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Foreword: End Game! An International Conference on Combating Maritime Piracy

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Foreword

End Game! An International Conference on Combating Maritime Piracy

Michael P. Scharf & Matthew E. Carlton

FOREWORD

END GAME! AN INTERNATIONAL CONFERENCE ON COMBATING MARITIME PIRACY

Michael P. Scharf[*]
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I.

As anyone who has seen the 2013 blockbuster film, "Captain Philips," starring Tom Hanks, knows, real-life pirates are nothing like the lovable rogues portrayed by Johnny Depp and Orlando Bloom. Instead, they are sophisticated businessmen, desperate and impoverished ex-fisherman, vulnerable children, and deadly terrorists.

After 200 years of quiescence, maritime piracy has re-emerged as a major economic and humanitarian problem. A recent report found that piracy cost the world more than $12 billion in 2010—the price of everything from counter-piracy naval operations to higher insurance rates for commercial shippers to ransom payments.[1] Piracy is also significantly hampering the delivery of food aid to drought-stricken Somalia, resulting in untold thousands of deaths.[2] In the last few years, Somali pirates have seized more than 179 vessels, taken over 1,000 crewmembers and passengers hostage, and extracted more than $400 million in ransom.[3] While the world has seen a temporary

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† Matthew Carlton, J.D. 2014, was the Symposium Editor of the Case Western Reserve Journal of International Law from 2013-2014.

1. THE WORLD BANK, THE PIRATES OF SOMALIA: ENDING A THREAT, REBUILDING A NATION 25 (2013), *available at* http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/05/06/000333037_20130506120556/Rendered/PDF/767130WP0REPLA0alia0main0report0web.pdf.

2. Robyn Curnow, *Piracy Delaying Vital Food Aid from Reaching Somalia*, CNN (Nov. 3, 2011), http://edition.cnn.com/2011/11/03/business/mpa-piracy/.

3. Christopher Harress, *Secret Flow of Somali Piracy Ransoms: 179 Hijacked Ships Generated Some $400 Million in Payments Since 2005. So Where Has It All Gone?* INT'L BUSINESS TIMES (Nov. 4, 2013), http://www.ibtimes.com/secret-flow-somali-piracy-ransoms-179-hijacked-ships-generated-some-400m-payments-2005-so-where-has; Kaija Hurlburt & D. Conor Seyle, The Human Cost of Maritime Piracy 2012,

downturn in piracy this year, most experts believe the problem will soon get much worse as the international community begins to draw down its anti-pirate armada off the east coast of Africa. Meanwhile, piracy is proliferating to Africa's west coast, transforming the threat into a two-ocean challenge.[4]

In 2011, under the auspices of the Public International Law and Policy Group (PILPG),[5] a Nobel Peace Prize-nominated NGO which I co-founded nineteen years ago with Paul Williams, I convened a "High Level Piracy Working Group" devoted to addressing the numerous challenges posed by modern maritime piracy, focusing especially on facilitating prosecutions of captured pirates. Since its establishment, the Working Group has met physically several times a year at the PILPG office in Washington, D.C., and virtually via video conference.

The High Level Piracy Working Group consists of over thirty key actors in counter-piracy efforts, including representatives of the Department of State, Department of Defense, and the Department of Justice, as well as judges, practitioners, and leading academics. The High Level Piracy Working Group's mandate has been to provide legal and policy advice to domestic, regional and international counter-piracy mechanisms, with the goal of helping to create effective responses to the growing piracy threat.

The Working Group has been providing legal assistance to countries such as Kenya, the Seychelles, and Mauritius, which have established U.N.-funded regional piracy courts and prisons. The Group has also forged relationships with other regional and international partners, including the U.N. Office on Drugs and Crime and the U.N. Contact Group on Piracy. To date, the members of the Working Group have prepared more than sixty research memoranda on cutting-edge issues raised by modern piracy prosecutions. Many of these memoranda were prepared by students in the Case Western Reserve University School of Law War Crimes Research Lab, and are available on our Portal.[6] In addition, I have led teams from the Working Group on missions to Kenya, the Seychelles, and Mauritius to provide copies of these memoranda and expert advice to the

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at 3 (2013) (working paper) (on file with Oceans Beyond Piracy & One Earth Future Found.), *available at* http://oceansbeyondpiracy.org/sites/default/files/attachments/View%20Full%20Report.pdf.

