010), available at <http://www.state.gov/documents/organization/153108.pdf>.

tenure that “we may be dealing with a 17th century crime, but we need to bring 21st century solutions to bear.”¹¹⁹ Since then, the State Department, along with other U.S. agencies, has been working—with some success—“to deter piracy through effective apprehension, prosecution and incarceration.”¹²⁰ For several years, under both Republican and Democratic administrations, prosecution has been a crucial component of U.S. antipiracy policies.¹²¹

Congress, too, is engaged with the subject. Congress has requested that the Government Accountability Office (“GAO”) evaluate weaknesses in the Action Plan.¹²² The GAO found that the United States had made some, but not substantial, progress in increasing the prosecutions of pirates.¹²³ Indeed, the GAO found that “[a]gencies face challenges facilitating the prosecution of suspected pirates without defined roles and joint guidance.”¹²⁴ Although sustained commitment by the U.S. government to prosecuting pirates is necessary to establishing a meaningful deterrent, it alone is not sufficient without changes to U.S. law.

These various documents outline a U.S. policy of support, not one of leadership. Although supporting the prosecution of pirates in other countries is progress from the United States’ pre-2007 policy, U.S. support only goes so far in equipping other countries with the navies, prisons, technology, prosecutorial staffs, judges, and courtrooms needed to prosecute pirates on the needed scale. U.S. law itself must

¹¹⁹ *Secretary Clinton Announces Counter-Piracy Initiatives*, DIPNOTE (Apr. 15, 2009), <https://blogs.state.gov/stories/2009/04/15/secretary-clinton-announces-counter-piracy-initiatives>.

¹²⁰ Andrew J. Shapiro, U.S. Assistant Sec’y of State, Bureau of Political-Military Affairs, *Turning the Tide on Somali Piracy*, Remarks to the Atlantic Council (Oct. 26, 2012), *available at* <http://www.state.gov/t/pm/rls/rm/199927.htm>.

¹²¹ U.S. NAT’L SEC. COUNCIL, *supra* note 111, at 3. This plan was issued under President George W. Bush and implementation efforts have been ongoing under President Barack Obama. *See* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-856, *MARITIME SECURITY: ACTIONS NEEDED TO ASSESS AND UPDATE PLAN AND ENHANCE COLLABORATION AMONG PARTNERS INVOLVED IN COUNTERING PIRACY OFF THE HORN OF AFRICA* 1–5 (2010), *available at* <http://www.gao.gov/assets/320/310144.pdf> (reporting to Congress the status of the implementation of the action plan).

¹²² *See* U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 121, at 3; U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-449T, *MARITIME SECURITY: UPDATING U.S. COUNTERPIRACY Action Plan Gains Urgency As Piracy Escalates off the Horn of Africa* 1–2 (2011) [hereinafter U.S. GOV’T ACCOUNTABILITY OFFICE, *UPDATING Action Plan*], *available at* <http://www.gao.gov/new.items/d11449t.pdf>.

¹²³ U.S. GOV’T ACCOUNTABILITY OFFICE, *UPDATING Action Plan*, *supra* note 122, at 5 fig.1.

¹²⁴ *Id.* at 13.

also provide effective provisions for the prosecution of twenty-first-century piracy.

B. U.S. Antipiracy Laws Are Obsolete and Ineffective

Although the United States has had antipiracy laws on the books for hundreds of years, the realities of modern piracy expose flaws in a system originally created to deal with pirates in the age of sail.¹²⁵ Academics have critiqued the laws as being both under- and over-inclusive.¹²⁶ The statutes are under-inclusive in that they fail to criminalize many actions of modern pirates and do not conform to modern law of the sea.¹²⁷ The statutes are over-inclusive in that they criminalize archaic behavior unlikely to occur in the modern era.¹²⁸ Despite these critiques, Congress has failed to amend the antipiracy statutes in any significant manner.¹²⁹

1. America's Nineteenth-Century Antipiracy Laws

Current U.S. antipiracy laws are contained in 18 U.S.C. §§ 1651–61.¹³⁰ The principle antipiracy law is § 1651, which states: “Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.”¹³¹ This provision can be directly traced back to an 1819 Act of Congress¹³² and has survived unaltered since that time, except for the substitution of the penalty of life imprisonment for the death penalty.¹³³ Congress’s power to criminalize piracy stems directly from the U.S. Constitution’s Define and Punish Clause, which gives Congress the power “[t]o define and punish [p]iracies and [f]elonies committed on the high [s]eas, and offenses against the [l]aw of [n]ations.”¹³⁴ The Constitution provides a

¹²⁵ See *infra* Part II.B.1.

¹²⁶ See *infra* Part II.B.2.

¹²⁷ See *infra* notes 157–62 and accompanying text.

¹²⁸ See *infra* notes 136–45 and accompanying text.

¹²⁹ See *infra* Part II.B.3.

¹³⁰ 18 U.S.C. §§ 1651–61 (2012) (defining piracy and criminalizing citizen pirates, alien pirates, arming or serving on privateers, assaulting ships’ commanders, confederating with pirates, plundering distressed vessels, attacking a vessel to plunder it, receiving pirate property, and pirates robbing ashore).

¹³¹ *Id.* § 1651.

¹³² Act of Mar. 3, 1819, ch. 77, 3 Stat. 510; see also *United States v. Hasan*, 747 F. Supp. 2d 599, 612–14 (E.D. Va. 2010) (discussing the nineteenth-century origins of U.S. antipiracy law), *aff’d sub nom.* *United States v. Dire*, 680 F.3d 446 (4th Cir. 2012).

¹³³ *United States v. Dire*, 680 F.3d 446, 452 (4th Cir. 2012); see also, e.g., 18 U.S.C. § 1652.

