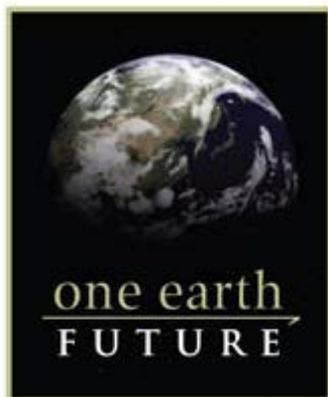


Hybrid Tribunals to Combat Regional Maritime Piracy: Guiding the Rule of Law
Through the Rocks and Shoals

by Andrew Lee

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Working Paper



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Abstract

Maritime piracy continues to afflict the modern world. Basing their operations in places like Somalia, modern pirates have been able to launch attacks on ships traveling some of the world's most trafficked waterways. The international community has created an interim prosecution regime that allows domestic courts in the region, notably those in Kenya, to try suspected pirates who are captured in international waters by cooperating navies.

Although domestic prosecutions in nations like Kenya are preferable to "catch and release" strategies that allow pirates to walk away from naval custody after being disarmed, such prosecutions come with their own problems. These prosecuting states tend to be developing nations, with relatively weak judicial institutions and penal infrastructures, and, in some cases, a history of corrupt government. They may suffer from a lack of resources not easily solved through foreign investment or intervention. On the other end of the spectrum, a supranational tribunal would face practical problems in trying pirates, and would potentially deprive nations within piracy-afflicted regions of the chance to contribute to and gain from international efforts to solve the problem. Hybrid tribunals offer a solution that would preserve the benefits of domestic and global tribunals, while minimizing their respective flaws

A lasting solution to the problem continues to elude the world, but legal measures should be taken now to ensure that captured pirates are punished, and that would-be pirates are deterred. As a mixture of domestic and global judicial mechanisms, hybrid tribunals may offer an effective means of prosecuting suspected pirates, one that provides the benefits of both approaches, while minimizing their flaws.

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List of Acronyms

| | |
|--------|--|
| ICC | International Criminal Court |
| RECAAP | Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia |
| UNODC | United Nations Office on Drugs and Crime |

I. Introduction

Maritime piracy has evolved tremendously from its ancient origins. Modern pirates may have lost the romantic appeal of yore, but they have gained technology and advanced weapons that allow them to continue to plague seafarers.¹ Although piracy is a more limited problem today than in the past, it continues to impose substantial costs on the shipping industry, as well as threatening the lives and well-being of seafarers.² Piracy may also serve as an indicator of land-based troubles, as modern pirates are often poor and desperate individuals from failed or troubled states.³ Schooners have been replaced with small motorboats, and cannons have given way to black-market machine guns and the occasional rocket-propelled grenade.⁴ The world's major states have given up the practice of commissioning privateers,⁵ but contemporary pirates have found a different sort of shelter in countries such as Somalia, where weak and unstable governments are unable to take effective action against them.⁶

The response to piracy has evolved as well. Innovations on this front include international, coordinated naval fleets and multinational agreements increasing cooperation and coordination between national anti-piracy institutions. Military deterrence and other pre-attack strategies have largely forced piracy into a niche of “hot spots” along major shipping routes, and in the vicinity of failed states like Somalia, where pirates set up shop.⁷

Legal work, specifically the prosecution of captured pirates, has not played as large a role in anti-piracy efforts as it could. This problem has not gone unnoticed, and the United Nations Office on Drugs and Crime (UNODC) has advocated the adoption of strong

¹ Audrey Gillan, *Guns, Grenades and GPS: The Brutal Reality of Somalia's Hi-Tech Pirates*, GUARDIAN (London), June 12, 2007, <http://www.guardian.co.uk/world/2007/jun/12/audreygillan.international>.

² Donna J. Nincic, *Maritime Piracy: Implications for Maritime Energy Security*, J. ENERGY SEC., Feb. 19, 2009, http://www.ensec.org/index.php?option=com_content&view=article&id=180:maritime-piracy-implications-for-maritime-energy-security&catid=92:issuecontent&Itemid=341.

³ See Sarah Percy & Anja Shortland, *The Business of Piracy in Somalia* 26 (DIW Berlin, Discussion Paper No. 1033, 2010) (finding a statistical correlation between low rainfalls, which indicate poor harvests, with rises in pirate attacks in the Somali Basin), available at <http://ideas.repec.org/p/diw/diwwpp/dp1033.html>. Though Somalia is possibly the paradigmatic failed state, poverty and marginalization may still lead to piratical activity in better-governed countries. See ADAM J. YOUNG, CONTEMPORARY MARITIME PIRACY IN SOUTHEAST ASIA: HISTORY, CAUSES, AND REMEDIES (2007) (arguing that the marginalization of maritime peoples in Southeast Asian countries contributes to the appeal of piracy).

⁴ In addition to providing better armaments and tracking technology to pirates, technology has also made cargo vessels easier to capture – automation has decreased the number of crew needed to run a large ship. Gillan, *supra* note 1.

⁵ Paris Declaration Respecting Maritime Law, Apr. 16, 1856, available at http://avalon.law.yale.edu/19th_century/decparis.asp.

⁶ At least some Somali pirates perceive a strong Somali government as being the only long-term means to end piracy. NIGEL CAWTHORNE, PIRATES OF THE 21ST CENTURY 150 (2009) (quoting from interviews with active pirates). Although one might reasonably believe that any increase in governance would lead to declines in piracy, a recent study argues that, along the spectrum of governmental stability, between the poles of very high and very low stability, there is a zone where piracy may actually flourish. Percy & Shortland, *supra* note 3, at 35–36.

⁷ INT'L MARITIME ORG., PIRACY IN WATERS OFF THE COAST OF SOMALIA (2009), available at http://www.imo.org/TCD/mainframe.asp?topic_id=1178.

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domestic antipiracy laws. It has also provided financial and technical assistance to those countries agreeing to take a role in the prosecution of captured pirates.⁸ Though most developed nations continue to avoid prosecuting pirates themselves,⁹ some have entered into agreements with East African nations.¹⁰ These agreements execute what are essentially prisoner transfer arrangements, allowing naval forces to deposit captured pirates for prosecution in nations like Kenya, which have enacted anti-piracy laws, and have agreed to serve as a prosecution forum.

Despite the participation of domestic courts in the East African region, the prosecution of captured pirates remains an unresolved problem. The United Nations Security Council recently passed Resolution 1918, calling for a report on global and regional options to prosecute and imprison pirates operating from Somalia,¹¹ in addition to calling for states to criminalize piracy in their domestic laws.¹² Current prosecution arrangements between Western nations and Kenya rely upon the concept of universal jurisdiction over piracy, which allows any nation to prosecute any pirate, regardless of any connections that may or may not exist between the accused pirate, the capturing state, the victim, and the prosecuting state.¹³ Resolution 1918 also requests a consideration of hybrid courts, regional tribunals, and an international tribunal as potential solutions.¹⁴

Though political and military actions are necessary parts of any attempt to eradicate maritime piracy, the law must also play a key role. A cooperative legal response is necessary due to the international significance of piratical attacks and the inability of pirates' home states to enforce anti-piracy laws or to prosecute offenders.