4. Gordon Ripinski, *Increasing Attacks: Piracy Shifts Coasts in Africa*, SPIEGEL (July 19, 2013), http://www.spiegel.de/international/world/threat-of-pirates-grows-off-west-coast-of-africa-a-912089.html

5. PUB. INT'L L. & POL'Y GROUP (Apr. 13, 2014), http://publicinternationallawandpolicygroup.org/.

6. Memos are searchable by date or key word at http://law.case.edu/war-crimes-research-portal/.

Attorneys General, prosecutors, and judges who are actively prosecuting piracy. And together with Professor Milena Sterio, I have presented the Working Group's recommendations to the U.N. Contact Group on Somali Piracy in Copenhagen.

Subsequent to these missions, Rosemelle Mutoka, the Chief Piracy Court Judge in Kenya, and Duncan Gaswaga, the Chief Piracy Court Judge in the Seychelles, each spent a year at Case Western Reserve University School of Law, enrolled in our International Criminal Law LL.M. Program and serving as our Distinguished Jurist in Residence. During their time at Case Western, we arranged for the two jurists to share their experience and expertise with government officials, practitioners, academics, and students throughout the United States.

As the culmination of our piracy work, on September 6, 2013, Case Western Reserve University School of Law hosted "End Game: An International Conference on Combating Maritime Piracy," which brought together two-dozen of the world's foremost counter-piracy experts to discuss the novel legal challenges and options related to the final phase in the fight against piracy. The purpose of the conference was to bring our counter-piracy experience and insights to a broader audience.

The International Piracy Conference was made possible by a generous grant of the Wolf Family Foundation, and was co-sponsored by the Frederick K. Cox International Law Center at Case Western Reserve University School of Law, the American Society of International Law, the Public International Law & Policy Group, the American Branch of the International Law Association, the Inamori International Center for Ethics and Excellence, and the Cleveland Council on World Affairs.

The highlight of the Piracy Conference was the Keynote Address by General Roméo Dallaire, the best-selling author who was played by Nick Nolte in the 2005 award-winning film "Hotel Rwanda." Dallaire, who now heads the The Roméo Dallaire Child Soldiers Initiative at Dalhousie University, was presented with the 2013 Frederick K. Cox International Law Center Humanitarian Award for Advancing Global Justice. Because European countries have implemented a "catch and release" policy with respect to juvenile pirates, recruitment and use of child pirates has become a major new problem in the struggle against piracy. General Dallaire used his speech to map out a new strategy to respond to child piracy.

Conference panelists included Mr. Yaron Gottlieb, Senior Counsel of INTERPOL; Ashley Roach, the State Department's foremost Law of the Sea expert until his recent retirement; Sandra Hodgkinson, former Deputy Assistant Secretary of Defense; Simon Barker of the Transportation Appeal Tribunal of Canada; Rosemelle Mutoka, the Chief Judge of the Kenya Piracy Court; Mr. Jon Huggins, the Director of Oceans Beyond Piracy; Sulakshna Beekarry, the Chief of Piracy Prosecutions of Mauritius, among others. Panels examined

current trends and efforts to combat piracy, the problem of child pirates, the challenge of combating pirate financing, and operational issues in combating and apprehending pirates.

The archived webcast of the Piracy Conference is available for viewing anytime at: http://law.case.edu/centers/cox/webcast.asp?dt=20130906. In addition, panelists Roméo Dallaire, Rosemelle Mutoka, Sulakshna Beekarry, and Milena Sterio appeared as guests on *Talking Foreign Policy*, the Public Radio show that I produce and host on WCPN 90.3 FM ideastream. The archived broadcast is available at http://law.case.edu/TalkingForeignPolicy.

This symposium issue of the *Case Western Reserve Journal of International Law* contains seventeen articles generated from the End Game Symposium, followed by the transcript of the *Talking Foreign Policy* broadcast.

