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On the Creation of a New Legal Regime to Try Sea Pirates

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I
INTRODUCTION

This paper discusses the adequacy of international regimes to combat maritime crime, particularly the unique problems the international community faces in attempting to prescribe and enforce law in connection with sea piracy. The paper also discusses other crimes at sea, including, *inter alia* human trafficking, environmental problems and the treatment of refugees at sea. Slavery and sea piracy are the only two crimes to which the doctrine of universal jurisdiction may apply. This poses unique problems for the international community, as will be seen shortly. The crime of sea piracy has been instrumental in causing all kinds of grief in conjunction with the freedom of shipping oil and other products through the Gulf of Aden area as well as on the high seas near Somalia and off of the coast of Nigeria and Bangladesh. When the Chairman of the Joint Chiefs of Staff indicated that he did not know whether the international community had jurisdiction to prosecute pirates,[1] it was obvious that something was terribly wrong with the understanding of international law on that subject.

The purpose of this paper, therefore, is to set forth the historical reasons for the modern jurisdictional problems concerning piracy. The historical perspective informs an understanding of the ways in which the international community has basically fumbled the ball in connection with this topic. Therefore, the paper begins with a brief discussion of the historic perspective of international sea piracy and then brings it up-to-date. By doing so, the reader will see clearly whether or not there are adequate international

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

regimes ready to combat sea piracy and the unique problem it creates in connection with jurisdiction.

II
A LITTLE BACKGROUND INTO THE TYPES OF PIRACY OCCURRING

A. Yesterday

In 1932, Professor Jonathan Bingham of Harvard University and his colleagues created the 1932 *Draft Convention on Piracy,* commonly called the "Harvard Draft."[2] This was the first such discussion on jurisdictional problems regarding sea piracy. In order to understand more fully the adequacy of legal regimes set up to combat piracy, it is first necessary to backtrack and look at what the Harvard Draft accomplished back in 1932.

As it was stated in a prior article, the Harvard Draft of 1932 was prepared for the purposes of "expediency."[3] 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 Seas[4] and the 1982 United Nations Law of the Sea Convention (UNCLOS)[5] as articles on piracy. The main question at the original Harvard study considered "what initial significance does piracy have in the law of nations?"[6] In contrast, the more limited subject discussed at the December 2009 Harvard conference on piracy, in which your author participated, concerned how to combat piracy, the significance being one of commercial necessity.

In addition, the 1932 Harvard Draft, later adopted by the two conventions aforementioned, related to piracy on the high seas only.[7] Because the crime

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[2]Harvard Research in International Law, *Draft Convention on Piracy, with Comment*, 26 AM. J. INT'L L. SUPP. 739 (1932) [hereinafter "Harvard Draft"].

[3]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).

[4]Convention on the High Seas, April 29, 1958, 13 U.S.T. 2312 (1962), 450 U.N.T.S. 82 [hereinafter Geneva Convention], available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/8_1_1958_high_seas.pdf.

[5]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.

[6]Dubner, supra note 3, at 16; Harvard Draft, supra note 2, at 749.

[7]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 5. The 1958 Geneva Convention includes identical language. See Geneva Convention, Art. 15, supra note 4.

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 could, and would want to, resolve the situation by prescribing and enforcing its own municipal legislation on sea piracy.[8] In the Harvard Draft, 1932, there was disagreement over whether piracy was "an international crime."[9] 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?"[10] At that time, there was a "modern orthodox view" that the law of nations is a law of States only.[11] 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."[12]

The only "norm" that was demonstrated by the Harvard Draft, 1932, was that a "diversity of opinion" existed in 1932 that was quite "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.[13]

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."[14] 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.[15]

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

[8]Dubner, supra note 3, at 17.
[9]Dubner, supra note 3, at 17.
[10]Harvard Draft, supra note 2, at 753; Dubner, supra note 3, at 17.
[11]Harvard Draft, supra note 2, at 760; Dubner, supra note 3, at 17.
[12]Harvard Draft, supra note 2, at 756; Dubner, supra note 3, at 17.
[13]Harvard Draft, supra note 2, at 749.
[14]Id. at 754.
[15]Id.

> 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.[16]

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.[17]

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 which needed protection against those dangerous common enemies . . .[18]

For example, during the Ming dynasty (1368-1644), Japanese pirates plundered the seacoasts of eastern Asia, ranging from Korea to Indochina.[19] 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 sixteen century.[20] As

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[16]Id. at 756.

[17]Id. at 752.

[18]Id. at 764-65.

[19]Kwan-wai So, JAPANESE PIRACY IN MING CHINA DURING THE 16TH CENTURY 1 (Michigan State University Press 1975).

[20]Id.

we shall see shortly when discussing the problems in modern-day piracy, there were socio-political factors which caused the rise and spread of piracy in parts of China and related areas.[21] One of these was the "growing influence of regionalism."[22] When the central government of China was effective, it was difficult for the smuggling-piratical activities to exist for a long time.[23] 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.[24] In fact, it has been said that the "budding growth of regionalism must have indulged the spread of smuggling before deteriorating into piracy."[25] In addition, another factor, which in the beginning was said to encourage piracy, was the terribly dilapidated state of coastal defense.[26] "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."[27]

The persons who prepared the 1932 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[28] 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.[29] He described his companions as "privateers;"[30] 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 the cut of the proceeds, which also had to be shared with the ship's owners.[31] 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

[21]Id. at 134.

[22]Id.

[23]Id.

[24]Id. at 134-35.

[25]Id. at 135.

[26]Id.

[27]Id.