⁸ UNODC and Piracy, <http://www.unodc.org/easternafrika/en/piracy/index.html?ref=menuseide> (last visited Sept. 20, 2010).

⁹ There have been a few exceptions; the United States, the Netherlands, and France have extradited suspected Somali pirates who were charged with attacking those nations citizens. Xan Rice, *Russia Frees Captured Somali Pirates*, GUARDIAN (London), May 7, 2010, <http://www.guardian.co.uk/world/2010/may/07/russia-frees-somali-pirates>.

¹⁰ A recent article lists the European Union, the United States, Canada, Denmark, Australia, and Britain as being parties to memoranda of understanding with Kenya. *EU Pledges More Support to Kenya for Piracy Trials*, PEOPLE'S DAILY (China), July 28, 2010, <http://english.peopledaily.com.cn/90001/90777/90855/7083003.html>.

¹¹ S.C. Res. 1918, ¶ 21, U.N. Doc. S/RES/1918 (Apr. 27, 2010).

¹² *Id.* ¶ 19.

¹³ See The 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, Including, in Particular, Options for Creating Special Domestic Chambers Possibly with International Components, a Regional Tribunal or an International Tribunal and Corresponding Imprisonment Arrangements, Taking into Account the Work of the Contact Group on Piracy off the Coast of Somalia, the Existing Practice in Establishing International and Mixed Tribunals, and the Time and Resources Necessary to Achieve and Sustain Substantive Results*, ¶ 15, delivered to the Security Council, U.N. Doc. S/2010/394 (July 26, 2010) [hereinafter *Report of the Secretary-General on Prosecuting Somali Pirates*]. This is subject, of course, to individual states' recognition and implementation of universal jurisdiction in their own laws. There is also some current dispute as to whether universal jurisdiction is a legitimate part of customary international law. See Michael Beck Pemberton, *A Beacon in Uncharted Waters: The International Tribunal for the Law of the Sea as a High Court of Piracy* (One Earth Future Foundation, Working Paper, 2010).

¹⁴ S.C. Res. 1918, *supra* note 11, at ¶ 21.

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Although domestic prosecutions hold some promise, these prosecuting states tend to be developing nations, with relatively weak judicial institutions and penal infrastructures, and, in some cases, a history of corrupt government. Hybrid tribunals, hosted by countries in piracy afflicted regions, but at least partly answerable to international organizations, would provide an effective method of bridging the gap between supranational and domestic responses to piracy. The possibilities offered by hybrid prosecution regimes have largely been overshadowed by efforts to co-opt and bolster domestic regimes, or create international tribunals that bypass those domestic regimes.¹⁵ A recent report by the Secretary-General of the U.N., requested in U.N. Resolution 1918, has brought domestic, hybrid, regional, and supranational options more prominently into consideration.¹⁶

This paper argues that a regional approach to prosecuting maritime piracy is essential, and that hybrid, internationalized tribunals are likely the best way to enter into such a regional approach. Current piracy prosecution efforts in the East African region, primarily in Kenya and the Seychelles, focus on utilizing existing domestic tribunals.¹⁷ These efforts represent a major improvement over capture-and-release tactics that simply set pirates free after taking away their weapons and equipment. However, domestic tribunals in Kenya, the Seychelles, and developing nations in general do not offer a particularly robust forum for the prosecution of piracy. These domestic tribunals may suffer from a lack of resources and infrastructure which may not be remedied simply by injections of foreign money. On the other end of the spectrum, a global tribunal would face practical problems in trying pirates, and would potentially deprive nations within piracy-afflicted regions of the chance to contribute to and gain from international efforts to solve the problem.

Hybrid tribunals offer a solution that would preserve the benefits of domestic and global tribunals, while minimizing their respective flaws. Part II discusses the current state of region-level judicial regimes, as both a complement and alternative to national and supranational tribunals. It presents a summary of innovative tribunals that have been established to address legal issues that possess transnational significance, with an emphasis on African efforts. Part III argues that piracy prosecution regimes that rely upon existing domestic tribunals within affected regions, or call for supranational tribunals would not provide effective prosecution forums. Part IV argues that a more widespread adoption of hybrid tribunals would provide many of the benefits of both national and global tribunals, while avoiding at least some of the disadvantages.

¹⁵ See William W. Burke-White, *Regionalization of International Criminal Law Enforcement*, 38 TEX. INT'L L.J. 729 (2003).

¹⁶ *Report of the Secretary-General on Prosecuting Somali Pirates*, *supra* note 13.

¹⁷ UNODC and Piracy, *supra* note 8.

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II. Cooperation and Jurisprudence in the Regional Context

The effects of piracy are felt most strongly in the geographic regions where pirate attacks occur.¹⁸ There may be a normative argument to be made that nations should, when possible, take an active role in policing and prosecuting crimes that happen in their “neighborhood.” More practically, prosecutorial activity is probably more effective when it occurs close to the site of crimes. Although evidence gathering and witness availability are difficult problems in piracy, wherever the prosecution may be staged, a forum within the region allows for participation by regional states.

A. Regional Tribunals: Domestic, International, and Hybrid Types

A regional tribunal, by definition, tries issues deemed to be significant to nations within a specific geographical region. As such, a regional tribunal may be authorized to hear matters arising between member countries, or to pass on conduct occurring within a single member country.¹⁹ International courts act globally, with only limited intervention by nation-states. They exist as supranational entities, overseen (at this point in time) by the United Nations.²⁰

Domestic tribunals are created by individual states, typically as a fundamental element of a national government. In addition to hearing and passing on domestic disputes, domestic tribunals may be enabled, by appropriate legislation, to hear cases arising from international disputes. Under the doctrine of universal jurisdiction, states may implement laws that grant their domestic courts jurisdiction over cases they would normally be unable to try - cases where the parties are not national citizens or entities, and the dispute arises from activities outside the nation.²¹ Under international law, such universal jurisdiction is available for maritime piracy and certain other crimes that are deemed to be against all of humanity.²²

¹⁸ Antonio Maria Costa, Op-Ed., *The War on Piracy Must Start on Land*, N.Y. TIMES, June 8, 2010, www.nytimes.com/2010/06/09/opinion/09iht-edcosta.html.

¹⁹ Some regional tribunals may be created as simple international tribunals – in such cases, regionality is achieved by having a relatively small, geographically associated set of states as participants. For example, the South African Development Community Tribunal (SADC-T) is a regional, supranational tribunal whose members are all South African countries. Created by multilateral treaty, the SADC-T acts independently from the judiciaries of the member states. The resulting regional tribunal possesses a specific mandate and structural separation from the individual governments of member states. *See* Burke-White, *supra* note 15, at 749. For the purposes of this paper, a regional tribunal (and, in the case of Somali piracy, a hybrid tribunal) is one that hears criminal cases that arise from activities within the geographical region that includes the host state.