II.

This symposium issue opens with the keynote speech from Lieutenant-General Roméo Dallaire entitled *Perspectives on the Growing Trend of Child Piracy.*[7] Lieutenant-General Dallaire discussed his experience with child soldiers as U.N. Force Commander in Rwanda during the 1994 Genocide, and applied those lessons to the current challenge of child pirates.

The next section of the issue contains seven articles assessing the current trends and efforts to combat maritime piracy. President of the AIDP/U.S. National Section and Creighton Law School Professor, Michael J. Kelly's article, *The Pre-History of Piracy as a Crime & Its Definitional Odyssey*,[8] reflects back on the early history of piracy in order to provide an understanding of the evolving definition of the crime. Ved P. Nanda, University of Denver School of Law Professor, and Jonathan Bellish, Project Officer at Oceans Beyond Piracy, argue in their article, *Moving from Crisis Management to a Sustainable Solution for Somali Piracy: Selected Initiatives and the Role of International Law*,[9] that with the development of norms and creation of institutions related to maritime security, now is the right time to implement a sustainable solution to piracy on shore. Nanda and Bellish proclaim that an important aspect of the transition from crisis management at sea to a sustainable solution on shore is to continue cost-effective suppression at sea while capacity is built within

7. Roméo Dallaire, *Perspectives on the Growing Trend of Child Piracy*, 46 CASE W. RES. J. INT'L L. 10 (2014).

8. Michael J. Kelly, *The Pre-History of Piracy as a Crime & Its Definitional Odyssey*, 46 CASE W. RES. J. INT'L L. 24 (2014).

9. Ved P. Nanda & Jonathan Bellish, 46 CASE W. RES. J. INT'L L. 42 (2014).

Somalia. Former State Department Official J. Ashley Roach's article, *Global Conventions on Maritime Crimes Involving Piratical Acts*,[10] argues that the 1979 International Convention Against the Taking of Hostages and the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation together fill many of the gaps and limitations found in the provisions of the international treaties on piracy. However, Roach concludes that implementation through domestic legislation is essential to enable nations to suppress acts of piracy and armed robbery at sea. Kenyan Chief Piracy Judge Honorable Rosemelle Mutoka's article, *Assessing Current Trends and Efforts to Combat Piracy: A Case Study on Kenya*,[11] emphasizes that in order to effectively eradicate piracy, an assessment of the current counter-piracy efforts and remaining challenges is required to pave the way forward. Furthermore, Mutoka determines that understanding the root causes and motivations of pirates, building a viable Somali State, and strengthening regional and international legal frameworks are the necessary elements in a sustainable solution to ending piracy. Former Deputy Assistant Secretary of Defense (currently Vice President of Planning and Chief of Staff at Finmeccanica North America), Sandra L. Hodgkinson's article *Current Trends in Global Piracy: Can Somalian Success Help Combat Piracy in the Gulf of Guinea and Elsewhere?*,[12] first argues that combined maritime patrols by international naval forces, development in the industry of Best Management Practices, increased armed security guards on ships, and international piracy prosecutions have resulted in a significant decline in the number of piracy attacks. Hodgkinson stresses that even though piracy characteristics differ between regions, a combination of best management practices and armed security personnel is still needed in addition to increasing efforts at domestic prosecutions. Chief of Piracy Prosecutions in the Office of the Director of Public Prosecutions in Mauritius, Sulakshna Beekarry's article *Assessing Current Trends and Efforts to Combat Piracy*,[13] argues that in order to face the ongoing difficulties related to piracy, states should engage in novel mechanisms such as pre- and post-trial transfer agreements, adoption of domestic piracy-specific legislation, and revision of

10. J. Ashley Roach, *Global Conventions on Maritime Crimes Involving Piratical Acts*, 46 CASE W. RES. J. INT'L L. 88 (2014).

11. Rosemelle Mutoka, *Assessing Current Trends and Efforts to Combat Piracy: A Case Study on Kenya*, 46 CASE W. RES. J. INT'L L. 122 (2014).