[28]Although there is some dispute about the exact dates, the "Golden Age" of piracy extended from approximately 1650 to 1730. MARCUS REDIKER, VILLIANS OF ALL NATIONS: ATLANTIC PIRACY IN THE GOLDEN AGE 8 (Beacon Press 2004). Estimates of the number of pirates operating during the Golden Age range from 1,000 to 2,000 per year. PETER T. LEESON, THE INVISIBLE HOOK: THE HIDDEN ECONOMICS OF PIRATES 23 (Princeton University Press 2009). Crew sizes generally ranged from 80 to perhaps 200, although Blackbeard's crew aboard *The Queen Anne's Revenge* consisted of as many as 300. Id. at 24. Some of the larger pirate crews formed squadrons, with multiple ships under the command of a single captain. Id.

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

[30]Id. at 44.

[31]Id. at 44-45.

and the loot had to be shared with no one.[32] The term "buccaneer" is derived from a 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.[33] Much of the piracy that occurs today off of the coast of Somalia is driven by financial gain.[34] 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 their government in return for a piece of the action.

Another similarity between "older" and current Somali pirates, as we will see, is that the Somalis claim that their fishing area was destroyed by European and Asian fishing vessels and the environment was equally decimated by dumping.[35] 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.[36]

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 was the case historically. However, as will be discussed shortly, the jurisdiction over pirates has not changed. The adequacy of the current legal regimes is an issue.

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[32]Id. at 45.

[33]Id. at 45 n.†.

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

[35]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.

[36]Preston & Preston, supra note 29, at 141.

B. Today

In order to understand whether or not regimes are properly in place to try pirates and other maritime crimes, it is important at this point to discuss the problem of the number of incidents and piracy as well as whether they are organized or not together with how they are being treated today. Only in looking at the statistics figures and the facts surrounding the incidents, will we have a better understanding of what needs to be accomplished.

Your author recently attended a meeting/conference on "combating maritime piracy" at Harvard University School of Law which was a two-day and evening session consisting of approximately twenty-five persons. The outcome of the meeting was a Policy Brief published by the World Peace Foundation.[37] It was pointed out by military personnel, as well as former ambassadors and U.S. State Department officials, that the crime of maritime piracy, especially off the Somali coast, has grown significantly. The statistics at the 2009 Harvard Conference showed that in 2009 pirates attacked a total of 217 ships (of the 22,000 that passed through the Gulf of Aden alone and others traversed the wider waters of the Indian Ocean), with forty seven successful hijackings and the collection, in 2009, of more than $60 million in ransom payments.[38] This included the hijacking of a large oil tanker in 2009, which was ransomed for about $5 million, which was the largest ransom payment on record until the $5.5 to $7 million ransom paid for a Greek-owned oil tanker in early 2010.[39] In 2008, 111 ships were attacked, up from approximately fifty in 2007.[40] Of the 2008 attempted attacks, thirty-two were successful.[41] About $55 million was delivered to the pirates for ransom in 2008.[42] The cost to industry alone during this period of time, due to just the increase in Somali piracy, was at least $100 million dollars.[43] At the beginning of 2010, twelve of the forty-seven vessels successfully hijacked in 2009 were still being held, along with 263 crew members.[44] In January, 2010, two ships, a British cargo vessel taken 600 miles east of Somalia and a Singaporian chemical tanker en route to India, were seized in the Gulf of

[37]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.

[38]Id. at 1. Note that all numbers in the Policy Brief were collated from official International Maritime Bureau statistics, compilations of the East Africa Seafarer's Program, news reports, and naval task force estimates. Id. at n. 1.

[39]Id.

[40]Id.

[41]Id.

[42]Id.

[43]Id.

[44]Id.

Aden where no ship has been successfully hijacked since July, 2009.[45] At least twenty-four mariners from those ships joined the 263 crew already held.[46]

A more significant figure was the fact that in 2009, the combined maritime operations of NATO and allied forces disrupted 411 pirate operations of the 706; delivered 269 pirates for prosecution to Kenya and other jurisdictions (of whom forty-six were jailed); and killed eleven pirates.[47] The combined operations also destroyed forty-two pirate vessels; confiscated fourteen boats, hundreds of small arms, nearly fifty rocket-propelled grenade launchers, and numerous ladders, grappling hooks, GPS receivers, mobile phones, etc.[48]

Somalia is not the only part of the world where piracy occurs. Off the coast of Nigeria there have been attacks; the Chittagong port in Bangladesh and the South China Sea have seen an increasing number of incidents.[49] While the number of incidents of Somali piracy have significantly increased, there has been a significant drop in the number of reported incidents in Indonesian waters – only seven incidents in 2009 as compared to twenty-three in 2008, a drop of over 75 percent.[50] In addition, in the Malacca Strait, the littoral States have continued to cooperate insuring an overall decline in the number of incidents in this important strategic chokepoint.[51] As will be seen shortly, this area relies on a regional approach to jurisdiction and enforcement.[52] The question remains whether this regional approach can be applied in a satisfactory manner elsewhere in the world. Returning to Somalia, the number of pirates total about 1,500 and are involved with about seven syndicates controlling separate organizations, but linked to larger, better-financed syndicates in Kenya, Dubai, Lebanon, Somalia, and elsewhere – including, possibly, Russia.[53]

As was seen earlier, historically, pirates have no political motives or ideological drivers, despite the widespread assertion (part-fact and part-myth) that piracy began in the earlier years of the last century in retaliation against and in response to European, Egyptian, Indian, Taiwanese, Thai, Korean and

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[45]Id.

[46]Id.

[47]Id. at 2.

[48]Id.

[49]ICC INTERNATIONAL MARITIME BUREAU, PIRACY AND ARMED ROBBERY AGAINST SHIPS, ANNUAL REPORT: 1 JANUARY – 31 DECEMBER 2009 27 (2010) [hereinafter IMB ANNUAL REPORT 2009].

