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ON THE EVOLUTION OF THE LAW OF INTERNATIONAL SEA PIRACY: HOW PROPERTY TRUMPED HUMAN RIGHTS, THE ENVIRONMENT AND THE SOVEREIGN RIGHTS OF STATES IN THE AREAS OF THE CREATION AND ENFORCEMENT OF JURISDICTION

*Leticia M. Diaz and Barry Hart Dubner**

I. INTRODUCTION

One cannot pick up a newspaper or watch the news these days without seeing articles or stories about the “Somali pirates.” In fact, piracy has taken an increasing toll on international shipping in the key water link between the Mediterranean Sea and the Indian Ocean. In 2008, a total of forty-nine vessels were hijacked worldwide.¹ Forty-two of the forty-nine hijackings occurred off Somalia’s 1,900 mile (3,000-kilometer) coast line, and pirates made an estimated \$30 million in ransom for those forty-two vessels.² Navies from all over the world have begun to show their presence in this area. However, the problem has arisen with regard to whether or not the various countries involved have the prescriptive and enforcement jurisdiction over these pirates. In fact, Admiral Mike Mullen, Chairman of the Joint Chiefs of Staff, said that there were legal and military *obstacles* combating piracy.³ “One of the challenges that you will have in piracy, clearly, is, if you are intervening and you capture pirates, is there a path to prosecute them?”⁴ This statement by the Chairman of the Joint Chief of Staff is rather surprising because the jurisdiction to prescribe and enforce punishment over pirates has long been settled. If the comment by Admiral Mullen is merely requesting information about where to prosecute the pirates if they are captured, that is a valid query. The purpose of this article, therefore, is to review the evolution of the law of international sea piracy in order to assist people like Admiral Mike Mullen and the Danish Government, among others, in giving them authority for prosecuting pirates. As this article develops, the reader is going to see how property rights have become so

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1. ICC INTERNATIONAL MARITIME BUREAU, PIRACY AND ARMED ROBBERY AGAINST SHIPS, ANNUAL REPORT: 1 JANUARY – 31 DECEMBER 2008 26 (2009) [hereinafter IMB ANNUAL REPORT 2008].

2. *Id.*; Malkhadir M. Muhumed, *Somali pirates make off with \$3.2 million ransom*, Associated Press, Feb. 5, 2009, available at <http://www.thefreelibrary.com/Somali+pirates+make+off+with+%243.2+million+ransom-a01611787903>.

3. Thom Shanker, *U.S. Urges Merchant Ships to Try Steps to Foil Pirates*, N.Y. TIMES, Nov. 20, 2008, at A10.

4. *Id.*

important due to the value of the cargo and ships taken both off the coast of Somalia and in the Gulf of Aden, that human rights, the environment and the sovereign right of at least one State, Somalia, has been trumped by such actions. In other words, the reader will observe that property is far more important than human rights and the environment. The question is whether certain U.N. Resolutions have given the various navies authority to attack targets on land as well as ones in internal waters or territorial seas.

The aforementioned article, which set forth Admiral Mullen's comment, went on to say that as of that day, there had been 95 acts of piracy committed in the Gulf of Aden and the surrounding waters,³⁹ captured vessels, and 330 sailors from 25 nations who still remain hostage.⁵ If the Admiral's remark was somewhat confusing to those of us who thought we understood jurisdictional matters regarding sea piracy, it was compounded by the fact that around the middle of November, the Somali pirates captured a Saudi owned super tanker, VLCC (a very large crude carrier) Sirius Star, owned by Saudi Aramco's Tanker Arm, Vela, with about two million barrels of crude oil aboard the ship.⁶ It was the largest ship ever hijacked.⁷ It was hijacked off the Somali coast.⁸ It was hijacked several hundred miles off shore which was an anomaly because, for the most part, the pirate attacks occurred in coastal waters.⁹ The super tanker was a ship that measured 1,080 feet in length (which happens to be the length of an aircraft carrier).¹⁰ It had a 25-man crew, including Croatian, British, Filipino, Polish, Saudi and American citizens.¹¹ Although in most cases ships and crews are freed after payment of ransom money, the hijackings that have occurred could boost freight rates and insurance.¹² Therefore, some shipping companies are choosing to divert their ships around the Cape of Good Hope rather than go through the Suez Canal; such a diversion could add as many as ten to twenty days to their journeys, as well as increasing fuel costs.¹³ In the end, everything shipped in that area would cost more for consumers.

Against this background, we will first look at statistics concerning piratical incidents that have occurred during the past year in order to see the impact that they are having on the world economy. It is also important to review the total scope of piracy worldwide with regard to the number and type of incidents thereof, because Somalia is not the only place in the world where piracy occurs. Thereafter, we will

5. *Id.*

6. Robert F. Worth, *Pirates Seize Saudi Tanker off Kenya; Ship Called the Largest Ever Hijacked*, N.Y. TIMES, Nov. 18, 2008, at A6.

7. *Id.*

8. *Id.*; see also, Barbara Surk & Tarek el-Tablawy, *Daring pirates pull off coup: Seizing giant oil tanker*, ORLANDO SENTINEL, Nov. 18, 2008, at A15.

9. Surk & el-Tablawy, *supra* note 8, at A15.

10. Worth, *supra* note 6, at A6.

11. *Id.*

12. INTERNATIONAL ENERGY AGENCY, OIL MARKET REPORT FOR 12/11/2008, p. 40 [hereinafter, IEA REPORT], available at <http://omrpublic.iea.org/omrarchive/11dec08full.pdf>; Jeffrey Gettleman, *Pirates in Skiffs Still Outmaneuvering Warships Off Somalia*, N.Y. TIMES, Dec. 16, 2008, International, at A6 [hereinafter *Pirates in Skiffs*].

13. IEA REPORT, *supra* note 12, at 40.

analyze the history of prescribing and enforcing a jurisdiction regarding the international law of sea piracy.

A. Background to “Somali” Piracy

1. The Problems Concerning Piratical Acts

Some of the important facts derived from the news in 2008 regarding the “Somali pirates” should be shown here; inter alia: the number of pirates; the type of vessels attacked; the amount of hijackings; the kidnapping of crews; the ransom demands; the hostages taken, have served to exacerbate the situation with regard to prescribing and enforcing jurisdiction. For example, it was reported on September 27th that pirates have more than 1,000 gunmen at their disposal.¹⁴ Mr. Mohamed, a Somali diplomat, said: “This is not a Somali problem. This is an international problem. Shipping across this entire region is imperiled by this.”¹⁵ Apparently, the Somali pirates “tend to hide their captured ships in isolated coves, ferrying people and cargo back and forth in dingies which are not exactly built for transporting forty ton pieces of solid steel equipment.”¹⁶ On September 28th and 29th it was reported that the Ukrainian vessel was taken toward Xarardheere and Hobyo which are isolated fishing villages that have thrived on organized crime and are frequently used as pirate hide-outs and places to keep seized ships.¹⁷ The pirates made it quite clear that they were not interested in the tanks aboard the Ukrainian vessel.¹⁸ They were interested in reward money or ransom.¹⁹ The Somali pirates freed the Ukrainian ship that was carrying tanks and other heavy weapons on Thursday, February 5, 2009 after receiving a \$3.2 million ransom which was dropped by air into the water.²⁰ The United States Navy watched the pirates get the money but did not act because the pirates were still holding 147 people from other crews that had been taken as hostages.²¹

The piracy “industry” in Somalia started ten to fifteen years ago as a response to illegal fishing of tuna in Somalia waters by various States.²² These “fishermen” armed themselves and became piracy (vigilantes) by confronting illegal fishing boats and demanding that they pay a tax.²³ Then the “fishermen” saw how easy it was to obtain ransoms and became greedy.²⁴ Piracy in Somalia is a highly orga-

14. Jeffrey Gettleman, *Long Scourge of Somali Seas, Pirates Provoke World Powers*, N.Y. TIMES, Sept. 10, 2008, at A1, A9 [hereinafter *Long Scourge of Somali Seas*].

15. *Id.*

16. *Id.* (referring to the kidnapping of a Ukrainian vessel with tanks and other military equipment aboard).

17. Jeffrey Gettleman, *Pirates Seek \$35 Million For Ship With Costly Cargo*, N.Y. TIMES, Sept. 28, 2008, International, at 11 [hereinafter *Pirates Seek \$35 Million*]; Jeffrey Gettleman, *Tensions Rise Over Ship Hijacked Off Somalia*, N.Y. TIMES, Sept. 29, 2008, at A9 [hereinafter *Tensions Rise*].

18. Jeffrey Gettleman, *Pirates Tell Their Side: They Want Only Money*, N.Y. TIMES, Oct. 1, 2008, at A6, A10 [hereinafter, *Pirates Tell Their Side*].

19. *Id.*

20. Muhumed, *supra* note 2.

21. *Id.*

22. *Pirates Tell Their Side*, *supra* note 18, at A10.

23. *Id.*

24. *Id.*

nized, ransom-driven business.²⁵ As far as the arms-laden Ukrainian ship is concerned, Somalia officials were quoted as saying that “‘a military operation has to be taken.’ . . . ‘If the Islamists get the arms,’ he said, referring to Islamist insurgents currently waging war on Somalia’s weak government, ‘they will cause problems for all of Somalia.’”²⁶

Seventeen years ago, Somalia’s central government collapsed and clan warlords divided the country into fiefs, plunging the country into chaos which continues to the present.²⁷ The fighting has intensified since December 2006 when Ethiopian troops invaded the country in order to rid Somalia of Islamic movements that controlled most of Somalia.²⁸ The American military helped the Ethiopians hunt down the Islamic leaders because the Islamist leaders were harboring al Qaeda terrorists.²⁹ As a result of the intensified conflict and a recent drought, more than three million Somalis – nearly half the population – need emergency food to survive.³⁰ Most of this aid comes by ship, which poses a major problem because “Somalia’s 1,880-mile coastline is crawling with pirates.”³¹

As far as the Ukrainian freighter is concerned, pirates asked for \$20 million.³² The freighter was hijacked 200 miles from the coastline on September 25th and was carrying 33 T-72 tanks, 150 grenade launchers, 6 anti-aircraft guns, and heaps of ammunition – including some made from depleted uranium.³³ The Kenyan government claimed Kenya was the final destination of the armament, but some believe the arms may have been heading for Sudan.³⁴ The ship was owned by an Israeli; the Ukrainians operated it; the crew consisted of seventeen Ukrainian sailors, two Russians, and one Latvian.³⁵

B. Somali Pirates and Their Hunting Grounds – The Nature and Extent of the Problem

Hunting grounds for the pirates comprise more than a million square miles.³⁶ To be safe, merchant ships have to stay in a narrow corridor identified by U.S. Naval authorities.³⁷ Of fifteen recent pirate attacks, ten took place outside these corridors.³⁸ Most ships do not have heavy security.³⁹

25. *Id.* at A6.