¹³⁴ U.S. CONST. art. I, § 8, cl. 10.

clear basis for the exercise of universal jurisdiction over piracy, meaning that the United States could properly invoke jurisdiction over pirates outside of the United States even if no United States person, vessel, or property was involved.¹³⁵

In addition to § 1651, other provisions in U.S. law make it a crime for U.S. citizens to act as privateers for other nations,¹³⁶ for aliens to “mak[e] war upon” or “cruis[e] against” the United States,¹³⁷ for U.S. citizens to arm, command, or purchase an interest in “any private vessel of war,”¹³⁸ for any seaman to assault his commander,¹³⁹ for any seaman to “voluntarily” surrender his vessel to pirates,¹⁴⁰ for anyone to “confederate” with pirates,¹⁴¹ for anyone to plunder a distressed vessel,¹⁴² for anyone within the maritime jurisdiction of the United States to attack and plunder vessels,¹⁴³ for anyone to receive pirate property,¹⁴⁴ and for anyone “being engaged in any piratical cruise or enterprise” to rob properties on shore.¹⁴⁵

2. *U.S. Antipiracy Statutes Are Both Over- and Under-Inclusive*

Despite their apparent comprehensiveness, the antipiracy statutes have been criticized as ambiguous, incomplete, and obsolete.¹⁴⁶ Even the editors of the United States Code, who presumably have some general perspective on which portions of U.S. law are most anachronistic, call for updating the laws.¹⁴⁷ They write, rather emphatically: “In the light of far-reaching developments in the field of international law and foreign relations, the law of piracy is deemed to require a fundamental reconsideration . . . perhaps resulting in drastic

¹³⁵ See generally Eugene Kontorovich, *The “Define and Punish” Clause and the Limits of Universal Jurisdiction*, 103 NW. U. L. REV. 149 (2009) (examining the history behind the drafting, early interpretation, and use of the clause and defining limits on Congress’s ability to exercise universal jurisdiction under the clause).

¹³⁶ 18 U.S.C. § 1652.

¹³⁷ *Id.* § 1653.

¹³⁸ *Id.* § 1654.

¹³⁹ *Id.* § 1655.

¹⁴⁰ *Id.* § 1656.

¹⁴¹ *Id.* § 1657.

¹⁴² *Id.* § 1658.

¹⁴³ *Id.* § 1659.

¹⁴⁴ *Id.* § 1660.

¹⁴⁵ *Id.* § 1661.

¹⁴⁶ See, e.g., Samuel Pyeatt Menefee, “*Yo Heave Ho!*”: *Updating America’s Piracy Laws*, 21 CAL. W. INT’L L.J. 151, 169 (1990) (critiquing current U.S. antipiracy laws as antiquated and ambiguous).

¹⁴⁷ 18 U.S.C. ch. 81 note (2012) (Historical and Revision Notes).

changes”¹⁴⁸ The editors recommend that at “some opportune time in the near future” the laws relating to piracy be restated “in accordance with the needs of the times.”¹⁴⁹

Some of the more major structural problems identified include challenges of definitions (e.g., “private ends” or “high seas”), of spatial jurisdiction, of jurisdiction over individuals, and of jurisdiction over specific acts.¹⁵⁰ The statutes both criminalize anachronistic behavior *and* fail to criminalize modern piratical behavior.¹⁵¹

Certain provisions are over-inclusive in that they criminalize archaic behavior. For example, several sections of the statute are directed against U.S. citizens becoming privateers¹⁵² or arming or serving on privateers.¹⁵³ Privateering was effectively abolished more than 150 years ago.¹⁵⁴ U.S. antipiracy law also provides that anyone “engaged in any piratical cruise” who lands on shore and commits robbery is to be imprisoned for life.¹⁵⁵ This provision, too, is irrelevant to modern circumstances.¹⁵⁶

In addition to being over-inclusive, the piracy statutes are also under-inclusive. The distinctions the statutes draw—between citizens and aliens, between the high seas and other areas, between murder and robbery and other violent acts—result in a matrix with serious gaps in coverage.¹⁵⁷ For example, the statutes criminalize robbery and murder, but not kidnapping or torture.¹⁵⁸ They make it a crime for a crew to assault a ship’s commander or to attempt to convince the commander to become a pirate, but they do not criminalize similar behavior by passengers.¹⁵⁹ The statutes do not address acts of piracy with

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ See Menefee, *supra* note 146, at 169.

¹⁵¹ See *id.*

¹⁵² 18 U.S.C. § 1652 (criminalizing murder, robbery, or any act of hostility against the United States “under color of any commission from any foreign prince”).

¹⁵³ 18 U.S.C. § 1654 (making it illegal for U.S. citizens to “arm . . . any private vessel of war or privateer . . . to cruise or commit hostilities upon the citizens of the United States”; making it illegal to take command of or purchase an interest in such a vessel).

¹⁵⁴ Paris Declaration Respecting Maritime Law, Apr. 16, 1856, *reprinted in* THE LAW OF NAVAL WARFARE: A COLLECTION OF AGREEMENTS AND DOCUMENTS WITH COMMENTARIES 61, 64 (N. Ronzitti ed. 1988).

¹⁵⁵ 18 U.S.C. § 1661.

¹⁵⁶ Menefee, *supra* note 146, at 169.

¹⁵⁷ See, e.g., *id.* at 164 (noting problems inherent in limiting the statute’s protection to U.S. citizens and other problems of defining jurisdiction given the evolution in the law of maritime boundaries).

¹⁵⁸ 18 U.S.C. § 1652; Menefee, *supra* note 146, at 164.

¹⁵⁹ 18 U.S.C. §§ 1655, 1657; Menefee, *supra* note 146, at 167.

ideological or political motivations or the problems inherent in dealing with non-state or stateless actors.¹⁶⁰ The statutes also fail to address attempted acts of piracy or accessories to piracy.¹⁶¹ Despite these critiques and the marked increase in piracy over the past ten years, Congress has yet to remedy the flaws in the antipiracy statutes.