[50]Id. at 28.

[51]Id.

[52]See 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).

[53]Rotberg, supra note 37, at 3.

Japanese trawlers fishing illegally in Somali waters and depleting customary catches.[54] While there is no hard evidence of illicit dumping of radioactive waste, there have been pictures alleged to be of this on YouTube.[55] One of the important thoughts of the 2009 Harvard Conference was that since piracy was an income-generating industry and not a way of life, incentives could wean pirates away from their dangerous pursuits.[56] Most Somali pirates are unemployed young men.[57] Most hail from two of Somalia's clans and many are ex-militia from the internal wars in the south.[58] As has been the case since the 1600s, these young men were attracted to piracy by the opportunities for gain.

At the 2009 Harvard Conference, there were many other suggestions for land-based policies aimed at discouraging piracy.[59] The first recommendation from the Conference is:

> the international community should create an ad hoc international/Somali body under the U.N. Security Council in order to ascertain the truth or falsity concerning toxic dumping and if there has been and is, illegal fishing. This new body should report conclusively within six months to the U.N. Security Council, providing a point of departure for stating how the international community can aid Somalia in enforcing lawful fisheries and environmental measures in its 200 nautical mile Exclusive Economic Zone.[60]

Another concern at the Conference was exploring the flow of money received by the pirates.[61] "The battle against piracy will be assisted when we know precisely where the money goes, who controls the sources of financing, and who receives the profits."[62] The Conference also generated recommendations relating to making ships harder to capture[63] and strengthening the legal response to piracy.[64]

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[54]Id.

[55]For example, *People & Power: The Toxic Truth* (Al Jazeera English broadcast, 17 Jan. 2009), is available on Youtube.com in two parts. Part I is available here: http://www.youtube.com/watch?v=ud1pQ7lGn48; Part II is available here: http://www.youtube.com/watch?v=-lM7VCluCXI&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.

[56]Rotberg, supra note 37, at 3.

[57]Id. at 4.

[58]Id.

[59]Id. at 4-7.

[60]Id. at 5.

[61]Id. at 7-8.

[62]Id. at 7.

[63]Id. at 8-10.

[64]Id. at 10-11.

With all of this as a background, the reader can observe that the piracy off the coast of Somalia remains a large problem for the international community. It is now essential to see the legal response (or lack thereof) of the international community, and why certain affected States are reluctant to place pirates on trial in their countries.

III
JURISDICTIONAL PROBLEMS AND THE LEGAL RESPONSE OF THE INTERNATIONAL COMMUNITY

A. Jurisdiction

While the Chairman of the Joint Chiefs of Staff was in a quandary about how to proceed legally against pirates, most legal scholars were not. All one has to do is to look at the history of international sea piracy to see that jurisdiction over pirates exists universally. What does this mean? Universal jurisdiction is based "solely on the nature of the crime."[65] 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."[66] A variety of human rights abuses, such as genocide, crimes against humanity, war crimes, and torture, are widely considered to be subject to universal jurisdiction.[67] The term *hostis humani generis* (enemy of mankind) has been used to describe both pirates and slaves traders.[68] As an enemy of mankind, pirates could be tried by any country, anywhere they were found, and could be executed summarily. Unfortunately, "the jurisprudence of universal jurisdiction is disparate, disjointed, and poorly understood."[69] For example, the Chairman of the Joint Chiefs of Staff recently asked, "One of the challenges that you will have in piracy, clearly, is, if you are intervening and you capture pirates, is there a place to prosecute them?"[70] Those of us in the field of international law, were rather surprised as we thought the matter of jurisdiction over pirates had been settled centuries ago. In order to determine the adequacy of international regimes (be they regional, already

[65] THE PRINCETON PROJECT ON UNIVERSAL JURISDICTION 23 (2001) [hereinafter, THE PRINCETON PROJECT], available at http://lapa.princeton.edu/hosteddocs/unive_jur.pdf.

[66] Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 Tex. L.R. 785, 788 (1988).

[67] Mary Robinson, *Forward* to THE PRINCETON PROJECT ON UNIVERSAL JURISDICTION 15 (2001).

[68] Randall, supra note 66, at 791, 794.

[69] THE PRINCETON PROJECT, supra note 65, at 24.

[70] Shanker, supra note 1, at A10.

established, or ad hoc), it is necessary to first determine how such a regime will have jurisdiction over pirates.

Historically, in international law, one could say that the general rule is there must be a connection between the crime and the forum in order to justify adjudicatory jurisdiction.[71] Such a nexus can involve the territory where the alleged crime occurred; the nationalities of the victim or perpetrator; or the security of the forum territory.[72] International law characterizes the justification of such jurisdiction under the principles, respectively, of territoriality,[73] personality,[74] nationality,[75] and protective principles.[76] The international jurisdiction over piracy is an exception to the nexus normally required for criminal jurisdiction.[77] "Universal jurisdiction, then, is an exception to – if not an aberration within – the sovereignty hallmark which has served as the most basic organizing principle of the world legal order since the Treaty of Westphalia in 1648. Sovereignty both authorizes and limits a government's authority within the state's borders and over its people, to protect its land and resources and protect and regulate its citizens."[78] As early as the sixteenth century, every nation-state authority was able to capture and punish pirates under the guise of universal jurisdiction.[79] The reason why universal jurisdiction exists over sea piracy is that if the crime is committed on the high seas, beyond any State's territorial waters, it occurs in an area where space belongs to no one State.[80]

Under universal jurisdiction, a sovereign has the right, but not the responsibility, to punish pirates.[81] It is expensive to do so and it creates many problems, discussed *infra*. Also, there are many ongoing international conflicts and the countries may not have the wherewithal to patrol all of their waters,[82] especially off the 1700 mile coastline of Somalia.[83]

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[71]Ken Randall, *Reframing Universal Jurisdiction* 1(Dec. 10, 2009) (manuscript included in materials distributed to attendees at the 2009 Harvard Conference, and on file with the authors).