26. *Tensions Rise*, *supra* note 17, at A9.

27. *Long Scourge of Somali Seas*, *supra* note 14, at A9.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at A1.

32. Jeffrey Gettleman, *Amid Talks With Pirates, A Question of Who Pays*, N.Y. TIMES, Oct. 4, 2008, at A8 [hereinafter *Talks With Pirates*].

33. *Long Scourge of Somali Seas*, *supra* note 14, at A9.; *Pirates Seek \$35 Million*, *supra* note 17, at 11; *Tensions Rise*, *supra* note 17, at A9; Jeffrey Gettleman, *Hijacked Arms Freighter Is Cornered by U.S. Navy*, N.Y. TIMES, Sept. 30, 2008, at A14 [hereinafter, *Hijacked Arms Freighter*].

34. *Hijacked Arms Freighter*, *supra* note 33, at A14.

35. *Talks With Pirates*, *supra* note 32, at A8.

36. Worth, *supra* note 6, at A6.

37. *Id.*; IMB ANNUAL REPORT 2008, *supra* note 1, at 23 (listing the co-ordinates of the corridor).

38. Worth, *supra* note 6, at A6.

The average ransom for a ship is now in the range of \$500,000 to \$2 million.⁴⁰ In 2008, these sums went up from tens of thousands of dollars to hundreds of thousands, and even millions of dollars.⁴¹ The United Nations estimated the Somali pirates' profits at \$120 million in 2008.⁴² The question has been asked why bother paying at all? Why not just give the pirates the vessels? Apparently, ransoms are paid because they are low when compared to the values of the ships.⁴³

How do pirates get aboard such large ships? Pirates use ropes and ladders to climb the hulls, which are generally about thirty feet from water to the deck.⁴⁴ On large ships with small crews – like the Saudi supertanker, *Sirius Star*, which had only a 25-member crew on a ship 1,080 feet long – pirates can often board the ship unnoticed.⁴⁵ Pirates also use rocket propelled grenade launchers that punch holes on the side of the ships.⁴⁶ An example of such an attack was made against a Japanese oil tanker in April, 2008.⁴⁷ Oil can be spilled into the sea due to this type of attack, causing heavy environmental damage.⁴⁸

Apparently, pirates are now moving southward into the area of the Indian Ocean, thereby becoming more difficult and costly to patrol.⁴⁹ Accidental deaths can occur due to over-anxious sailors. For example, the Indian Navy sank a Thai boat that had allegedly been seized by pirates.⁵⁰ “This vessel was similar in description to the ‘mother vessel’ mentioned in various piracy bulletins. ‘Mother ships’ are defined as ocean going boats, often large fishing trawlers, that tow or carry speedboats.”⁵¹ Faster, more nimble speed boats are deployed to attack and hijack commercial vessels, which are then held for ransom.⁵² On November 29, 2008, the *Orlando Sentinel* reported that when Somali pirates seized a chemical tanker, three security guards jumped into the sea and were rescued by a NATO helicopter gunship.⁵³ There was a crew on board of twenty-five Indians and two Bangladeshis who were taken as hostage.⁵⁴ It is important to note the fact that about twenty tankers sail through the international shipping lane daily.⁵⁵

39. *Id.*

40. *Id.*

41. *Id.*

42. *Pirates in Skiffs*, *supra* note 12, at A6.

43. Worth, *supra* note 6, at A6.

44. Surk & el-Tablawy, *supra* note 8, at A15.

45. *Id.*

46. *Id.*

47. *Id.*

48. The *Sirius Star*, which was hijacked by Somali pirates on November 15, 2008, was carrying 84 million gallons of oil. John S. Burnett, *Grand Theft Nautical*, N.Y. TIMES, Dec. 5, 2008, Op-Ed, at A33. The *Exxon Valdez*, which caused extensive environmental damage when it ran aground and spilled much of its oil into the Gulf of Alaska in 1989, carried 53 million gallons of crude oil. *Id.*

49. Surk & el-Tablawy, *supra* note 8, at A15.

50. Mark McDonald, *Mistake Cited in Sinking of Boat by India*, N.Y. TIMES, Nov. 27, 2008, at A10.

51. *Id.*

52. *Id.*

53. Katharine Houreld, *Pirates take over tanker – 3 guards jump ship*, ORLANDO SENTINEL, Nov. 29, 2008, at A5.

54. *Id.*

55. *Id.*

The pirates seem to be getting bolder. Twenty speedboats filled with pirates launched a simultaneous attack off the coast of Yemen.⁵⁶ All ships used evasive maneuvers to prevent boarding during a four-hour attack.⁵⁷ Russia's UN Ambassador Churkin said that the UN might pass a new resolution with aggressive rules of engagement.⁵⁸ According to the *New York Times*, October 2, 2008, the growing price to free a hijacked ship was between \$1 million and \$2 million.⁵⁹ As of December 10th, there were 102 ships attacked off of Somalia and in the Gulf region; forty hijackings; and, "piracy is now a real industry in Somalia. Whole clans are living off it."⁶⁰ How can pirates in small boats stop a 30,000 ton ship? These ships are usually equipped with a cannon-long-range acoustic devise (or LRAD) that can cost up to \$125,000 – which shoots sound waves that can be debilitating at 100 meters or 330 feet.⁶¹ However, pirates usually come at night in speedboats (too small and too fast to be picked up by radar.)⁶² Using grappling hooks over the railings and scampering up the sides, the whole process to board the ship takes about five minutes.⁶³

In November, 2008, two Chinese ships were hijacked – a fishing trawler and a cargo flying a Hong Kong flag and carrying wheat.⁶⁴ "About 60% of China's imported oil comes from the Middle East, and much of that passes through the Gulf of Aden, along with huge shipments of raw materials from Africa."⁶⁵ "To help combat the sharp rise of increasingly brazen pirate attacks in the [G]ulf, the European Union deployed its first-ever naval mission in December, 2008, a six-ship flotilla. The Union's operation, code-name Atalanta, joined other navies already patrolling there, including those from the United States, Russia, and India."⁶⁶ The article went on to say that the U.N. Security Council passed a Resolution allowing hot pursuit and/or breach of Somalia's 12-mile territorial sea and internal waters.⁶⁷ The Resolution seemed to indicate that they could launch a ground attack against the pirates on Somali soil.⁶⁸ (More on that later.) On December 17, 2008, it was also reported that pirates could be attacked on shore.⁶⁹ However, the final wording of the Resolution narrowed the application of enforcement by requiring the express consent of Somalia's government and saying that pirates should be pursued with an

56. *Id.*

57. *Id.*

58. *Id.*

59. Jeffrey Gettleman, *Somali Pirates, Hagglng Over Arms-Laden Ship, Appear to Be Reducing Ransom*, N.Y. TIMES, Oct. 2, 2008, at A14.

60. Mark McDonald, *Array of Strategies Are Tried To Turn Back Pirates at Sea*, N.Y. TIMES, Dec. 10, 2008, at A21.

61. *Id.*

62. *Id.*

63. *Id.*

64. Mark McDonald, *China Seems Prepared to Join Antipirate Patrols, in Rare Move Beyond the Pacific*, N.Y. TIMES, Dec. 18, 2008, at A6 [hereinafter, *China Seems Prepared to Join Antipirate Patrols*].

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. Neil MacFarquahar, *U.N. Council Shows Support For U.S. Plan Against Piracy*, N.Y. TIMES, Dec. 17, 2008, at A11.

appropriate level of intensity.⁷⁰ (The security council resolution(s) will be discussed later.) The U.N. decided not to send a force to Somalia. According to CNN, by December 17, 2008, there were 20,000 oil tankers, freighters and merchant vessels that normally passed along the crucial shipping route each year.⁷¹ It pointed out that the U.N. Resolution authorized hot pursuit and coastal attacks on land.⁷² However, the Resolution does not state anything regarding enforcing jurisdiction on land.⁷³

As stated earlier, about 60% of China's imported oil is from the Middle East and most of that passes through the Gulf of Aden.⁷⁴ The article on December 27, 2008 indicated that 110 ships have been attacked in the Gulf in 2008 and 42 were hijacked.⁷⁵ Fourteen ships were still being held for ransom as of that day.⁷⁶ Twelve hundred and sixty-five Chinese commercial vessels passed through the Gulf in 2008, seven of those were attacked.⁷⁷ Pirates were still holding a Chinese fishing trawler and eighteen crew men as hostage.⁷⁸ In response thereto, China sent two destroyers, equipped with guided missiles, a supply ship, special forces, and two helicopters into the region.⁷⁹ By doing so, China made a strong showing of force as well as creating a naval presence in the area. The pirates made more than \$30 million in 2008.⁸⁰ Keep in mind that the Somali coastline is 1,880 miles.⁸¹ As an aside, one third of the world's merchant sailors are from the Philippines.⁸² More than 100 Filipinos have been held by Somali pirates.⁸³ Nearly 300 sailors in all are being held.⁸⁴ As a final touch to end a rather "long" year of Somali incidents, a Greek ship escaped pirates by using fire hoses on January 1, thus, bringing in the New Year of 2009.⁸⁵ The incidents of Somali piracy have resulted in higher insurance rates for shippers, higher fuel costs because of detours, new private security bills and million-dollar ransoms.

