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FOREIGN FISHING PIRACY VS. SOMALIA PIRACY – DOES WRONG EQUAL WRONG?

Leticia M. Diaz and Barry Hart Dubner*

This article is a sequel (and in some ways, a “prequel”) to our last article, *On the Evolution of the Law of International Sea Piracy*.¹ That piece, prepared in April 2009, attempted to illustrate the enormous problem of sea piracy off of Somalia. It was updated through October 2009 and published in December 2009.

We were invited to, and participated in, a conference sponsored by the Harvard Kennedy Center. Professor Robert Rotberg, Director of the Intrastate Conflict program at Harvard Kennedy School’s Belfer Center for Science and International Affairs,² was the coordinator for two days of intensive presentations and discussions (10-12 December, 2009). As a result of the conference, Harvard published a policy statement on how to combat sea piracy, with an emphasis on Somalia.³ In addition to your authors, the twenty-two conference panelists included individuals from different think tanks, the intelligence community, the U.S. State Department, and the military, including one of the Joint Chiefs of Staff. After each session’s panelists presented individually, we launched into discussions. Prior to the conference, each panelist submitted a synopsis, which served to focus our discussions.

Your authors discussed jurisdiction, sovereignty, the environment and human refugees who may be affected by sea piracy. We also learned quite a bit of new information. For example, one of the gentlemen present was from an African country. He provided a viewpoint that was both interesting and disturbing, and took us back to Somalia and a way of life that existed prior to the recent surge of piracy in that region. We left the conference inspired to write this article which sets forth a view of why Somali piracy started and some of the problems created by these illegal acts. Harvard’s policy statement will speak for itself.

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1. Leticia M. Diaz & Barry Hart Dubner, *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*, 13 BARRY L. REV. 175 (2009).

2. See Belfer Center Home, Programs/Projects, Intrastate Conflict Program, http://belfercenter.ksg.harvard.edu/project/52/intrastate_conflict_program.html (last visited Jan. 19, 2010).

3. Robert I. Rotberg, World Peace Foundation, COMBATING MARITIME PIRACY: A POLICY BRIEF WITH RECOMMENDATIONS FOR ACTION (2010), available at http://www.worldpeacefoundation.org/WPF_Piracy_PolicyBrief_11.pdf.

I. INTRODUCTION

The conference at the Harvard Kennedy School, concerning the topic of controlling maritime piracy, was the first such meeting that Harvard University has hosted since the early 1930s. The agenda covered a range of topics, mostly related to piracy off the coast of Somalia. The subjects included, *inter alia*: the intensity, spread, and economics of maritime piracy globally; the exploration of relevant legal issues, including sovereignty and jurisdiction; preventing piracy at sea; preventing piracy from land; national and regional policies and strategies of the United States and the European Union. A policy statement was issued after this intense, three-day conference. Your authors left the conference convinced that it was important to discuss certain topics that were not covered in their previous article.

The December 2009 conference was not intended to mirror the extensive time that Professor Jonathan Bingham, Harvard University, spent with a group of persons in creating the 1932 *Draft Convention on Piracy*, commonly called the “Harvard Draft.”⁴ However, in order to understand more fully the topics discussed at the 2009 Harvard conference, it is first necessary to backtrack and look at what the initial Harvard Draft accomplished back in 1932.

As was stated in our prior article, the Harvard Draft of 1932 was prepared for the purposes of “expediency.”⁵ The study itself was extremely comprehensive and has been used and cited in many different texts. In addition, most of the articles therein were set forth in the 1958 Geneva Convention on the High Seas⁶ and the 1982 United Nations Law of the Sea Convention (UNCLOS)⁷ as articles on piracy. The main question at the original Harvard study considered “what initial significance does piracy have in the law of nations?”⁸ In contrast, the more limited subject discussed at the latest Harvard conference concerned ways to combat piracy, the significance being one of commercial necessity.

The 1932 Harvard Draft, later adopted by the two conventions aforementioned, related to piracy on the high seas only.⁹ Because the crime of piracy interfered with international shipping on the high seas, it was thought that if the acts of piracy occurred in territorial or internal waters of the coastal-State, the coastal-State

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

5. Diaz & Dubner, *supra* note 1, at 192; 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, 11-12 (1997).

6. Convention on the High Seas, April 29, 2958, 13 U.S.T. 2312 (1962), 450 U.N.T.S. 82 [hereinafter Geneva Convention].

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

8. Diaz & Dubner, *supra* note 1, at 193; Dubner, *supra* note 5, at 16; Harvard Draft, *supra* note 4, at 749.

9. According to UNCLOS, “[p]iracy 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. . .” 1982 Convention, Art. 101, *supra* note 7. The 1958 Geneva Convention includes identical language. See Geneva Convention, Art. 15, *supra* note 6.

could, and would want to, resolve the situation by prescribing and enforcing its own municipal legislation on sea piracy.¹⁰ In the Harvard Draft there was disagreement over whether or not piracy was “an international crime.”¹¹ 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?”¹² At that time, there was a “modern orthodox view” that the law of nations is a law of States only.¹³ 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 law of many States punishing foreigners which political offense was committed outside the State’s ordinary jurisdiction, it cannot truly be said that piracy are crimes or are offenses by the law of nations in a sense which a strict technical interpretation look at those terms.”¹⁴

The only “norm” that was demonstrated by the Harvard Draft was that a “diversity of opinion” existed in 1932 that was “especially remarkable with respect to the following fundamental matters”:

- (1) The definition of piracy in the sense of the law of the nations.
- (2) The meaning and justification of the traditional assertions that piracy is an offence or crime against law of nations.
- (3) The common jurisdiction of all states to prosecute and punish pirates.¹⁵

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.”¹⁶ 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.¹⁷

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

10. Diaz & Dubner, *supra* note 1, at 193; Dubner, *supra* note 5, at 17.

11. *Id.*

12. Harvard Draft, *supra* note 4, at 753; Diaz & Dubner, *supra* note 1, at 193; Dubner, *supra* note 5, at 17.

13. Harvard Draft, *supra* note 4, at 760; Diaz & Dubner, *supra* note 1, at 193; Dubner, *supra* note 5, at 17.

14. Harvard Draft, *supra* note 4, at 756; Diaz & Dubner, *supra* note 1, at 193; Dubner, *supra* note 5, at 17.

15. Harvard Draft, *supra* note 4, at 749.

16. *Id.* at 754.

17. *Id.*

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 nation in a sense which a strict technical interpretation would give those terms.¹⁸

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 recognized 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.¹⁹

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 fought 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

18. *Id.* at 756.

19. *Id.* at 752.

which needed protection against those dangerous common enemies

...²⁰

For example, during the Ming dynasty (1368-1644), Japanese pirates plundered the seacoasts of eastern Asia, ranging from Korea to Indochina.²¹ According to certain sources, as early as 1223 Japanese pirates who raided the Korean coast were the first to be called Wo-k'ou, and such Japanese pirates were active along Asian coasts until the last quarter of the sixteenth century.²² As we shall see shortly when discussing the problems in Somalia, there were socio-political factors which caused the rise and spread of piracy in parts of China and related areas.²³ One of these was the "growing influence of regionalism."²⁴ When the central government of China was effective, it was difficult for the smuggling-piratical activities to exist for a long time.²⁵ But the Chi-Ching period was a far cry from other periods when the ruler was an autocrat and his influence could reach every nook and corner of the empire.²⁶ In fact, it has been said that the "budding growth of regionalism must have indulged the spread of smuggling before deteriorating into piracy."²⁷ Another factor, which in the beginning was said to encourage piracy, was the terribly dilapidated state of coastal defense.²⁸ "After a long period of peace, not only the original system of coastal defense had deteriorated, but the people had also grown timid and averse to the art of war."²⁹

The persons who prepared the Harvard Draft believed that the type of piracy seen in Errol Flynn's movies (and possibly off the coast of China) had died years before the preparation of the 1932 Draft. An illustration of such European piracy is described in a book about William Dampier, a noted author and naturalist as well as a pirate during the late 1600s to the early 1700s.³⁰ He described his companions as "privateers";³¹ they were not. Privateers at the time were "legalized" maritime raiders given official letters of marque in war times by governments to attack enemy shipping, usually in return for a cut of the proceeds, which also had to be shared with the ship's owners.³² The men to whom Dampier referred were actually "buccaneers" – adventurers whose activities often had no legal sanction and crossed the boundary into out-and-out piracy, when all ships were fair game and the loot had to be shared with no one.³³ The term "buccaneer" is derived from a

20. *Id.* at 764-65.

