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SOMALI PIRACY:
GENUINE BUT MISGUIDED**

A Thesis Submitted to the

Department of Law

**in partial fulfillment of the requirements for
The LL.M degree in International and Comparative Law**

By

Essam Mahmoud Badran

May 2010

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DEDICATION

Special thanks to all my family members who supported me while I wrote this thesis, especially my beloved father.

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Supervised by Professor Thomas Skouteris

ABSTRACT

The increasing piracy in the Gulf of Aden has captured the attention of the international community. Somali pirates have proven their ability to attack all types of vessels from small yachts to giant oil supertankers. As a result, series of serious efforts by international community have been undertaken to put an end to this emerging phenomenon. These include, deploying the biggest anti-piracy fleet in modern history, permitting warships to purse pirates in Somali territorial waters under special conditions, and the new approach toward establishing international tribunals to prosecute pirates. However, there is a growing need to re-examine Somali piracy counter-measures and evaluate their effectiveness. In this respect, a profound analysis of the circumstances surrounding Somali piracy is required. It is crucial to question to what extent the current anti-piracy efforts respond to the original roots of the problem and the needs of Somalia. This research critically analyzes anti-piracy efforts taken by the international community and its impact on the ground. In this regard, a holistic approach was taken to examine Somali piracy. Any anti-piracy measures have to respond to the roots of the problem in order to guarantee their effectiveness in the long-term. Undoubtedly, building a military coalition to patrol ships passing through Somali waters is a needed measure to deter pirates. However, it is crucial to ask ourselves to what extent such measures are sustainable and to what extent it responds to the roots of the problem. Thus, the international community needs to look to the bigger picture and to carefully analyze factors contributing to spread of piracy especially off the coast of Somali. The solution to piracy may lie on the land not in the sea.

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I. Introduction

Seas and oceans has been the theatre for piratical operations for centuries. Although maritime piracy is one of the oldest crimes, it is still alive and flourishing on the world's commercial sea-lanes.[1] Recent years have witnessed a surge in piratical attacks. Observers call it: "a new golden age of piracy."[2] In response, the international community has adopted new anti-piracy measures and new rules of engagement going beyond the traditional measures within the framework of International law. It is crucial to revisit the modern piracy of the twenty first century by examining piracy off the coast of Somalia and evaluating the effectiveness of international and regional anti-piracy measures adopted to counter Somali piracy.

The case of Somali piracy is particularly pressing for five reasons. First, Somali pirates are a good example of modern piracy with its sophisticated operations using high-technology. Second, Somali piracy challenges global maritime security as it poses a significant threat to International trade by targeting the strategic area of Gulf of Aden; where as 30% of the world oil transports through.[3] Over 20,000 vessels pass through this area each year.[4] Third, Somali pirates have made a record of successful hijacking of all types of vessels. According to International Maritime Bureau, there were 111 attempted pirate attack the in the Gulf of Aden in 2008, of which 42 were successful, resulting in the capture of 815 merchant seamen.[5] This represents an increase of nearly 200% from 2007,[6] accounting for an estimated 40% of the 293 pirate attacks reported worldwide in 2008.[7] Further, Somali pirates are accredited for "the largest ship seizure in history, that of the oil-tanker *Sirus Star*."[8]

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[1] Over 6.8 billion tons of goods are moved by sea annually in a global trade cycle worth $7.4 trillion, with up to 90% of international trade traveling by ship at some point. See Generally, Rubrick Biegon, *Somali Piracy and the International Response*, Foreign Policy in Focus, Jan. 29, 2009, http://www.fpif.org/articles/somali_piracy _and_the_international _response.

[2] Kerry Nankivell, *Troubled waters*, Foreign Policy, Nov./Dec. 2004.

[3] Eric Watkins, *Now Russians enter Somalia*, Oil & Gas J. 38,(2008).

[4] Rawle O. King, *Ocean Piracy and Its Impact on Insurance*, Congressional Research Service, Feb. 6, 2009.

[5] Mark Hosenball , *Raising the Ransoms*, Newsweek, Vol.153, April 10, 2009.

[6] Nicolas Gros-Verheyde, *Maritime Piracy: Report: Attacks On Ships Rise 14% Worldwide in 2008*, EURE, Jan 20 (2009).

[7] Lauren Ploch ET AL., *Piracy of The Cost off The Horn of Africa*, Congressional Research Service, No.7-5700 R40528, Sept.28, 2009.

[8] Daniele Archibugi & Marina Chiarugi, *Piracy Challenges Global Governance*, Open Democracy, (2009), http://www.opendemocracy.net/article/piracy-challenges-global-governance.

Fourth, Somali piracy has tremendous economic implications worldwide, in a time of global financial crisis. "By one estimate, due to piracy in the Gulf of Aden, the cost of insuring a container went from $900 in 2007 to $9,000 in the closing months of 2008."[9] The Suez Canal, for example, witnessed a steep drop in revenue affecting Egypt's main source of foreign currency.[10] Also, the cost of the fuel bill has increased 25% for European ships which sail around the Cape of Good Hope to avoid Somali piracy.[11] Indeed, even the average person will experience higher prices because shipping fees have increased due to the increased costs of security, higher insurance premiums, ransoms and extra fuel for longer routes.[12] Ultimately, everyone is affected in one way or another. And the case of Somali piracy shows the dynamics existing among pirates, the world navies, international organizations, and regional actors. And last but not least, Somali Piracy poses a serious test to the traditional legal framework and its efficiency in fighting maritime piracy.

All of the previous distinctive features of Somali piracy make it the ideal choice to be the prime case of study. This research focuses on providing an in depth analysis of Somali piracy counter-measures, taken on international and regional levels, and most importantly to what extent these measures respond to the roots of the problem. Although new and genuine anti-piracy measures were adopted to counter Somali piracy, those measures are short term, counter-productive, and fail to respond to the special circumstances surrounding Somali piracy. This paper argues that although genuine international and regional anti-piracy measures have been adopted to suppress Somali piracy, those measures are misguided as they miss the root causes of the crisis. Anti-piracy efforts in Somalia, simply put, are genuine but misguided.

The scope of the paper is to examine factors behind the emergence of modern piracy in the case of Somali piracy and to monitor the extent to which international and regional anti-piracy measures adopted have respond to the causes of piracy. The research does not cover historical literature on piracy or in-depth analysis legal framework on piracy.