One of the problems that will be discussed concerning jurisdiction is the attitude of many Western diplomats who have stated that maritime law can be "as murky as the seas."⁸⁶ Several times during 2008, the Danish Navy captured men they suspected of being pirates only to dump them onshore after the Danish gov-

70. *Id.*

71. *About 20 Chinese rescued from pirate attack*, CNN.COM, Dec. 17, 2008, <http://www.cnn.com/2008/world/africa/12/17/somaliapiracy>.

72. *Id.*

73. *Id.*

74. *China Seems Prepared to Join Antipirate Patrols*, *supra* note 64, at A6.; Mark McDonald, *Chinese Warships Sail, Loaded for Pirates*, N.Y. TIMES, Dec. 27, 2008, at A6 [hereinafter *Chinese Warships Sail*].

75. *Chinese Warships Sail*, *supra* note 75, at A6.

76. *Id.*

77. *Id.*

78. *Id.*

79. *China will help run off pirates*, ORLANDO SENTINEL, Dec. 27, 2008, at A3.

80. *Id.*

81. *Id.*

82. Carlos H. Conde, *Despite Wave of Piracy, Filipinos Crave Work as Sailors*, N.Y. TIMES, International, Dec. 21, 2008, at A24.

83. *Id.*

84. *Id.*

85. *Greek ship's crew foils pirates*, ORLANDO SENTINEL, Jan. 3, 2009, at A3.

86. *Pirates in Skiffs*, *supra* note 6, at A6.

ernment decided that they did not have jurisdiction.⁸⁷ The same article reported that it was unclear as to where pirates should be prosecuted.⁸⁸ In fact, at a recent antipiracy conference, British officials outlined a plan to try to capture pirates and prosecute them in Kenyan courts.⁸⁹ This plan was subsequently adopted.⁹⁰

C. On the Importance of Maritime Shipping and the Problems with “Choke Points”

In order to further our understanding of jurisdictional problems, it is best to give statistics on maritime shipping, in general, especially the shipment of oil. Contained in the United Nations General Assembly Report of the Secretary-General on the Oceans and the Law of the Sea is an excellent summary:

According to a recent UNCTAD publication, world seaborne trade (goods loaded) increased in 2006, reaching 7.4 billion tons. The world merchant fleet expanded to 1.04 billion deadweight tons (dwt) at the beginning of 2007, representing an 8.6-per cent increase over 2006, of which the highest growth was recorded for containerships. Total tonnage on order reached 6,908 vessels with a total tonnage of 302.7 million dwt. The estimated average age of the world fleet dropped marginally to 12 years in 2006. The oldest vessel type remains the general cargo vessel representing 56.8 per cent of all vessels more than 19 years old. It has an average age of 17.4 years. As regards fleet ownership, developing countries controlled about 31.2 per cent of the world dwt, developed countries about 65.9 per cent and economies in transition the remaining 2.9 per cent at the beginning of 2007. Between January 2006 and 2007, the foreign-flagged share for the first time since 1989 slightly decreased from 66.5 per cent to 66.3 per cent of the world total. The 10 major open and international registries account for 53.7 per cent of the world fleet. Of the remaining tonnage, 27.7 per cent is registered in developing countries, 18.9 per cent is registered in developed countries and 1.3 per cent in countries in transition.⁹¹

In order to better understand the economics regarding oil shipments, one must keep in mind that there are “choke points,” narrow channels along widely used global sea routes.⁹² Due to the high volume of oil traded through their narrow

87. *Id.*

88. *Id.* at A14.

89. *Id.*

90. Lolita Baldor, *Patrols keeping pirates at bay*, ORLANDO SENTINEL, Mar. 6, 2009, at A11.

91. The Secretary-General, *Report of the Secretary-General on Oceans and the law of the sea*, ¶ 51, *delivered to the General Assembly*, U.N. Doc. A/63/63/Add.1 (Aug. 29, 2008).

92. ENERGY INFO. ADMIN., COUNTRY ANALYSIS BRIEFS: WORLD OIL TRANSIT CHOKEPOINTS (2008), http://www.eia.doe.gov/cabs/World_Oil_Transit_Chokepoints/Full.html.

straits, they are critical to supplying global energy and security.⁹³ Two of the world's most strategic "choke points" are the Strait of Hormuz leading out of the Persian Gulf and the Strait of Malacca linking the Indian and Pacific Oceans.⁹⁴ Pertinent to our discussion is the Bab el-Mandab which connects the Arabian Sea with the Red Sea.⁹⁵ In 2007, total world oil production amounted to approximately eighty-five million barrels per day and around one-half, or over forty-three million barrels per day of oil, were moved by tankers on fixed maritime routes.⁹⁶ The international energy market is dependent upon reliable transport. So if a "choke point" is blocked, even temporarily, it can lead to increased energy cost.⁹⁷ In addition, as it will be seen here, "choke points" leave oil tankers vulnerable to theft from pirates, terrorist attacks and political unrest in the form of wars or hostilities, as well as shipping accidents, which can lead to disastrous oil spills and injure the environment.⁹⁸

The two "choke points" that are important for the purpose of this article are the Suez Canal/Sumed pipeline which, at the narrowest point, is only 1,000 feet; and, Bab el-Mandab, which is eighteen miles wide, at its narrowest point.⁹⁹ If either of these two "choke points" were shut off, it would be necessary to re-route around the southern tip of Africa (the Cape of Good Hope) which would mean an additional 6,000 miles in both cases.¹⁰⁰ In the case of Bab el-Mandab, northbound traffic can use the East-West oil pipeline through Saudi Arabia.¹⁰¹ There is no such outlet for the Suez Canal "choke point."¹⁰²

Having given an overview of the problems created by the Somali pirates and the extent to which the nations of the world are affected by these acts, we now turn to the jurisdictional evolution of international sea piracy. In order to understand the jurisdictional issues, it is first essential to be aware of certain international law of the sea concepts.

II. JURISDICTIONAL ANALYSIS OF LAW OF THE SEA CONCEPTS

The crime of "piracy" means different things to different people. As an introductory statement, it could be said that "piracy" is an act of violence, depredation or detention committed for private ends, delegated to the high seas and committed by one private ship against another ship.¹⁰³ The 1982 United Nations Convention

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. ENERGY INFO. ADMIN., COUNTRY ANALYSIS BRIEFS: WORLD OIL TRANSIT CHOKEPOINTS (2008), http://www.eia.doe.gov/cabs/World_Oil_Transit_Chokepoints/Full.html.

99. *Id.*

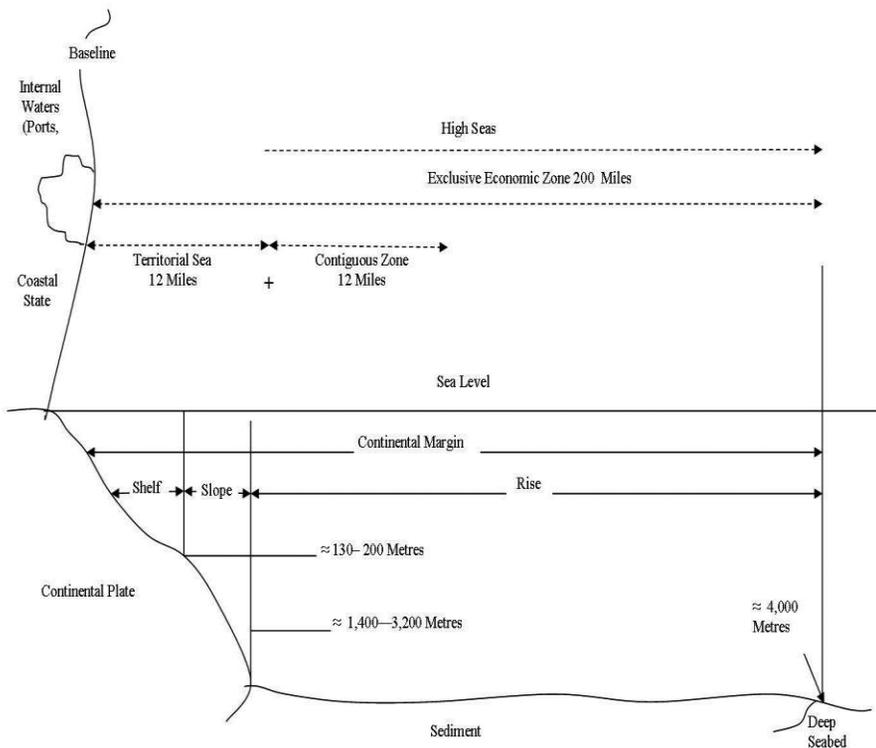
100. *Id.*

101. *Id.*

102. *Id.*

103. Barry Hart Dubner, *Human Rights and Environmental Disaster – Two Problems that Defy the "Norms" of the International Law of Sea Piracy*, 23 SYRACUSE J. INT'L L. & COM. 1, 9-10 (1997); see also United Nations Convention on the Law of the Sea, Art. 101, opened for signature Dec. 10, 1982, S. Treaty Doc. No. 39,

on the Law of the Sea (“UNCLOS”) took effect in November, 1994, and 159 nations have ratified it as of July 20, 2009.¹⁰⁴ The UNCLOS’s draft established a framework within which to codify existing customary law, in part, as well as to create new principles for civilized nations.¹⁰⁵ During the course of this article, there are law of the sea terms that need to be understood by the reader. The following is a schematic diagram which has been drawn for the purposes of introductory analysis:



103d Cong., 2d Sess. (1992) [hereinafter 1982 Convention], available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

104. Oceans and Law of the Sea, Division for Ocean Affairs and the Law of the Sea, Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as at [sic] 20 July 2009, [http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The United Nations Convention on the Law of the Sea](http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea).