21. KWAN-WAI SO, JAPANESE PIRACY IN MING CHINA DURING THE 16TH CENTURY I (Michigan State University Press 1975).

22. *Id.*

23. *Id.* at 134.

24. *Id.*

25. *Id.*

26. *Id.* at 134-35.

27. *Id.* at 135.

28. KWAN-WAI SO, *supra* note 21, at 135.

29. *Id.*

30. Diana Preston & Michael Preston, A PIRATE OF EXQUISITE MIND: EXPLORER, NATURALIST, AND BUCCANEER: THE LIFE OF WILLIAM DAMPIER (Walker & Company 2004).

31. *Id.* at 44.

32. *Id.* at 44-45.

33. *Id.* at 45.

French word “boucanier,” which means people who smoked or cured strips of meat on a frame of green sticks, or “boucan,” over a slow fire fed by animal bones and pieces of hide.³⁴ Much of the piracy that occurs today off of the coast of Somalia is driven for financial gain³⁵ and it is interesting to note, as we will see, if one substituted for the word “government” in the preceding definition of privateers, the word “mafia” or “financiers” or “terrorists” or “governmental assistants” or similar equivalents, one could see that the Somali pirates are actually financed, in part, by governmental clan people.

Another similarity between “older” and current Somali pirates, as we will see, is that the Somalis claim their fishing area was destroyed by European and Asian fishing vessels and the environment was equally decimated by dumping.³⁶ In the late 1600s, the:

Pirate and buccaneer ships also held another ceremony unique to themselves: the gallows humor of the mock trial. With the aid of a few props, such as a mop for the judge’s wig and a tarpaulin for his robe, the sailors would expiate their forebodings by taking turns playing the judge, lawyer, or prisoner. Sometimes the charges were ludicrous, and the humor was broad. At other times, the sailors’ pleas reflected what they might have said in reality before a stern-faced judge. Some swore they ‘came from the sea’ and so recognized no country and no authority. Some claimed to be egalitarian ‘Robin Hood’s men,’ righting social wrong, others that they were expansionist imperialists like Alexander the Great and that the only differences between them was the extent of their conquests, not their legitimacy.³⁷

It is apparent that while the types of piracy that the Harvard Draft referred to were no longer in existence, the customs and mores of classical pirates remain until today. Piracy, today, comes in more shapes and forms than the usual “historical” classical types of piracy. Let us examine the reasons given by the Somalis for their despicable actions. The “defense” of “justification” was raised at the 2009 Harvard conference.

II. DEFENSE OF THE SOMALIA PIRATES – SEA PIRACY VS. FISHING PIRACY

One of the most important items discussed at the 2009 Harvard conference was the devastating effect that the pirate fishing and the dumping of hazardous waste

34. *Id.* at 45 n.†.

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

36. Michael Vazquez, *Why We Don’t Condemn Our Pirates*, THE HUFFINGTON POST, Apr. 12, 2009, http://www.huffingtonpost.com/michael-vazquez/on-pirates_b_186015.html; Joann Hari, *You are Being Lied to about Pirates*, THE HUFFINGTON POST, Jan. 4, 2009, http://www.huffingtonpost.com/johann-hari/you-are-being-lied-to-abo_b_155147.html.

37. Preston & Preston, *supra* note 30, at 141.

has had on Somalia. Before discussing this matter, it is necessary to give a little historical perspective as to what is going on now in Somalia. The decline of the Somali fishery sector can be traced to the 1991 Somali Civil War, as most Somali fisheries were shut down during that period.³⁸

Thereafter, very sophisticated factory-style fishing vessels, designed for deep ocean fishing and coming from distant countries (countries often thousands of miles away from Somalia) started to overexploit the “rich, uncontrolled, and unprotected Somali seas.”³⁹ These fleets search Somali waters for valuable catches, including rock lobster and high value pelagic fish.⁴⁰ International demand for marine products has been increasing, but the Asian seas are overfished and the EU closed much of its fishing waters for up to 15 years in order to allow for fish regeneration.⁴¹ As a result, for the last nineteen years, “fishing piracy” has consisted of criminal poaching and wanton destruction of the Somali marine waters.⁴² This illegal fishing is economically and environmentally damaging to Somalia.⁴³ So, from the Somali point of view, while the U.N. was passing resolutions, and NATO and the E.E.U. were issuing decrees and orders to invade Somali seas to attack pirates, why did the concerned states not protect the Somali marine resources from violations in the same waters?⁴⁴ From this viewpoint, the U.N., NATO forces, the European Union, Russia, Japan, India, Egypt, Yemen, and others are only concentrating on the safety of merchant ships, while at the same time covering up and protecting their own illegal fishing activities.⁴⁵

Illegal, unregulated, and unreported (IUU) fishing⁴⁶ presents a serious problem globally, in that it does not respect the national boundaries of sovereigns; it puts an

38. Mohamed Abshir Waldo, *Somali piracy, the other side of the coin*, AFRICAN PROSPECT, Oct. 2009, at 8 [hereinafter Waldo, *Somali piracy*] (quoting the High Seas Task Force), available at <http://www.exacteditions.com/exact/browse/576/929/5847/3/8?dps=>.

39. *Id.*; Hari, *supra* note 36.

40. Waldo, *Somali piracy*, *supra* note 38, at 9.

41. *Id.*

42. *Id.*

43. *Id.* at 10-11.

44. *Id.* at 11.

45. *Id.*

46. The International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU) defines IUU as follows:

3.1 Illegal fishing refers to activities:

3.1.1 conducted by national or foreign vessels in waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations;

3.1.2 conducted by vessels flying the flag of States that are parties to a relevant regional fisheries management organization but operate in contravention of the conservation and management measures adopted by that organization and by which the States are bound, or relevant provisions of the applicable international law; or

3.1.3 in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organization.

3.2 Unreported fishing refers to fishing activities:

3.2.1 which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations; or

unsustainable pressure on stocks among marine life and habitats; and, it undermines labor standards and distorts markets.⁴⁷ IUU fishing is detrimental to the wider marine ecosystem because it ignores the rules that are designed to protect the marine environment, including restrictions on the harvest of juveniles, closing spawning grounds, and demanding gear modifications designed to minimize by-catch of non-target species.⁴⁸ IUU fishing robs the local people of an invaluable protein source; ruins the livelihoods of almost all legitimate fishermen; causes trawlers to come into inshore areas reserved for artisanal fishing, resulting in collisions with fishing boats, destruction of fishing gear, and deaths of fishermen.⁴⁹

This unlawful worldwide value of IUU catches is between USD 4 billion and USD 9 billion.⁵⁰ If this were not bad enough, there is also a serious global “fish-catch laundering” problem.⁵¹ Fish-catch laundering can occur through mother-ship factories that use uncontrolled transshipment and resupply lines at sea.⁵² Operations on this scale can keep their vessels at sea for months, refueling, resupplying and rotating their crews.⁵³ Their fishing vessels never have to enter port because they transfer their catches onto transport ships.⁵⁴ Fish-catch laundering generates hundreds of millions of dollars in the black market, and they use sea ports in the Seychelles, Mauritius, and the Maldives in order to launder Somali fish.⁵⁵ So, historically, just before the collapse of the Somali regime in 1991, it was estimated that at least 200,000 tonnes of fish per year could be harvested sustainably by both artisanal and industrial fisheries.⁵⁶ The international fishing racket loots this area to

3.2.2 undertaken in the area of competence of a relevant regional fisheries management organization which have not been reported or have been misreported, in contravention of the reporting procedures of that organization.