²⁰ The clearest example of an international court is the International Court of Justice, which serves as the judicial arm of the United Nations. Statute of the International Court of Justice art. 1, Apr. 18, 1946, <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>.

²¹ *See, e.g.*, Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1988) (discussing the history and modern evolution of universal jurisdiction).

²² Piracy is, notably, the wellspring of universal jurisdiction. *Id.* at 791.

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A hybrid, or internationalized, tribunal is built within a given domestic judiciary, and utilizes a mixture of domestic and international law.²³ This type of court is a cooperative effort between national governments and international organizations, and employs both domestic and international judges. For example, the Special Court for Sierra Leone was created as a joint effort by the Sierra Leonean government and the United Nations.²⁴ The Special Court is empowered to prosecute violations of international humanitarian law, as well as Sierra Leonean law covering the abuse of girls and “wanton destruction of property.”²⁵ Under its statute, the Special Court exists to prosecute individuals accused of committing war crimes and crimes against humanity during Sierra Leone’s civil war.²⁶ Because their structure, by design, combines domestic and international elements, hybrid tribunals present a flexible and innovative forum for the prosecution of regional crimes. Piracy prosecutions, which today rely upon a mixture of international law principles and enabling domestic legislation, would be well served by a network of hybrid tribunals.

| Tribunal Type | Description | Source of Jurisdiction |
|----------------------|--|---|
| International | Created to try matters of international importance, under the aegis of the United Nations. They may be requested by states to deal with matters, such as genocides, that would overwhelm those states’ domestic judiciaries. | Derived from U.N. Charter Chapter VII powers, or through negotiation with a requesting state. |
| Regional | Created through multilateral treaties involving multiple states in a given geographic region. The subject matter of the court can be as broad or narrow as the treating states desire. | The powers exercised by these courts are derived from the terms of the enabling treaties. |
| Hybrid | Created as cooperative ventures between the U.N. and a requesting state. All currently existing hybrid tribunals deal exclusively with criminal matters. | Hybrid tribunals have, to date, been created with authority deriving from an international authority (the U.N.) and the hosting nation’s domestic laws. |
| Domestic | “Traditional” courts, created to deal with matters arising within a state. | Domestic laws vest these courts with specific or general authority to hear cases. In domestic piracy trials, memoranda of understanding allow one state to receive and try suspected pirates captured by foreign countries that are parties to those memoranda. |

²³ Eur. Parl. Ass., *The Necessity to Take Additional International Legal Steps to Deal with Sea Piracy*, § 4.2, Doc. No. 12194 (2010).

²⁴ AMNESTY INTERNATIONAL, 2007-2008 FACT SHEET THREE: INTERNATIONAL AND INTERNATIONALIZED CRIMINAL TRIBUNALS (2008), available at www.amnestyusa.org/international_justice/pdf/IJA_Factsheet_3_International_Criminal_Tribunals.pdf.

²⁵ Statute of the Special Court for Sierra Leone, arts. 1–5, Jan. 16, 2002, U.N. Doc. S/2000/915.

²⁶ About the Special Court for Sierra Leone, <http://www.sc-sl.org/ABOUT/tabid/70/Default.aspx>.

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B. The Roles of International and Hybrid Tribunals

The rise of international interaction and cooperation in essentially every field of human endeavor has created a need for effective forums for dispute resolution. Africa's countries host a large number of new and innovative tribunals for the resolution of civil and criminal disputes.²⁷ These tribunals hear matters ranging from economic disputes to war crimes.²⁸ This is particularly relevant to the problem of Somali piracy – Africa's abundance of tribunals at the domestic, regional, and global levels makes it an ideal proving ground for hybrid tribunals for suspected pirates.

1. Criminal Issues

Supranational criminal law courts have tended to limit themselves to particularly objectionable crimes whose perpetrators are, by shared international norms, considered to have committed crimes against humanity.²⁹ The International Criminal Court is the most significant example of international criminal prosecution efforts. One hundred and thirteen States Parties are signatories to the Rome Statute of the International Criminal Court, which created this court to “end impunity for the perpetrators of the most serious crimes of concern to the international community.”³⁰ Another international tribunal, The International Criminal Tribunal for Rwanda, takes on a subset of the International Criminal Court's mission. Created in 1994, it exists to prosecute persons “responsible for genocide and other serious violations of international humanitarian law in the territory of Rwanda between 1 January 1994 and 31 December 1994.”³¹ Despite its exclusive focus on Rwandan war criminals, this court is entitled, by statute, to the cooperation of all UN member states.³²

Supplementing supranational criminal regimes, hybrid courts have played an important role in enhancing criminal prosecutions in nations lacking sufficient judicial resources. These courts are designed to address large-scale crimes, usually within the context of wars or other armed conflicts.³³ There are currently four operating hybrid tribunals: The Special Court for Sierra Leone, discussed above, The Extraordinary Chambers in the

²⁷ African International Courts and Tribunals, <http://www.aict-ctia.org> (a branch of the Project on International Courts and Tribunals) (last visited Sept. 9, 2010).

²⁸ *See id.* (describing the subject matter jurisdiction of various international and internationalized tribunals in Africa).

²⁹ *See, e.g.*, Project on International Courts and Tribunals, <http://www.pict-cti.org>. (describing the mandates of various int'l criminal courts) (last visited Sept. 20, 2010).

³⁰ International Criminal Court Website, <http://www.icc-cpi.int/Menus/ICC/About+the+Court/>

³¹ Statute of the International Tribunal for Rwanda, art. 1, Nov. 8, 1994, 33 I.L.M. 1602.

³² *Id.* art. 29.

³³ *See* Project on International Courts and Tribunals: Hybrid Courts, <http://www.pict-cti.org/courts/hybrid.html> (describing the mandates of the established hybrid courts) (last visited Sept. 21, 2010).

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Courts of Cambodia, the Crimes Panels of the District Court of Dili in East Timor, and the “Regulation 64” Panels in the Courts of Kosovo.³⁴

C. Jurisdictional Issues

Near the heart of international jurisprudence are the jurisdictional doctrines of primacy and complementarity. Both doctrines arise as solutions to the problems of concurrent jurisdiction – instances where a case falls under the jurisdiction of multiple courts. The application of either doctrine is determined in the statute establishing a given tribunal.³⁵ Primacy grants international tribunals a priority right to try any and all cases that fall under its jurisdiction – in other words, courts with primacy have a superior right to try cases falling within their jurisdiction, even if other courts also possess such jurisdiction.³⁶ Thus, international tribunals with primacy may preempt domestic tribunals if a case falls under the jurisdiction of both, whatever the capabilities or desires of those domestic tribunals may be.³⁷ On the other hand, international tribunals operating under the complementarity principle must cede cases to domestic tribunals, where jurisdiction is concurrent, and the domestic tribunals are properly equipped to investigate and prosecute.³⁸

Despite piracy being the original universal jurisdiction crime, the application of universal jurisdiction in domestic tribunals remains an academic problem, at the very least.³⁹ Primacy, complementarity, and universal jurisdiction constitute a political problem, as well as a legal one.⁴⁰ Jurisdiction over an internationally significant but local or regional matter can become a highly charged issue, if domestic courts and international tribunals must compete over jurisdiction. Hybrid tribunals, situated within the regions affected by

³⁴ *Id.*

³⁵ For a short discussion of how the United Nations has considered primacy and complementarity in the context of Somali piracy, see *Report of the Secretary-General on Prosecuting Somali Pirates*, *supra* note 13, ¶¶ 40–41.