105. Dubner, *supra* note 103, at 1 (citing, generally, Bernard H. Oxman, *United States Interests in the Law of the Sea Convention*, 88 Am. J. Int'l L. 167 (1994)).

A. Jurisdiction Concepts Regarding Laws of Sea

The coastal State exercises the utmost jurisdiction over its land territory.¹⁰⁶ Every coastal State has a baseline,¹⁰⁷ be it straight or mean average water line, which is used to measure the diminishing jurisdiction of the coastal state as one moves seaward.¹⁰⁸ The coastal State exercises exclusive jurisdiction over its ports and harbors (with possible access to visiting ships).¹⁰⁹ As one moves seaward from the baseline, the State exercises almost total jurisdiction over its territorial sea,¹¹⁰ except for the doctrine of innocent passage,¹¹¹ which is measured twelve miles

106. *Id.* at 11.

107. *Id.* The 1982 Convention defines “baseline” as follows: “Except where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal state.” 1982 Convention, *supra* note 103, at art. 5

108. Dubner, *supra* note 103, at 11.

109. *Id.*

110. *Id.* Articles 3 and 4 of the 1982 Convention define the “territorial sea.” “Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.” 1982 Convention, *supra* note 103, at art. 3. “The outer limit of the territorial sea is the line every point of which is at a distance from the nearest point of the baseline equal to the breadth of the territorial sea.” *Id.* at art. 4.

111. Dubner, *supra* note 103, at 11. “Innocent passage” is defined by the 1982 Convention as follows:

1. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.

2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:

a. any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;

b. any exercise or practice with weapons of any kind;

c. any act aimed at collecting information to the prejudice of the defence or security of the coastal State;

d. any act of propaganda aimed at affecting the defence or security of the coastal State;

e. the launching, landing or taking on board of any aircraft;

f. the launching, landing or taking on board of any military device;

g. the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;

h. any act of willful and serious pollution contrary to this Convention;

i. any fishing activities;

j. the carrying out of research or survey activities;

k. any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;

l. any other activity not having a direct bearing on passage.

1982 Convention, *supra* note 103, at art. 19.

seaward from its baseline.¹¹² The State's jurisdiction diminishes further when the continuous zone,¹¹³ which extends twelve miles beyond the territorial waters, reaches the high seas.¹¹⁴ The continuous zone gives a limited area to jurisdiction of the coastal State (e.g., navigation, sanitation, customs, fiscal) and is actually part of the high seas.¹¹⁵ The high seas are open to all nations and therefore the coastal State is not allowed to exercise its jurisdiction in this area (with limited exceptions, e.g., the exclusive economic zone).¹¹⁶

112. Dubner, *supra* note 103, at 11.

113. *Id.* "Contiguous zone" is defined by the 1982 Convention as follows:

1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:
 - a. Prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
 - b. Punish infringement of the above laws and regulations committed within its territory or territorial sea;
2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.

1982 Convention, *supra* note 103, at art. 33.

114. Dubner, *supra* note 103, at 11.

115. Dubner, *supra* note 103, at 11-12. "Exclusive economic zone" is defined as follows: "The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention." 1982 Convention, *supra* note 103, at art. 55. Article 56 of the 1982 Convention governs the rights, jurisdiction and duties of the coastal State in the exclusive economic zone:

1. In the exclusive economic zone, the coastal State has:
 - a. sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
 - b. jurisdiction as provided for in the relevant provisions of this Convention with regard to:
 - i. The establishment and use of artificial islands, installations and structures;
 - ii. Marine scientific research;
 - iii. The protection and preservation of the marine environment;
 - c. other rights and duties provided for in this Convention.
2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.
3. The rights set out in this article with respect to the sea-bed and subsoil shall be exercised in accordance with Part VI.

Id. at art. 56. Finally, the 1982 Convention defines the breadth of the exclusive economic zone. "The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured." *Id.* at art. 57.

116. Dubner, *supra* note 103, at 12.

Historically, the high seas have traditionally been open to all nations for the purpose of preserving international shipping and commerce.¹¹⁷ However, this “freedom of the high seas” did not always exist. In 1494, for example, the Pope, believing incorrectly at that time that Columbus had found the western sea route to Asia, divided the world between the two contending maritime nations by drawing a line through the middle of the Atlantic Ocean.¹¹⁸ “His ruling, agreed to in the treaty of Tordesillas, assigned all lands 370 leagues (about 1,000 miles of the 75 miles) west of the Cape Verde Islands to Spain, and all land to the east, to Portugal.”¹¹⁹ The freedom of the seas doctrine was first espoused by the writings of Grotius in the early 1600s.¹²⁰ He believed that the ocean was too vast and too rich in resources for any one nation to have control over its entire length and width.¹²¹ Since that time, the allowing of free maritime commerce and transport in international straits has been one of the hallmarks of the international community.¹²² International straits are preserved for international commerce and are open to all nations.¹²³ At the heart of all major maritime conventions and concerns is the concept that international commerce should not be interrupted by maritime violence (e.g.,

117. *Id.*

118. EDWARD KRITZLER, *JEWISH PIRATES OF THE CARIBBEAN: HOW A GENERATION OF SWASHBUCKLING JEWS CARVED OUT AN EMPIRE IN THE NEW WORLD IN THEIR QUEST FOR TREASURE, RELIGIOUS FREEDOM – AND REVENGE* 30 (2008).

119. *Id.*

120. HUGO GROTIUS, *THE FREEDOM OF THE SEAS* (James Scott Brown ed., Ralph van Deman Magoffin trans., Oxford University Press 1916) (1608).

121. *Id.* at 8.

122. The 1982 Convention governs the legal status of waters forming straits used for international purposes:

1. The regime of passage through straits used for international navigation established in this Part shall not in other respects affect the legal status of the waters forming such straits or in the exercise by the States bordering the straits of their sovereignty or jurisdiction over such waters and their air space, bed and subsoil.

2. The sovereignty or jurisdiction of the States bordering the straits is exercised subject to this Part and to other rules of international law.

1982 Convention, *supra* note 103, at art. 34. Articles 37 and 38 of the 1982 Convention apply to transit passage for international purposes. Article 37 limits transit passage to “straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.” *Id.* at art. 37. Article 38 then defines the right of transit passage as follows:

1. In straits referred to in article 37, all ships and aircraft enjoy the right of transit passage, which shall not be impeded; except that, if the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply if there exists seaward of the island a route through the high seas or through an exclusive economic zone of similar convenience with respect to navigational and hydrographical characteristics.

2. Transit passage means the exercise in accordance with this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone. However, the requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a State bordering the strait, subject to the conditions of entry to that State.

Id. at art. 38.

123. Dubner, *supra* note 103, at 12-13.

piracy and terrorism). In other words, commerce must be able to flow freely, uninhibited, without danger to life and limb, and without the fear of shipping causing widespread environmental contamination.

In order to be cognizant of the political dilemmas that certain countries such as Denmark and the United States (recall Admiral Mullen's comments) believe they are confronted with, it is necessary to examine the historical background of maritime violence in order to have a sufficient understanding of the jurisdictional problems. The authors will start by defining piracy under treaty law.

III. DEFINITION OF PIRACY, TERRORISM, AND MARITIME VIOLENCE

A. Definitions

"Piracy" as defined in both the 1958 Geneva Convention on the High Seas and UNCLOS were the same crime committed on high seas, as follows:

Article 101 Definition of piracy

Piracy consists of any of the following acts:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(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;

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

Article 102 Piracy by warship, government ship or government aircraft whose crew has mutinied

The acts of piracy, as defined in Article 101, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship or aircraft.

Article 103 definition of a pirate ship or aircraft

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the person guilty of that act.

Article 104 Retention or loss of the nationality of a pirate ship or aircraft

A ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the State from which such nationality was derived.

Article 105 Seizure of a pirate ship or aircraft

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

Article 106 Liability for seizure without adequate grounds

Where seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft for any loss or damage caused by the seizure.¹²⁴

Prior thereto, the 1958 Geneva Convention on the High Seas defined “piracy” as follows:

Article 15

Piracy consists of any of the following acts:

124. United Nations Convention on the Law of the Sea, Art. 101-06, opened for signature Dec. 10, 1982, S. Treaty Doc. No. 39, 103d Cong., 2d Sess. (1992), available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

(1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

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

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

(2) 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.

(3) Any act of inciting or of intentionally facilitating an act described in sub-paragraph 1 or sub-paragraph 2 of this article.

Article 16

The acts of piracy, as defined in article 15, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship.

Article 17

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 15. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.

Article 18

A ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the State from which such nationality was derived.

Article 19

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State

which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.¹²⁵

There was no change in the conventional definitions of “pirates” from 1958 through 1982. Before explaining why there was no change and why the crime of piracy took place on high seas rather than in territorial waters, it is first necessary to look at another definition.

The ICC International Maritime Bureau (IMB) is a specialized division of the International Chamber of Commerce (ICC).¹²⁶ The IMB is a non-profit organization which was established in 1981 to gather material and act as a focal point in the fight against all types of maritime crime and malpractice.¹²⁷ Their definition of piracy is: “An act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in the furtherance of that act.”¹²⁸ This definition thus covers actual or attempted attacks whether the ship is berthed, at anchor, or at sea.¹²⁹ Petty thefts are excluded unless the thieves are armed.¹³⁰

The above definition has been adopted by the IMB as the majority of attacks against ships take place within the jurisdictions of States and piracy as defined under UNCLOS does not address this aspect.¹³¹

The IMB noted that the International Maritime Organization (IMO) at its 74th meeting of MSC addressed this matter in the draft Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships (MSC/Circ./984) article (2.2) (“The Code of Practice”).¹³²

The Code of Practice defines “Piracy” and “Armed Robbery against Ships” as follows:

Piracy means unlawful acts as defined in article 101 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS):

ARTICLE 101

Definition of Piracy consists of any of the following acts:

a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed

125. Convention on the High Seas, April 29, 2958, 13 U.S.T. 2312 (1962), 450 U.N.T.S. 82.

126. IMB ANNUAL REPORT 2008, *supra* note 1, at 2.

127. *Id.*

128. *Id.* at 3.