3.3 Unregulated fishing refers to fishing activities:

3.3.1 in the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization; or

3.3.2 in areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law.

Food & Agric. Org. of the U.N., *The International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, ¶¶ 3.1-3.32, available at <ftp://ftp.fao.org/docrep/fao/012/y1224e/y1224e00.pdf>.

47. HIGH SEAS TASK FORCE, CLOSING THE NET: STOPPING ILLEGAL FISHING ON THE HIGH SEAS 1 (2006), <http://www.high-seas.org>, then click on documents.

48. Waldo, *Somali Piracy*, *supra* note 38, at 8.

49. *Id.*

50. HIGH SEAS TASK FORCE, *supra* note 47, at 1.

51. Waldo, *Somali Piracy*, *supra* note 38, at 8. Fish-catch laundering involves mixing illegally caught fish with legally caught fish prior to bringing the catch into port for sale. *Id.* at 8-9.

52. *Id.* at 8.

53. *Id.*

54. *Id.*

55. *Id.* at 9.

56. *Id.*

the point that one scientist has put the figure of illegal taking at 300,000 tonnes of fish per year.⁵⁷

There were also severe droughts in Somalia in 1974 and 1986, forcing many groups to be resettled along villages on the long, 33,000 kilometer Somali coast.⁵⁸ These groups developed into large fishing communities whose livelihoods depended mainly on inshore fishing.⁵⁹ But when the Siad Barre Regime fell in 1991, the coast guard and naval services of Somalia ceased to exist.⁶⁰

Deadly events followed the collapse of the Somali government. “Local fishermen documented cases of [foreign] trawlers pouring boiling water on them in their canoes, their nets cut or destroyed, smaller boats crushed, killing all the occupants, and other abuses suffered as they tried to protect their national fishing turf.”⁶¹ The escalation and cycle of war in Somalia has been going on from 1991 to the present. According to the High Seas Task Force (HSTF) there were over 800 IUU vessels in Somali waters at one time during 2005 because Somalia simply could not patrol and control its own waters and fishing grounds.⁶² The fish-poachers are estimated to take out more than USD \$450 million in fish value from Somalia annually.⁶³ They do not compensate the local fishermen, nor do they pay taxes, or any royalties.⁶⁴ They do not care about management, conservation, or environmental regulations which are norms that are associated with regulated fishing.⁶⁵

These IUU fishing trawlers are mostly owned by EU and Asian fishing companies, including: Italy, France, Spain, Greece, Russia, Britain, Ukraine, Japan, South Korea, Taiwan, India, Yemen, Egypt and Kenya.⁶⁶ Some of them are able to obtain illegal or counterfeit licenses to fish and share the loot with the local warlords in Somalia.⁶⁷ France and Spain have based fleets in the Seychelles obtaining two-thirds of the year’s tuna catch off Somalia between August and November 2008.⁶⁸ About fifty trawlers use Victoria Port, which handles up to 350,000 tonnes of tuna annually.⁶⁹ The stocks are falling due to overfishing and no regulations.⁷⁰ In 2008, the Somali pirates attacked tuna boats at least three times, successfully obtaining at least one ransom over \$1 million.⁷¹ Naturally, their appetites for hunting other ships have increased.

57. *Id.*

58. Waldo, *Somali Piracy*, *supra* note 38, at 9.

59. *Id.*

60. *Id.*

61. *Id.* at 3.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. Waldo, *Somali Piracy*, *supra* note 38, at 3.

67. *Id.* at 3-4.

68. Richard Lough, *Somali pirates threaten Indian Ocean tuna industry*, Reuters Africa, Jan. 22, 2009, available at <http://af.reuters.com/article/investingNews/idAFJJOE50L09S20090122?pageNumber=1&virtualBrandChannel=0>.

69. *Id.*

70. *Id.*

71. *Id.*

It was brought out at the 2009 Harvard conference, that there was also serious hazardous waste dumping. This includes industrial, toxic, and nuclear waste dumping in off-shore and non-shore areas of Somalia.⁷² In fact, it is so common to have illegal dumping that there are clips on YouTube showing where some of this waste has been buried.⁷³ It is believed that the U.N. agencies and organizations have been fully aware of this crisis but have done nothing either to take positive action against these criminal activities, or to advise the U.N. Security Council of this tragedy before passing resolutions 1816, 1815, 1814, 1846, 1838 and 1851 on sea piracy in 2008.⁷⁴ There is no mention of any illegal fishing piracy, hazardous waste dumping, or hostility of foreign vessels toward the Somali fishermen in any of the U.N. Security Council Resolutions.⁷⁵ Some of the perpetrators of these illegal dumping acts have been identified, including an Italian firm (Progresso) and a Swiss firm (Achair Partner).⁷⁶

Somalia currently has no provisions to deal with potential oil spills or other marine disasters and has no capability to control her coastal waters and, if necessary, provide sea search or rescue operations.⁷⁷ It should be noted that Somalia is recognized as one of the five richest fishing zones of the world and was previously unexploited.⁷⁸ It has now been ravaged and poisoned. In addition, the Somali people receive no income from this fishing resource. While the U.S. State Department is firm in stating that none of the illegal fishing and dumping justified the actions of the pirates,⁷⁹ the Somali fishermen pirates believe that they are protecting their fishing grounds.⁸⁰ They also feel that they are extracting justice and compensation for the marine resources stolen and the ecosystem destroyed by the IUU.⁸¹ As a possible solution to the problems it was pointed out that, first, the problems of sea piracy and pirate or illegal fishing must be addressed.⁸² This includes reviewing the national institutional crisis along with the piracy issues.⁸³ Perhaps a joint Somali and U.N. oversight agency could oversee the Somali wa-

72. Waldo, *Somali Piracy*, *supra* note 38, at 5. *See also*, Hari, *supra* note 36.

73. *See, e.g., People & Power: The Toxic Truth* (Al Jazeera English broadcast, Jan. 17, 2009) (available on Youtube.com in two parts. Part I available at <http://www.youtube.com/watch?v=ud1pQ7lGn48>; Part II available at <http://www.youtube.com/watch?v=-1M7VCtuCXI&NR=1>. Part I primarily recounts the murder of two journalists who travelled from Italy to Somalia in order to investigate misuse of Italian aid funds for smuggling illegal arms and toxic waste into Somalia. The last minute or so of Part I begins showing some video of dumped materials. This video continues in the first several minutes of Part II) (last visited Feb. 8, 2010).

74. Mohamed Abshir Waldo, *The Two Piracies in Somalia: Why the World Ignores the Other?* 6, http://www.imcsnet.org/imcs/docs/somalias_twin_sea_piracies_the_global_aramada.pdf (last visited Mar. 21, 2010) [hereinafter, Waldo, *The Two Piracies*].

75. *Id.* at 7.