[72]Id.

[73]The territoriality principle refers to jurisdiction over offenses which occur in the prosecuting state's territory. Randall, *Universal Jurisdiction Under International Law*, supra note 66, at 787.

[74]The personality principle establishes jurisdiction when the victim is a national of the state. Id.

[75]The nationality principle establishes jurisdiction when the offender is a national of the state. Id.

[76]The protective principle provides for jurisdiction over extraterritorial acts that threatens the State's security or a basic governmental function. Id. at 787-88.

[77]Randall, *Reframing Universal Jurisdiction*, supra note 66, at 1.

[78]Id.

[79]Id.

[80]Id. at 2.

[81]Id. at 3.

[82]Id.

[83]U.S. Dep't of State, Background Note: Somalia, http://www.state.gov/r/pa/ei/bgn/2863.htm (last visited June 18, 2010).

What should we do in terms of universal jurisdiction? Professor Kenneth Randall has suggested reframing it.[84] The international order has become increasingly centralized since World War II.[85] After the War, international organizations and multilateral agreements started to emerge.[86] Some of these treaties delegated States' sovereign powers of prescription and enforcement to the new international organizations.[87]

> The non-prosecution of piracy raises another problem. The historic universal jurisdiction over piracy has been used to justify universal jurisdiction over modern-day international offenses. Judges in the post-World War II prosecution of war criminals, in international tribunals and those organized by occupying authorities, relied on universal jurisdiction explicitly in their opinions. The precedent of universal jurisdiction over piracy similarly was important to drafting post-War humanitarian treaties and, later, human rights, hijacking, and terrorism treaties. Such multinational treaties oblige the parties to prosecute the targeted offenders or extradite the offenders to any state that will prosecute them.[88]

Since World War II, international laws established the hierarchy of norms.[89] No State can legally violate norms at the top of the hierarchy.[90] They do not require sovereign consent and thus essentially subvert sovereignty.[91] As can be seen by the 1982 Law of the Sea Convention (UNCLOS), States continued to place piracy on the top of the normative pyramid along with post-War humanitarian norms.[92] UNCLOS, in part, confirms the customary international law of the sea. The concept of universality principle is one of several legal concepts by which piracy and other selective offenses are elevated to the top tier of the normative hierarchy of international law.[93] Other concepts that do likewise include *jus cogens* and *erga omnes*.[94]

Given the various bases for jurisdiction, one can see why many found it very surprising that there was ever any doubt that pirates could be prosecuted. The problem is not that jurisdiction is unattainable, but rather that no

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[84]See Randall, *Reframing Universal Jurisdiction*, supra note 66.

[85]Id. at 3.

[86]Id.

[87]Id.

[88]Id.

[89]Id. at 4.

[90]Id.

[91]Id.

[92]Id.

[93]Id.

[94]Id. *Jus cogens* refers to "peremptory principles or norms from which no derogation is permitted, and which may therefore operate to invalidate a treaty or agreement between States to the extent of the inconsistency with any of such principles or norms." Randall, *Universal Jurisdiction Under International Law*, supra note 66 at 830 (quoting, J. Starke, INTRODUCTION TO INTERNATIONAL LAW 59 (7th ed. 1972)). "Obligations *erga omnes* are literally obligations 'flowing to all.'" Id.

country is exercising jurisdiction. Therefore, the current legal mechanism should focus on the obligations of international institutions.

B. Kenyan Courts

Through memos of understanding (MOUs) between Britain, the United States, the European Union and Kenya, the Kenyan government agreed to the use of their courts to try pirates.[95] Despite the MOU, evidentiary problems caused the U.S. Navy to release many pirates at sea.[96] 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 these cannot be used at trial.[97]

In addition, within a year and a half of the MOUs, Kenya declared that, with the prosecution of 100 suspects pending, the burden on its judicial system was too much.[98] Kenyan Attorney General Amos Wako admitted, "Everybody underestimated the number of pirates that we were going to prosecute. We all thought that it would be one or two or three maximum 10 or so. But the problem became far much bigger than we thought. Our assumption also that other member countries would also take up their responsibilities again have not been borne out."[99] The Seychelles and Yemen took on only a few piracy cases; Tanzania declined to take on any cases.[100]

The Kenyan government gave a 6-month notice of termination and convened a task force to review the MOUs and highlight the weaknesses in the agreements.[101] Kenya later reversed its position and articulated a willingness to continue trying pirates – if financial assistance was provided by other countries.[102] Recently, donors offered $9.3 million to cover the costs of try-

[95] *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.

[96] Eugene Kontorovich, "*A Guantanamo on the Sea*": *The Difficulty of Prosecuting Pirates and Terrorists* 99 (Dec. 10, 2009) (manuscript included in materials distributed to attendees at the 2009 Harvard Conference, and on file with the author).

[97] *Pirates hit navy ship 'in error,'* BBC NEWS, 7 Oct. 2009, http://news.bbc.co.uk/2/hi/8294858.stm (last visited June 18, 2010).

[98] Tristan McConnell, *Where to Try Pirates?: Kenya? Kenya?*, Bartamaha, Apr. 30, 2010, http://www.bartamaha.com/?p=26241 (last visited June 18, 2010).

[99] Sarah Wambui, *Kenya backtracks on pirate deal*, Capital News, Apr. 1, 2010, http://www.capitalfm.co.ke/news/Kenyanews/Kenya-backtracks-on-pirates-deal-7989.html (last visited June 18, 2010).