Others seeking to modernize U.S. antipiracy statutes have suggested that Congress enact a “material-support-to-piracy” statute, which would target the financiers of pirate expeditions and those who provide the pirates with their supplies.¹⁶² They also recommend that the United States adopt a series of federal guidelines that would permit and govern the use of private armed guards on merchant ships.¹⁶³

3. *Congressional Efforts to Amend the Antipiracy Statutes Have Been Limited in Scope and Unsuccessful*

The only recent effort by Congress to change antipiracy statutes was intended to promote the use of armed guards on merchant ships. In 2011, the House of Representatives introduced a bill that would change the definition of piracy in the statutes to conform to that in the UNCLOS, make piracy a crime punishable by death, and establish a training program for mariners in the use of force against pirates.¹⁶⁴ This bill addressed only one of the definitional problems in the antipiracy statutes, leaving much to be desired, and the only portions that eventually became law were limited to the establishment of a training program for mariners and a piracy-reporting requirement for the Secretary of Defense.¹⁶⁵

As these laws remain in force, however flawed they may be, courts must still apply them to pirates charged under them in the United States. In recent years, federal courts have struggled to interpret these statutes anew in order to conduct the trials of Somali pirates captured after attacking U.S. naval vessels.

¹⁶⁰ Menefee, *supra* note 146, at 164–65.

¹⁶¹ *Id.* at 175–76.

¹⁶² See, e.g., Pines, *supra* note 91, at 119–20 (proposing the adoption of a statute criminalizing material support for piracy).

¹⁶³ *Id.* at 122–24.

¹⁶⁴ Piracy Suppression Act, H.R. 2839, 112th Cong. §§ 2, 4 (2011).

¹⁶⁵ Coast Guard and Maritime Transportation Act of 2012, Pub. L. No. 112–213, §§ 501–504, 126 Stat. 1540, 1574–76.

C. *Current U.S. Practice Is to Prosecute Pirates in the Federal Courts*

For almost 150 years, there were no trials for piracy in the United States because the U.S. Navy rarely encountered pirates.¹⁶⁶ When the U.S. Navy deployed against Somali pirates in 2008, however, the United States faced the question of what to do with suspected pirates, giving rise to the first pirate trials in the United States of the modern era. Two cases in 2010 in the Eastern District of Virginia, *United States v. Said*¹⁶⁷ and *United States v. Hasan*,¹⁶⁸ represent the first attempts to apply the archaic U.S. antipiracy statutes to the reality of modern maritime piracy.

Given the ambiguous language of the statutes and the lack of recent judicial opinions interpreting them, the judges in the two cases came to opposite conclusions about what, exactly, constituted piracy. The *Hasan* court used UNCLOS to define piracy.¹⁶⁹ On the other hand, the *Said* court used U.S. common law to define piracy as robbery upon the sea.¹⁷⁰ The Fourth Circuit resolved the issue in favor of the *Hasan* court, overruling *Said*.¹⁷¹ These decisions give insight into the legal challenges inherent in prosecuting modern piracy.

1. *United States v. Said: Defining Piracy as Robbery upon the Sea*

On April 10, 2010, a skiff came alongside the amphibious landing ship *U.S.S. Ashland* in the Gulf of Aden and opened fire.¹⁷² The naval

¹⁶⁶ Before the recent trials of Somali pirates, the last piracy trial was held in New York in 1861 for the crew of a Confederate privateer. Mark Tempest, *The Last American Pirate Trial?*, U.S. NAVAL INST. BLOG (Apr. 18, 2009), <http://blog.usni.org/2009/04/18/the-last-american-pirate-trial>.

¹⁶⁷ *United States v. Said*, 757 F. Supp. 2d 554 (E.D. Va. 2010), *vacated*, 680 F.3d 374 (4th Cir. 2012).

¹⁶⁸ *United States v. Hasan*, 747 F. Supp. 2d 599 (E.D. Va. 2010), *aff'd sub nom. United States v. Dire*, 680 F.3d 446 (4th Cir. 2012). The trials occur in Virginia because it is the home of Naval Station Norfolk where U.S. naval vessels capturing pirates are based. See *Major Achievements in the Courtroom: Piracy Cases*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/usao/briefing_room/ns/mca_piracy.html (last visited Sept. 6, 2014) (summarizing completed and ongoing piracy prosecutions in the United States).

¹⁶⁹ *Hasan*, 747 F. Supp. 2d at 634–35. UNCLOS codifies the customary international law approach to piracy by criminalizing violence, detention, and depredations for “private ends” by the crew or passengers of a “private ship.” UNCLOS, *supra* note 88, art. 101.

¹⁷⁰ *Said*, 757 F. Supp. 2d at 559–61.

¹⁷¹ *United States v. Dire*, 680 F.3d 446, 468–469 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 982 (2013); see also *United States v. Said*, 680 F.3d 374, 375 (4th Cir. 2012), *rev'g United States v. Said*, 757 F. Supp. 2d 554 (E.D. Va. 2010).

¹⁷² *Said*, 757 F. Supp. 2d at 556–57.

vessel returned fire, sinking the skiff.¹⁷³ The crew of the *Ashland* then took the occupants of the skiff into custody.¹⁷⁴ The U.S. government prosecuted the pirates under 18 U.S.C. § 1651.¹⁷⁵ The court was called upon to define what piracy meant under the statute and decided that an 1820 case, *United States v. Smith*,¹⁷⁶ governed.¹⁷⁷ In applying the *Smith* holding, which defined piracy according to the then-prevailing customary international law,¹⁷⁸ the district court in *Said* defined piracy as “robbery on the sea.”¹⁷⁹ Because the defendants never robbed the *Ashland*, and the law does not criminalize attempted piracy, the court dismissed the indictment under § 1651.¹⁸⁰

2. *United States v. Hasan: Adopting the UNCLOS Definition of Piracy as Binding Customary International Law*

Less than three months after the *Said* decision, another district court in the Eastern District of Virginia came to the opposite conclusion about the meaning of piracy under § 1651.¹⁸¹ The defendants in *Hasan* approached the Navy frigate *U.S.S. Nicholas*, believing her to be a merchant ship, and opened fire with rocket propelled grenades and AK-47 assault rifles.¹⁸² After returning fire and a pursuit, the Navy took the assailants into custody.¹⁸³ When called upon to define piracy, the district court concluded that the “law of nations” language of § 1651 “connotes a changing body of law, and that the definition of piracy . . . must therefore be assessed according to the international consensus definition at the time of the alleged offense.”¹⁸⁴ The court did not feel bound by the definition given in *Smith* almost two centuries before.¹⁸⁵ After examining the High Seas Convention and UNCLOS, international custom, judicial decisions, and scholarly writings,

¹⁷³ *Id.* at 557.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820).