76. Jonathan Clayton, *Somalia's secret dumps of toxic waste washed ashore by tsunami*, TIMESONLINE, Mar. 4, 2005, <http://www.timesonline.co.uk/tol/news/world/article418665.ece>.

77. Waldo, *The Two Piracies*, *supra* note 74, at 7 (quoting Dominic Langenbacher, UNDP Somalia Resident Representative).

78. *Id.*

79. U.S. Dep't of State, Office of the Spokesman, *Setting the Record Straight: No Justification for Piracy off the Coast of Somalia* (Dec. 17, 2009), <http://www.state.gov/r/pa/prs/ps/2009/dec/133784.htm> (last visited Jan. 19, 2010).

80. Waldo, *The Two Piracies*, *supra* note 74, at 9.

81. *Id.*

82. Rotberg, *supra* note 3, at 5.

83. *Id.* at 4-5.

ters.⁸⁴ The most important thought was that the problem of piracy will never be completely eradicated unless there is a restoration of stability on the ground and there are effective institutions and structures in Somalia that can address the piracy issue in its totality.⁸⁵ The actions needed and recommended by in the 2009 Harvard Policy Brief include taking immediate action by the international armada of navies against the illegal dumping and the illegal fishing in and around the Somali waters; the revision of Somali fisheries and environmental protection legislation and institutions; the strengthening of a decentralized governance and legal structures in Somalia; establishment of a regional action plan against IUU fishing and dumping of toxic or nuclear waste; and, more importantly, a recognition that piracy must be addressed from the land as well as the sea.⁸⁶

Having looked at the Somali piracy and the “fishing pirates” of Europe and elsewhere, and having seen briefly the environment created by dumping various toxins, nuclear waste, etc., in Somalia, let us now turn to the other side of the coin; the jurisdictional problems regarding piracy. Much of this topic was touched on in our prior article which was just recently published; however, certain information was discussed at the 2009 Harvard conference, which is worth repeating here.

III. JURISDICTIONAL PROBLEMS REGARDING SOMALI SEA PIRACY AND OTHER ENVIRONMENTAL AND PIRATICAL ACTS FROM ELSEWHERE

According to the U.S. Department of State, Somalia’s 637,657 square miles (an area slightly smaller than Texas) contain 9.8 million people, 2 million of which live in Somaliland (one of the three provinces in Somalia).⁸⁷ The per capita gross domestic product in 2008 was US \$600.⁸⁸ The gross domestic product in 2008 was US \$5.524 billion.⁸⁹ The country is 99.9% Muslim.⁹⁰ It was suggested that 706 pirates have been encountered by war ships since August 2008.⁹¹ Of those, 411 (58%) were caught and released.⁹² Two hundred sixty-nine pirates were turned over for prosecution.⁹³ That represents 38% of the total. Two hundred were sent to Kenya where there have been sixty-nine trials resulting in twenty-three of the pirates being released.⁹⁴ During this same period forty-two pirate ships were destroyed.⁹⁵ These numbers suggest that there is a greater problem. It is very diffi-

84. *Id.* at 5.

85. *Id.* at 4.

86. *Id.* at 5.

87. U.S. Dep’t of State, Background Note: Somalia, <http://www.state.gov/r/pa/ei/bgn/2863.htm> (last visited Jan. 19, 2010).

88. *Id.*

89. *Id.*

90. *Id.*

91. *All Things Considered: Examining Impact of Pirate Attacks* (NPR radio broadcast Dec. 28, 2009) (interview with Peter Pham, senior fellow and Africa Project director at the National Committee on American Foreign Policy), *transcript available at* <http://www.npr.org/templates/story/story.php?storyId=121982547> [hereinafter Pham interview].

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

cult to catch the pirates, but the question is who will try them and where will they be tried. It was brought to our attention that about 1,500 pirates operate off of Somalia at the current time. One of the main problems is that most of the countries do not want to try these pirates, as this will create greater political problems for them at home and in the region off the east coast of Africa.

As was shown earlier by the 1932 Harvard Draft, there have always been two views regarding jurisdiction and sea piracy. The first view would say that pirates have always been considered enemies of mankind. They could be tried and executed no matter where they were found by any nation that wishes to do so. This was known as the “Universality principle.”⁹⁶ A few of us at the 2009 Harvard conference, your authors included, thought the best way to handle both the Somali and other types of piracy that could arise elsewhere, was to establish a multi-lateral force as well as an international tribunal to prosecute pirates. This tribunal would be established by the United Nation as an ad hoc tribunal with the obligation to address piracy. As can be seen in the Somalia situation, the reality is that States usually do not want to be delegated this authority to try and prosecute pirates and to enforce some type of punishment.⁹⁷

Suggestions were made by a couple of us that perhaps the U.N. could set up or use the International Tribunal for the Law of the Sea, established under the 1982 United Nations Law of the Sea Convention. This body, located in Hamburg, Germany,⁹⁸ only has civil authority and apparently does not have the authority to try pirates.⁹⁹ However, the Germans, Dutch and Danes have shown no inclination to try Somali pirates on their shore, either because they do not wish to get involved because of political ramifications, or they are afraid that the pirates, having such a low income in Somalia, would probably want to stay in jail as it would be preferable due to the terrible economic conditions at home.

Another thought was that perhaps a treaty could be worked out or possibly the IMO or the United Nations could set up this type of tribunal that would have authority to try pirates. The location of the tribunal would be problematic as certain nearby countries, such as the Seychelles, did not express an interest in having such

96. While most jurisdictional bases require a direct connection between the prosecuting state and the crime, “the universality principle assumes that every state has an interest in exercising jurisdiction to combat egregious offenses that states universally have condemned.” Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 Tex. L.R. 785, 788 (1988).

97. In fact, several European nations have instructed their navies not to make any arrests of pirates, thereby avoiding the issue entirely. See Eugene Kontorovich, “A Guantanamo on the Sea”: The Difficulty of Prosecuting Pirates and Terrorists 103 (Dec. 10, 2009) (manuscript included in materials distributed to attendees at the 2009 Harvard Conference, and on file with the authors).

98. International Tribunal for the Law of the Sea, General Information – Overview, Seat of the Tribunal, http://www.itlos.org/start2_en.html (last visited Jan 19, 2010) (click link for “General Information,” then “Overview,” then “Seat of the Tribunal”).

99. “The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with [UNCLOS] and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.” 1982 Convention, Annex VI, Art. 21, *supra* note 6. In addition, access to the Tribunal is primarily limited to State Parties. *Id.* at Annex VI, Art. 20. The Tribunal only has jurisdiction over natural or juridical persons as defined elsewhere in UNCLOS. *Id.* Such jurisdiction is granted only for disputes involving contract interpretation, prospective contractors, or when a State Party sponsors the natural or juridical person and the UNCLOS Authority incurs liability. 1982 Convention, Art. 187(c)-(e).

a tribunal.¹⁰⁰ There is already a cost-effective one in Kenya trying pirates. The Kenyan government agreed to the use of their court by virtue of a couple of memos of understanding (MOUs) between Britain, the United States, the European Union, and Kenya.¹⁰¹ However, there are problems with this process, which will be touched on shortly. Apparently, the 1982 UNCLOS has articles on piracy but they only cover piracy on the high seas between one private vessel and another private vessel.¹⁰² There is also the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA).¹⁰³ It covers areas and types of acts not included in the 1982 UNCLOS.¹⁰⁴ That treaty has 154 signatures, whose merchant marines comprise 93.45% of the world's shipping tonnage.¹⁰⁵ One of the problems with obtaining jurisdiction of pirates is that the Security Council Resolution requires that any actions taken against pirates have to comport with international humanitarian law.¹⁰⁶ There are real difficulties in bringing a criminal case against a foreigner on seas in remote parts of the world.¹⁰⁷ For example, evidentiary problems have caused the U.S. Navy to release many pirates at sea in the wake of the January, 2009, MOU with Kenya.¹⁰⁸ A pirate who sees a U.S. war ship approaching often fears being captured, so he dumps every incriminating piece of evidence, including all AK-47s and other arms, overboard, so they cannot be used at trial.¹⁰⁹