[100] Id.

[101] Sarah Wambui, *Kenya wants pirate pact review*, Capital News, May 15, 2010, http://www.capitalfm.co.ke/news/Kenyanews/Kenya-wants-pirates-pact-review-8482.html (last visited June 18, 2010).

[102] Lisa Bryant, *Kenya Willing to Try More Somali Pirates*, *Voice of America*, June 1, 2010, http://www1.voanews.com/english/news/africa/Kenya-Willing-to-Try-More-Somali-Pirates-with-Help-from-Wealthier-Nations-95304929.html (last visited June 18, 2010).

ing pirates.[103] The European Union is the largest donor to the program, with Australia, Canada, France, Germany, the U.S., and a U.N-administered fund also contributing.[104] The U.N. Office on Drugs and Crime's counter-piracy program in East Africa will be managing the funds, which are estimated to cover 18 months of expenses.[105]

C. Creation of an Ad Hoc Court

One of the suggestions made by a few of the attendees at the 2009 Harvard Conference was that the United Nations should establish an international tribunal to prosecute pirates. For a long range solution to combat piracy, my suggestion is that this ad hoc international tribunal could be created by the United Nations Security Council. The physical court could take place on a ship that goes out on circuit. This would alleviate the problem of States not wanting to try pirates on their own soil. The court could move to practically any location.

However, a number of problems do remain to be solved.[106] For example, which definition of piracy would be used? The weaknesses of the current definition of piracy in UNCLOS is discussed at length in this paper. What penalties would convicted pirates face, and where would prisoners be jailed? The court must be created in such a fashion that States are not deprived of universal jurisdiction over piracy. In other words, while every state should retain the right to redress piracy, the United Nations could create an ad hoc tribunal to have the obligation to redress piracy.[107] Finally, the scope of this article does not include a discussion of important practical considerations, such as the selection process for judges and financing for the creation and maintenance of the court.

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[103]Tom Maliti, *UN: Donors to give $9.3M on Somali cases*, MSNBC, June 15, 2010, http://www.msnbc.msn.com/id/37701563 (last visited June 18, 2010).

[104]Id.

[105]Id.

[106]The author wishes to thank John Noyes for his thoughtful correspondence, which raised some of the problems presented here. See E-mail from John Noyes, Roger J. Traynor Professor of Law, California Western School of Law, to Barry Hart Dubner, Professor of Law, Barry University Dwayne O. Andreas School of Law (Feb. 19, 2010, 06:52:00 EST) (on file with author).

[107]See Randall, *Reframing Universal Jurisdiction*, supra note 67, at 4-5. The United Nations has already considered similar issues in the creation of the International Criminal Court (ICC). The ICC is intended to be complementary to national criminal justice systems, and therefore only exercises its jurisdiction only in cases where States do not exercise their national jurisdiction, either because they are unable or unwilling to do so. International Criminal Court, About the Court, Frequently asked Questions, http://www.icc-cpi.int/Menus/ICC/About+the+Court/Frequently+asked+Questions/ (last visited June 18, 2010). This principle of complementarity could also be included in defining the authority of an ad hoc court to try pirates.

Post-World War II, it is significant that piracy and other super norms trigger special collective action rather than empowering autonomous extraordinary sovereign action.[108] The universality principle should likewise move from the sovereign to the collective arenas.[109] Reframing universal jurisdiction would shift enforcement responsibility not from States to an international tribunal but from States to private actors.[110] In other words, due to resource problems as well as structural authority, perhaps an international agreement could be forged obligating states to relax or revise their domestic impediments that restrain corporations from protecting their own ships such as export law, tort law, insurance law and the carrying of weapons on board ships in certain ports.[111]

The problems facing an ad hoc international tribunal really are those which any court will face. The problems include: *inter alia*, establishing and proving who is a pirate. Most of these pirates will claim to be fishermen or some type of related activity and since they are captured by the military at sea, they will not be flying the flag of any State; they could be subject to misidentification; and the burden will be on military forces to prove they are pirates rather than fishermen.[112] Few countries are willing to prosecute pirates, at least in part due to costs of transportation to court, and other logistical problems.[113] Some of the problems are evidentiary: *inter alia*, proving piracy status, trial cost, and problems with detaining subjects.[114]

Most Somali pirates are fishermen – after all, piracy is not a full-time job.[115] Pirates carry no identification, so nationality is difficult to establish.[116] Human rights considerations enter into these situations, especially if there is a wrongful arrest and detention. It has been suggested that the right to detain a pirate could be made to depend partly on creating a foreigner's status as a "combatant."[117] As a result, detained pirates may be able to go before military tribunals to challenge the factual basis for being classified as a combatant before a full trial for piracy.[118] However, pirates are not military; they are civilians.

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[108]See Randall, *Reframing Universal Jurisdiction*, supra note 71, at 5.
[109]Id.
[110]Id.
[111]Id.
[112]Kontorovich, supra note 96, at 138-39.
[113]Id. at 139-40.
[114]Id. at 140.
[115]Id.
[116]Id.
[117]Id. at 142 (citing Rasul v. Bush, 542, U.S. 466 (2004)).
[118]Id.

Gathering of evidence is also problematic. When pirates are about to be arrested, they frequently throw evidence overboard.[119] As far as the burdens at trial are concerned, normal rights given by many constitutions at a civilian trial are absent in remote locations where prisoners are sometimes tortured and forced to live in inhumane conditions.[120] Once the pirates are captured, it is necessary to transport the prosecution team, the defendants, witnesses and evidence to a foreign court.[121] Identifying multinational crews of foreign flag vessels is difficult.