129. *Id.*

130. *Id.*

131. *Id.*

132. IMB ANNUAL REPORT 2008, *supra* note 1, at 2.

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

“Armed Robbery against Ships means any unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of “piracy,” directed against a ship or against persons or property on board such ship, within a State’s jurisdiction over such offences”¹³³

The above definitions now cover actual or attempted attacks whether the ship is berthed, at anchor, or at sea.¹³⁴

The reader will know right away that IMB’s definition is given “for statistical purposes” and defines Piracy and Armed Robbery in such a way that the definition covers actual or attempted attacks in any water, be it internal, territorial or high seas.¹³⁵ Again, this is only for statistical purposes. This is not a treaty signed onto by a consensus of the international community. However, the statistics are very important to any discussion of maritime violence and are so noted.

B. The Harvard Draft

In order to understand why certain states are having difficulty understanding jurisdictional concepts concerning the crime of piracy, it is necessary to look back and see why the articles at the 1958 Convention were originally drafted. Both the 1958 and 1982 definitions of piracy (again, both are identical) are based on the Harvard Research Draft¹³⁶ (“Harvard Draft”), which was prepared in 1932 for the purposes of “expediency.”¹³⁷ The study itself was extremely comprehensive and has been used and cited in different texts. In 1932, the drafters of the study were presented with a main question: “What initial significance does piracy have in the

133. *Id.* (quoting proposed changes to Int’l Mar. Org., Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery Against Ships, Res. A.922(22) (Nov. 2001)).

134. *Id.*

135. *Id.*

136. Harvard Research in International Law, *Draft Convention on Piracy, with Comment*, 26 AM. J. INT’L L. SUPP. 739 (1932) [hereinafter “Harvard Draft”].

137. Dubner, *supra* note 103, at 11-12.

law of nations?”¹³⁸ In order to find the intents of the drafters, we have selected a few excerpts from the Harvard Draft (a) to demonstrate the thinking of its drafters; and (b) to show their diverse opinions about what the contents of a convention should contain and why. You will observe that many of their comments, and those of the commentaries quoted by them, are applicable to the situation today in Somalia and other areas of the world.

Why was the definition of piracy limited to the high seas? Because the crime of piracy interfered with international shipping on the high seas.¹³⁹ It was thought that if the piracy occurred in territorial or internal waters of the coastal State, the coastal State could (and would want to) resolve the situation by prescribing and enforcing its own municipal legislation on sea piracy.¹⁴⁰ There was a disagreement over whether piracy was “an international crime.”¹⁴¹ The question at that time was “how would we treat the problem of piracy today in the light of the possibility of an international agreement for suppression?”¹⁴² At the time, there was a “modern orthodox view” that the law of nations is a law between States only, and limits their respect of jurisdictions.¹⁴³ Since there was no “super-government and no international tribunal to administer international civil or criminal justice against private persons,” and since there was “no provision in the laws of many states for punishing foreigners which political offence was committed outside the state’s ordinary jurisdiction, it cannot truly be said that piracy is a crime or an offence by the law of nations, in a sense which a strict technical interpretation will give those terms.”¹⁴⁴ Proceeding with the discussion regarding any “norms” regarding law of international sea piracy, it is necessary to first set forth statistics regarding this crime so that the readers can understand the true nature of the acts of piracy, where they occur and what is being done by other States to handle the situation.

The IMB reported that there were 293 incidents of piracy during the year 2008.¹⁴⁵ This is more than an 11% increase on 2007, which is attributed to the unprecedented number of attacks in the Gulf of Aden.¹⁴⁶ The number of attacks has increased from the years 2006 and 2007 where there were a total of 239 and 263 incidents reported respectively.¹⁴⁷

Not only did 2008 see an unprecedented number of attacks in the Gulf of Aden, it also saw the largest tanker ever hijacked, and successful attacks carried out at greater distances from land, along the east coast of Africa, than ever before.¹⁴⁸ Every attack off Somalia is aimed at hijacking a vessel; hence every attempted

138. *Id.* at 16; Harvard Draft, *supra* note 136, at 749.

139. *See generally*, United Nations Convention on the Law of the Sea, Art. 101-06, opened for signature Dec. 10, 1982, S. Treaty Doc. No. 39, 103d Cong., 2d Sess. (1992), *available at* http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

140. Dubner, *supra* note 103, at 17.

141. *Id.*

142. Harvard Draft, *supra* note 136, at 753; Dubner, *supra* note 103, at 17.

143. Harvard Draft, *supra* note 136, at 760; Dubner, *supra* note 103, at 17.

144. Harvard Draft, *supra* note 136, at 756; Dubner, *supra* note 103, at 17.

145. IMB ANNUAL REPORT 2008, *supra* note 1, at 26.

146. *Id.*

147. *Id.*

148. *Id.*

attack is a failed hijacking rather than a simple act of robbery.¹⁴⁹ All types of vessels, with varying freeboards and speeds have been targeted and attacked.¹⁵⁰ Looking at the number worldwide in 2008, there were a total of forty-nine vessels hijacked, 889 crew taken hostage and forty-six vessels reported being fired upon.¹⁵¹ These are the highest numbers ever recorded by the Piracy Reporting Center.¹⁵² Thirty-two crew members were injured: eleven killed and twenty-one missing, presumed dead.¹⁵³ The nature of the attacks indicates that the pirates are better armed and prepared to assault and injure the usually unarmed crew.¹⁵⁴ The total incidents in which guns have been used are 139, up from seventy-two in 2007.¹⁵⁵ Of the 293 worldwide incidents, 111 occurred off the east coast of Somalia or in the Gulf of Aden, an increase of nearly 200% over 2007.¹⁵⁶ A total of forty-two vessels were hijacked by Somali pirates and 815 crew taken hostage.¹⁵⁷ As of December 31, 2008, Somali pirates were holding thirteen vessels for ransom and 242 hostage.¹⁵⁸ The attacks picked up in September with nineteen attacks.¹⁵⁹ In October and November there were fifteen and sixteen attacks respectively.¹⁶⁰ During the first six months of 2009, worldwide piracy attacks numbered 240, more than double the 114 attacks for the same period in 2008.¹⁶¹ The rise in numbers is due almost entirely to increased Somali pirate activity off the Gulf of Aden and east coast of Somalia, which accounted for 130 of the 240 attacks.¹⁶²

One of the trends that the IMB also points out is the increased ability of Somali pirates to go out further to sea than before.¹⁶³ This range, coupled with the inability of the Somali government to respond, encourage the pirates further.¹⁶⁴ Currently, the reward to risk ratio for the Somali pirates is so large that only robust measures by international governments and navies will enable the safety and security of this major trade route to be restored.¹⁶⁵ According to the IMB, Nigeria has the second highest number of serious attacks and is viewed as another high-risk area.¹⁶⁶ The main difference between East and West African piracy is that almost all the incidents in Nigeria are conducted within their territorial waters whereas most of the incidents along the East coast of Africa and the Gulf of Aden occur on the high

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. IMB ANNUAL REPORT 2008, *supra* note 1, at 26.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. ICC Commercial Crime Services, *Piracy doubles in first six months of 2009*, July 15, 2009, http://www.icc-ccs.org/index.php?option=com_content&view=article&id=362:piracy-doubles-in-first-six-months-of-2009&catid=60:news&Itemid=51.

162. *Id.*

163. IMB ANNUAL REPORT 2008, *supra* note 1, at 26.

164. *Id.*

165. *Id.*

166. *Id.*

seas.¹⁶⁷ Somalia's attacks are completely financially motivated, while Nigeria's attacks are at least partly political.¹⁶⁸ There have been forty confirmed incidents in Nigeria reported via the masters, owners and other risk intelligence gathering organizations.¹⁶⁹ There are also approximately 100 unconfirmed incidents.¹⁷⁰ Of the forty confirmed attacks, twenty-seven vessels have been boarded and five hijacked.¹⁷¹ Nigeria has the highest number of crew being kidnapped (thirty-nine).¹⁷² Many of the incidents go unreported as owners do not like to see their insurance rates go any higher than they are.¹⁷³ The attacks in the Niger delta and the kidnappings are targeted against the oil industry and reportedly for political change.¹⁷⁴ Of course, from the shipping industry's point of view, these attacks are criminal; seventeen of the incidents were against tankers, seven on supply ships and the remaining on bulk carriers, general cargo ships and container ships.¹⁷⁵ The incidents in Nigeria are often quite violent and the crews are frequently injured and kidnapped.¹⁷⁶ Even ships provided with escort protection and armed security guards are still prey to the dedicated pirates.¹⁷⁷ On the other hand, there are areas where there have been declines in these incidents of piracy.¹⁷⁸ Indonesia is an example. Indonesia reported only twenty-eight, mostly opportunistic, attacks in 2008, down from a 2003 high of 121.¹⁷⁹ The Malacca Strait has seen a further reduction in number of incidents reported with only two reported in 2008 as compared to seven in 2007.¹⁸⁰ Incidents in the Singapore Strait are, however, up from three in 2007 to six in 2008.¹⁸¹ Malaysia has also seen a slight increase in the number of incidents with three vessels being hijacked and seven boarded as compared to nine boarded in 2007.¹⁸² The reduction on acts of piracy in the Indonesia, Strait of Malacca, areas is due to regional ship controls, increased vigilance and patrolling by the littoral States and the precautionary measures taken on boarded ships.¹⁸³ We can only assume that with the world economy being in the State that it is at the time of the writing of this article, there is a strong possibility of various acts of piracy increasing. The number of attacks, and the value of the property involved, has brought a sense of outrage from the ship owners with a degree of response from the States affected thereby.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. IMB ANNUAL REPORT 2008, *supra* note 1, at 26.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. IMB ANNUAL REPORT 2008, *supra* note 1, at 26.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at 27.