12. Sandra L. Hodgkinson, *Current Trends in Global Piracy: Can Somalian Success Help Combat Piracy in the Gulf of Guinea and Elsewhere?*, 46 CASE W. RES. J. INT'L L. 142 (2014).

13. Sulakshna Beekarry, *Assessing Current Trends and Efforts to Combat Piracy*, 46 CASE W. RES. J. INT'L L. 158 (2014).

procedural rules used in prosecutions. Beekarry specifically analyzes the practices in Mauritius and the Seychelles, which have already successfully adopted and implemented such measures to facilitate extraterritorial prosecutions. The section concludes with an article from Paul R. Williams, Professor at American University Washington College of Law, and Lowry Pressly, a Ph.D. candidate at Harvard University, titled *Maritime Piracy: A Sustainable Global Solution*,[14] which offers a sustainable, global solution to maritime piracy that focuses on both deterrence at the point of attack and disruption of transnational networks of organization and finance. Williams avers that this solution is fundamentally composed of using private security on ships, establishing an international piracy court, and allowing the private industry the space to innovate and experiment with effective deterrence techniques.

The issue moves on to three articles examining how best to deter the use of child pirates. Dalhousie University Professor Shelly L. Whitman begins the section with her article, *Children and Marine Piracy*.[15] Whitman analyzes from a socioeconomic perspective the growing problem of children and youth who are being recruited by piracy gangs, while noting that the international community has largely overlooked this issue in its counter-piracy efforts. Washington and Lee College of Law Professor Mark A. Drumbl's article, *Child Pirates: Rehabilitation, Reintegration, and Accountability*,[16] recommends that those responsible for addressing piracy should ensure that accused juvenile pirates not face criminal prosecution but, instead, participate in restorative justice mechanisms to promote their societal reintegration. The section concludes with Cleveland Marshall College of Law Professor Milena Sterio's article, *Juvenile Pirates: "Lost Boys" or Violent Criminals?*,[17] which argues that all juvenile piracy suspects need to be treated distinctly and with dignity. Sterio proposes that this distinct treatment should include ascertaining a suspect's age through medical and scientific procedures and providing corrective, educational, and rehabilitative opportunities.

The next section of the issue contains two articles addressing new ideas for combating pirate financing and plunder. INTERPOL Senior Counsel Yaron Gottlieb's article, *Combating Maritime Piracy:*

14. Paul R. Williams & Lowry Pressly, *Maritime Piracy: A Sustainable Global Solution*, 46 CASE W. RES. J. INT'L L. 174 (2014).

15. Shelly L. Whitman, *Children and Marine Piracy*, 46 CASE W. RES. J. INT'L L. 213 (2014).

16. Mark A. Drumbl, *Child Pirates: Rehabilitation, Reintegration, and Accountability*, 46 CASE W. RES. J. INT'L L. 231 (2014).

17. Milena Sterio, *Juvenile Pirates: "Lost Boys" or Violent Criminals?*, 46 CASE W. RES. J. INT'L L. 274 (2014).

Inter-Disciplinary Cooperation and Information Sharing,[18] introduces and emphasizes the idea that there is a duty to cooperate in the repression of piracy under international law. It further argues that sharing relevant information among states and international organizations is part of this duty and is vital for combating piracy. Dalhousie University Professor Hugh R. Williamson's article, *New Thinking in the Fight Against Marine Piracy: Financing and Plunder Pre-Empting Piracy Before Prevention Becomes Necessary*,[19] argues that in order to reduce the profitability of piracy and restrict it to an opportunistic activity, the potential vulnerabilities in the business model need to be identified and exploited. Williamson asserts that providing better employment alternatives for potential pirates and decreasing the profitability of piracy provides a solution to avoid future outbreaks.