Another view suggests that there will still be difficulty having nations that wish to prosecute pirates after looking at the fact that there were 33,000 ships transiting the Gulf of Aden annually, including some 65,000 tankers that carry seven percent of the world's oil supply.¹¹⁰ Why? The main reason seems to be that they are afraid that their fight will look as though white people are grouping up on people of color—who also happen to be Muslim.¹¹¹ Denmark, for example, simply releases the Somali pirates after capturing them.¹¹²

100. Kontorovich, *supra* note 97, at 126. The Seychelles have, however, signed a transfer agreement with Kenya under which pirates convicted in Kenyan courts may serve out their sentences at facilities on the Seychelles. John Ungoed-Thomas & Marie Woolf, *Navy Releases Somali Pirates Caught Red-handed*, TIMES ONLINE, Nov. 29, 2009, <http://www.timesonline.co.uk/tol/news/world/africa/article6936318.ece>.

101. *We'll Not Relent on Piracy War, Kenya to Work with Others to Protect its Tourism Sector*, WORLD SENTINEL, Nov. 13, 2009, <http://www.worldsentinel.com/articles/view/128580>.

102. 1982 Convention, *supra* note 7, at Art. 101.

103. 27 I.L.M. 668 (1988), available at <http://www.admiraltylawguide.com/conven/suppression1988.html>.

104. Unlike UNCLOS, SUA applies to acts in territorial waters, sets out acts which are considered 'offences' and allows a State to try an individual in that State's own courts for those offences. *Id.* at 674-77.

105. International Maritime Organization, Summary of Status of Convention as of 31 December 2009, http://www.imo.org/conventions/mainframe.asp?topic_id=247 (last visited Jan. 24, 2010).

106. Kontorovich, *supra* note 97, at 130.

107. *Id.* at 142.

108. *Id.*

109. BBC News Archive, *Pirates hit navy ship 'in error'*, BBC NEWS, 7 Oct. 2009, <http://news.bbc.co.uk/2/hi/8294858.stm> (last visited Jan. 24, 2009).

110. James Kraska, *Coalition Strategy and the Pirates of the Gulf of Aden and the Red Sea 198 (Dec. 10, 2009)* (manuscript included in materials distributed to attendees at the 2009 Harvard conference, and on file with the authors).

111. Kontorovich, *supra* note 97, at 145-46.

112. *A pirate gang captured off the Somalian coast last week has been let free*, THE COPENHAGEN POST ONLINE, 24 Sept. 2008, <http://www.cphpost.dk/news/1-latest-news/350.html> (last visited Jan. 24, 2010). The Netherlands recently released pirates after no country, including Kenya and the Seychelles, which both have

The International Maritime Organization (IMO) consists of 169 member States and works extensively with non-governmental organizations in the cargo and shipping industry.¹¹³ The suggestion has been made that a multi-layered regional approach that includes putting pirates on trial, would work.¹¹⁴ Such a direction was taken successfully in the Strait of Malacca and Singapore although it was argued that a tsunami that occurred in the Aceh region of Indonesia had more to do with the lowering of piracy rates.¹¹⁵ Such a regional approach has resulted in the Nairobi Report, which sought to establish better intelligence gathering including the penetration of piracy groups.¹¹⁶ The Contact Group on Piracy off the Coast of Somalia (CGPCS) was also created, which met for the first time at the United Nations on January 14, 2009.¹¹⁷ Twenty-four countries from the EU, NATO, and the African Union participated in discussions to find a way to create working groups in order to develop collective action against different aspects (i.e. financial, etc.) of the Somalia piracy.¹¹⁸ The International Trust Fund through the CGPCS was created in order to fund the expenses associated with the prosecution of the suspected pirates.¹¹⁹

Against this background, your authors have been stressing for years the fact that there has been, and will continue to be, piracy in other parts of the globe. Somalia has been getting a lot of attention, and rightfully so, because of the amount of piracy and the amount of the ransoms being paid by various companies. There is no uniform policy on paying ransom. Right now there are approximately 260 hostages who, if ransoms were not paid, could be sold to terrorists. It was suggested that the best way to keep the government out of this problem would be to let the companies continue to negotiate ransoms. However, others felt that we should have a consistent policy in treating responses to ransom demands.

The authors believe that there are other important problems that must be considered when discussing jurisdiction as they will affect, not only the human rights, but also the environment. For instance, what happens if the pirates decide that they are tired of taking hostages and seize ships in order to put a dirty bomb on board and then decide it is easier to negotiate a ransom for the ship without the crew members? In other words, not all acts of piracy will occur in the high seas. A ship can be held for ransom in territorial waters. This raises multiple questions. Should the international community be allowed to attack pirates that are holding the human race and its environment hostage?¹²⁰ Should these countries be allowed to attack

agreements with the European Union to help press charges against suspected pirates, would agree to prosecute them. *'Somali pirates' held by Dutch freed*, EUBUSINESS.COM, 17 Dec. 2009, <http://www.eubusiness.com/news-eu/netherlands-somalia.20n> (last visited Jan. 24, 2009). England's Royal Navy has also released pirates "either because they have not been captured 'in the act of piracy' or because of the risk that they would claim asylum if prosecuted in Europe." Ungoed-Thomas & Woolf, *supra* note 100.

113. International Maritime Organization, About IMO, Introduction to IMO, http://www.imo.org/home.asp?topic_id=910 (last visited Jan. 24, 2010).

114. Kraska, *supra* note 110, at 203-06 (describing possible precedent for such an approach).

115. *Id.*

116. *Id.* at 207-09.

117. *Id.* at 210.

118. *Id.*

119. Kraska, *supra* note 110, at 210.

120. Diaz & Dubner, *supra* note 1, at 199-200.

pirates in territorial waters that are about to use a dirty bomb on a ship inside these waters? What if the coastal State cannot or will not attempt to stop these pirates? Is an attack on the environment that will destroy human life and the ecosystem not a crime against mankind? We are seeking to elevate customary law concerning the environmental and human rights or, to put it another way: “the tendency to “find” new customary law based mainly on the *opinio juris* (i.e., statements that a legal rule has now been recognized) without demonstrating uniform conduct among states in general is especially evident in regard to human rights, environmental protection and economic development.”¹²¹ The issue is whether this is an “attempt to put new wine into old bottles legitimized by the felt necessity to extend law to meet social objectives, when neither treaties nor uniform practice serve that function?”¹²² In other words, has custom become less important in this time of pervasive change (as Kelsen suggests)¹²³ or has its character changed in response to rapidly changing demands? Today some writers refer to “instant custom” or to “custom on demand.”¹²⁴ Instead of emphasis on uniformities of conduct (the material element), more importance is accorded to the subjective element of *opinio juris*, particularly when declared by states collectively with reasonable expectation of future conduct conforming to the new principle.¹²⁵ Henkin comments: “Such efforts to create new customary law by purposeful activity have included . . . resolutions adopted by international organizations . . . to promote, declare or confirm principles of law by overwhelming majorities or by consensus resolutions which discourage dissent.”¹²⁶

For example, at the 2009 Harvard conference, one of the participants discussed two legislative bills pertaining to piracy that were submitted to the Federal Parliament of Belgium.¹²⁷ This was a reaction by Belgium to one of their flagged vessels, the Pompei, a stone dumping ship owned by several Belgian dredging companies, being hijacked 100 miles north of the Seychelles.¹²⁸ Eventually, Belgium paid the ransom.¹²⁹ However, Belgium also introduced a couple of legislative bills, one of which set forth a new definition of piracy as well as a penalty under Belgian penal law.¹³⁰ It was pointed out that the definition of piracy in the proposed Belgian legislation differs from Article 101 of UNCLOS.¹³¹ First, the bill does not only punish illegal acts of violence, detention, and any acts of depredation, but also

121. LORI F. DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 96 (4th ed. 1993).

122. See *id.* at 95 (citing H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 450-54 (2d ed. R. Tucker 1966)).
Id.

123. *Id.* at 95-96.