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[9] Rawle O. King, *supra* note 4.
[10] Louis Wasse, *Somali Piracy Costs Suez Canal Business*, Chronicle Foreign Service, April 19, 2009, http://articles.sfgate.com/2009-04-29/news/17192647_1_somali-pirates-suez-canal-somali-coast.
[11] Sherry Shannon, Ships, *Piracy in Numbers*, Fin. Main Ed., Nov. 28, 2008, at 26.
[12] *Q&A: Somali Piracy*, BBC News, Jan. 9 (2009), http://news.bbc.co.uk/2/hi/africa/7734985.stm.

This paper is divided into four chapters. Chapter one provides a background on Somali piracy. Chapter two tackles the legal framework in international law applicable to maritime piracy. Chapter three highlights anti-piracy efforts, on the international and regional levels, to counter Somali piracy. Chapter four critically analyzes those measures and concludes that the current anti-piracy measures are counter-productive and inefficient because of practical constrains and legal complexities. The last part is the conclusion which paves the way for a durable solution to piracy in the Gulf of Aden.

II. Background on Somali Piracy

This section offers in depth analysis of Somali pirates: attacks, tactics, land bases and their organizational structure. The perspective of pirates themselves is also highlighted. It is hard to separate Somali piracy form Somalia ongoing situation. Certain features of Somalia have made piracy possible and allow it to flourish. Thus, a quick overview of Somali is needed to grasp the bigger picture surrounding Somali piracy. A special focus is given to the main factors contributed to spread of piracy activities launched from Somalia. "If the international community is to comprehensively address the crisis, its first task is to understand the background."[13]

A. Overview of Somalia

Somalia is the country form which pirates initiate their attacks. Back to Somalia, pirates bring their kidnapped ships. In Somalia, the hostages are kept till ransom is paid. All pirates land bases are located in Somalia. All pirates are Somali nationals, unlike piracy elsewhere.[14] No wonder, all piratical activities in the Gulf of Aden and Indian Ocean are attributed to *Somali pirates* and labeled *Somali piracy*. For the first time, piracy is associated with one single country: Somalia. The link between Somalia and piracy is unmistakable. Therefore, a better understanding of piracy requires shedding some light on Somalia ongoing situation.

Somalia is strategically situated in Eastern Africa bordering the Gulf of Aden and the Indian Ocean with a long coastline extending for 3,025 km.[15] Somalia, a former British (Somaliland) and Italian (the reminder of the country) protectorates, has become independent and unified in 1960. After the Somali president, Abdi Rashid Ali Shermarke, was assassinated in 1969, the army under Major General Mohamed Siad Barre took power and established a dictatorship regime. For two decades Somalia enjoyed stability and effective central government, till Barre was ousted in January 1991. As a result, a tribal power struggle erupted between clan warlords. The North-western

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[13] Rubrick Biegon , *Somali Piracy and the International Response*, Foreign Policy in Focus, Jan. 29, 2009, http://www.fpif.org/articles/somali_piracy _and_the_international _response.
[14] *See*, Peter T. Leeson, *An-arrgh-chy: The Law and Economics of Pirate Organization*, Journal of Political Economy, vol. 115, no. 6, 2007 at 1050 (indicating that pirates of the Caribbean between 1715 and 1725, for example, were racially diverse and belong to multiple countries unlike Somali pirates).
[15] See Appendix A: Map of Somalia

region of Somaliland had unilaterally declared itself independent in 1991, while the Government of Puntland controlled the semi-autonomous region of Puntland. Since then, the Somali state collapsed. In 1992, a desperate attempt by UN peacekeeping forces to restore order and safeguard relief supplies miserably failed. As a result, the US mission ended in 1994 and UN peacekeepers left Somalia in 1995. The world abandoned Somalia, leaving it alone to face its destiny. [16]

In 2004, a two year peace process led by Kenya was concluded with the election of Abdullah Yusuf as president of the Transitional Federal Government (TFG) of Somalia and the formation of an interim government; known as Somalia Transitional Federal Institutions (TFIs) which included a 275-member parliamentary body called The Transitional Federal Assembly (TFA). The transitional government moved from Kenya to Somalia. However, this weak government has failed to restore peace and order in a country torn by ethnic tribal conflict. At the same time, Somalia witnessed relative stability with the spread of Islamic Courts in regions where Islamic Shari'a was applied by Islamists. Consequently, a union of Islamic Courts (UIC) was established, sweeping vast regions of Somalia and attacking the Transitional Federal Government. In December 2006, Ethiopia invaded Somalia in support of the Federal government against the UIC. A new Alliance for the Re-Liberation of Somalia (ARS) was headed by UIC to face Ethiopian invasion. In 2007, the UN Security Council authorized African Union peacekeeping forces to Somalia. [17]

New peace talks in Djibouti sponsored by the UN started in June 2008 between the TFG and ARS. As a result, a TFG-ARS unity government was formed. In January 2009, Ethiopia withdrew from Somalia. A new expanded TFA with 550 seats elected Sheikh Shrief Sheikh Ahmed the former chairman of the UIC and ARS to be the new Somali president on 31 January 2009. The new president and unity government was widely supported by the UN and the West. The TFIs are based on the Transitional Federal Charter (TFC), which outlines a five-year mandate leading to the establishment of a new Somali constitution and a transition to a representative government following national

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[16] *Timeline: Somalia, A Chronology of Key Event*, BBC News, Feb. 11, 2010, http://news.bbc.co.uk/2/hi/africa/country_profiles/1072611.stm.
[17] *Somalia : Background*, The World Factbook, https://www.cia.gov/library/publications/the-world-factbook/geos/so.html.

elections. However, in January 2009 the TFA amended the TFC to extend TFG's mandate until 2011. Still, the institutions of TFIs remain weak. Massive world support is needed to rebuild the country from scratch. However, little has been done in this area.[18]

To sum up, Somalia lived almost two decades of political turmoil, civil war, and ethnic tribal conflict. Internal fighting has torn the country apart. Even, the new TFG under Sheikh Shrief continues fighting Al-Shabab, a group of radical Islamists with close link of Al-Qaeda. The seat of the government in Mogadishu is under heavy fire. The government forces and African Union peacekeeping forces continue to fight a bloody battle with Al Shabab militia. On the ground, the government of Sheikh Shrief is controlling only few kilometers of Somalia, the area around the presidential palace in Mogadishu. Therefore, the dream for peace and stability seems to be far away.[19]

Somalia is a perfect example of a failed state marked with chaos, civil war, absence of law and order and deteriorating humanitarian and economic conditions. Any state consists of three basic elements: people, land, and a sovereign political authority. Somalia seems to be missing the third element. As a result, Somalia has no army, police or even a justice system. The Somali TFG minister of information has announced that the buildings of the new ministries of defense and ministry of interior would be accomplished within a year. Although the building would be soon done, improving security on the ground has a long way to go. Indeed, absence of effective government has serious implications on Somalia and its people.