¹⁷⁷ *Said*, 757 F. Supp. 2d at 559; *see also Smith*, 18 U.S. at 155 (defining piracy).

¹⁷⁸ *See Smith*, 18 U.S. at 162 (“We have, therefore, no hesitation in declaring, that piracy, by the law of nations, is robbery upon the sea . . .”).

¹⁷⁹ *Said*, 757 F. Supp. 2d at 559, 562.

¹⁸⁰ *Id.* at 567.

¹⁸¹ *See generally* *United States v. Hasan*, 747 F. Supp. 2d 599 (E.D. Va. 2010), *aff’d sub nom.* *United States v. Dire*, 680 F.3d 446 (4th Cir. 2012) (determining that the law against piracy incorporated customary international law and that the UNCLOS defined customary international law on piracy).

¹⁸² *Id.* at 601.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 623.

¹⁸⁵ *Id.*

the court concluded that Article 101 of UNCLOS “reflects the modern customary international law definition of general piracy, which is applicable to 18 U.S.C. § 1651.”¹⁸⁶ The district court in this case concluded that because Article 101 of UNCLOS includes acts of violence generally, as opposed to robbery only, § 1651 was properly invoked to prosecute the pirates who attacked the *Nicholas*.¹⁸⁷

3. *The Fourth Circuit Interpretation*

Given the diametrically opposed conclusions of the district courts in *Said* and *Hasan*, the Fourth Circuit accepted appeals and decided the issue. The Fourth Circuit recapitulated the district court’s opinion in *Hasan* at length and with approval.¹⁸⁸ The court made two key holdings confirming the *Hasan* court’s expansive reading of § 1651. First, the court rejected the contention that *Smith* dictated that piracy was limited to robbery upon the sea.¹⁸⁹ Equating piracy with robbery upon the sea would render U.S. law “incongruous with the modern law of nations and prevent us from exercising universal jurisdiction in piracy cases.”¹⁹⁰ Second, the court held that the definition of piracy under the law of nations “had for decades encompassed . . . violent conduct,” like the attack on the *Nicholas*.¹⁹¹ Although the Supreme Court denied certiorari¹⁹² and the Fourth Circuit decision is not binding on the other circuits, for now the crime of piracy under 18 U.S.C. § 1651 is defined by Article 101 of UNCLOS.

Although the Fourth Circuit decision provides one modern interpretation of § 1651, the court cannot fix remaining problems with the other antipiracy provisions, §§ 1652–1661. The court’s holding was based on a specific set of facts—a pirate attack on an American warship—and cannot be understood to address the jurisdictional and definitional problems posed by other factual scenarios involving pirates, including, for example: pirates intercepted by the United States while attacking a foreign vessel; pirates intercepted by a foreign navy while attacking an American vessel; pirates intercepted by a foreign navy while attacking a foreign-flagged, but American-owned, vessel; and pirates intercepted by the United States while attacking a foreign vessel

¹⁸⁶ *Hasan*, 747 F. Supp. 2d at 637.

¹⁸⁷ *See id.* at 641–42.

¹⁸⁸ *See* *United States v. Dire*, 680 F.3d 446, 454–67 (4th Cir. 2012) (“Simply put, we agree with the conception of the law outlined by the court below.”).

¹⁸⁹ *Id.* at 468–69.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 469.

¹⁹² *Said v. United States*, 133 S. Ct. 982 (2013) (denying certiorari).

with American crew. And what if these attacks occur not on the “high seas” but rather in Somalia’s or a third state’s exclusive economic zone or territorial waters? Answers to these questions can only be had through statutory amendment.

Furthermore, the Fourth Circuit decision does not solve the practical problems faced by naval officers like the captain of the *U.S.S. Farragut*.¹⁹³ Notwithstanding the Fourth Circuit’s decision in *Dire*, pirates must still be intercepted on the high seas by the U.S. Navy, detained, transferred to federal court in the United States, held in federal prison during trial, tried and sentenced, and finally must serve a sentence in U.S. federal penitentiaries. Given the analogies between pirates and terrorists, discussed *infra* in Part III.B, the efforts of the federal courts should be augmented to allow pirates to be tried in the judicial system created especially to deal with terrorists captured on the battlefield.

III. EMPOWERING MILITARY COMMISSIONS TO TRY PIRATES

Although trials for piracy are ongoing in the federal courts,¹⁹⁴ there are far too few prosecutions by American authorities¹⁹⁵ given the scale of modern maritime piracy¹⁹⁶ and America’s position as the world’s leading naval power. In the past, when confronted with piracy epidemics, nations have resorted to specialized antipiracy tribunals.¹⁹⁷ The United States has already established specialized courts to try non-state terrorism suspects—the military commissions—and this sys-

¹⁹³ See *supra* Introduction.