If hijacked crew members are not kept as material witnesses, as they may be scattered around the world by the time of trial.[122] Counsel will have to be provided and translators will have to be obtained.[123] Naval officers will be called as witnesses and the process could take months, thereby keeping military officers needed for active duty in regions of abuse from their otherwise important tasks.[124]

Kenyan prisons are crowded, the environment often infested, the prisoners may be tortured and denied religious freedoms.[125] Pirates could also raise additional issues if they claim to be considered as refugees and therefore able to make an asylum claim under European Union human rights law.[126] Pirates could claim they would be subject to torture and unfair trial if they are repatriated to Somalia.[127] If they serve their time or are released before trial, they may seek to stay in a wealthier prosecuting country indefinitely.[128] In fact, it may seem like a reward to be able to stay in a different country, where they would probably eat and live better than they would in Somalia at this time.[129]

There are problems with holding trials in other countries. We have discussed universal jurisdiction, but it has to be pointed out once again that there are countries that do not wish to prosecute pirates on their own territory. Therefore, some countries have simply freed pirates who are within their custody or sent them to another country for trial.[130] This raises a question of non-refoulement.

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[119]Id. at 143.

[120]Id.

[121]Id.

[122]Id. at 144.

[123]Id.

[124]Id.

[125]Id. at 145.

[126]Id. at 146.

[127]Id.

[128]Id. at 147.

[129]Id.

[130]*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 June 18, 2010). The Netherlands recently released pirates after no country, including Kenya and the Seychelles, which

Non-refoulement is a *jus cogens* of international law that forbids the expulsion of a refugee into an area where the person might be again subjected to persecution.[131] The principle of non-refoulement arises out of the international collective memory of the failure of Western nations in providing a safe haven to refugees fleeing genocide at the hands of the Nazi regime during World War II.[132] Unlike political asylum, which applies to those who can prove a well-grounded fear of persecution based on membership in a social group or class of persons, non-refoulement refers to the generic repatriation of people, generally refugees into war zones and other disaster areas. Under this doctrine, sending pirates back to Somalia may not be an option as there is no central government; unfair trials are prevalent; and, there is general cruelty and a death penalty.[133]

To summarize the problem of the European Union Member States, the representative from the EU, Professor Erik Franckx, stated that the member States were faced with three undesirable options vis-à-vis the pirates they have captured:

1. prosecute the pirates before one's national courts and thus become exposed to expensive, energy-consuming proceedings and potential asylum requests;

2. release captured pirates and thus grant them *de facto* immunity;

3. send the pirates back to Somalia where they risk being tortured and thus violate one's non-refoulement commitments.

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both have 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 June 18, 2010). 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 & Marie Wood, *Navy releases Somali pirates caught red-handed*, TIMES ONLINE, Nov. 29, 2009, http://www.timesonline.co.uk/tol/news/world/africa/article6936318.ece (last visited June 18, 2010).

[131]See, e.g. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 at Art. 33(1). ("No contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.")

[132]Armen H. Merjian, *A Guinean Refugee's Odyssey*: in re Jarno, *the Biggest Asylum Case in U.S. History and What it Tells Us About Our Broken System*, 23 GEO. IMMIGR. L.J. 649, 652 (2009).

[133]Article 33 (2) of the Refugee Convention does provide that "[t]he benefit of the [refoulement] provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 at Art. 33(2). If a pirate could be considered such a danger to the security or community of the prosecuting country, he could be subject to refoulement under this provision. However, the principle of non-refoulement has been incorporated as an absolute, (no exceptions) provision into a variety of other international treaties. Rene Bruin and Kees Wouters, Terrorism and the Non-derogability of Non-refoulement, 15 Int'l J. of Refugee L. 5 (2003), abstract available at http://ijrl.oxfordjournals.org/cgi/content/abstract/15/1/5.

> In order to escape this catch-22 situation, the EU signed an exchange of letters with Kenya on 6 March 2009 in order to render detained pirates to Kenyan justice. Although in theory this initiative should be welcomed, two practical points of concern arise. Firstly, in turning pirates over to the Kenyan authorities, EU Member States that have ratified UNCLOS might actually be violating the latter treaty, which in article 105 stipulates that the prosecution of caught pirates must be done by "the courts of the state *which carried out the seizure*" (emphasis added). Secondly, despite the fact that the exchange of letters contains a series of guarantees pertaining to human rights and the death penalty, some fear that Kenya won't comply with its commitments in light of the scandals surrounding its criminal justice system. It should be noted that most recently, on 30 October 2009, the EU signed a similar agreement with the Seychelles.[134]

A couple of the highlights from Belgium legislation submitted to the Federal Parliament on October 21, 2009, included a new definition of piracy in the Belgian penal law which differed from article 101 of UNCLOS.[135] Notably, the bill not only punishes illegal acts of violence or depredation, but also the threat thereof, and it broadens the maritime zones to the extent provided for by international law.[136] The more interesting part was that the proposed law added two instances of aggravating circumstances which warrant a higher penalty.[137] The first is an attack endangering navigational safety, for instance, by sailing at night with all lights turned off or by colliding with another ship during a chase.[138] Even "[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."[139] The bill also empowered Belgian war ships to prevent and suppress piracy.[140]

The second bill that was introduced into the Belgium legislature was intended to provide a new basis of extraterritorial jurisdiction for trying pirates in Belgium.[141] This would give the Belgian courts and tribunals jurisdiction when piracy has been committed against a Belgian ship or when piracy suspects are apprehended by Belgian military personnel.[142] In both cases there is a link with Belgium.[143] Hence, the basis of jurisdiction is the

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[134]Erik Franckx & Marco Benatar, *Operation Atlanta: The European Approach to Fighting Piracy* 6 (Dec. 10, 2009) (manuscript included in materials distributed to attendees at the 2009 Harvard Conference, and on file with the authors).