Somalia's sovereignty has been infringed upon in different ways. Firstly, many reports indicate that Somalia's Exclusive Economic Zone (EEZ) and territorial waters has been subject to illegal, unreported, and unregulated (IUU) fishing by Asian and European commercial vessels. It was estimated that up to 700 foreign vessels- some of them armed- conduct unlicensed fishing off Somalia.[20] Accordingly, "over "$300 million worth of tuna, shrimp and lobster are stolen every year, by illegal trawlers that fish off the Somali

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[18] *Id.*

[19] Alan Taylor, *Fighting for Control of Somalia,* Poston: The Big Picture, May 29, 2009, http://www.boston.com/bigpicture/2009/05/fighting_for_control_of_somali.html

[20] Douglas Guilfoyle, *Piracy Off Somalia: UN Security Council Resolution1816 and IMO Regional Counter-Piracy Efforts*, International and Comparative Law Quarterly, vol 57, July, 2008 pp 690–699, at 692.

coasts."[21] This inflicts harm on coastal communities and their livelihood. Overfishing resulting from illegal fishing threatens Somalia's natural fishing resources and negatively affects Somalia's economy.[22] International community has failed to address this problem and have totally ignored it. Despite the fact that this illegal activity has been going on for seventeen years and despite the awareness of the international community, no action has been taken to stop it.[23]

Another serious violation of Somalia Sovereignty was revealed by chance. The huge waves of the tsunami that hit northern Somalia have revealed a secret that was buried in the sea. The massive tsunami brought with it tons of nuclear and toxic waste illegally dumped along the coast off Somalia. Nick Nuttal, the spokesman for the United Nations Environment Program (UNEP), said "Initial reports indicate that the tsunami waves broke open containers full of toxic waste and scattered the contents."[24] Mr. Nuttal added that "Somalia has been used as a dumping ground for hazardous waste starting since 1990s and counting through the civil war there."[25] European companies were accused of illegally dumping nuclear waste off Somalia, such as, "[the] Swiss firm, Achair Partners, and an Italian waste broker, Progresso.[26] Consequently, many Somalis living in towns on the Indian Ocean coast suffer from radiation sickness, such as "respiratory infections, mouth ulcers and bleeding, abdominal haemorrhages and unusual skin infections."[27] However, no serious investigation has been opened on this subject matter. Both the cases of illegal fishing and the dumping of toxic waste off the coast of Somalia have created a deep feeling of injustice among Somali people especially communities live near by the

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[21] Saeed Shabazz, *Pirates Abound*, The Amsterdam News, Vol. 100 No. 16 April 16-22, 2009, at 1.
[22] See Also, *Review of Impacts of Illegal, Unreported and Unregulated Fishing on Developing Countries Synthesis Report*, Marine Resources Assessment Group Ltd, July 2005, (showing that IUU fishing cause direct loss of the value of the catches, loss to GNP, loss of lading fees, license fees, and other levies payable for legal fishing operators; while indirect impact of IUU includes loss of income, and employment in other industries and activities such as fishing equipment, boats and fish processing, packaging, and transport).
[23] *International Expert Group on Piracy Off The Somali Coast*: Workshop Commissioned by The Special Representatives of the Secretary General of UN to Somalia Ambassador Ahmedou Ould-Abdallah (2008).
[24] Jonathan Clayton, *Somalia's secret dumps of toxic waste washed ashore by tsunami*, Times Online, World News, March 4, 2005, http://www.timesonline.co.uk/tol/news/world/article418665.
[25] Alisha Raya, *Waste Dumping Off Somalia Coast May Have links to Mafia, Somali Warlords,* Voice of America, The Environment in the News, United Nation Environment Program, March 16, 2005.
[26] *Id.* (European companies found it to be very cheap to get rid of waste there, costing as little as $2.50 per ton where disposal costs in Europe amount to $250 a ton).
[27] *Id.*

coast. The chairman of Somalia Concern Group, Mohamed Gure, has warned that "Somali coastline used to sustain hhundreds of thousands of people, as a source of food and livelihoods."[28]

In addition to the above, Somali people are living an ongoing tragedy, a mix of natural and man-made disasters. USAID last Situation Report calls it: a "complex emergency: widespread violence, endemic poverty, recurrent draughts, and floods."[29] Recently, the World Food Program (WFP) suspended food distribution in Somalia because of insecurity; this decision has a direct impact on half of Somalia's population dependant on humanitarian aid.[30] Therefore, millions of Somali people, especially children with malnutrition, are facing starvation. Somalia is one of the poorest countries in the world, ranked 161 of 163 on the UNDP's Human Development Index.[31] Health indicators are among the worst in Africa; the life expectancy is 47 years.[32] Thousands of Somalis try to escape their harsh realities through illegal human trafficking. UN officials said that "nearly 30,000 Somalis and Ethiopians came ashore in Yemen in 2007; about 700 bodies washed up, some gnawed by sharks and another 700 people went missing."[33] There are 1.3 million internally displaced persons in Somalia with 400,000 refugees in other countries.[34] The continued humanitarian crisis in Somalia pushed a UN official to declare that "the situation is severe. It is the most pressing humanitarian emergency in the world today- even worse than Darfur."[35]

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[28] Najad Abdullahi, *Toxic Waste Behind Somali Piracy,* Aljazeera: News Africa, Oct. 11, 2008, http://english.aljazeera.net/news/africa/2008/10/2008109174223218644.html

[29] *Somalia: Complex Emergency,* USAID, Bureau for Democracy, Conflict and Humanitarian Assistance (DCHA) & Office of US Foreign Disaster Assistance (OFDA), Situation Report No.8 (2009).

[30] Frank Nyakairu, Children *Hit Hardest After WFP Suspends Work in Southern Somalia,* Reuters, Jan. 5, 2010, http://www.alertnet.org/db/an_art/55866/2010/00/5-162826-1.htm (According to UNICEF, 40 percent of children in Somalia show signs of chronic nutritional deprivation).

[31] *Somalia: Country Brief,* World Bank, Aug. 2009, http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/ AFRICA EXT/SOMALIAEXTN/0,,menuPK:367675~pagePK:141132~piPK:141107~theSitePK:367665,00.html

[32] *Id.*

[33] *Yemen Better Than Somalia,* News24, March 5, 200, http://www.news24.com/Africa/News/Yemen-better-than-Somalia-20080228 (Reports estimate 700,000 Somalis living in Yemen. The paradox is that Yemen is the poorest Arab Country, but still for many Somalis is better than misery and danger at home. Many Somali use Yemen as a getaway to other countries).

[34] Shabazz, *supra* note 18, at 1.