¹⁹⁴ In April 2012, Mohammad Saaili Shibin, a Somali, was found guilty of piracy for his role as the hostage negotiator in the 2011 hijacking of the *SV Quest* in which four Americans died. *Somali Mohammad Shibin Guilty over Quest Hijacking*, BBC NEWS (Apr. 30, 2012), <http://www.bbc.co.uk/news/world-us-canada-17875710>. Although ultimately plagued by difficulties, a U.S. court allowed a prosecution for aiding and abetting piracy to go forward in the first case where U.S. prosecutors tried to exercise truly universal jurisdiction over piracy (i.e., where there was no nexus between the alleged acts and the United States). See *United States v. Ali*, 885 F. Supp. 2d 17, 45 (D.D.C.), *vacated in part*, 885 F. Supp. 2d 55 (D.D.C. 2012), *aff’d in part, rev’d in part*, 718 F.3d 929 (D.C. Cir. 2013).

¹⁹⁵ See Tom Syring, *A Pirate and a Refugee: Reservations and Responses in the Fight Against Piracy*, 17 ILSA J. INT’L & COMP. L. 437, 449 (2011) (“Overall, piracy prosecutions in countries other than Kenya have thus far been almost absent.”).

¹⁹⁶ *Id.* at 438–39.

¹⁹⁷ See, e.g., An Act for the More Effectual Suppression of Piracy, 11 Will. 3, c. 7, § 1 (1698), reprinted in 7 THE STATUTES OF THE REALM 590, 591 (1820) (authorizing colonial courts with special jurisdiction to try pirates). For a modern example, see the specialized tribunal established in Kenya described in U.N. Secretary-General, *Report on Anti-Piracy Courts*, *supra* note 18, ¶¶ 58–80.

tem can be readily adapted to provide for the trial of suspected pirates captured by the U.S. Navy.¹⁹⁸

A. *Proposed Statutory Language and Illustration*

Congress should amend the Military Commissions Act of 2009¹⁹⁹ by (1) defining the term “suspected pirate,” (2) by making suspected pirates subject to trial by military commission, and (3) by defining the offense of piracy in conformity with Article 101 of UNCLOS.²⁰⁰

These specific provisions serve two main purposes. First, they bring pirates under the military commission legal regime, allowing prosecutors to take advantage of specialized preexisting judicial infrastructure. This makes the development of separate rules of procedure or of evidence for specialized piracy tribunals unnecessary, as those already in use in the military commissions would apply. Second, the proposed language defines piracy in a way that is consistent with international law and that removes the anachronisms and definitional problems in the current U.S. antipiracy laws.²⁰¹ Under the proposed regime, the nationality of the victim or of the pirate would not matter, the spatial scope of the law is clear, and the types of acts criminalized expand beyond robbery and murder to include all “illegal acts of violence.” The proposed statutory changes take advantage of an extant, specialized judicial system and they resolve the many ambiguities in current U.S. law.

To understand how these provisions might work in practice, if accompanied by the necessary regulations and funding, return to the episode that opened this Note: the attack on the *MV Evita* and the capture of eleven pirates by the *U.S.S. Farragut*.²⁰² Under these new provisions, the pirates could be arrested and charged with attempted piracy and held in the *Farragut*’s brig. Perhaps naval lawyers would take depositions of the pilots of the naval aircraft and the crew of the *MV Evita*. The pirates could then be transferred from the *Farragut* to U.S. military installations in the region, for example in Bahrain or Diego Garcia. At these installations, a military commission could be convened and a trial might begin, or alternatively, from these points the pirates might be transferred to the naval base at Guantanamo Bay for trial at the military commission facilities there.

¹⁹⁸ See *infra* Part III.B.

¹⁹⁹ Military Commissions Act of 2009, 10 U.S.C. §§ 948a–950t (2012).

²⁰⁰ See *infra* Appendix. See also UNCLOS, *supra* note 88.

²⁰¹ See *supra* Part II.B.

²⁰² See *supra* Introduction.

Under these proposed provisions, read in conjunction with the rest of the Military Commissions Act of 2009, the captain of the *Farragut* in the Indian Ocean, when confronted by pirates, would know exactly which law applied. The captain of the *Farragut* would be able to take the pirates into custody and, with the assistance of his onboard JAG officer, would be able to preserve evidence and make preparations for a transfer of the pirates to the relevant detention facilities. Under the proposed scheme, there would be no reason for the interdicting naval officer to release captured pirates.

B. Military Commissions Are Already Structured to Prosecute Violent Non-State Actors

Giving military commissions jurisdiction over piracy fits well with the practical goals and structure of the courts. First, military commissions are designed to be forums in which non-state actors can be prosecuted.²⁰³ Second, the crime of piracy bears significant relationship to many of the crimes already chargeable before a military commission.²⁰⁴ Third, the military commissions contain adequate procedural safeguards that would ensure suspected pirates a fair trial.²⁰⁵

1. Military Commissions Are Designed to Be Forums in Which Non-State Actors Can Be Prosecuted

The stated purpose of military commissions is to try “unprivileged enemy belligerents for violations of the law of war.”²⁰⁶ In other words, the law is designed to cover aliens who attack the United States outside of the context of nation-to-nation military conflicts.²⁰⁷ Pirates, too, are non-state actors. Whereas terrorists commit acts of political or ideological violence, pirates commit acts of violence for “private ends,” namely pecuniary gain.²⁰⁸ Difficulties arise because of the legal status of conflicts between states and armed non-state

²⁰³ 10 U.S.C. § 948b.

²⁰⁴ See generally *id.* § 950t (making the crimes of attacking civilians, pillaging, taking hostages, and hijacking vessels subject to trial by military commission).

²⁰⁵ See generally *id.* § 949a (these procedural safeguards include the right to cross-examine witnesses, to present witnesses in defense, and to counsel, among others).

²⁰⁶ *Id.* § 948b(a).

²⁰⁷ See generally William K. Lietzau, *Military Commissions: Old Laws for New Wars*, in INTERNATIONAL LAW CHALLENGES: HOMELAND SECURITY AND COMBATING TERRORISM, 255 (Thomas McK. Sparks & Glenn M. Sulmasy eds., Int'l Law Studies vol. 81, 2006) (providing a summary of the use of military commissions since September 11th and highlighting the particular challenges posed by prosecuting terrorists and how the military commissions system addresses those problems).