124. *Id.* at 95 (citing H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 450-54 (2d ed. R. Tucker 1966)).

125. *Id.* at 96 (citing General course on public international law taught by Louis Henkin at the Hague Academy of International Law in 216 COLLECTED COURSES OF THE HAGUE ACADEMY 58 (1989)).

126. *Id.*

127. Erik Franckx & Marco Benatar, Operation Atalanta: The European Approach to Fighting Piracy 6-9 (Dec. 10, 2009) (manuscript included in materials distributed to attendees at the 2009 Harvard conference, and on file with the authors).

128. *Id.* at 6.

129. *Id.*

130. *Id.* at 7.

131. *Id.*

the threat therein.¹³² Second, whilst Article 101 of UNCLOS defines piracy as taking place in the high seas (or a place outside of any State's jurisdiction), it extends jurisdiction of piracy to other maritime zones to the extent provided for by international law.¹³³ The proposed law of Belgium adds two instances of aggravating circumstances that may warrant a higher penalty.¹³⁴ The first is an attack that endangers navigational safety (e.g., by sailing at night with all lights turned off or by colliding into another ship during a chase).¹³⁵ However, "[m]ore novel is the circumstance of endangering the environment. This could occur when a ship empties its fuel tanks or toxic cargo in an attempt to lighten the ship during a chase."¹³⁶ In addition, the bill empowers Belgian warships to prevent and suppress piracy.¹³⁷ Specifically, it enables Belgian warships to send military protection teams on board civilian vessels.¹³⁸ The bill also stipulates certain rules of engagement.¹³⁹

The second bill introduced into the Belgium legislature was intended to provide a new basis of extraterritorial jurisdiction for trying pirates in Belgium.¹⁴⁰ This would give the Belgian courts and tribunals jurisdiction when piracy is committed against a Belgian ship or when Belgian military personnel apprehend piracy suspects.¹⁴¹ In both cases there is a link with Belgium.¹⁴² Hence, the ground of jurisdiction is based on the passive personality principle.¹⁴³ Perhaps the most famous expression of the passive personality principle is Article 14 of the French Civil Code: "L'étranger pourra être traduit devant les tribunaux de France, pour les obligations par lui contractées en pays étrangers envers des Français."¹⁴⁴ ("A foreigner may be tried before the French courts for obligations contracted in foreign countries respecting the French.")¹⁴⁵

Those were some of the problems that were discussed regarding sovereignty and jurisdiction (i.e., who will try the pirates and where will they be tried are issues that are currently in flux). The next issue is who supplies the pirates with weaponry; and, is there greater influence from terrorists, the mafia(s) or other organizations?

132. *Id.*

133. *Id.*

134. Franckx & Benatar, *supra* note 127, at 8.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. Franckx & Benatar, *supra* note 127, at 8.

141. *Id.*

142. *Id.*

143. *Id.* The protective principle guards the security of the central interest of the State. The principle "asserts that a state may apply law . . . to an act committed outside its territory by a person not its national where the victim of the act was its national."

144. *Id.*

145. *Id.*

IV. HOSTAGE TAKING FOR RANSOM AT SEA: THE MONEY VAPOR TRIAL

We know that at least 20,000 ships pass through the Gulf of Aden each year.¹⁴⁶ The ransoms paid used to be cheaper.¹⁴⁷ It is believed that between US \$500,000 and \$2 million have been paid per ship.¹⁴⁸ However, ransoms continue to increase. Just recently, owners of a Greek-flagged oil tanker paid \$5.5 to \$7.0 million U.S. dollars for release of the ship.¹⁴⁹ If only one in 1,000 ships is hijacked (as discussed at the Conference), this would represent approximately \$15 million in 2007.¹⁵⁰ In 2008, which was a bounty year for the pirates, an estimated \$180 million U.S. was paid in ransom money.¹⁵¹ That year, 111 ships were attacked, a 200% increase over 2007.¹⁵² Two hundred fourteen ships were attacked in 2009, nearly doubling the 2008 number.¹⁵³ The question is “where does this money go to and how are the pirates supplied?” The following is a chart that was presented at the Conference answering this question.

146. Diaz & Dubner, *supra* note 1, at 181; *About 20 Chinese rescued from pirate attack*, CNN, Dec. 17, 2008, <http://www.cnn.com/2008/world/africa/12/17/somaliapiracy>.

147. Diaz & Dubner, *supra* note 1, at 179-80.

148. *Id.*

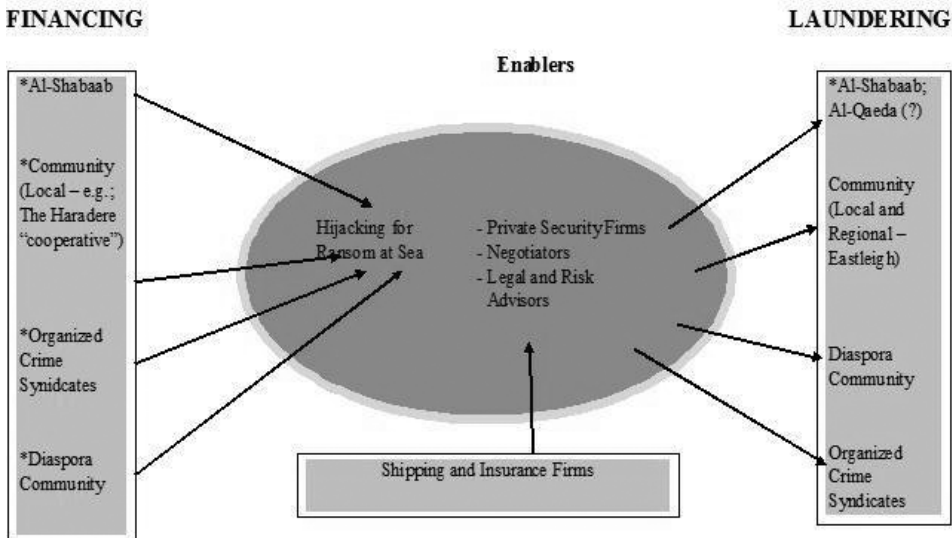
149. Scott Baldauf, *Somali pirates fight over record ransom*, THE CHRISTIAN SCIENCE MONITOR, Jan. 18, 2010, <http://www.csmonitor.com/World/Africa/2010/0118/Somali-pirates-fight-over-record-ransom> (last visited Jan. 24, 2010).

150. Karl Sorenson, *Emergence of an Equilibrium in the greater Gulf of Aden?* 3 (Dec. 10, 2009) (manuscript included in materials distributed to attendees at the 2009 Harvard Conference, and on file with the authors).