C. The Outrage of the Ship Owners over Property Losses

As the reader has observed, there has been an enormous increase (“unprecedented”) in the number of piracy attacks in Somalia/Gulf of Aden. One of the surprising events that have occurred in connection with the attacks by the Somali pirates is that the violence attached to these attacks is unprecedented; the number of crew men hijacked; and, the amount of ransom demanded by the pirates is totally unprecedented in history.¹⁸⁴ Also, all one need do is look at the size of the vessels that the pirates have attacked and one will see size does not matter in this situation. As stated previously in this article, there was a Saudi VLCC oil tanker hijacked and held for ransom as well as a bulk carrier weighing 74,000 tons, the largest bulk carrier ever hijacked.¹⁸⁵ The main problem, however is that according to the IMB, navies are facing restrictions when dealing with the pirates.¹⁸⁶ It is apparently unclear how a naval vessel should proceed if it intervenes and takes pirate prisoners, rather than killing them.¹⁸⁷ According to the IMB, there have been very few flag states and only one neighboring country in the region, which has accepted prisoners for investigation and prosecution. Naval vessels will understandably hesitate to intervene once hijackers have taken over a vessel and are holding crew hostage. Concern of the safety of the hostages may preclude on the intervention except in exceptional circumstances.¹⁸⁸

The naval units of various governments have been deployed in this area recently.¹⁸⁹ They could certainly deploy in the high seas areas without any Resolution by the Security Council and without the approval of the government of Somalia. Mother vessels could be attacked if found and suspected pirates could have their weapons confiscated and their movements closely tracked as a deterrent. The international shipping industry points out that pirates are now attacking ships on a daily basis with machine guns and rocket propelled grenades and have over 200 to 300 seafarers hostage.¹⁹⁰ They are operating with impunity while governments stand idly by.¹⁹¹ They point out that if civil aircrafts were being hijacked on a daily basis the response of governments would be very different.¹⁹² They also state that ships, which are the life blood of the global community, are seemingly “out of sight” and therefore “out of mind.”¹⁹³ It shows an indifference to the lives of the merchant seafarers as well as an indifference to the consequences for society at large, which is unacceptable. The shipping industry is also shocked that the world’s leading nations, with the naval resources at their disposal, are unable to

184. *Id.* at 26.

185. Worth, *supra* note 6, at A6.

186. ICC INTERNATIONAL MARITIME BUREAU, PIRACY AND ARMED ROBBERY AGAINST SHIPS, REPORT FOR THE PERIOD 1 JANUARY – 30 SEPTEMBER 2008 32 (2008) [hereinafter IMB REPORT FOR 2008 THROUGH SEPTEMBER].

187. *Id.*

188. *Id.*

189. *Id.* at 33.

190. IMB REPORT FOR 2008 THROUGH SEPTEMBER, *supra* note 186, at 35.

191. *Id.*

192. *Id.*

193. *Id.*

maintain the security of one of the world's most strategically important seaways, like the one from Europe to Asia via the Red Sea/Suez Canal.¹⁹⁴ The shipping industry has spent billions of dollars since 9/11 to comply with stringent new security requirements agreed by the international community in order to address concerns about terrorism.¹⁹⁵ Yet, when merchant ships – which carry 90% of the world trade and keep the world economy moving – are subject to attack by pirates, the response of many governments is that it is not their problem and the shipping companies should hire mercenaries.¹⁹⁶ The arming of merchant ships will almost certainly put the lives of the ships' crew in even greater danger and is likely to escalate the level of violence employed by the pirates.¹⁹⁷ It would also be illegal under the national law of many ships' flag states and many other countries with whom they are trading.¹⁹⁸ Thus, the shipping industry requested that the various nations send in their navies and protect merchant vessels.¹⁹⁹ The navies must try to bring the pirates to justice in a court of law. The pirates should not be allowed to resume their piratical activities because of the international community's unwillingness to take the necessary action. If merchant vessels are forced to redirect their ships via the Cape of Good Hope, this would add several weeks to the duration of many ships' voyages and would have severe consequences for international trade, the maintenance of inventories and the price of fuel and raw materials.²⁰⁰ It would also affect not just those countries to which cargos are destined but all other sea born trade, a consequence that, in the current economic climate, must surely be avoided.²⁰¹ It cannot escape notice that the supply of consumer goods – the majority of which are carried via this vital sea line – could also be seriously affected.²⁰²

One wonders where the voice of the shipping industry disappeared to when the Vietnamese refugees were raped and murdered by Thai fishermen many years ago.²⁰³ According to P.W. Birnie, "from 1980-85 the UNHCR received reports that overall 13,076 had been killed, 2,283 women raped and 592 kidnapped by Thai fishermen."²⁰⁴ According to piracy statistics based on refugee reports in 1981, for example, 571 rapes occurred; in 1982, 176; in 1983, 95; in 1984, 68; in 1985, 67; in 1986, 58; in 1987, 67; etc.²⁰⁵ In contrast, the European Union Anti Piracy Operation off the coast of Somalia (named Operation Atalanta) was started on September 12, 2008.²⁰⁶ The Operation was established in support of the UN Security

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. IMB REPORT FOR 2008 THROUGH SEPTEMBER, *supra* note 186, at 35.

199. *Id.*

200. *Id.* at 36.

201. *Id.*

202. *Id.*

203. For an account of this incident, see Dubner, *supra* note 103, at 3-4 (1997).

204. *Id.* at 4 (quoting P.W. Birnie, *Piracy – Past, Present and Future*, in *PIRACY AT SEA* 131 (Eric Ellen ed., 1989)).

205. *Id.* at 4-5.

206. IMB ANNUAL REPORT 2008, *supra* note 1, at 41.

Council Resolutions 1814, 1816, 1838 and 1846 (2008).²⁰⁷ Its tasks are to (a) protect vessels of the World Food Programme delivering food aid to displaced persons in Somalia; (b) the protection of vulnerable vessels cruising off the Somali coast; and (c) the deterrence prevention and repression of acts of piracy and armed robbery off the Somali coast.²⁰⁸ The Operation was originally intended to last for twelve months,²⁰⁹ but appears to have been extended indefinitely.²¹⁰

In addition, China and Iran also sent destroyers and supply ships in order to join the anti piracy patrols off Somalia.²¹¹ Japan and South Korea were also sending warships to join the missions.²¹²

More surprisingly, the United Nations Security Council authorized nations to conduct land attacks on pirate bases in Somalia.²¹³ Then U.S. Secretary of State, Condoleezza Rice, hailed the adoption saying it sent a “strong signal to combat the scourge of piracy and the need to end the impunity of Somali pirates.”²¹⁴ Rice also said that the Resolution will have a significant impact since “pirates are adapting to the naval presence by traveling further into the sea not guarded by warships sent by the United States and other countries.”²¹⁵ Resolution 1851 authorized the States to “take all necessary measures that are appropriate in Somalia” to suppress “acts of piracy and armed robbery at sea.”²¹⁶ Who would bear the cost? The French container carrier CMA CGM will impose a \$23.00 per TEU²¹⁷ surcharge for all containers on board ships that are transported through the pirate infested Gulf of Aden which started January 1, 2009.²¹⁸ In addition, the ACC accepted the demand to double pay the crews on board ships that transit through the Gulf of Aden.²¹⁹ Naturally, as the global recession picks up steam, there should be more pirates and illegal activities taking place off of the coast of Somalia and other strategic commercial areas such as the Malacca Strait.²²⁰ According to a newspaper article from February 3, 2009, the nation’s maritime academies are offering more training to merchant seamen on how to fend off attacks from pirates armed not with cutlasses and flintlocks but automatic weapons and grenade launchers.²²¹ Seamen are taught

207. *Id.*

208. *Id.*

209. *Id.*

210. See Maritime Security Centre, About the Maritime Security Centre – Horn of Africa, <http://www.mschoa.org/About.aspx> (last visited Aug. 23, 2009).

211. IMB ANNUAL REPORT 2008, *supra* note 1, at 41.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.* at 41-42.

217. TEU stands for “twenty-foot equivalent,” which is the 8 foot by 8 foot by 20 foot intermodal container that is the standard measure used for containerized cargo. U.S. Dep’t of Transp., Planning Glossary, TEU, http://www.fhwa.dot.gov/planning/glossary/glossary_listing.cfm?sort=definition&TitleStart=T (last visited Aug. 30, 2009).

218. *Id.* at 42.

219. *Id.*

220. *Id.*

221. Clarke Canfield, *Sailors learn to fight pirates*, ORLANDO SENTINEL, Feb. 3, 2009 at A9.

to fishtail the vessels at high speed and to drive off intruders with high pressure hoses as well as illuminating the flood lights on their own decks.²²²

D. The Potential for Environmental Violence

The pirates have demonstrated adaptability to changing circumstances and flexibility in adapting new methods as necessary to achieve their financial objectives. Experts have predicted that ships carrying oil, gas and other environmentally treacherous chemicals are now targeted by terrorists who could sail these ships into a major port and intentionally explode them, echoing the destruction of September 11, 2001.²²³ Given their primarily financial motive, pirates will undoubtedly soon seize these ships, holding the environment hostage, for the purpose of seeking a handsome reward in exchange for release of these caustic chemicals. A piratical attack on a ship carrying caustic chemicals could inadvertently cause a chemical spill wreaking havoc on the surrounding ecosystem. The likelihood of such a catastrophic occurrence is a bona fide disaster waiting to happen. However, the odds are increased if piratical acts involving the environment move from inadvertence to intentional. Rather than utilizing conventional techniques such as the kidnapping and ransoming of ship captains and crew members, why not kidnap the root of the world's food chain – the environment? This refined form of piracy is a calamity in the making, given that many targets could be chemical carriers or ships loaded with nuclear supplies.²²⁴

How much of a ransom would be conveyed, and who would pay the ransom, when more than one State could be affected? If the coastal State is not the only one affected, the other States should have the power to act with a degree of urgency even if outside its jurisdictional bounds. Environmental concerns related to piracy have raised the level of unease among nations, who unfortunately lack a uniform international mechanism to attack such a problem.²²⁵ As stated, *supra*, coastal

222. *Id.*

223. Brooke A. Bornick, *Bounty Hunters and Pirates: Filling in the Gaps of the 1982 U.N. Convention on the Law of the Sea*, 17 FLA. J. OF INT'L LAW 259 (2005).