[35] Emma Batha, *Somalia is Worst Humanitarian Crisis*, UN Official, Reuters, Jan. 30, 2008, http://www.alertnet.org/db/an_art/1564/2008/00/30-152422-1.htm.(Unlike Darfur, whereas the suffering is eased by a billion-dollar aid operation and more than 10,000 workers, Somalia is still consider a no go zone. UN officials estimate that the total emergency aid for Somalia is less than $ 200 million), *See,*

1.Factors Behind Emergence of Modern Piracy and Spread of Piracy in Somalia:

This lengthy background of Somalia is a necessary and integral part of the paper in order to grasp the broader picture surrounding Somali piracy. It is now less surprising that piracy has taken root in Somalia. It is crystal clear that certain features of Somalia have made piracy possible. Nonetheless, this background is not attempt to come up with a theory to explain Somali piracy, but rather an attempt to highlight a number of factors which have contributed to the spread of piracy off the coast of Somalia. Before analyzing Somali piracy, it is important to explore literature of piracy.

Piracy: Past and Present

It is crucial to contrast Somali piracy with piracy on other regions through out history, in order to see how modern piracy has evolved over years. Looking back to history of piracy offers valuable lessons on countering piracy and distinguishes between different types of pirates.

History reveals two contrasted forms of piracy, a heroic form and a disgracful one: *privateering* and *piracy*. The first was authorized by the state, by letters of marque and reprisal, to raid the ships of declared enemies. Further, the licensor state receives a percentage of its privateers' gains. In the other hand, pirates were not loyal to any state. Thus, they used to attack all ships indiscriminately for their own gain. A heroic welcome was waiting for privateers, while harsh punishment was directed toward pirates. The line between glory and disgrace was very thin.[36]

 Throughout the sixteenth to the eighteenth centuries, privateers and pirates were a major threat, especially in the Americas. During Spanish exploration and colonization, treasure fleets, which were sent to the new world to bring treasures and precious metals, were subject to attacks from pirates and privateers. Therefore, the governments of American colonies attempted to suppress both piracy and privateering.[37]

However, with the end of colonization, a reduction of naval presence was noticed in regions where piracy had historically flourished. Moreover, after the Cold War, most

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Jeffery Gettleman, Somalia Worst Humaniterinan Crisis in Africa, UN Says, The New York Times, Nov. 19, 2007, http://www.nytimes.com/2007/11/20/world/africa/20iht-20somalia.8399453.html?_r=1.
[36] *The Privateers: Pirates or Soliders,* History of Piracy, http://www.thewayofthepirates.com/history-of-piracy/privateers.php.
[37] *Military: Pirates,* Global Security, http://www.globalsecurity.org/military/world/para/pirates.htm.

countries have reduced their naval forces. [38] Currently, the volume of merchant ships has significantly increased, carrying high-value cargos with small unarmed crews. Therefore, the level of vulnerability is high. This has paved the way for the re-emergence of modern piracy. Modern piracy of the 1990s has special features which distinguish it from the more traditional piracy. Modern piracy has witnessed a new level of professional organization. Piracy evolved into a more organized form of crime, with a high level of sophistication using hi-technology. Piracy has become a sophisticated criminal enterprise, including intelligence gathering, ransom negotiations, and multiple coordinated hijack operations.[39]

Modern piracy can be seen as post-colonial type of piracy which benefited from the vacuum of power resulted from the withdraw of colonial naval presence from its former colonies. Somali piracy seems to fall within this category. During the 19th century, Italians, French and British controlled the Horn of Africa. The British Royal Navy used to have a residence in Aden, due to the proximity of imperial India. Britain continued its control of the Somali coastline and the Gulf of Aden, while governing its formal protectorate of Somaliland. Britain asserted its presence in the region till the birth of the new Somali Republic in 1960. In the following period, a small Somali maritime force had attempted to control Somali strategic waters till the regime was collapsed in 1991; Somali ports were closed to foreign vessels in 1995.[40]

The emergence of piracy indicates the struggle of infant states in controlling their vast waters. It is a difficult task for the new newly established states, especially developing countries, to fill the vacuum of power left by colonial navies. Strong navies with superior technical support are required to ensure control over territorial waters of independent states. While the number of independent states continued to increase during 1950s to 1960s, the new states raised claims over the limits of national jurisdiction and upon exploiting natural resources beyond their territorial waters. This has paved to way toward a new maritime framework which was designed to cope with new structural changes in world system. Those endeavors have resulted upon the new United Nations

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[38]*Id.*
[39] *The Profits of Piracy Soar,* The Middle East, 47, 47-50 Nov. 2008.
[40] Gary E. Weir, *Fish, Family and Profit: Piracy and the Gulf of Aden,* 62 Naval War College Review, 15, 15-28 (2009)

Convention of the Sea (UNCLS) in 1982, which is considered as "constitution of the oceans."[41] However, the problem of inability of developing countries to control its waters remains unsolved. Piracy incidents continues to be concentrated in "areas with little or no maritime law enforcement, political and economic instability, and high volume of commercial activity."[42]

J. L. Anderson, in his exceptional article: *Piracy and World History,* has identified a type of piracy which he termed "episodic piracy."[43] This type of piracy accompanies the weakening of political power, either on a regional or local level. For example, in the seventeenth century, with the decline of the Iberian, Ottoman, Mughal, and Ming empires, a surge of piracy spread from the Caribbean to the South China Sea**.** Disruption of trade resulted in the unemployment of both seamen and ships, leading those whose livelihood was derived from maritime activity to seek alternatives, which included smuggling and piracy. However, when normal levels or patterns of trade were restored, this type of piracy disappears.[44] Accordingly, the collapse of the central government in Somalia in 1991 is the defining moment in which the normal pattern of life in Somalia was disrupted, causing a surge in piracy. It is a simple cause and effect relationship.

Piracy offered an alternative to bankruptcy and starvation. An immediate consequence of state collapse is the army being dissolved. Hundred of thousands of militants were discharged, unemployed and with no source of income. Many of them engaged in clan warfare; others turned to piracy. Well-equipped professional militants and expert fishermen together made Somali waters the most dangerous waters on earth.

There are socio-economic factors that fuel piracy. Pirates are seen as heroes in Somalia. This widespread glorification of piracy is a function of a sense of victimhood and national humiliation in response to illegal fishing and dumping toxic waste.[45] Still, the characteristics of a failed state in Somalia, which expand to include "sociopolitical instability, dire economic conditions and crushing poverty,"[46] are responsible for making

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[41] Tullio Treves, *United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982,* Audiovisual library of International Law. http://untreaty.un.org/cod/avl/ha/uncls/uncls.html.