151. Nick Wadhams, *Drownings and Lost Ransom Won't Deter Somali Pirates*, TIME, Jan. 12, 2009, <http://www.time.com/time/world/article/0,8599,1871204,00.html> (last visited Jan. 24, 2009). Participants at the 2009 Harvard conference suggested \$50 million is a fairer estimate once the lawyers' fees and agents' commissions are stripped away. Martin N. Murphy, *Piracy as a Land-based problem* 4 (Dec. 10, 2009) (manuscript included in materials distributed to attendees at the 2009 Harvard conference, and on file with the authors); *see also* Sorenson, *supra* note 150, at 3.

152. Mark McDonald, *For Somali Pirates, 2009 Is a Record Year*, N.Y. TIMES A9, Dec. 30, 2009.

153. *Id.*



“Predictability of Market”

After looking at the chart, one of the issues raised at the 2009 Harvard conference was whether we should say “no” when ransom is requested? It was pointed out that there are 260 hostages being held, as of this writing, by the pirates. If the companies did not pay off the ransoms, it is possible that the pirates would sell the hostages off to terrorists. It was agreed that everybody wants to keep the government out of the ransom game; however, it was also pointed out that the responses to the pirates have to be consistent. It is important to recognize the international dimension of Somali piracy – a large proportion of ship ransoms flows out of Somalia.¹⁵⁴ In other words, go after the warlords located in Somalia, as well as the Russian and Italian mafias.¹⁵⁵ The U.S. Treasury Department could possibly trace where funds are coming from and going to. The big problem here, as we discussed in our prior article, *On the Evolution of the Law of International Sea Piracy*, is: are these pirates interacting with terrorists?¹⁵⁶ Will terrorists eventually see that these ransoms could help in their various political causes? Will they eventually become pirates themselves? It is estimated that pirate attacks are underreported by fifty

154. Patrick Lennox, *Verbal Treasure Chests and Money Vapor Trails: A Financial Response to Somali Piracy?* 4 (Dec. 10, 2009) (manuscript included in materials distributed to attendees at the 2009 Harvard conference, and on file with the authors).

155. Rotberg, *supra* note 3, at 7.

156. Diaz & Dubner, *supra* note 1, at 204-05.

percent so that insurance companies do not raise rates even more than they already have.

One of the suggestions to limit piracy was to occupy the country from which the pirates operate.¹⁵⁷ An example of the French invasion of Algeria in 1830 was given as an effective way to root out the notorious Barbary Corsairs;¹⁵⁸ however, an occupation of Puntland (another Somali Province) is not in the international committee's political agenda.¹⁵⁹ As we pointed out in our prior article, the shipping industry prefers to avoid confrontation with the pirates.¹⁶⁰ The reasons for this behavior are quite clear as ransoms paid to the pirates may equal a few million dollars, but the actual value of the crew, cargo, and ship is much more.¹⁶¹ It was brought out that the number of attempted attacks as of the beginning of December 2009, had already surpassed the total that occurred in 2008.¹⁶² Successful Somali hijackings, however, have fallen in number.¹⁶³ Somali piracy, which previously concentrated in the Gulf of Aden and off the Somali coast, is now occurring more frequently in the waters between Somalia and the Seychelles, off the Kenyan coast, the Red Sea, and as far away as Oman.¹⁶⁴ It was also pointed out that Somali piracy is constantly changing.¹⁶⁵ Somalis are entrepreneurial, flexible, and adaptive – their primary goal is making money.¹⁶⁶ If the cost becomes too high or the task too difficult, the Somalis will seek another way to carry on piracy.¹⁶⁷

Actually, paying ransoms is the least of the worries that the international community may face. As one participant at the 2009 Harvard conference pointed out, Somali piracy may become a “Mujahideen at Sea.”¹⁶⁸ It was stated that Al-Shabaab (i.e. “the youth” – a faction in Somalia) spokespersons portray the pirates as “Mujahideen because they are at war with the Christian countries” defending “the coast of Allah’s enemies.”¹⁶⁹ It is feared that taking the Al-Shabaab’s hint and ostentatiously fighting for a bigger cause in the shape of a maritime Jihad against the West would provide the pirates with some sort of “semi-official” sanction.¹⁷⁰ They could demand that the Western ships withdraw from the Somali waters; otherwise, they would kill hostages.¹⁷¹ If they view hostages essentially as a commodity and the ransom money dries up, then we may find a situation in which they are

157. Sorenson, *supra* note 150, at 4.

158. *Id.*

159. *Id.*

160. Diaz & Dubner, *supra* note 1, at 192-96; *See also*, Sorenson, *supra* note 150, at 6.

161. Diaz & Dubner, *supra* note 1, at 179.

162. McDonald, *supra* note 152, at A9.

163. David H. Shinn, *The Intensity, Spread and Economics of Somali Piracy 4* (Dec. 10, 2009) (manuscript included in materials distributed to attendees at the 2009 Harvard conference, and on file with the authors).

164. *Id.* at 3.

165. *Id.* at 2.

166. *Id.*

167. *Id.*

168. Peter Lehr, *Somali Piracy: The Next Iteration 8* (Dec. 10, 2009) (manuscript included in materials distributed to attendees at the 2009 Harvard conference, and on file with the authors).

169. *Id.*

170. *Id.*

171. *Id.*

selling the hostages to the highest bidder – Al-Shabaab or another terrorist organization.¹⁷²

Let us turn to some possible solutions suggested at the 2009 Harvard conference.

V. SOLUTIONS

Most of the attendees at the 2009 Harvard conference agreed that there should be short and long term solutions discussed as there are eminent problems and problems that may occur in the future. Also, that there are two possible ways to handle the situation. One emanates from the sea and the other from the land.

A. The sea

One suggestion was a regional-based anti-piracy patrol conducted by Arab States under the lead of Saudi Arabia.¹⁷³ The regional approach worked in other areas of the world, especially the Malacca Strait where the Malacca Strait Patrol came into existence.¹⁷⁴ This was a joint, anti-piracy patrol of Indonesia, Malaysia, Singapore, and Royal Thai Navy vessels.¹⁷⁵ The establishment of this type of patrol has led to a reduction in the severity and overall number of piracy attacks.¹⁷⁶

The second possible solution would be establishing an international piracy tribunal.¹⁷⁷ The third possibility is attacking the pirates' land bases but this may lead to an escalation of force that is used currently.¹⁷⁸ The fourth suggestion was the use of a blockade of the whole coast,¹⁷⁹ but as Commander Mike Jager stated after the recent hijack of the Greek tanker *Maran Centaurus*: "Patrolling the whole coast of Somalia is like policing the East Coast of America with five police cars."¹⁸⁰

B. By land

One of the greatest political problems facing the international community is the lack of governance in Somalia.¹⁸¹ What to do about that country has been a conundrum for nearly two decades.¹⁸² Somalia is an example *par excellence* of a failed State. The term "failed state" really only applies to part of the country of Somalia.¹⁸³ Of the estimated nine million Somalis in the world, more than one million of

172. *Id.*

173. *Id.* at 2.

174. *Id.*

175. Lehr, *supra* note 168, at 2.

176. *Id.*

177. *Id.*

178. *Id.* at 5-7.

179. *Id.* at 8.

180. *Id.*

181. J. Peter Pham, *Response to Ken Menkhaus – Peripheral Vision: A Model Solution for Somalia*, 154 THE RUSI JOURNAL 84, Oct. 2009 (as included in materials distributed to attendees at the 2009 Harvard conference, and on file with the authors).