224. "Some years ago, the world went wild over consequences of M/T Exxon Valdez having gone aground at slow speed in Prince William Sound in Alaskan waters. Our TV screens were filled with scenes of marine pollution and environmental damage. On the other hand you probably don't even know, that on 16 January 1999 the Very Large Crude Carrier (VLCC); M/T Chaumont was attacked by pirates while underway in Philip Channel which is the narrowest part of the Strait of Malacca. Incredibly, the vessel with her millions of gallons of oil steamed at full speed for over 70 minutes with no one on the bridge to in command. An environmental disaster of epic proportions was avoided, but no one is quite sure how. Likewise, no one is quite sure when this risk will next become a terrible reality. But the 'reality' can become 'unimaginable' given the right fuse to light. If M/T Chaumont had been a liquified natural gas carrier, an unimaginable event could become plausible -- the equal of a hundred thousand tons of TNT exploding upon the right collision conditions. Worse, imagine if a foreign power were to manipulate pirates to undertake such a mission by design, such as when the vessel is entering a port. Given the increase in pirate activity -- true environmental disaster is only a question of time. The clock is ticking." Michael S. McDaniel, Presentation before the Propeller Club of the United States (Nov. 20, 2000), http://cargolaw.com/presentations_pirates.html.

225. ZOU Keyuan, *Seeking Effectiveness for the Crackdown of Piracy at Sea*, 59 J. Int'l Affairs 117, 118 (2005), [available at](http://www.southchinesea.org/docs/Seeking%20Effectiveness%20for%20the%20Crackdown%20of%20Piracy%20at%20Sea.pdf) <http://www.southchinesea.org/docs/Seeking%20Effectiveness%20for%20the%20Crackdown%20of%20Piracy%20at%20Sea.pdf>.

States bear the burden of preventing damages to their environments. However, damage to the environment is not always restricted to the waters of the coastal States, and the impact is usually a global one. Oceanic life tainted with chemicals in one part of the world could easily find its way to a dinner plate thousands of miles away.²²⁶

For this reason, it is time to implement the concept articulated in the Harvard Draft of 1932, of allowing “hot pursuit” of pirate ships from high seas into territorial waters in certain instances.²²⁷ As the comment to section 7 of the Harvard Draft discusses, hot pursuit will “prevent the escape of culprits who seek to elude pursuers by entering territorial waters and who could not be captured lawfully by a foreign pursuer were it not for the license of” the doctrine of hot pursuit.²²⁸ In the instance of imminent environmental damage, the hot pursuit doctrine is of the utmost import. Hot pursuit could prevent an ecological disaster prior to its occurrence. As seen with the Exxon Valdez Oil spill, the clean up and recovery of an environmental injury to oceanic life is not always completely possible. Although waters have been cleaned, they will never again reclaim their pristine condition.²²⁹ An environmental disaster as a result of piracy must be prevented at all costs. Sovereignty should not trump environmental sustainability.

IV. ON THE HISTORICAL PERSPECTIVES OF ENFORCING PIRACY LAWS – WERE THERE “NORMS” REGARDING THE LAW OF INTERNATIONAL SEA PIRACY?²³⁰

The only “norm” that was demonstrated by the Harvard Draft was the fact that a “diversity of opinion” existed in 1932²³¹ that was “especially remarkable with respect to the following fundamental matters”:

- (1) The definition of piracy in the sense of the law of nations.
- (2) The meaning and justification of the traditional assertions that piracy is an offence or a crime against the law of nations.

226. For a general overview of the marine food chain and how contaminants might be concentrated in fish that make their way onto dinner plates around the world, see Clean Ocean Action, Contaminated Sediments, The Basic Facts: Food Chain, <http://www.cleanoceanaction.org/index.php?id=118> (last visited Sept. 26, 2009). For a detailed scientific description of the process of bioaccumulation in marine fish of contaminants released directly into ocean water, broken down by contaminant, see J.M. NEFF, BIOACCUMULATION IN MARINE ORGANISMS: EFFECT OF CONTAMINANTS FROM OIL WELL PRODUCED WATER (2002).

227. Harvard Draft, *supra* note 136, at 832.

228. *Id.*

229. The clean-up of the 11 million gallons of crude oil spilled into the formerly pristine Prince William Sound by the Exxon Valdez in 1989 illustrates this point perfectly. Bryan Walsh, *Still Digging Up Exxon Valdez Oil, 20 Years Later*, Time (June 4, 2009), available at <http://www.time.com/time/health/article/0,8599,1902333,00.html>. Although the sound has made a “remarkable turnaround” since the day of the spill, and the coast is now clear and clean it is not pristine. *Id.* Oil is still present in the sand and the animal populations in the region have not yet rebounded fully. *Id.*

230. See also the previous discussion of these issues in Dubner, *supra* note 103, at, 31-33.

231. Harvard Draft, *supra* note 136, at 749.

(3) The common jurisdiction of all states to prosecute and punish pirates.²³²

The Harvard Draft explained that there was the “modern orthodox” view as well as other views on the “nature and scope of the law of nations.”²³³ The orthodox view provided that:

The law of nations is a law between states only, and limits the respective jurisdictions. Private individuals are not legal persons under the law of nations. The rights, duties, privileges, and powers which it defines are only those of states. There is no legal universal society of private persons regulated by international law.²³⁴

Under the orthodox view, then:

Pirates are not criminals by the law of nations, since there is no international agency to capture them and no international tribunal to punish them and no provision in the laws of many states for punishing foreigners whose piratical offence was committed outside the state’s ordinary jurisdiction; [therefore,] it cannot be truly said that piracy is a crime or an offence by the law of nations, in a sense which a strict technical interpretation would give those terms.²³⁵

To the contrary, those with “unorthodox” views would conclude that:

the law of nations is like municipal law except that it has no international governmental agencies to enforce it. These jurists conceive of the civilized states of the world as members of a veritable legal community, all subject to the authority of a definite legal order. Some speak of a citizenship of private individuals in this world community, and of international law as the law of a super-society. Some maintain that there are international law crimes, although because the international community is backward in organization, there are no agencies except those of individual states to punish offenders. Some of these jurists argue that there should be an international tribunal of justice before which private individuals might prosecute their claims against states and private individuals might be prosecuted for crimes against the international community. They would classify piracy as such a crime. Indeed one jurist whose fundamental views on international law are otherwise orthodox, M. Pella of Romania, considers piracy a prototype to which should be assimilated in time all crimes universally recog-

232. *Id.*

233. *Id.* at 754.

234. *Id.*

235. *Id.* at 756.

nized as offenses against society. The perpetrators of such crimes, he says, should be punished by any state which seizes them, pending the establishment of an international court of criminal justice.²³⁶

The upshot of all this is that by 1932:

[p]iracy lost its great importance in the law of nations before the modern principles of finely discriminated state jurisdictions and... freedom of the seas became thoroughly established. Indeed, the former prevalence of piracy may be assigned as a principal cause of the old reluctance of states to accept the doctrine of the freedom of the seas. Formerly naval powers bought pirates with little regard for the sort of problems which would trouble our modern world of intense commerce and strongly asserted national claims of numerous states, and with an acquiescence of the commercial interests which needed protection against those dangerous common enemies...²³⁷

V. ON ADDRESSING THREATS OF PIRACY IN THE SOMALI/GULF OF ADEN REGION

The United Nations General Assembly each year publishes the Report of the Secretary-General on Oceans and the law of the sea. It usually comes out in March or April and there are appendices later added to the Report(s).²³⁸ Last year, 2008, it was pointed out in this report that according to UNCLOS, all States have an obligation to cooperate to the fullest possible extent in the repression of piracy (Article 100) and have universal jurisdiction on the high seas to seize pirate ships and aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the pirates and seize the property on board (Article 105).²³⁹ Those provisions also apply in the exclusive economic zone (Article 58) (2).²⁴⁰

Concerning acts of piracy/armed robbery against ships committed in the internal waters or territorial sea of a littoral State, the primary responsibility falls on the coastal State.²⁴¹ Why? Because piracy/armed robbery against ships also constitutes an offense under the 1988 Convention for the Suppression of Unlawful Acts

236. *Id.* at 752.

237. *Id.* at 764-65.

238. The annual reports from 1994 to the present, along with their addendices, are available on the website of the United Nations Division for Ocean Affairs and the Law of the Sea, http://www.un.org/Depts/los/general_assembly/general_assembly_reports.htm.

239. The Secretary-General, *Report of the Secretary-General on Oceans and the law of the sea*, ¶ 57, delivered to the General Assembly, U.N. Doc. A/63/63 (Mar. 10, 2008).