³⁶ For a more thorough discussion of primacy, complementarity, and their role in the interaction between national and international courts, see Bertram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 *YALE J. INT’L LAW* 383 (1998).

³⁷ Primacy has generally been employed in tribunals with limited jurisdiction; for example, the International Criminal Tribunal for the Former Yugoslavia has primacy, but as its jurisdiction is limited to “serious violations of international humanitarian law” that occurred in Yugoslavia after 1990, the tribunal’s ability to exert primacy is quite limited. *Id.* at 394–396.

³⁸ The International Criminal Court is the exemplar of a complementarity regime, having it explicitly laid out in its establishing statute. Rome Statute of the International Criminal Court, art. 17, U.N. Doc. A/CONF.183/9 (July 17, 1998); see also Kevin Jon Heller, *The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process*, 17 *CRIM. L.F.* 255 (2006) (discussing the International Criminal Court’s complementarity regime).

³⁹ See, e.g., Anthony N. Colangelo, *The Legal Limits of Universal Jurisdiction*, 47 *VA. J. INT’L L.* 149 (2006); James Thuo Gathii, *Jurisdiction to Prosecute Non-National Pirates Captured by Third States Under Kenyan and International Law* (2009) (unpublished manuscript, available at http://works.bepress.com/james_gathii/16/).

⁴⁰ See Diane F. Orentlicher, *The Future of Universal Jurisdiction in the New Architecture of Transnational Justice*, in *UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW* 214 (Stephen Macedo, ed., 2004).

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piratical attacks, with a judicial composition reflecting the international effects of the crimes, may offer a way to avoid jurisdictional problems while representing an ideal compromise between local, regional, and international stakeholders.⁴¹

III. The Shortcomings of Domestic and Supranational Tribunals as Forums for the Prosecution of Suspected Pirates

A. Domestic Tribunals

As discussed above, the universal jurisdiction doctrine makes it possible, at least legally, to prosecute pirates anywhere.⁴² If implemented by appropriate domestic legislation, universal jurisdiction allows a court to hear cases involving suspected pirates regardless of the site of the crime, the citizenship of the pirates and their victims, or which nation actually arrested the pirates.⁴³ Although universal jurisdiction clears the way for developed states to bring their significant judicial resources to bear on the prosecution of suspected pirates, Western countries have chosen to prosecute only a few high-profile cases.⁴⁴ Professor Milena Sterio notes that the United States and the United Kingdom have displayed a strong preference for “regional partnerships” with local countries, handing apprehended pirates to them for prosecution.⁴⁵

Although domestic courts may present a more desirable option than a single tribunal with global jurisdiction, the use of such domestic courts, even within the applicable region, does not necessarily avoid all the problems created by prosecuting in a very remote jurisdiction. For example, Somali pirate prosecutions have been hampered by a lack of language translators, even in Kenya.⁴⁶ Development of domestic judicial resources is a laudable goal, but a focus on developing juridical skill in dealing with piracy would not necessarily create spillover effects in other aspects of the law. Domestic courts in developing nations have more problems to deal with than piracy, and the devotion of significant internal resources, even bolstered by foreign aid, to piracy prosecutions may have deleterious effects in other aspects of the law.

⁴¹ See *id.* at 223.

⁴² Eugene Kontorovich, “A *Guantánamo on the Sea*”: *The Difficulty of Prosecuting Pirates and Terrorists*, 33 CAL. L. REV. 243, 244 (2010).

⁴³ See, e.g., Randall, *supra* note 21.

⁴⁴ See, e.g., Kontorovich, *supra* note 42 (noting the unwillingness of capturing nations to prosecute pirates, despite the availability of universal jurisdiction); Nick Wadhams, *Who Wants to Try the Captured Pirates? (No One)*, TIME, Jun. 2, 2010, <http://www.time.com/time/world/article/0,8599,1993444,00.html>. One concern that may support Western nations’ reluctance to prosecute pirates, particularly in Europe, is the possibility of thorny asylum problems after suspected pirates are convicted or acquitted. Bruno Waterfield, *Somali Pirates Embrace Capture as Route to Europe*, TELEGRAPH (London), May 19, 2009, <http://www.telegraph.co.uk/news/worldnews/piracy/5350183/Somali-pirates-embrace-capture-as-route-to-Europe.html>.

⁴⁵ Milena Sterio, *Fighting Piracy in Somalia (And Elsewhere): Why More Is Needed*, 33 FORDHAM INT’L L.J. 372 (2010).

⁴⁶ Kontorovich, *supra* note 42, at 265.

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1. East Africa

Kenya and the Seychelles have taken active roles as domestic prosecution forums. Each country has agreed to prosecute suspected pirates captured in the geographic region. These prosecution arrangements include international aid, but the Kenyan and Seychellois judiciaries remain hindered by resource constraints.⁴⁷ Kenya has voiced concerns that its judicial system is being overtaxed, and had at one point declared its intention to stop taking pirates.⁴⁸ Seychellois courts are a recent addition to piracy prosecution venues, but the small size and limited resources of the Seychelles domestic judiciary restrict the number of pirates that could be prosecuted there. Even if assisted by foreign nations, it is doubtful that prosecution and imprisonment efforts by the Seychelles will have a notable impact on piracy.⁴⁹ As an example, the Seychelles cabinet plans to build a new jail, scheduled for completion by the end of 2010, for the incarceration of convicted pirates. This jail will hold only 40 inmates.⁵⁰ Although the Seychelles has only agreed to prosecute pirates, not to imprison them after conviction,⁵¹ there are already 31 pirates awaiting trial in the Seychelles.⁵²

A further glaring disadvantage of the use of domestic tribunals in international and regional matters is that the rule of law may be held hostage to political and financial interests of the nation enlisted as a prosecuting state. Kenya has already demonstrated its willingness to halt, or at least to threaten to halt, piracy prosecutions if international assistance does not come up to Kenya's expectations.⁵³

Politics aside, international desire for a stable piracy prosecution regime in Kenya has already led to juridical novelties. A new court has been opened in Mombasa, at the Shimo la Tewa prison, devoted primarily to hearing piracy cases.⁵⁴ It is funded by international donors, and is accompanied by financial support for the Kenyan prosecutor's office.⁵⁵ This is a fast-track court, established primarily to hear piracy cases, rather than to serve

⁴⁷ See, e.g., Richard Meade, *Prisons Present Piracy Prosecution Problem*, LLOYD'S LIST, May 28 2010, <http://www.lloydslist.com/ll/sector/regulation/article169802.ece> (discussing how a lack of prisons remains an unresolved issue in extraterritorial prosecutions of piracy suspects).