182. *Id.*

183. *Id.* at 86.

them are refugees permanently living in the Diaspora;¹⁸⁴ 3.5 million live in the Republic of Somaliland,¹⁸⁵ and another 2.4 million in Puntland.¹⁸⁶ Thus, the temporary federal government (TFG) has control over, at most, less than one-third of the population, all of whom live in the southern and central Somalia, and about the same proportion of the former national territory.¹⁸⁷ The self-proclaimed “Republic of Somaliland” and north-western coast of the former Somali State shows what is possible when a “bottom-up” or “building-block” approach is allowed to take place instead of imposing the favorite “top-down” strategy for resolving conflicts, consolidating peace and stability within a political space.¹⁸⁸ The British Protectorate of Somaliland gained its independence and became the State of Somaliland on June 26, 1960.¹⁸⁹ Less than a week later, it merged with a former Italian colony of Somalia in the south and east.¹⁹⁰ The union with Somalia was regretted almost from the beginning as they faced increasing modernization within both government and civil society at the hands of a numerically superior seven clansman.¹⁹¹ By the 1980s, full force civil war was underway as Siyad Barre issued measures to suppress the Somali National Movement, which was the primary opposition in Somaliland, and represented the aspirations of the various Isaq clans in particular.¹⁹²

All of the piracy occurs in Puntland.¹⁹³ In 1998, tired of being held back by the constant violence and overall lack of social and political progress in central and southern Somalia, traditional clan allies of the Darod clan family’s Harti Clan – including its Dhulbahante, Majeerteen, and Warsangeli sub-groups – meeting in the town of Garowe, decided to establish an autonomous administration for Puntland State, Somalia.¹⁹⁴ Unlike Somaliland which asserted its independence, Puntland’s constitution simultaneously supports the notion of a federal Somalia and asserts the region’s rights to negotiate the terms of any event of national government.¹⁹⁵

The aforementioned very brief description of Somalia can be summed up as basically a stateless or lawless country. Piracy is a crime from the land. Before any long-term solution can be reached, there must be stability in all of Somalia. Piracy exploits the anarchy and the wilderness that is the sea but it does so in response to seven factors including, *inter alia*: 1. opportunity for reward; 2. favorable geography; 3. permissive political environment; 4. inadequate securities/law enforcement; 5. conflict and disorder; 6. cultural acceptability/maritime tradition; and, 7. legal and jurisdictional opportunity.¹⁹⁶ Historically, pirates have been con-

184. *Id.*
 185. *Id.*
 186. *Id.*
 187. *Id.*
 188. Pham, *supra* note 181, at 86.
 189. *Id.*
 190. *Id.*
 191. *Id.*
 192. *Id.*
 193. *Id.* at 87.
 194. *Id.*
 195. *Id.*
 196. Murphy, *supra* note 151, at 1.

sidered everything from criminal to fighters for liberty.¹⁹⁷ Their's might be considered a legitimate way of earning a living.¹⁹⁸ Their way might be considered a normal societal activity.¹⁹⁹ For example, the Barbary coast, the Jolo or Sulu pirates of the Philippines, who used the notorious "pirate wind" to raid communities elsewhere in the region, or the historic Japanese and Chinese pirates mentioned earlier in this paper.²⁰⁰

VI. THE RESPONSE OF THE INTERNATIONAL COMMUNITY

One may ask, "is there any international, or even United States policy, about dealing with pirates?" The answer that was suggested at the 2009 Harvard conference was "yes!" Fifty-Eight percent of the pirates are released, as we stated earlier, and this is considered a "default" policy.²⁰¹ There are believed to be 150,000 to 200,000 militia in Somalia. One of the main questions confronting the various countries who are affected by piracy off of Somalia is "how do you harmonize your responses?" For now, U.S. responses are inadequate because the United States has other problems in Iraq and Afghanistan. Just the sheer size of the areas involved is discouraging. NATO uses a checklist for what to do when pirates are captured and where they should be transferred for trial.

Another main problem is the vulnerability of ships today.²⁰² Due to inefficiency, cost-cutting, and the great world recession, there are sub-standard ships being used.²⁰³ Quality ships are not being hijacked.²⁰⁴ They move too quickly (i.e. around 22 knots).²⁰⁵ The sub-standard ships are referred to as "ships of shame" by the trade.²⁰⁶ Many ships are idle due to the global financial crisis.²⁰⁷ In addition, the size and the wages of crews are reduced drastically.²⁰⁸ In addition, flag-of-convenience states are also at fault because they do not care if their flagged vessels meet the minimum standards of safety and maintenance.²⁰⁹

In the short term, we are looking at NATO as an interim solution. In the medium term, we are looking at the regional approach as we mentioned earlier in the paper. In the long term, we are looking and hope to establish law in Somalia and other places where piracy may erupt.

Other problems include whether or not armed sailors should be placed on board ships that are sub-standard. The richer ships can do over 20 knots and usual-

197. *Id.* at 2.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. Sam Bateman, Preventing Piracy at Sea – Some Industry Issues 2 (Dec. 10, 2009) (manuscript included in materials distributed to attendees at the 2009 Harvard Conference, and on file with the authors).

203. *Id.*

204. *Id.* at 2-3.

205. *Id.* at 1.

206. *Id.*

207. *Id.* at 4-5.

208. *Id.* at 5.

209. Bateman, *supra* note 201.

ly pirates do not attack ships travelling over 20 knots.²¹⁰ The argument is that if we arm sailors, then there may be problems with the sailors killing each other, they may have inadequate training, or it may lead to an escalation of violence at sea between the pirates and the ships they seek to hijack.

VII. CONCLUSION

The 2009 Harvard conference discussed all of the aforementioned items. Your authors are still concerned about piracy occurring in other areas and taking different forms of violence as violence may affect far more than one ship at a time. We have mentioned the scenario where pirates decide to put a dirty bomb on a ship that has been hijacked and use that as ransom rather than the hostages. It may be to their benefit to do this as there will be fewer problems dealing with hostages. However, the other problem concerns the damage that will be caused to the environment and various ecosystems if pirates decide to hijack a ship and then blow it up in a very sensitive environmental region. The same is true with human refugees. As we stated in our last article, there may be many millions of refugees due to a decline in the amount of potable water, and these refugees will certainly be attacked by pirates who are actually primarily fishermen, as occurred earlier on during the Vietnamese refugee attacks.

The second item that comes to mind is the fact that we have only been discussing piracy on the high seas. We believe it will be necessary for the regions to allow ships to go into territorial waters where either the country does not wish to, or is unable to, go after the pirates. There may not be time for Security Council Resolutions if the pirates intend to blow up the ship or kill many refugees. The Harvard Draft of 1932 clearly set forth articles permitting hot pursuit into territorial waters to stop pirates from using the territorial waters of another country as a hiding place. However, due to reasons of expediency (which was explained in our last article), the international community decided to adopt the piracy articles set forth in both the 1958 Geneva Convention on the High Seas and the current UNCLOS 1982.²¹¹ If the international community needs long-term solutions it seems to us that an international tribunal will have to be set up to handle the situation. It will have to be located in a neutral place, which will not affect any local inhabitants who would be biased against Muslims or Christians or whoever is involved in the situation. Perhaps it could go out on "circuit" holding court in different places. In other words, there are many problems that may occur due to an outgrowth in piracy. Currently we have the SUA in effect to cover those areas (other than high seas) where the UNCLOS 1982 does not apply. However, that treaty is not really a solution to anything other than terrorist attacks such as those that occurred on the Achille Lauro earlier on.

The international community must confront these situations and deal with them both from the land from which they arise (e.g., Somalia) and from the sea. The

210. *Id.* at 1.

211. Diaz & Dubner, *supra* note 1, at 188-192; Dubner, *supra* note 5, at 11-12.

main theme of UNCLOS 1982 was the “common heritage of mankind.” Throughout our discussions at the 2009 Harvard conference, it was apparent that all persons present were interested in preserving civility, even though force might be necessary. We hope that the international community keeps up with the current events and possibly plans ahead for more scenarios.