²⁰⁸ See UNCLOS, *supra* note 88, art. 101 (defining piracy).

groups.²⁰⁹ Using established antiterror courts to try pirates builds on a framework designed to meet those very challenges.

2. *The Crime of Piracy Is Similar to Many of the Crimes Already Chargeable Before a Military Commission*

In addition to similarities between terror networks and pirate operations, the military commissions are already empowered to try cases involving many crimes which may be incidental to modern piracy and thus would close some of the gaps in coverage that weaken the traditional antipiracy statutes.²¹⁰ Although piracy is not a crime currently covered by the military commissions law, the commissions are empowered to try “unprivileged enemy belligerents” for murder of protected persons, attacks on civilians, civilian objects, or civilian property, pillaging, taking hostages, using civilians as human shields, torture, cruel or inhuman treatment, and the hijacking of civilian vessels or aircraft.²¹¹ As discussed in Part I, pirates commit many of these same crimes against those they attack or take hostage for ransom.

The military commissions are also able to prosecute those who are accessories after the fact²¹² and those who attempt to commit any of the enumerated offenses.²¹³ Including piracy as a crime within the jurisdiction of military commissions would broaden the reach of pirate prosecutions from 18 U.S.C. §§ 1651–1661 and would criminalize the methods used by modern pirates.

3. *Military Commissions Now Contain Adequate Procedural Safeguards*

Finally, if pirates were to be tried before military commissions, they would receive adequate procedural safeguards of their rights.²¹⁴ Among other rights, defendants before military commissions have the right to counsel, the right against self-incrimination, the right to present evidence and witnesses, the right to suppress evidence that is not reliable or probative, and the right to appeal their conviction.²¹⁵

²⁰⁹ See generally Eugene Kontorovich, “A Guantánamo on the Sea”: *The Difficulty of Prosecuting Pirates and Terrorists*, 98 CAL. L. REV. 243 (2010) (providing a broad discussion of the similarities between pirates and terrorists and the difficulties of prosecuting them).

²¹⁰ See 18 U.S.C. §§ 1651–1661.

²¹¹ 10 U.S.C. § 950t(1)–(5), (7), (9), (11)–(12), (23).

²¹² *Id.* § 950r.

²¹³ *Id.* § 950t(28).

²¹⁴ Issues of constitutional law or international human rights law relating to the legality of military commissions or the procedures to be used therein are beyond the scope of this Note.

²¹⁵ See generally 10 U.S.C. § 949a (providing rules of trial procedure in military commissions).

Given the particular challenges of apprehension on the high seas, the transnational criminal nature of piracy itself, and the status of pirates as armed private non-state actors, the procedural safeguards that would apply to pirates in a military commission are comparable to that of a criminal proceeding in federal court; pirates would be entitled to the hallmarks of a fair trial, such as a right to counsel and a right against self-incrimination.²¹⁶

C. Specialized Quasi-Military Tribunals to Try Pirates Have Worked in the Past

The last time the world faced pirates on a wide scale, the winning strategy incorporated *in situ* trials in specialized courts with military or quasi-military judges.²¹⁷ At the turn of the seventeenth century, Great Britain, then the world's leading naval power, also turned to specialized antipiracy tribunals similar to those proposed in this Note.²¹⁸ In the fight against piracy in earlier eras, states relied on a two-pronged strategy consisting of effective courts and robust naval deployments.²¹⁹ The British Act for the More Effectual Suppression of Piracy, passed in 1700, is widely credited with enabling the British Navy to end widespread piracy by the end of the eighteenth century.²²⁰

The Act shares many of the features of the modern U.S. military commission system.²²¹ The Act provided for trials to be conducted by a seven-person court whose members could be composed of English governors, lieutenant governors, colonial councilors, and naval com-

²¹⁶ For a detailed comparison of the rights in military commissions versus those in federal criminal court, see JENNIFER K. ELSEA, CONG. RESEARCH SERV., R40932, COMPARISON OF RIGHTS IN MILITARY COMMISSION TRIALS AND TRIALS IN FEDERAL CRIMINAL COURT 13–27 (2014), available at <http://www.fas.org/sgp/crs/natsec/R40932.pdf>.

²¹⁷ See Peter T. Leeson, *Rationality, Pirates, and the Law: A Retrospective*, 59 AM. U. L. REV. 1219, 1222–25 (2010) (discussing Great Britain's Act for the More Effectual Suppression of Piracy, passed in 1700, which allowed pirates to be tried on location in vice-admiralty courts).

²¹⁸ See *id.*

²¹⁹ Max Boot, *Pirates, Then and Now: How Piracy Was Defeated in the Past and Can Be Again*, FOREIGN AFF., July–Aug. 2009, at 94, 99–100 (2009). The naval expansion noted by Boot—Great Britain deployed only two ships against pirates in 1670, but deployed twenty-four of them in 1700, *id.* at 100—is analogous to the expansion of Western antipiracy patrols off Somalia led by NATO and the EU. See *supra* Part I.B.3.

²²⁰ See Peter T. Leeson, *The Invisible Hook: The Law and Economics of Pirate Tolerance*, 4 N.Y.U. J.L. & LIBERTY 139, 168 (2009) (observing that passage of the Act “corresponded with the beginning of the precipitous decline of the Anglo-American pirate population”); see also Leeson, *supra* note 217, at 1222–25 (examining the effect of antipiracy laws in the eighteenth century and the response by pirates to the new legal regime).