⁴⁸ Kenya has since resumed taking suspects, but has declared that it will decide who to prosecute on a "case-by-case basis." Mariama Diallo, *Nations Prove More Willing to Combat Piracy than Prosecuting Pirate Suspects*, VOICE OF AM., June 8, 2010, <http://www1.voanews.com/english/news/africa/east/Nations-Prove-More-Willing-to-Combat-Piracy-than-Prosecuting-Pirate-Suspects-95861284.html>.

⁴⁹ See Michael Onyiego, *Seychelles to Establish Regional Court to Prosecute Pirates*, VOICE OF AM., May 6, 2010, <http://www1.voanews.com/english/news/africa/Seychelles-to-Establish-Regional-Court-to-Prosecute-Pirates-92969969.html>.

⁵⁰ David Smith, *Pirate Prison on Way as Seychelles Seeks to Protect Tourism and Fishing Industries*, IRISH TIMES, Feb. 8, 2010, <http://www.irishtimes.com/newspaper/world/2010/0208/1224263954988.html>.

⁵¹ Meade, *supra* note 47.

⁵² *Id.*

⁵³ Walter Menya, *Kenya: Deal on Piracy Trials Skewed, Say Ministers*, ALLAFRICA.COM, June 26, 2010, <http://allafrica.com/stories/201006280086.html>.

⁵⁴ *Kenya Opens Fast-Track Piracy Court in Mombasa*, BBC NEWS, June 24, 2010, <http://news.bbc.co.uk/2/hi/world/africa/10401413.stm>.

⁵⁵ *Id.*

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as a general purpose court. Despite being part of Kenya's domestic judiciary, this court was created using international money, to serve primarily international interests. This approach differs from existing hybrid courts in two key respects: the judicial composition of the court is purely Kenyan, and the cases the court will hear are primarily international.

Despite the domestic nature of this new court, a successful piracy-focused hybrid tribunal would probably need to integrate the second characteristic: in order to hear piracy prosecution cases, hybrid tribunals must have jurisdiction over international cases. Although hybrid tribunals do apply international law, their subject matter has been restricted to offenses committed within, or against the people of, the nation hosting the hybrid tribunal.⁵⁶ Although it operates entirely within a domestic regime, Kenya's new fast-track court does provide some guidance for a piracy-focused hybrid tribunal.

In addition to structural considerations, fairness may be an issue in domestic piracy prosecutions in East Africa. There have been claims that the Kenyan government and the international community have not provided adequately for the legal defense of suspected pirates.⁵⁷ At least one Kenyan defense attorney has dismissed Kenyan piracy prosecutions as a one-way ticket into jail, sanctioned by the international community to create the appearance of fair trials, while "their intention is only to put these people in jail."⁵⁸ Corruption also remains an issue in Kenya.⁵⁹ Reason to believe that fair trials for accused pirates are the exception, rather than the rule, would be ample justification for an independent tribunal, operating in cooperation with domestic governments, rather than under them.

Another prominent problem is the lack of states that possess an adequate judicial infrastructure to hear piracy cases. According to the United Nations Office on Drugs and Crime, Tanzania and Mauritius⁶⁰ have recently enacted legislation that allows domestic courts to hear piracy cases under universal jurisdiction.⁶¹ Mauritius has also announced that it will begin prosecuting suspected pirates.⁶² These countries cannot, alone or in concert with Kenya and the Seychelles, prosecute pirates without devoting an unrealistically large portion of their criminal justice resources to piracy cases.

⁵⁶ Brown, *supra* note 36.

⁵⁷ Wadhams, *supra* note 44.

⁵⁸ *Id.* See also Tristan McConnell, *Kenyan Courts on Legal Front Line in Battle to Stop Somali Pirates*, TIMES (London), Dec. 10, 2009, <http://www.timesonline.co.uk/tol/news/world/africa/article6950951.ece> (quoting Kenyan lawyer Oruko Nyarwinda).

⁵⁹ See, e.g., Global Integrity Report – Kenya: 2009, <http://report.globalintegrity.org/Kenya/2009> (last visited Sept. 25, 2010).

⁶⁰ UNITED NATIONS OFFICE ON DRUGS AND CRIME, COUNTER-PIRACY PROGRAMME: SUPPORT TO THE TRIAL AND RELATED TREATMENT OF PIRACY SUSPECTS (2010), *available at* http://www.unodc.org/documents/easternafrika//piracy/20100701_CPP_Brochure_3.pdf.

⁶¹ *UK Lauds Tanzania for Enacting Anti-Piracy Law*, CITIZEN (Tanzania), May 11, 2010, <http://www.thecitizen.co.tz/news/4-national-news/1861-uk-lauds-tanzania-for-enacting-anti-piracy-law>

⁶² Daniel Richey, *Mauritius to Try Accused Somali Pirates*, JURIST, June 13, 2010, <http://jurist.org/paperchase/2010/06/mauritius-to-try-accused-somali-pirates.php>.

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Piracy is, in the global context, a marginal problem.⁶³ Granting that a supranational tribunal for piracy prosecutions would be a disproportionately large response, domestic tribunals in regional states are clearly unequipped and unwilling to handle piracy prosecutions without substantial international aid,⁶⁴ and efforts to shunt these prosecutions into domestic tribunals may conflict with judicial development in more prosaic matters. Hybrid tribunals make use of existing resources, represent a less resource-intensive alternative to new supranational tribunals, and may help enhance judiciaries in less developed countries.

B. International Tribunals

International tribunals with essentially global jurisdiction, such as the International Court of Justice, the International Tribunal for the Law of the Sea (ITLOS), and the International Criminal Court serve to address global issues, but the regional nature of modern maritime piracy, as well as the interests of accused pirates, their victims, and the nations most affected, call for a more targeted response.⁶⁵ Moreover, the International Court of Justice may only hear cases where states, rather than individuals, are parties to the dispute, and ITLOS operates under a similar restriction.⁶⁶ The International Criminal Court, on the other hand, is limited to hearing cases of genocide, crimes against humanity, war crimes, and crimes of aggression.⁶⁷ None of these categories seem to comfortably hold the crime of maritime piracy. In addition, the International Criminal Court positions itself as a court of last resort – it does not hear cases unless and until all potential domestic forums have been found unavailable, unwilling, or incompetent.⁶⁸ Yvonne Dutton proposes that it should be empowered to hear cases arising from incidents of piracy.⁶⁹ Dutton notes that states have historically attempted to prosecute crimes of piracy by applying international law in national tribunals, or by appealing to supranational bodies like the International Criminal Court.⁷⁰ The area in between domestic and supranational tribunals has been largely ignored.