[42] Military *Pirates, Global Security,* http://www.globalsecurity.org/military/world/para/pirates.htm.

[43] J. L. Anderson, *Piracy and World History: An Economic Perspective on Maritime Predation*, Journal of World History, Vol. 6, No. 2 (Fall, 1995), pp. 175-199, http://www.jstor.org/stable/20078637.

[44] *Id.* at 193.

[45] *Somalia: The Trouble With Puntland*, International Crisis Group, Policy Briefing, Aug. 12, 2009.

[46] Shabazz, *supra* note 18, at 1.

piracy pervasive in Somalia. These harsh realities of life in the context of the chaotic political situation onshore have made piracy flourish at sea.

The final UN report on piracy off the coast of Somalia commissioned by the Special Representatives of the Secretary General of UN to Somalia concluded that:

> Poverty, lack of employment, environmental hardship, pitifully low incomes, reduction of pastoralist and maritime resources due to drought and illegal fishing and a volatile security and political situation all contribute to the rise and continuance of piracy in Somalia. This situation will remain so until there is an effective and simultaneous action taken against the pirate trade and an alternative means of income support mechanism implemented to replace it; otherwise criminal activity, in some shape or form, will continue to take priority as a means of generating income among the armed militias of Somalia.[47]

Determining the factors behind Somali piracy is the first step toward finding a permanent solution to piracy in the Gulf of Aden. Therefore, it is crucial to firstly identify the problem before moving to the next step which is solving the problem. Thus, any anti-piracy measures have to respond to the roots of the problem in order to guarantee their effectiveness in the long-term. In this regards, an essential question has to be answered: What makes a pirate? What turn an ordinary person into a vicious pirate?

Somali pirates are a mix of ex-fishermen and ex-militants. Fishermen are turned into pirates because they could not sustain their livelihood due to illegal fishing, and nuclear waste dumping which have harmed their communities and natural fishing resources. On the other hand, ex-militants join piracy as a response to the state collapse, and absence of alternative income after losing their jobs in the former Somali army or police force.

In the final analysis, I would argue that there are two set of factors contributing to Somali piracy: factors relating to Somalia in general and factors relating to coastal Somali communities specifically. The first set of factors feeding piracy is the current chaotic political situation which is marked by an ineffective central government, civil war, and tribal welfare. The second set of factors contributing to piracy originates from Somali coastal communities, the breeding ground of pirates. What drives coastal communities toward piracy are illegal fishing, nuclear waste dumping, and poverty. Consequently, anti-piracy measures have to respond to those two sets of factors feeding

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[47] *International Expert Group on Piracy Off The Somali Coast, supra* note 20, at15.

piracy in Somalia. Before the situation can be resolved, international and regional anti-piracy efforts will continue to be misguided and surely ineffective.

B. Somali Pirates:

Piracy in Somalia was not a big issue before 1990; recognizing only minor incidents of armed robbery against few small fishing crafts. By the mid 1990s, a more structured form of piracy began to take place when armed groups, claiming they were authorized to be coast guards responsible for protecting Somali fishing resources, began to attack vessels illegally fishing in their territorial waters and held them for ransom. Since 2005, this practice has continued against any ship that sails within or close to Somali territorial waters. By 2005, attacks of Somali pirates intensified in the Indian Ocean off the cost of Somalia. In 2006, pirates extended their theater of operations as far as 350 nautical miles off the cost of Somalia, targeting the Gulf of Aden and the mouth of the Red Sea. A surge in pirate attacks during 2008 made Somali waters the most dangerous waters in the world.[48] By 2008, the international community had started to react to the threat of piracy in the Gulf of Aden in a coordinated, dedicated manner launching the biggest anti-piracy mission in modern history.[49]

1. Bases & Main Groups

While Somali pirates groups are formed largely on clan or sub-clan lines, but they still sometimes recruit members of other clans for their particular skills.[50] Most of the pirates are young in age between 20 and 35. A pirate gang can consist of 62 men, as in the case of MV Faina.[51] Somali pirates consist of warlords and former fishermen. This alliance between warlords and former fishermen has proven to be powerful. In this alliance, warlords are the muscle providing arms and ammunitions, and skilled armed men; while fishermen are the brains with their knowledge of the sea and ability to pilot speed boats and ships. Also, pirate gangs include technical experts who use high-tech equipment such as satellite phones, GPS and military hardware. Therefore, a Somali gang

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[48] *Piracy Off The Somali Coast*, *supra* note 12, at 14.
[49] Lauren Ploch ET AL., *supra* note 7, at 7.
[50] *Piracy Off The Somali Coast*, *supra* note 12, at 17.
[51] The MV Faina was initially attacked by a gang of 62 men. MV Faina was carrying heavy weapons and 33 tanks to unknown destination. It is one of high profile attacks by Somali pirates.

consists of brains, muscles and computer geeks: ex-fishermen, ex-militants, and technical experts.[52]

There are five main active pirate groups spreading along the long coast of Somalia: groups from the Darood clan, are active in coastal towns: Eyl, Garad, and Hobyo; pirate groups, from Hawaiye clan, are active in coastal towns in Hardaheere and Mogadishu.[53] Puntland is the most important base for Somali pirates. Puntland is the epicenter of piracy where piracy penetrates all levels of society even governmental officials of Puntland.[54] The East African Seafarers' Association estimates that these five pirate gangs have a total of 1,000 armed men and unlimited supply of unemployed young men who are willing to be pirates.[55] For many pirates, piracy is not lucrative a business but rather a means of survival.

The most interesting feature of Somali pirates is that they see themselves as coastguards as it appears on names of main pirate groups. For example, one Pirate group is called *The National Volunteer Coast Guard* (NVCG) which is only targeting fishing vessels and small boats in the area around Kismaya on the northern coast. Another groups is called *The Marka Group* named upon the town of Marka from where they operate; similar to *Puntland Group* operating around Puntland. The most powerful sophisticated Somali pirate group is known as *The Somali Marines* which has a fleet admiral, vice admiral and head of financial operations.[56] Another alarming feature of Somali pirates that they are expanding by time and building up in terms of military capabilities and resource bases; piracy become a powerful rival institution to the Somali government.[57]

2. Tactics

Somali pirates' hijacking techniques have evolved over time. Their successful record of high profile attacks reveals their advanced level of organization. No type of vessel is immune from pirates attack. Although there are five separate pirate groups operating in different regions, they all use the same tactics. Therefore, many believe that these pirates

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[52] Robyn Hunter, *Somali Pirates Living The High Life*, BBC News, Oct. 29, 2008, http://news.bbc.co.uk/2/hi/7650415.stm.