²²¹ An Act for the More Effectual Suppression of Piracy, 11 Will. 3, c. 7 (1698), reprinted in 7 THE STATUTES OF THE REALM 590–94 (1820).

manders.²²² In other words, military officers and colonial officials were the judges and juries. The courts could be assembled “in any Place at sea or upon the Land,”²²³ a significant departure from prior practice which had required pirates to be transported to London to stand trial.²²⁴ The *in situ* courts were empowered by the Act to issue warrants, subpoena witnesses, take testimony under oath, and to keep an official record of their proceedings.²²⁵ A suspected pirate also had rights including those to be present in court, to hear witnesses against him, to cross-examine those witnesses, to call his own witnesses, to testify on his own behalf, and to make closing arguments to the court.²²⁶ Judgment and sentence were to be determined by a plurality of the court.²²⁷

The colonial courts with authority to try pirates established by the Act “proved to be a tremendous boon to the government’s assault on sea robbers.”²²⁸ The Act was renewed and eventually made permanent.²²⁹ The United States has already adopted the military element of the successful eighteenth century British strategy. Adopting the proven legal framework, with appropriate modernization, is the missing element in the United States’ antipiracy efforts.

In summary, the statutory changes needed to bring piracy under the jurisdiction of military commissions are straightforward and commonsense. The military commissions are a specialized institution originally developed to deal with terrorism but are uniquely well suited to tackle the challenges of prosecuting pirates because they are equipped to deal with non-state actors and with battlefield realities. The commissions already have jurisdiction over many crimes incidental to piracy and can be used to close many of the gaps in the coverage of the current antipiracy statutes. Furthermore, specialized military courts have a proven track record, dating from the eighteenth century British antipiracy campaigns, in providing effective forums for the prosecution of pirates. An effective prosecutorial framework, like that proposed here and previously used by the British, is key to deterring modern-day piracy.

²²² *Id.* § 2.

²²³ *Id.* § 1.

²²⁴ Leeson, *supra* note 217, at 1220–21.

²²⁵ An Act for the More Effectual Suppression of Piracy §§ 4, 6.

²²⁶ *Id.* § 5.

²²⁷ *Id.*

²²⁸ Leeson, *supra* note 217, at 1223.

²²⁹ *Id.*

IV. COUNTERARGUMENTS

Two main objections may caution against the implementation of this proposal. First, many nations and organizations are already working on the problem of piracy prosecution and introducing U.S. military commissions into the mix might very well disrupt or distract from those other efforts. Second, if the objective is an increased volume of pirate trials to deter piracy, then the military commissions might not be the most effective U.S. forum because they have conducted notably few trials since their inception. The proposed statutory changes, however, should nonetheless be enacted given the dangers posed by modern piracy and the potential benefits of a more robust U.S. prosecutorial regime

A. *U.S. Prosecution of Pirates Before Military Commissions Will Compliment, Not Hinder Ongoing International Efforts*

Based on a mandate from the Security Council, the U.N. Secretary-General has worked to further the aim of prosecuting pirates, with a particular focus on those originating in the lawless regions of Somalia.²³⁰ In 2010, the Secretary-General presented the Security Council with a report detailing seven specific options for the prosecution of suspected pirates.²³¹ The broad frameworks for prosecution outlined in the report are the establishment of an extraterritorial Somali antipiracy court, a specialized antipiracy court in a regional state, a regional antipiracy tribunal, and an international antipiracy tribunal.²³²

The establishment of an extraterritorial Somali antipiracy court was originally considered the most promising proposal and was the subject of an extensive U.N. report in 2011.²³³ Opposition by Somali authorities to the establishment of a tribunal outside of Somalia and the continued nonfunctioning of the domestic legal system in Somalia, however, rendered Somali prosecutions of suspected Somali pirates in

²³⁰ See generally U.N. Secretary-General, *Report on Anti-Piracy Courts*, *supra* note 18; U.N. Secretary-General, *Report on Prosecutions*, *supra* note 23; U.N. Secretary-General, *Letter Dated 24 January 2011 from the Secretary-General to the President of the Security Council*, annex, U.N. Doc. S/2011/30 (Jan. 25, 2011) [hereinafter U.N. Secretary-General, *Lang Report*], available at http://www.un.org/Depts/los/piracy/piracy_documents.htm (containing a report from Jack Lang, Special Advisor to the Secretary-General on Legal Issues Relating to Piracy off the Coast of Somalia).

²³¹ U.N. Secretary-General, *Report on Prosecutions*, *supra* note 23, at 1–5.

²³² *Id.*

²³³ U.N. Secretary-General, *Lang Report*, *supra* note 230, at annex ¶¶ 101–41.

a Somali court impossible.²³⁴ For the time being, the United Nations' efforts to further piracy prosecutions are focused on capacity building in the national courts of the region.²³⁵ These efforts include everything from the building of police stations, courtrooms, and prisons, to the provision of computers and cars, to the mentoring of local prosecutors and investigators in legal and practical issues peculiar to the crime of piracy.²³⁶

Even with the commitment of all the resources recommended by the Secretary-General and adhering closely to his recommended timeline, however, many of the regional states would still lack the capacity to prosecute piracy for *two years*.²³⁷ Given the dearth of regional capacity and the timeline needed for capacity building, more states need to prosecute pirates, not fewer. In 2012, twenty states had ongoing piracy prosecutions, yet the U.N. still sought to increase the number of states participating in piracy prosecutions.²³⁸ Rather than hindering the ongoing efforts of the international community with respect to piracy prosecutions, the establishment of U.S. military commissions to try pirates could serve as a welcome temporary mechanism to bridge the gap while regional states continue to build their own judicial capabilities and domestic legal infrastructures.

B. Prosecuting Pirates Before Military Commissions Would Augment, Not Replace Prosecution of Pirates before U.S. Civilian Courts

The argument presented by this Note in favor of allowing military commissions jurisdiction to try pirates is that more prosecutions would

²³⁴ U.N. Secretary-General, *Report on Anti-Piracy Courts*, *supra* note 18, ¶ 38.