⁶³ Brooke Smith-Windsor, *Piracy Is a Sideshow That Could Skew Naval Investment*, FIN. TIMES, Jan. 18, 2010, <http://www.ft.com/cms/s/0/ab75a682-03d1-11df-a601-00144feabdc0.html>.

⁶⁴ See Menya, *supra* note 53.

⁶⁵ See James Kraska & Brian Wilson, *Fighting Piracy*, ARMED FORCES J., Feb. 2009, <http://www.armedforcesjournal.com/2009/02/3928962> (“Collaboration and regional partnering, not armed force, is the long-term solution to piracy.”).

⁶⁶ Statute of the International Court of Justice, art. 1, Apr. 18, 1946, <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>; Statute of the International Tribunal for the Law of the Sea, art. 20, Dec. 10, 1982, www.itlos.org/documents_publications/documents/statute_en.pdf.

⁶⁷ Rome Statute of the International Criminal Court, art. 5, July 17, 1998, U.N. Doc. A/CONF.183/9.

⁶⁸ This state of affairs reflects the principle of complementarity, which is integrated into the agreement creating the ICC. *Id.* art. 18.

⁶⁹ Yvonne M. Dutton, *Bringing Pirates to Justice: A Case for Including Piracy Within the Jurisdiction of the International Criminal Court*, 11 CHI. J. INT’L L. 197 (2010).

⁷⁰ *Id.* at 223

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ITLOS is a relatively underutilized tribunal, consisting of 21 judges who have heard 17 cases since its inception in 1994.⁷¹ Michael Beck Pemberton examines the role ITLOS might play in piracy prosecutions.⁷² ITLOS's small caseload might be interpreted in one of two ways: it is (or should be) available for piracy prosecution,⁷³ or it is unable or unwilling to act on piracy in its capacity as a tribunal.⁷⁴ Pemberton argues that ITLOS, lacking a mandate to act as a trial court, should position itself as a quasi-appellate court.⁷⁵ Although this approach has merits, not the least of which is potentially providing an authoritative interpretation of international piracy law, it does not adequately answer the question of initial review and judgment in piracy cases.

IV. Hybrid Tribunals as a Solution

Some have argued that political and historical realities make it necessary for powerful nations to tread cautiously when acting near smaller nations, particularly those with a colonial history.⁷⁶ International tribunals that displace the roles of domestic tribunals may be distasteful, or even destabilizing, to some regional states, particularly if spearheaded by nations that are unpopular in that region.⁷⁷

Insofar as piracy is arguably incentivized by a lack of legitimate employment, and is generally conducted by nationals of impoverished or developing nations, hybrid responses offer a favorable alternative to a global tribunal, in that they allow these developing nations to be seen as accepting an active role in solving international problems. In addition, regional responses create prosecution regimes that incorporate domestic legal regimes and talents, which may provide positive spillover effects in the form of enhanced juridical legitimacy. Hybrid tribunals may also possess the same advantages, as a domestic court enhanced by foreign money and personnel would necessarily involve the host state. However, there would probably be less motivation to harmonize applicable piracy laws if the court was primarily a domestic product.

Hybrid courts add judicial talent, support personnel, and financial assistance to domestic judiciaries to create a mixed entity. By enhancing domestic tribunals in this manner, rather than replacing them, hybrid courts can allow nations to retain a stake in prosecuting crimes that would overwhelm domestic tribunals working alone. This characteristic helps make hybrid tribunals an appealing forum for the prosecution of region-specific crimes. By integrating international resources and expertise into domestic judiciaries, hybrid tribunals allow the international community to bolster the

⁷¹ International Tribunal for the Law of the Sea: Proceedings and Cases – List of Cases, http://www.itlos.org/cgi-bin/cases/list_of_cases.pl?language=en (last visited Sept. 23, 2010).

⁷² Pemberton, *supra* note 13.

⁷³ *Id.*

⁷⁴ Any number of reasons might cause a tribunal to set aside a case - politics, excessive costs, or overly complex legal problems among them.

⁷⁵ Pemberton, *supra* note 13.

⁷⁶ Rosemary Collins & Daud Hassan, *Applications and Shortcomings of the Law of the Sea in Combating Piracy: A South East Asian Perspective*, 40 J. MAR. L. & COM. 89, 112

⁷⁷ *See id.* at 91, 109–10.

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effectiveness of regional nations in upholding the rule of law, rather than simply taking over the work of prosecution, or throwing money at prosecuting nations.

This enhancement of existing judiciaries is particularly relevant for Somali piracy, as a lack of well-developed judiciaries in the region have increased international demand on those few states with functioning judicial systems to hear piracy cases arising in the region. The “strength” or “weakness” of a given tribunal for piracy prosecutions is, at least in part, related to an arresting nation’s ability to rely on that tribunal’s ability and willingness to prosecute captured pirates. By combining the political will to prosecute of an individual nation with the expertise of international judges, hybrid tribunals would present a strong forum for piracy prosecutions.

A. Legitimacy Considerations

One advantage presented by hybrid tribunals is the cultural and physical proximity to interested parties, which is not only an issue of perceived legitimacy; establishing tribunals close to the site of crimes would also have positive consequences for practical questions of evidence gathering and some jurisdictional issues.⁷⁸ Purely domestic tribunals that try cases of Somali piracy may have *fewer* legitimacy advantages because domestic prosecutions are, at least currently, pursued by countries other than Somalia. A hybrid tribunal that can claim a measure of international authority may be perceived as more equitable, or perhaps less corruptible, than the domestic courts of a third-party country.

There may also be problems caused by the magnitude of punishments meted out by domestic tribunals applying their own law, as compared to punishments considered appropriate under more internationalized norms. For example, human rights issues may arise where punishments for pirates found guilty exceed what is acceptable by more progressive standards. Conversely, the possibility exists that regional nations may find those standards to be too lenient, and potentially destructive to existing cultural norms. Such normative mismatches may force hybrid tribunals to try to reconcile diverging domestic, regional, and international interests.

One example of a conflict between the progressive standards that the United Nations seeks to impose and individual states’ notions of justice can be found in the creation of the International Criminal Tribunal for Rwanda. This tribunal was established by U.N. Security Council Resolution 955.⁷⁹ Though Rwanda requested United Nations assistance in apprehending and trying Rwandan war criminals, Rwanda itself was the only member

⁷⁸ Though, in the case of piracy, the benefits of proximity are less pronounced, as the ships and crews that are hijacked may hail from almost any country in the world, making testimony and material evidence difficult to gather regardless of the location of prosecution.

⁷⁹ S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

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of the UN Security Council to vote against Resolution 955.⁸⁰ This rejection of the UN's proposed tribunal was, at least in part, precipitated by Rwanda's desire to include crimes occurring before 1994 as part of the tribunal's jurisdiction, and to preserve the possibility of the death penalty in cases of genocide.⁸¹

The problem of legitimacy is made more complex in the context of piracy, because such fragmentation is enhanced by the fact that Somali nationals comprise the majority of East African pirates, that they are being prosecuted outside of their home country, and that at least some portion of the prosecuting states' incentive to cooperate is pecuniary. The availability of legal counsel for suspected pirates is also an issue.⁸² Pirates constitute a special category of defendants, and present legal hurdles not present in most domestic criminal cases.⁸³ Though defense counsel may be made available to suspected pirates in any case, the ad hoc provision of lawyers does not provide the legitimacy that would be provided by a codified system matching defendants to counsel.