[135]Id. at 7.

[136]Id.

[137]Id. at 8.

[138]Id.

[139]Id.

[140]Id.

[141]Id.

[142]Id.

[143]Id.

passive personality principle.[144] This bill uses a legal fiction called "the law of the flag," which means that acts of piracy on board a Belgian ship are considered to have been committed in Belgian territory.[145] There are also some procedural protections afforded to suspected pirates in order to comply with Article 5 (the right to liberty and security) of the European Convention on Human Rights to which Belgium is a party.[146]

> Two holdings of the European Court of Human Rights (ECtHR) are of particular relevance in this respect. The first is *Medvedyev v. France* (10 July 2008) in which France had detained a person suspected of drug trafficking on one of its warships. The Court held that France had violated article 5 of ECHR in keeping the person detained throughout the duration of the trip back to French territory (13 days) without subjecting his arrest to some form of control by an independent judicial body. In a similar case involving drug trafficking, *Rigopoulos v. Spain* (12 January 1999), the Court decided that Spain had not violated the same provision although the person in question was held on a customs ship for 16 days before arriving in Spanish territory. The reason for this decision lies in the fact that an investigative judge was appointed from the onset of the person's deprivation of liberty.[147]

IV
ON THE ADEQUACY OF INTERNATIONAL REGIMES TO COMBAT SEA PIRACY

Many scholars thought that the concept of "universal jurisdiction" was the only basis the international community needed in order to combat sea piracy. It was one of the few crimes that could actually be said to fall under the doctrine of universal jurisdiction. A "legal regime" is a totality of rules. With the crime of piracy there are treaties involved, which I call "approaches" to creating solutions to problems. By looking at the types of the international regimes available, we can see the shortcomings of each and make proper suggestions.

Both the 1958 Geneva Convention and 1982 UNCLOS contained definitions of "piracy" which were based on the draft prepared by Harvard in 1932. As discussed, the definition of piracy was prepared with the thought that piracy had died out years before the 1932 Harvard Draft. It was limited, for "expediency's" sake, to various acts of depredation, detention, or violence committed for private ends by one private ship or aircraft against another private ship or aircraft, occurring on the high seas. "Piracy" as

[144]Id.
[145]Id.
[146]Id.
[147]Id. at 8-9.

defined in both the 1958 Geneva Convention and UNCLOS were the same crime committed on high seas, as follows:[148]

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

[148]Since the two Conventions contain identical language regarding piracy, I will refer herein to UNCLOS.

> 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.[149]

This language clearly assumes action by the capturing State. However, action is not a requirement. Naturally, there was liability for proceeding without adequate grounds. You will observe that the definition is quite limited in geographic area to the high seas. Some scholars today believe that this is the only place where piracy can occur. However, under customary law, piracy can still occur within territorial waters, internal waters and on land. All one needs to look at is the piracy committed by William Dampier and other pirates on the land, on the high seas, and on other waters as well.

The current legal regime of UNCLOS regarding high seas piracy has its limitations. In this regard, UNCLOS also has provisions relating to other regimes at sea. Article 99 deals with slavery (today's terminology is generally 'human trafficking' rather than 'slavery'). Articles 100 through 107 address pirates and article 111 provisions on hot pursuit on the high seas, but not into a coastal state's territorial sea. Article 108 of the treaty contains a provision for controlling illicit traffic and narcotic drugs. Article 110 incorporates a customary norm that warships may approach commercial vessels in order to determine the nationality and, if they are found to commit "universal crimes," such as human slave trafficking and maritime piracy, they can be boarded. As was explained earlier in the case of Belgium, for example, some States do not have criminal laws applying beyond the edge of their territorial seas. However, that does not stop other States from taking action if a particular State does not have domestic criminal codes for prescribing the conduct.

Another legal regime that is quite effective and would pick up the slack left by the articles on piracy in the UNCLOS is the 1988 Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation

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[149]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.

(SUA). For example, consider the *Achille Lauro*. Terrorists took over a ship and killed helpless individuals aboard.[150] There was an outcry and States labeled the terrorists "pirates."[151] However, due to the limitation of the definition of piracy, which requires action by one private vessel against another private vessel on the high seas, the legal regime of piracy under UNCLOS was ineffective.[152] To cover the void where either terrorists or pirates board the ship from land and then take the ship over, or to cover the situation where States do not have their own laws proscribing the crime of piracy in their domestic legislation, they could use the SUA.[153] There are approximately 149 States that are parties to the SUA.[154] This is a tool that States anywhere can use to implement their obligations to build capacity for a successful prosecution of persons suspected of piracy at sea.[155] The offense itself covers the unlawful and intentional seizure and/or control over a ship by force or threat of force and other forms of intimidation.[156] The treaty provides that State parties shall either prosecute a violation or extradite the offender.[157] In 2005, the SUA was amended with two Protocols that set forth a legal framework to combat the proliferation of weapons of mass destruction and the delivery systems onboard vessels and platforms at sea.[158] It obligates State parties to criminalize attacks against vessels and establish jurisdiction over such offenses with ships flying their flag.[159]

Another institution that has been of great assistance in combating piracy and creating awareness, support, and frameworks for combating piracy is the International Maritime Organization (IMO). The IMO consists of 169 member States and works extensively with non-governmental organizations in the cargo and shipping industry.[160] IMO is funded by member States in accordance with a formula based on the size of the shipping registry; the States with the largest open registries – Panama, Liberia, and the Bahamas – fund more than thirty percent of the budget of the IMO.[161] Since 1998, IMO has conducted an antipiracy project, including a number of regional

[150]Kraska, supra note 52, at 206.

[151]Id.

[152]Id.

[153]Id.

[154]Id.