[53] See Appendix A: Somalia Map

[54] *Piracy Off the Somali Coast, supra* note 1, at 17.

[55] *Overview: Somalia Pirates Profile, Somali Pirate*, http://somalipirate.com/history/.

[56] Military *Pirates, Global Security,* http://www.globalsecurity.org/military/world/para/pirates.htm.

[57] Supra note 7, at 7.

follow a code of procedures similar to modern navies. Their sophisticated types of attacks are worth noting.

If the target vessel is within the territorial water or nearby, Somali pirates will use speedboats. Around six speedboats, each loaded with six to ten armed men, will surround the target from all sides. If the captain refused to surrender, they would fire alarming shoots from their automatic weapons and rocket propelled grenade (RPG); while one of their boats will move toward the ship unnoticed where pirates will gain access using grappling hooks and irons to climb aboard. Then they overtake and put all the hostages in one place and order the captain to sail toward Somali waters, usually toward Eye Port, the headquarters for pirates. Hostages are kept safe, till ransom is paid.[58]

If the target vessel sails in international waters far awary from Somali waters, Somali pirates use the phantom ship technique. They launch their operation from a mother ship or "phantom ship," an ordinary ship which seems non-threatening. Mother ships are usually larger fishing vessels which were previously captured and whose owners refused to pay ransom to free them[59] Pirates reuse these ships in their piratical operation as the mother ship. They load their speedboats, arms, food, and fuel onto their mother ship. In Most of the cases, the mother ships are fishing vessels from neighboring states such as Yemen and Egypt. The original crew of the mother ship is asked to act normally, while pirates on board try to identify any vessels passing by. Once the target is identified, six speedboats are launched immediately from the mother ship to attack the target. This technique in hijacking ships has enabled Somali pirates to attack ships far away from Somalia.[60] This technique is swift and surprising. Captains realize that they are under attack late. The average time for a pirate attack is fifteen to thirty minutes.[61] It is extremely difficult to distinguish a pirate mother ship from any ordinary ship since pirates' mother ship does not carry the Somali flag.

Unlike pirates in other parts of the world, Somali pirates do not steal the hijacked ship and its cargo. Somali pirates create hostage situations. They ask the owner of the hijacked vessel to pay ransom in exchange for the ship and its crew. Once ransom is delivered, the

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[58] *Supra, Q&A: Somali Piracy*, note 12.
[59] Lauren Ploch, *supra* note 7, at 9.
[60] See appendix C: Range of Pirates Attacks.
[61] Lauren Ploch, *Id,* at 9.

crew and their ship are released. Somali pirates are known for taking care of their hostages to ensure ransom is paid. Another distinctive feature of Somali piracy is that pirates do not try to hide the hijacked ships; they sail openly toward the Somalia coast. Pirates either keep the hostages in their ship near the Somali coast or take them ashore till ransom is paid. It is estimated that pirates gained $ 150 million of ransom payments in 2008.[62]

E. Somali pirates Side of the story

How little we know about pirates themselves! Analysts, observers, and commentators warn us of their threat to maritime security. The personal side of the pirates is not presented. For pirates elsewhere, famous captains and their stories are publically known. None of the Somali pirate captains are widely known. May be Somali pirates are ordinary youth. However, a few rare interviews with Somali pirates have managed to bring pirates' perspective into the surface.

The questions of the following interview were sent to a Somali journalist who managed to conduct this interview with one of the Somali pirates, named Said who based in Gu'ard. This interview reveals how pirates see themselves and offers inside information on their tactics, organization, and ransom arrangements. The purpose of the interview is to fairly represent pirates' perspective in the subject. By the way, the full interview was republished on online website.[63]

How did you become a pirate?
Saaid: I was a fisherman in Gar'ad, a coastal village in Somalia's Mudug region, before I turned into a coast guard. We decided to counter illegal fishing along our coastlines ourselves, and to protect our resources from foreign looters who destroyed our fishing equipment.

Illegal foreign fishing vessels have taken all the fish, big and small. Nothing was left for us. They even fished about 2 to 3 miles near our coastlines. At that time, we only had AK-47, assault rifles, and other small weapons but we had more skiffs. We used to attack one foreign fishing ships by 200 skiffs, while each skiff carries onboard 3 pirates armed with AK-47. No one was supporting us financially at that time.

Also, we have seen foreign ships dumping toxic waste nearby our shore, resulting in the death of fish and affecting the health of many coastal villagers. Therefore, we decided to capture the vessels before they dump toxic waste in our sea.

What are the tactics you use to hijack ships?

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[62] *Supra, Q&A: Somali Piracy*, note 12.
[63] *Interview: A Somali Pirate Reveals his Career Story,* Politics in Depth: Africa, Jan. 4, 2010, http://www.islamonline.net/servlet/Satellite?c=Article_C&pagename=Zone-English-Muslim_Affairs/MAELayout&cid=1258880415993

Saaid: A big boat (mother ship) and two small high-speed boats will go together. Each small boat carries five pirates armed with Rocket Propel Grenades (RPGs) and sophisticated GPS and AIS (Automated Information Systems).

When we receive a signal of a cargo ship transiting nearby, we set our perimeters and launch the attack from the two skiffs while the mother ship backs us.

We chase the target, firing weapons at the captain's mast; some captains give up, while others speed off. Those we seize; we order the captain of the vessel to send signal informing the nearby forces that we are onboard. Then, the vessel changes its direction and sail towards Somali coast.

How do you deal with the hostages? Do you strip them of personal properties?
Saaid: We have a code of conduct that outlines how we will deal with the hostages, we respect the hostages. We don't touch their personal properties or the cargo of the hijacked ship. We don't rope them and ask them ransom but we deal with the owner of the seized ship. Our aim is to get money and we only deal with the ship owner.

How is the ransom delivered to you?
Saaid: The ransom money reaches us in two ways. First, we are not connected to any port; our station is where we operate. A warship from the country that owns the ship delivers the money if the money is more than $1.5 million. If the money is less than $ 1.5 million, we use other ways including money transfer systems locally known as Hawala.

And how is it divided?
Saaid: The gentle pirates who captured the vessel take 50%, and the groups which provided financial support take 40%, and the rest 10% is for the guards who stay with the hijacked ship at the coast and the people who work with us until we get the ransom.

What if a ship owner refused to pay ransom?
Saaid: We do two things if the owners refused to pay ransom for their seized ships. We move the ship's crew to the shore including the captain until the owner pay the ransom which we demanded. If not, we use the ship to hijack other ships.

Who funds your piracy operations?

Saaid: Most of the pirates are young men; nobody really finances our operations; we have umbrella groups which do everything we need including financing our operations.