B. Ordinary Criminals in Extraordinary Circumstances

Eugene Kontorovich has stated that the idea of prosecuting pirates as "ordinary criminals" has not yet been proven ineffective, but nations perceive that possibility as being so fraught with difficulty as not to be worth the attempt.⁸⁴ He concludes that current international law is incapable of adequately addressing the problem of piracy.⁸⁵ Hybrid tribunals, if they properly combine domestic laws with international authority and will, might be a viable solution because they do not rely on international law; rather, they depend on international resources, which flow more freely than laws, and can be used to augment and supplement existing legal regimes.

Piracy cases, as they are currently prosecuted, present a muddy mix of domestic and international law.⁸⁶ Developed nations have demonstrated a desire to leave prosecution in

⁸⁰ The vote was 13 nations in favor, 1 against, with China abstaining from the vote. Rwanda was, at the time, a member of the Security Council. MACHTELD BOOT, NULLUM CRIMEN SINE LEGE AND THE SUBJECT MATTER JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT 227 (2002).

⁸¹ See, e.g., Julia Preston, *Tribunal Set on Rwandan War Crimes; Kigali Votes No on U.N. Resolution*, WASH. POST, Nov. 9, 1994, at A44. As a supranational tribunal, the International Criminal Tribunal for Rwanda draws its jurisdiction from Chapter VII of the United Nations Charter. Statute of the International Tribunal for Rwanda, U.N. Doc. S/RES/955 (Nov. 8, 1994). There are no Rwandan judges on the Court.

⁸² In one case, a defense attorney claimed that funds earmarked for the legal representation of suspected pirates had been "diverted to other uses," and that his clients had not been informed of their right to counsel. Philip Muyanga, *EU Funds Diverted, Piracy Trial Told*, ALLAFRICA.COM, July 21, 2010, <http://allafrica.com/stories/201007210761.html>. See *supra* note 58 and accompanying text.

⁸³ Piracy trials in Kenya, for example, present problems of evidence and witness collection, as well as language barriers. Otto Bakano, *Piracy Trials in Kenya Beset by Legal Obstacles*, TELEGRAPH (London), Mar. 8, 2010, <http://www.telegraph.co.uk/expat/expatnews/7398594/Piracy-trials-in-Kenya-beset-by-legal-obstacles.html>.

⁸⁴ Kontorovich, *supra* note 42, at 274.

⁸⁵ *Id.* at 275.

⁸⁶ The definition of piracy lies within international treaties, and the rules under which suspected pirates are prosecuted, as well as the potential punishments they face, lie in domestic law.

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the hands of nations within the region.⁸⁷ Even if pirates are “ordinary criminals,” they act in extraordinary circumstances, largely due to jurisdictional issues stemming from their own citizenship and that of their victims. If universal jurisdiction under international law is not enough, on its own, to ensure prosecution, then there must be a more targeted solution. Transfer agreements that send captured suspects to prosecuting regional states may increase the number of pirate prosecutions, but those regional states may be unreliable partners.⁸⁸

Pirates present legal problems, not necessarily because of what they do, but because of where they do it. Acting on the high seas, outside more traditional realms of jurisdiction, pirates force the international community to engage in catch-and-release activities, or to create new ways to bring suspected pirates before a court. The interests of justice would seem to require the latter path, and hybrid tribunals, properly formed, might present a mixture of domestic and international features tailor-made to address the ambiguities of pirate prosecutions.

C. Regional Anti-Piracy Agreements – A Role for Hybrids?

Hybrid tribunals might address the unification problem by ensuring a continuous entwinement of international and domestic law, and the sovereignty problem by actively seeking collaboration between domestic and international legal authorities. Prosecutorial arrangements have generally been given superficial treatment in regional anti-piracy agreements. One regional agreement that has met with some success in creating a unified response to piracy is the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP).⁸⁹ With fifteen contracting nations, ReCAAP creates a regional Information Sharing Centre to combat piracy, but does not provide specifically for a regional tribunal to prosecute pirates. Though a regional tribunal is not part of ReCAAP’s provisions, Article 13 provides for “mutual legal assistance,” which facilitates, among other things, evidence sharing for state-level prosecutions. The Djibouti Code of Conduct, inspired by ReCAAP and adopted in 2009, also calls for regional cooperation to “prevent, deter and suppress” piracy.⁹⁰

ReCAAP represents a substantial step towards the sort of agreement espoused by Timothy Goodman a decade ago. Goodman, a former lieutenant in the United States

⁸⁷ *Report of the Secretary-General on Prosecuting Somali Pirates*, *supra* note 13, ¶ 22. *See supra* note 44 and accompanying text.

⁸⁸ As discussed above, Kenya had previously declared its intent to stop receiving captured pirates. *See supra* note 48 and accompanying text. Though assurances of increased assistance convinced Kenya to resume prisoner transfers, the burden that transfer agreements place on prosecuting regional states seems substantial enough to caution against international overreliance on those states.

⁸⁹ Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia (ReCAAP), Nov. 11, 2004, *available at* <http://www.recaap.org/about/pdf/ReCAAP%20Agreement.pdf>.

⁹⁰ Briefing, Int’l Maritime Org., High-Level Meeting in Djibouti Adopts a Code of Conduct to Repress Acts of Piracy and Armed Robbery Against Ships (Jan. 30, 2009) (*available at* http://www.imo.org/About/mainframe.asp?topic_id=1773&doc_id=10933).

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Navy, called for a regional response to piracy, in the form of a “piracy charter.”⁹¹ Although Goodman’s proposed piracy charter includes elements that have been incorporated into ReCAAP, there are also a number of features in Goodman’s charter that are not part of ReCAAP. Notably, an important part of Goodman’s proposal is a “quasi-judicial ‘Piracy Commission,’” empowered to make decisions on extradition based on a finding of which nation has suffered the most determinable harm.⁹² As an alternative to such a “Piracy Commission,” Goodman proposes a regional piracy court, empowered to try piracy cases itself, rather than simply funneling suspects to one jurisdiction or another. He presents this alternative as less desirable than his commission, arguing that regional supranational tribunals would require a more unified international criminal law with respect to piracy, as well as potentially igniting conflicts where nations pit their sovereignty against the rulings of a supranational tribunal.⁹³ Hybrid tribunals may offer a third path, one that respects sovereignty through their integration with domestic tribunals, while still maintaining a level of international involvement and cooperation.