[155]Id.

[156]Id. at 207.

[157] Id.

[158]Id.

[159]Id.

[160]International Maritime Organization, About IMO, Introduction to IMO, http://www.imo.org, then click on "About IMO" button at the top of the screen (last visited June 18, 2010).

[161]International Maritime Organization, Frequently Asked Questions, http://www.imo.org, then click on "IMO FAQ" on the menu along the left of the screen (last visited June 18, 2010).

workshops which have been very effective, especially in the Strait of Malacca and in Singapore.[162] This multi-layered regional approach has led to significant reduction in maritime piracy in Southeast Asia.[163] In 2004, sixteen nations signed the "Regional Agreement on Combating Piracy and Armed Robbery (ReCAAP).[164] This was the first treaty dedicated solely to combating piracy.[165] The treaty entered into force in 2006, and has established an Information Sharing Centre in Singapore to share and coordinate pirate related information among member States.[166] Another example of multilateral approach included the regional States in East Africa.[167] In November, 2007, IMO Resolution A.1002(25) called on the regional States to conclude an international agreement to prevent, deter, and suppress piracy, seeking to replicate the success of ReCAAP.[168] A final meeting in Djabouti, in January, 2009, produced a regional agreement to facilitate cooperation in the prosecution and repatriation of captured Somali pirates.[169]

V
CONCLUSION

In determining the adequacy of the international regimes available to combat piracy and other crimes such as human trafficking, drugs, etc., it is important to keep up with the criminals so to speak. In other words, there are going to be other types of piracy committed, not necessarily by fishermen but by pirates (who are not politically motivated but want to earn money) working with terrorists (who are politically motivated and need money to carry on their activities). Are the international regimes sufficient to combat organized crime? What about dealing with violent transnational networks of crime and terrorists? Should we be using a purely military justice model for prosecuting hostile foreigners or should we use the civilian enforcement model? No matter what we attempt to do, we have to keep in mind that the prosecution of captured pirates is a problem due to lack of evidence available; the cost of presenting evidence; asylum requests; and, strains on the military operation as well as limitations put upon the military by various governments and legal regimes. So far, the international community has

[162]Kraska, supra note 52, at 203.
[163]Id.
[164]Id.
[165]Id.
[166]Id.
[167]Id. at 204.
[168]Id.
[169]Id.

ignored universal jurisdiction in the Somali situation by refusing to prosecute pirates in their own homelands for the most part.

At the Harvard conference in December 2009, it was concluded that the United Nations should be encouraged to expand upon and update Resolution 1897 in order to make the existence of equipment capable of being employed for purposes of piracy *prima facie* evidence of piratical intent. In that manner, mother ships and other pirate vessels could be confiscated at sea. In addition to grappling hooks and ladders, specialized equipment should specifically include outboard motors of certain (large) sizes, rocket-propelled grenade launchers and machine guns. The battle against piracy at sea would be enhanced if the United Nations Security Council and countries around the Red Sea, the Gulf of Aden, the Arabian Sea, the Indian Ocean, harmonized their rules regarding merchant vessels bringing weapons aboard into ports. If weapons are going to be available aboard vessels at sea to deter pirates, ships would want to be able to keep those arms legally on board while in a refueling, or loading or discharging cargo in harbor. The aforementioned recommendations would help update the 1988 Convention for the Suppression of Unlawful Acts against the Safety and Maritime Navigation (SUA) and expand upon the Djibouti Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden in order to strengthen international legal codes concerning and permitting the prosecution of pirates and pirate financiers.

Had the Security Council Resolutions that have been mentioned couched their language regarding the intrusion into territorial, internal waters and land in terms of expressing concern for the human rights of the crew, perhaps ships would not be blockaded and hijacked by Somali pirates. The question is, are human rights and the environment more important than the sovereign rights of a State? 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. The question is: Should the international community be allowed to attack pirates that are holding the human race and its environment hostage? Should any or all countries be allowed to attack pirates in the territorial waters of a sovereign state if those pirates are about to use a dirty bomb on a ship inside such waters? If not, is the situation altered if the coastal State cannot or will not attempt to stop these pirates? Is a potential attack on the environment, that could destroy human life and severely damage the ecosystem, not a crime against mankind?

Aside from human slavery (your author equates slavery and human trafficking), there are no other maritime crimes subject to universal jurisdiction in UNCLOS. The doctrine of universality should give every nation the right to try pirates. While regional arrangements are extremely helpful and have been quite successful, your author believes that the state of piracy, like the concept of international law, is not stagnant but instead evolves. In the case of piracy, it evolves into a crime. As your author has stated on different occasions, the concept of international waters and territorial seas should have another layer of superior jurisdiction in order to permit nations to effectively fight specific crimes of terrorism and/or piracy: namely, reaction zones. This would allow the extension of the hot pursuit doctrine for those crimes originating in reaction zones as well as for those occurring exclusively on the high seas. Your author does not believe that one should think in terms of sovereignty when human rights have been violated (in the case of the Vietnamese refugees, for example) or where the environment is in danger of being 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. As your author has said previously, one should not need a UN Resolution to act against pirates.

Finally, while every state retains the right to redress piracy, the United Nations could create an ad hoc tribunal to have the obligation to redress piracy. In order to avoid the undesirable choices of prosecuting pirates in expensive, energy-consuming proceedings before national courts, involving potential asylum requests from pirates, "catch and release" policies that grant pirates *de facto* immunity, and issues of non-refoulement, this ad hoc tribunal should be physically located on a ship that goes out on "circuit." This would alleviate the problem of States not wanting to try pirates on their own soil. Since a pirate would not have to leave his home country, an onboard court sidesteps issues of asylum and refoulement. The court could be moved to practically any location.