From where do you get your weapons?
Saaid: Somalia has weapons from all the world. We get weapons from inside and from outside the country; mostly we buy from our neighboring countries illegally.

Any country in particular?
Saaid: Yemeni illegal arm dealers supply us.

What is the most dangerous situation you have ever faced while in a piracy operation?
Saaid: We were nine of us on a boat seafaring more than a thousand miles off Somalia over a month and three days. We were unlucky and decided to return to shores but some 120 miles off the shorelines, we encountered one of the worst tragedies.

We saw a cloud of dust whirling and scores of high-tweeting birds flying over the waters. All over the sudden, the waters became so rough and the boat was half sunk. Only one of us, who was on the lower part of the boat, remained onboard. He was the one who could rescue us.

Later, we have discovered that the dust was caused by a toxic waste dumped by a ship that immediately fled the area.

How do pirates manage to deal with warships patrolling Somali waters?
Saaid: The warships are here to fight, so we are prepared all the time for it. Nevertheless, when we encounter them in the high seas, some of us send their weapons overboard and claim that they are illegal immigrants.

Others will decide to fight them and the mighty will prevail; while other groups will simply decide to flee.

If they were in three boats, they will divide themselves and start fleeing in three different directions. The forces will go after one boat and the rest will escape.

Do you have one leader or each group has its own leader? Is there a form of coordination between Somali pirates?
Saaid: The pirates belong to different groups, but we have umbrella groups. There are two main groups; one in Puntland and the other in south and central Somalia. I am a member of the one in Puntland.

We stay in contact and we respect each other. For example, when a group of pirates in Gar'ad takes ransom they will share it with their friends in south and central Somalia and vice versa.

IOL: Do pirates have a network of intelligence in ports around Somalia such as in Yemen or Kenya?
Saaid: No, we don't have any link with the ports around Somalia. We reach only the border near Kenya and back to our positions in Somalia.. But, we reach secretly to the coasts of Yemen to buy high-speed boats and arms illegally.

IOL: Do you think piracy will end here one day? And when?
Saaid: Piracy will end when the government of Somalia restores law and order; when the world really wants to protect the Somali waters and stops dumping toxic waste and leave the coast of Somalia.
I mean you can't pretend to correct things on the land while you destroy the sea. Multinational warships must leave the Somali waters. Otherwise, piracy will remain forever.

3. Current Situation

Pirates are more dangerous than ever. World navies have failed to deter them. Recent statistics are very alarming. The first 9 months of 2009 have shown that the Somali pirates expanded their operation from Gulf of Aden and the east Coast of Somalia to the southern part of the Read Sea, the Bab el Mandab Straits and the east coast of Oman.

International Maritime Bureau announced that year 2009 witnessed unprecedented increase of pirate activity off Somali coast. Somali pirates are responsible for a total of 168 incidents reported in the first nine months 2009,[64] with a total of 533 crew members have been hostages,[65] accounting for more than the half of reported attacks.[66] . The rate of pirate attacks doubled in the last three months of September to November 2009.[67] The

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[64] See Appendix D: Statistics Jan-Sept. 2009
[65] *Q&A: Somali Piracy, supra note 12.*
[66] *Piracy and Armed Robbery Against Ships Report of the Period 11 January-30 September 2009*, ICC International Maritime Bureau
[67] Nick Childs, *Navies struggle with 'swarming' pirates*, BBC News, April 1, 2010, http://news.bbc.co.uk/2/hi/8598726.stm.

accelerating pace of pirate attacks continued in 2010. According to EU naval force there was nine hijackings in March 2010 alone.[68]

The next chapter explores the legal framework governing piracy. This is followed by discussion anti-piracy measures against Somali pirates.

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[68] *Id.*

II. Piracy and International Law

For centuries, seas and oceans were loosely governed. Since the seventeenth century, the concept of *freedom of the seas* was the dominant rule; whereas national rights only extend to the narrow belt of waters from state's coastline. It was three miles, a range of a canon at that time. Waters behind it were regarded *high seas*; belonging to no one, whereas all states enjoyed freedom of navigation. High seas are "res communis, or the common property to all nations."[69] Only in the early twentieth century, United Nations Convention on The Law of the Sea (UNCLS) have replaced the concept of freedom of the sea and designed a comprehensive legal framework with more than 400 articles.[70] It determined territorial waters, exclusive economic zones, and international waters.[71]

The High Seas Convention and United Nation Convention on The Law of the Sea (UNCLS) set the legal framework for tackling piracy. It identifies piracy, states' duties in the repression of piracy and the seizure procedures of a pirate ship. The effectiveness of UNCLS legal framework in tackling Somali piracy is addressed in chapter four. This chapter explores the legal framework applicable to maritime piracy, focusing on legal definition, states' obligations, and tradition anti-piracy measures. Difficulties of enforcement are sufficiently addressed, as piracy continues to contest the legal framework governing seas.

A. Legal definition

The legal definition of piracy is crucial in identifying acts which constitute the crime of piracy. Piracy is one of the oldest crimes. The crime of piracy is a well-known example of a crime relating to pre-existing customary international law. For over two thousand years, world's nations have regarded pirates as enemies of the human race "hostes humani generis."[72] The High Seas Convention of 1958 and the UN Convention on The Law of the Sea of 1982 codified those rules into a treaty law. The codified definition of piracy is "generally, thought not universally, accepted" as codified

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[69] Bernard G. Heinzen, The Three Miles Limit: Preserving the Freedom of the Seas, 11 Stan. L. Rev. 597, 664 (1959), http://www.jstor.org/stable/1226663.
[70] Tullio Treves, *supra* note 41.
[71] See Appendix E: illustration of internal waters, territorial waters, and International waters.
[72] *Countering Piracy Off the Horn of Africa: Partenership & Action Plan,* USA National Security Council, Dec. 2008.

customary international law. UNCLS defines piracy in article 101 as 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).[73]

Although this article defines acts of piracy committed by private ship, piracy can be also committed by a warship or government ship, whose crew has mutinied and taken control of the ship. In this case, their acts would be assimilated to acts committed by a private ship.[74] That is because the crew, in this instance, is acting on its own. The state lost control over its warship, while the crew attacks ships for private ends.

The crime of piracy in international law can be committed on international waters, including the high seas and the exclusive economic zones. If the same acts were committed within internal waters or territorial sea, those acts would not be a crime of piracy, but rather a crime of armed robbery against ships, and would be subject to a nation's domestic jurisdiction.[75] However, the International Maritime Bureau (IMB) has suggested another definition in an attempt to expand the scope of piracy to "include boarding to steal or commit some other crime and the actual and implied use of force by perpetrators."[76] Piracy threatens navigational safety regardless of the location, whether the crime was committed was in the high seas or territorial waters.[77] It is questionable whether a change in the location may change the nature of the crime. The paradox is that piracy mainly occurs in territorial waters near ports and rarely takes place in international waters.