D. A Spectrum of Regional Solutions, a Hierarchy of International Authority

Jon Peppetti discusses the idea of using “soft” law as a framework for regional cooperation.⁹⁴ He discusses the spectrum of formality that nations consider when entering into bilateral and multilateral agreements. Formal instruments, such as treaties, create obligations and penalties for noncompliance (“hard” regionalism). At the other end of the spectrum, memoranda of understanding create legally non-binding agreements that nevertheless carry political binding force (“soft” regionalism).

Peppetti has proposed that a regional approach to maritime threats is an effective means of addressing the various threats facing seafarers with legitimate purpose, and minimizing the possibility that disagreements between nations will bring the entire enterprise to a halt.⁹⁵ He discusses the roles that specialized hybrid tribunals might play in Southeast Asia, each imbued with jurisdiction over a specific crime of international interest.⁹⁶

Hybrid tribunals may also play a role in a hierarchy of supranational juridical entities. For example, Pemberton suggests that ITLOS should become a “quasi-appellate” body, issuing advisory decisions that would, ideally, have binding force on lower courts’ interpretations of piracy law.⁹⁷ With ties to the United Nations, and a relatively strong international character, hybrid tribunals would be well-suited to act as courts of first instance under this vitalized ITLOS.

⁹¹ Timothy H. Goodman, “*Leaving the Corsair’s Name to Other Times: How to Enforce the Law of Sea Piracy in the 21st Century Through Regional International Agreements*,” 31 CASE W. RES. J. INT’L L. 139, 154 (1999).

⁹² *Id.* at 160.

⁹³ *Id.* at 167.

⁹⁴ Jon D. Peppetti, *Building the Global Maritime Security Network: A Multinational Legal Structure to Combat Transnational Threats*, 55 NAVAL L. REV. 73, 152 (2008).

⁹⁵ *Id.* at 115–22.

⁹⁶ *Id.* at 148.

⁹⁷ Pemberton, *supra* note 13.

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E. The Jurisdictional Foundation of Hybrid Tribunals

The Special Court of Sierra Leone demonstrates how hybrid courts may operate under both domestic and international law. Primarily concerning itself with violations of international law, the Special Court also hears cases involving two crimes under Sierra Leonean law.⁹⁸ Hybrid piracy tribunals could be formed with the power to hear cases under an explicit grant of jurisdiction through the U.N., as well as under domestic enabling legislation. Another, less friendly, means of granting jurisdiction would be through a U.N. Security Council resolution conferring such jurisdiction under their Chapter VII powers.⁹⁹

Some commentators have argued against that universal jurisdiction and international treaties do not provide a legal basis for domestic piracy trials in third-party states like Kenya.¹⁰⁰ One of the arguments against universal jurisdiction involves a strict interpretation of the codified grant of jurisdiction over high-seas piracy, provided by Article 105 of UNCLOS.¹⁰¹ This argument maintains that jurisdiction to prosecute rests with the arresting state, and that prisoner transfer agreements that allow arresting states to leave captured pirates to be prosecuted in third-party nations violate the terms of Article 105.¹⁰² Hybrid tribunals could address this argument through the mechanisms of their formation; in creating a hybrid tribunal, the U.N. and cooperating nations would be forced to address jurisdictional issues as a fundamental matter. Practically speaking, the existence of such a hybrid tribunal would itself be a rebuttal to the argument, since the domestic and international support underpinning that tribunal would create a perception, at least, of legitimacy.

F. Moving Forward to a Lasting Solution.

On a more speculative level, hybrid tribunals might present a viable means to try Somali pirates in Somalia itself. It is arguable that maritime piracy is motivated by governmental instability and a lack of legitimate economic opportunities; however, Sarah Percy and Anja Shortland have argued that the gap between anarchy and a strong, centralized, and stable government presents a large “sweet spot” where piracy may flourish.¹⁰³ Recognizing that any solution to Somali piracy must lie in Somalia itself, the Secretary-General of the United Nations, in his recent report, has explored the option of establishing a Somali court, albeit one sited outside of Somalia itself.¹⁰⁴ A hybrid court

⁹⁸ Statute of the Special Court for Sierra Leone, *supra* note 25.

⁹⁹ Chapter VII of the United Nations Charter gives the Security Council broad discretion in deciding what actions to take when a threat to peace is perceived. U.N. Charter arts. 39–51.

¹⁰⁰ Eugene Kontorovich, *International Legal Responses to Piracy off the Coast of Somalia*, ASIL INSIGHTS, Feb. 6, 2009, <http://www.asil.org/insights090206.cfm>.

¹⁰¹ United Nations Convention on the Law of the Sea art. 105, Dec. 10, 1982, 1833 U.N.T.S. 397.

¹⁰² Kontorovich, *supra* note 100. For a counterargument, see Douglas Guilfoyle, *Counter-Piracy Law Enforcement and Human Rights*, 59 INT'L & COMP. L.Q. 141, 144–45 (2010).

¹⁰³ Percy & Shortland, *supra* note 3, at 36.

¹⁰⁴ *Report of the Secretary-General on Prosecuting Somali Pirates*, *supra* note 13, ¶¶ 62–67.

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negotiated by the U.N. and Somalia itself would probably be the best way to address jurisdictional and legitimacy issues; however, the Secretary-General's report also notes the lack of Somali judicial resources, and suggests that this option be "borne in mind" until adequate Somali participation is possible.¹⁰⁵

V. Conclusion

One important aspect of the issue of maritime piracy is the relatively limited nature of the offense. Maritime piracy represents a relatively minor portion of the ills plaguing the world.¹⁰⁶ Deterrence, through military cooperation, information sharing, and other means may shrink the problem further. A judicial response to a specialized problem like piracy must be responsive to changes in the nature and scale of the problem.

As discussed above in part II, political and financial goals may affect a state government's willingness to prosecute pirates domestically. Existing domestic prosecution arrangements create a system where piracy trials are essentially a product purchased by the international community – and the supply provided by small East African nations cannot meet international demand. These domestic prosecution arrangements do not address issues of legitimacy and legality as thoroughly as hybrid tribunals could. Hybrid courts acting regionally, though not immune from political manipulation, are more insulated by their international component, as well as any structural separations that may be erected between them and their host governments.

Hybrid tribunals should be implemented as a complement to domestic prosecution forums. The international significance of piracy, the national origins of those who are accused of piratical crimes, and the interests and national capabilities in the regions where piracy occurs make hybrid tribunals a particularly appropriate measure. By bridging the gap between international and domestic law, hybrid tribunals can ameliorate the lack of harmonization between domestic piracy laws, perhaps initially in terms of punishments. As a tangential benefit, hybrid courts may serve as an important evolutionary step in the advancement of legal regimes in developing nations. In the context of developing nations, hybrid tribunals offer paths to well-developed domestic tribunals as a long-term goal, and increased participation in internationally relevant law and justice as a short-term goal. As a response to piracy, and as part of a cooperative, rather than coercive, form of international intervention, hybrid tribunals are a step in the right direction.

¹⁰⁵ *Id.* ¶ 67.

¹⁰⁶ *Id.* ¶ 8 (predicting that the success rate of pirate attacks in 2010 is likely to be under 20 percent).