The issue then moves to a discussion of the legal and operational issues in combating and apprehending pirates. Oceans Beyond Piracy Director Jon Huggins and Liza Kane-Hartnett's article, *Somali Piracy—Are We at the End Game?*,[20] offers recommendations for reaching a sustainable solution for piracy both at sea and onshore. Huggins recommends that while the initial crisis has been mitigated, a continued commitment and an increased focus on onshore initiatives are needed to ensure that a long-term and sustainable solution to Somali-based piracy is reached. Dalhousie University Research Fellow Mark Sloan's article, *Operational Responses to Piracy—A First Principles Approach*,[21] states that there is a continued need for operational responses to piracy. To this end, Sloan uses the critical infrastructure protection framework to illustrate how a systematic risk management approach works to develop the operational responses to piracy and plan for incident response and the restoration of mission success. Transportation Appeal Tribunal of Canada's Simon Barker declares that it is time to re-think the crime of international piracy and place it into a modern context in his article, *International Maritime Piracy: An Old Profession that is Capable of New Tricks,*

18. Yaron Gottlieb, *Combating Maritime Piracy: Inter-Disciplinary Cooperation and Information Sharing*, 46 CASE W. RES. J. INT'L L. 298 (2014).

19. Hugh R. Williamson, *New Thinking in the Fight Against Marine Piracy: Financing and Plunder Pre-Empting Piracy Before Prevention Becomes Necessary*, 46 CASE W. RES. J. INT'L L. 330 (2014).

20. Jon Huggins & Liza Kane-Hartnett, *Somali Piracy—Are We at the End Game?*, 46 CASE W. RES. J. INT'L L. 351 (2014).

21. Mark Sloan, *Operational Responses to Piracy—A First Principles Approach*, 46 CASE W. RES. J. INT'L L. 371 (2014).

but Change is Possible.[22] Barker argues that the solution to the evolving method of piracy is to combine diplomacy, legal reform, military force, continued vigilance, and a desire to treat the matter as a law enforcement problem. This section concludes with Emory Law School Professor Laurie R. Blank's article, *Rules of Engagement and Legal Frameworks for Multinational Counter-Piracy Operations*.[23] Blank's article builds upon the legal frameworks that could and do apply to counter-piracy operations by military forces. Blank does this with a discussion of the rules of engagement and the specific challenges multinational operations face in coordinating and implementing effective rules of engagement in counter-piracy operations.

The symposium articles are followed by the edited transcript of the *Talking Foreign Policy* broadcast devoted to piracy.[24] Lieutenant-General Dallaire, Prosecutor Sulakshna Beekarry, Judge Rosemelle Mutoka, and Professor Milena Sterio engage in a wrap-up discussion of topics including deterring child pirates, discouraging those who recruit and use child pirates, and preventing a resurgence of piracy when the anti-piracy naval forces have to depart the Indian Ocean.

The issue's final section contains the student Note of the year by the Journal's Managing Editor, Garret Bowman. His Note, *Why Now Is the Time to Resolve the Dokdo/Takeshima Dispute*,[25] explains how resolving the Dokdo/Takeshima controversy presents a unique opportunity to begin unwinding the political tensions that threaten Northeast Asia's productive economic interdependence. Bowman suggests that Japan should embrace effective control as the decisive factor in island disputes. Though this would require Japanese acknowledgment of Korean sovereignty over Dokdo/Takeshima, it will in the long run strengthen Japan's hand in its island disputes with China.

The articles, edited transcripts, and Student Note contained in this special double issue of the *Journal of International Law* were the combined effort and support of many people. We would like to thank all of those who participated in the End Game Symposium on

22. Simon Barker, *International Maritime Piracy: An Old Profession that is Capable of New Tricks, But Change is Possible*, 46 CASE W. RES. J. INT'L L. 383 (2014).

23. Laurie R. Blank, *Rules of Engagement and Legal Frameworks for Multinational Counter-Piracy Operations*, 46 CASE W. RES. J. INT'L L. 393 (2014).

24. *Talking Foreign Policy: A Roundtable on Piracy*, 46 CASE W. RES. J. INT'L L. 407 (2014).

25. Garret Bowman, Note, *Why Now Is the Time to Resolve the Dokdo/Takeshima Dispute*, 46 CASE W. RES. J. INT'L L. 429 (2014).

September 6, 2013 for their scholarly insights. We would also like to extend a very special thank you to the Wolf Family Foundation for its support in making the conference possible. Finally, we would like to thank the student editors of the *Journal of International Law* who diligently worked to make this publication possible.


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