²³⁵ See, e.g., U.N. Secretary-General, *Report on Anti-Piracy Courts*, *supra* note 18, ¶¶ 60–61. Kenya is perhaps the success story of these efforts. With the help of the United Nations and the European Union, Kenya established specialized piracy courts and convicted fifty pirates in seven separate piracy cases. See generally James Thuo Gathii, *Kenya's Piracy Prosecutions*, 104 AM. J. INT'L. L. 416 (2010) (outlining the history, scope, and current status of piracy prosecutions in Kenya).

²³⁶ See generally U.N. Secretary-General, *Report on Anti-Piracy Courts*, *supra* note 18 (detailing U.N. efforts in the courts of Somalia, Puntland, Somaliland, the Seychelles, Kenya, Mauritius, and Tanzania).

²³⁷ *Id.* ¶¶ 23, 31, 54, 73, 87, 92, 94, 106.

²³⁸ *Id.* ¶ 10; see also U.N. Secretary-General, *Letter Dated 23 March 2012 from the Secretary-General to the President of the Security Council*, annex, U.N. Doc. S/2012/177 (Mar. 26, 2012), available at http://www.un.org/ga/search/view_doc.asp?symbol=S/2012/177 (summarizing the measures taken by forty-two states to criminalize piracy under their domestic law, to prosecute suspected pirates, and to imprison convicted pirates).

thereby be encouraged.²³⁹ It is, therefore, of some concern that military commissions have conducted remarkably few trials since their establishment.²⁴⁰ The 2009 changes to the Military Commissions Act,²⁴¹ however, substantially increased the procedural safeguards afforded to defendants. In addition, military commissions will also continue, as a practical matter, to operate for the foreseeable future.²⁴² Giving the commissions the power to hear piracy cases could complement efforts to prosecute pirates in U.S. civilian courts.

The military commissions are here to stay, and they are specifically designed to accommodate battlefield (or, in the case of piracy, high seas) realities.²⁴³ Military commission prosecutions of pirates would not suffer from many of the difficulties that plagued their use to try terrorists. Unlike crimes of terrorism, international law recognizes every state's universal jurisdiction to try captured pirates.²⁴⁴ Unlike many of the early terrorism detainees who were captured before 2005, pirates captured today would not be subjected to torture.²⁴⁵ Finally, fears of terrorist retaliation against the U.S. homeland have prevented certain terror trials,²⁴⁶ but pirates, unlike terrorists, lack the ideological motivation to retaliate against the United States.

Taken together, the settled international law on piracy, the evolution since 9/11 of the military commissions system, and the differences between pirates and terrorists suggest that prosecuting pirates before

²³⁹ Larger issues about the constitutionality of the military commissions or their desirability in a democratic society are beyond the scope of this Note.

²⁴⁰ Eugene R. Fidell, *Charm Offensive in Lilliput: Military Commissions 3.1*, 56 ST. LOUIS U. L.J. 1177, 1180 (2012) (noting that the military commissions have only secured seven convictions); see also David D. Cole, *Military Commissions and the Paradigm of Prevention*, in GUANTÁNAMO AND BEYOND: EXCEPTIONAL COURTS AND MILITARY COMMISSIONS IN COMPARATIVE PERSPECTIVE 95, 96 (Oren Gross & Fionnuala Ní Aoláin eds., 2013) (remarking that the military commissions system is "largely untested").

²⁴¹ See Military Commissions Act of 2009, 10 U.S.C. §§ 948a–950t (2012).

²⁴² See Remarks at the National Archives and Records Administration, 2009 DAILY COMP. PRES. DOC. 6 (May 21, 2009) (President Obama acknowledging that military commissions serve a useful purpose and saying he will continue using them "in line with the rule of law").

²⁴³ *Id.* at 5 (President Obama noting that military commissions "are an appropriate venue for trying detainees for violations of the laws of war. They allow for the protection of sensitive sources and methods of intelligence gathering; they allow for the safety and security of participants and for the presentation of evidence gathered from the battlefield that cannot always be effectively presented in Federal courts.").

²⁴⁴ See generally *supra* Part I.C (discussing the international law applicable to piracy).

²⁴⁵ See Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1003, 119 Stat. 2739, 2739 (codified at 42 U.S.C. § 2000dd (2012)) (prohibiting cruel, inhuman, or degrading treatment of persons in the custody of the United States, including terror detainees).

²⁴⁶ See Charlie Savage, *Attorney General and Senator Clash on Where to Try Terror Suspects*, N.Y. TIMES, June 17, 2011, at A20.

military commissions could be easily accomplished. Military commissions can be used to compliment the work of the federal courts in prosecuting pirates, resulting in a more effective legal framework for the trial of pirates and more frequent piracy prosecutions.

CONCLUSION

Twenty-first century maritime piracy is a major problem because it threatens the free navigation of the world's oceans. Piracy is one of the oldest and most widely recognized crimes under international law. The United States has repeatedly recognized piracy as a threat to national security and has repeatedly affirmed that the prosecution and imprisonment of suspected pirates must be part of any successful, sustainable strategy to combat modern piracy. Despite these statements, action is lacking.

Current prosecution efforts are insufficient both globally and in the United States. Allowing U.S. military commissions to try pirates would help bring more pirates to trial and create a more effective deterrent. The strategy of specialized antipiracy courts has worked before and it will work today. By allowing military commissions to try pirates, those who roam the oceans seeking to hijack and hold vessels for ransom would know that they will face a court if caught, and if found guilty, that they will be punished.

APPENDIX

Definitions. Proposed § 948a(10):

SUSPECTED PIRATE.—The term “suspected pirate” means a person who has been charged with engaging in the activities constituting piracy as defined in § 950t(33).

Persons Subject to Military Commission and Jurisdiction. Proposed addition to § 948c:

Any alien unprivileged enemy belligerent *or any alien suspected pirate* is subject to trial by military commission as set forth in this chapter.

Definition of the Offense. Proposed § 950t(33):

PIRACY.—Any person subject to this chapter who as a crew member or passenger of a private ship or private aircraft commits

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends and directed:

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; or

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