240. *Id.*

241. *Id.*

Against the Safety of Maritime Navigation (“SUA Convention”) and in some cases the 2000 United Nations Convention Against Transnational Organized Crime.²⁴²

By Resolution 1816 adopted on June 2, 2008, the Security Council authorized nations to attack pirates in territorial and internal waters of Somalia.²⁴³ The Transitional Federal Government (TFG) gave its permission for many reasons including the deplorable recent incidents of attacks upon, and the hijacking of, vessels in the territorial waters and on the high seas off the coast of Somalia.²⁴⁴ There had been attacks upon, and the hijacking of, vessels operated by the World Food Programme and numerous commercial vessels.²⁴⁵ These attacks created a serious adverse impact on the prompt, safe and effective delivery of food aid and all humanitarian assistance to the people of Somalia including the grave dangers they represented to vessels, crews, passengers and cargo.²⁴⁶ The Secretary-General noted that the IMO, on July 5, 2007, and again on September 18, 2007, sent letters to the Secretary General regarding the piracy problems that the IMO Assembly Resolution A.1002 (25), which strongly urged governments to increase their efforts to suppress and prevent piracy, also was in effect.²⁴⁷ It also noted that the Transitional Federal Government of Somalia needed and requested international assistance to address the problem on the high seas, but also in the territorial waters as well.²⁴⁸ The Resolution gives various States the right to enter into territorial waters of Somalia in a manner consistent with such action permitted on the high seas²⁴⁹; this authorization applies only to the situation in Somalia and not to other member States under international law and it shall *not be considered as establishing customary international law*.²⁵⁰ The idea is to protect international shipping, the food program and the international law regarding human rights law, as well.²⁵¹ In addition, Resolution no. 1851, adopted by the Security Council on December 16, 2008, concerned the lack of capacity, domestic legislation and clarity about how to dispose of pirates after they are captured.²⁵² This lack in turn, has hindered more robust international action against the pirates off the coast of Somalia and, in some cases led to pirates being released without facing justice²⁵³ (e.g., Denmark dropping pirates off on a beach).²⁵⁴ Resolution 1851 reiterated that the 1988 SUA Convention created criminal offenses, established jurisdiction and accepted delivery of persons responsible for, or suspected of, seizing or exercising control over a ship by force or threat and included any other form of intimidation.²⁵⁵ It also called on

242. *Id.*

243. S.C. Res. 1816, ¶ 7, U.N. Doc. S/RES/1816 (June 2, 2008).

244. *Id.* at 2.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.* at ¶ 7(a).

250. *Id.* at ¶ 9 (emphasis added).

251. *Id.* at 2, ¶ 11.

252. S.C. Res. 1816, at 2, U.N. Doc. S/RES/1851 (Dec. 16, 2008).

253. *Id.*

254. *Pirates in Skiffs*, *supra* note 6, at A6.

255. S.C. Res. 1816, at 2, U.N. Doc. S/RES/1851 (Dec. 16, 2008).

nations to enter into special agreements or arrangements with other nations willing to take custody of pirates.²⁵⁶ This was resolved so that enforcement officials (“shipriders”) from the affected countries, in particular, countries in the region, could facilitate the investigation and prosecution of persons detained as a result of operations, conducted under this Resolution, for acts of piracy and armed robbery at sea off the coast of Somalia.²⁵⁷ The resolution does require the advance consent of the TFG prior to any action in Somali territorial waters.²⁵⁸ States are to establish an international cooperation mechanism so as to have a common point of contact between and among States, regional and international organizations.²⁵⁹ States are also encouraged to consider creating a center in the region to coordinate information relevant to piracy and armed robbery at sea off the coast of Somalia, to increase regional capacity with the systems of UNODC, to arrange effective shiprider agreements or arrangements consistent with UNCLOS and to implement the SUA Convention, the United Nations Convention Against Transnational Organized Crime and other relevant instruments to which States in the region are party in order to effectively investigate and prosecute piracy and armed robbery at sea offenses.²⁶⁰ All of these matters should be conducted with regard to applicable international humanitarian and human rights laws.²⁶¹ A further Security Council Resolution stated, *inter alia*, that the arms embargo on Somalia does not apply to weapons, military equipment, technical training and assistance intended solely for support or abuse by the African Union Mission in Somalia and also supplies and technical assistance by the States intended solely for the purpose of helping develop security institutions, etc.²⁶²

The reader will observe the evolution of piracy from earlier centuries, where there was an act of one private ship attacking another on the high seas, has evolved into a major industry. We have gone from a state of having the Harvard Draft suggesting that enforcement should be permitted in territorial waters and internal waters (which was not adopted at any of the two prior Conventions) to a state of permitting, by virtue of Security Council resolutions, navies to interdict and attack pirates in territorial waters, internal waters, and on land, all under the guise of protecting shipping, oil supplies, humanitarian supplies to the Somalis *and hopefully to protect the environment from oil tankers being ruptured and destroying fragile ecosystems*. The Security Council reminded all of us that none of these Resolutions shall become customary international law, that the necessity of protecting shipping and crews trumped the sovereignty of a nation when commercial passage was undergoing severe trauma. The pirates argued that their fishing grounds have been decimated by foreign fishing vessels and that they had to resort to these acts

256. *Id.* at ¶ 3.

257. *Id.*

258. *Id.*

259. *Id.* at ¶ 4.

260. *Id.* at ¶ 5.

261. *Id.* at ¶ 6.

262. S.C. Res. 1853, p. 1, U.N. Doc. S/RES/1853 (Dec. 19, 2008).

of violence in order to make a living.²⁶³ At least one other author has suggested that these piratical acts are acts of terrorism as well as piracy.²⁶⁴ Our understanding of terrorism is basically that it is an act done for “political” as opposed to “private” ends. Certainly if terrorist groups were to attack merchant ships at “choke points” and elsewhere, they would definitely be considered terrorists. But we think a fair reading of the source material on the subject seems to indicate that these pirates are well organized and have the criminal intent to rob. They are not conducting their acts of piracy for political ends. In fact, if anything, terrorists would want to lure the merchant ships closer to their coast so that they could attack and cause huge explosions and blow up vessels, which is more in line with terrorism. Pirates are interested in ransom money and nothing else. However, there is nothing to prevent pirates joining forces with terrorists and vice versa.

VI. CONCLUSION

The Security Council Resolutions that have been mentioned couched the intrusion into territorial, internal waters and land, by expressing concern for human rights so that food shipments would not be blockaded and hijacked by Somali pirates. Are human rights and the environment more important than the sovereign rights of a State? In our particular situation, this was not a call that had to be made because the temporary government of Somalia granted permission for foreign navies to intercede against the pirates. The more interesting question is what if there were no Security Council Resolutions? Could not one argue that piracy is a crime against mankind? The Harvard Draft stated, in part, because there was no international criminal court (in 1932) to prosecute a crime of piracy, it should not be considered a crime against mankind for treaty (or “expediency”) purposes. However, according to the information supplied by the Harvard Draft, piracy was always considered a crime against mankind and States could punish pirates even if the States had not enacted municipal legislation against the crime of piracy. As one author pointed out:

The Vienna Declaration and the regional declarations reiterated that human rights – civil and political, as well as economic, social and cultural – should be implemented simultaneously, and that neither set of rights (primarily from Asia,) had to do with “private” rights.

All states are willing to accept the universality of a certain core group of rights. These are the rights that are listed in the human rights treaties as “non-derogable” rights or are considered *jus cogens*.

263. *Pirates Tell Their Side*, *supra* note 18, at A6. See also Johann Hari, *You are being lied to about pirates*, 50 SYNTHESIS/REGENERATION 47, Sept. 22, 2009.

264. Douglas R. Burgess, Jr. *Piracy is Terrorism*, N.Y. TIMES, Dec. 5, 2008, at A33.

The major distinguishing feature of such rules [of *jus cogens*] is their relative indelibility. They are rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect. The least controversial examples of the class are the prohibition of the use of force, the law of genocide, the principle of racial non-discrimination, crimes against humanity, and the rules prohibiting trade in slaves and piracy . . .

Other rules probably have this special status include the principle of permanent sovereignty over natural resources and the principle of self-determination.²⁶⁵

An International Law of the Sea Tribunal and compulsory dispute provisions were created under UNCLOS. The Tribunal and compulsory dispute provisions exist to deal with rights arising under UNCLOS. An international criminal court is in place; and, treaty and customary international laws regarding the rights of human beings, vis-à-vis the rights of States to proceed on individuals' behalf, still exist. The doctrine of universality should give every nation the right to try pirates under either treaty or customary law.

International law is an evolving concept. There is no question that the United States, Denmark, and most of the other nations involved believed that it was necessary to obtain a Security Council Resolution(s) in order to pursue pirates into the territorial, internal waters and on the territory of Somalia. This was done for political as well as economic reasons.

Piracy is being conducted more and more by organized gangs in internal waters and territorial seas. It is necessary for States to prescribe and enforce municipal statutes in their internal waters and territorial seas in order to block these acts and to react, in kind, to them. Regional cooperation is currently occurring in certain areas (e.g., Malacca Strait). Under the UNCLOS, it is the duty of the coastal States to prevent damages to their environments as well as to loss of life and property due to the crime of piracy. By preventing these acts in their territory, they are preventing severe damage to other States and to the world community as a whole. They have a duty to do as much as they can and should not be allowed to hide behind the shield of sovereignty.

As was stated prior by one of your authors, international waters and territorial seas should have another layer of jurisdiction in order to fight specific crimes of terrorism and/or piracy: namely, *reaction zones*.²⁶⁶ This would entail the extension of the hot pursuit doctrine for those crimes originating in *reaction zones* as

265. Christina M. Cerna, *Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts*, 16 Hum. Rts. Q. 740, 745 (1994) (quoting Ian Brownlie, *Principles of Public International Law* 513 (1993)) (emphasis added).

266. Leticia Diaz and Barry Hart Dubner, *On the Problem of Utilizing Unilateral Action to Prevent Acts of Sea Piracy and Terrorism: A Proactive Approach to the Evolution of International Law*, 32 SYRACUSE J. INT'L L. & COM. 1, 49 (2004).

well as for those occurring exclusively on the high seas.²⁶⁷ Are these proposals subject to abuse by the intervening State? Yes, however, there may be no other alternative open in a given situation. Do not think in terms of sovereignty where human rights are being violated and the environment despoiled; it is important to have these rights considered on the same plane as property rights for purposes of obtaining prescriptive and enforcement legislation against pirates. One should not need a UN Resolution to act against pirates.

^{267.} *Id.*