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[73] *United Nation Convention on The Law of the Sea art.101*, Dec. 10, 1982, 1833 U.N.T.S. 397.

[74] *Supra*, art. 102.

[75] James P. Terry, *Lawlessness In A Failed State: The Case For Eradicating Piracy In Somalia*, Center for the Study of Democracy, St. Mary's College of Maryland, http://www.smcm.edu/democracy/_assets/documents/Lawlessness%20in%20a%20 Failed %20State.pdf

[76] Craig J. Forsyth, ET AL., *Waterborne Crime: Examining contemporary Piracy*, Deviant Behavior, 30: 669–679, 2009.

[77] *Id,* at 672.

The convention of the Sea stresses on the element of private purpose "animus furandi" in the crime of piracy to be distinguished form political activity.[78] However, this definition does not exclude politically motivated violence. It basically means that violence is not public. Pirates are acting not on behalf of their states but rather for their private interests. The words of "for private ends" was originally included to the definition of piracy to "acknowledge the historical exception of civil war insurgencies who attacked only the vessels of the government they sought to overthrow."[79] However, many state's officials at all levels, throughout history, have profited and secretly sponsored acts of piracy.[80] Thus, giving a blind eye and taking no active measures toward pirates raises doubts about state responsibility.

On the other hand, piracy might be socially accepted in a number of societies and an entire coastal community's economy might be based on piracy. Eradication of piracy in this instance would be hard. Law is not targeting criminal individuals but rather communities. It is problematic when piracy becomes a basic activity for survival. Also, piracy becomes more complex in the case of a state claim of a historical right and authority to tax nearby shipping lanes. Conflicting claims of state authority over historical waters is a challenge. In this case, can state actions of arresting and detaining crew and confiscating boats in its historical waters be regarded as piracy?

B. States' obligations in the repression of piracy

Fighting piracy requires a well-coordinated response. That is because the crime of piracy takes place on the high seas, outside all state's jurisdiction targeting foreign vessels. The overwhelming international dimensions of the crime require an international coordination.

Therefore, all state are under legal duty to fully cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any state.[81] Both the High Seas Convention and UN Convention on The Law of the Sea stressed the importance of cooperation in fighting piracy. That is because piracy is an

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[78] J. L. Anderson, *supra* note 36.

[79] Douglas Guilfoyle, *supra* note 17, at 693.

[80] In the case of Somali piracy, there is evidence of state complicity. It is an open secret that elements of the police, the security services, and government of Puntland have benefited financially from piracy or felt compelled to turn a blind eye out of filial and clan loyalty See, *Somalia: The Trouble with Puntland*, International Crisis Group, Africa Briefing 64, Aug. 12, 2009, at 11.

[81] *UN Convention on the Law of the Sea, supra*, note 47, art.100; see also High Seas Convention, art. 14.

international crime which threatens the security and safety of navigations in the high seas. No single country, regardless of its naval power, can unilaterally suppress piracy. Coordinated efforts are a must.

International law did not elaborate upon the nature or level of cooperation. A regional form of cooperation between coastal states is very effective in suppressing piracy. International organizations, such as International Maritime Organization (IMO), play a key role in coordinating international efforts in fighting piracy on the high seas. Therefore, there are multiple levels of coordination from regional level to the international level or military verses civilian cooperation.

C. Traditional Anti-Piracy Measures in International Law

International law specifies certain rules of engagement to be followed by warships in capturing and prosecution of pirates. This section is particularly important in determining the effectiveness of legal framework in tackling piracy. Then, problems arise from legal framework is foll0wed.

International law allows the seizure of a pirate ship and the arrest of pirates on board. To begin with, UN Convention on The Law of the Sea defined a pirate ship as:

> 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 persons guilty of that act.[82]

According to article 105 of UN Convention on the Law of the Sea, once a pirate ship is identified, every state may seize a pirate ship or a ship taken by piracy and under the control of pirates. Nonetheless, the seizure of a pirate ship must be done on the high seas. Therefore, any state can seize a pirate ship on high seas and arrest the persons and seize the property on board. In this regard, the courts of the state which carried out the seizure may try them and determine the action to be taken with regard to ships, and property on board. However, this would be subject to the rights of the third parties acting in a good faith.[83]

A seizure of a pirate ship is only authorized to be carried out by warships or "other ships clearly marked and identified as being in government service and authorized to that

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[82] *Supra*, UNCLS, art 103.
[83] *Id. art. 105.*

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effect."[84] Therefore, any state warship or government vessel may board a ship suspect of piracy as an exception to the otherwise exclusive jurisdiction of the flag state.[85] However, if "the seizure of a ship on suspicion of piracy has been effected without adequate grounds, the state making the seizure shall be liable for any loss or damage caused by the seizure."[86] In addition, any state under international customary law can persecute a pirate found within its territory, as an exercise of universal jurisdiction.[87]

D. Difficulties of Enforcement

Common difficulties are associated with the enforcement of international law in regards to piracy. Firstly, prosecuting pirates is a challenging task because pirate attacks occur outside the territorial waters of any state. The enforcement jurisdiction granted to all states to purse pirate ships in international waters does not extend to the territorial sea of any state. In traditional cases of hot pursuit, pursuit must cease "as soon as the ship pursued enters the territorial sea of its own [flag] state or a third state."[88] Pirates' ability to escape pursuit by crossing into territorial waters remains a serious challenge to efforts to suppress piracy.

The second difficulty in prosecuting pirates is that pirates tend to "seek a sanctuary in countries whose judicial system is ill equipped to prosecute them."[89] Pirates seek refugee on remote islands or in countries with weak governments. Most developing countries overlooking the sea are not well-equipped to protect their waters which require well-stationed naval forces with sufficient technical support. Therefore, rogue states waters are loosely governed, if governed at all. Consequently, the High Seas Convention and UNCLS lack enforcement in such instances. Actually, the UNCLS desperately calls on developed countries to provide assistant to developing countries in protecting their waters. However, those calls are met with silence. Thus, prosecuting pirates in such circumstances is a real challenge.

A third problem in prosecuting pirates is the absence of national legislation criminalizing piracy in most countries. Indeed, very few countries have ratified laws

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[84] *Id.* art. 107.
[85] Douglas Guilfoyle, *supra note 17*, at 692.
[86] UNCLS, *supra*, art 106.
[87] Douglas, *supra note 17*, at 693.
[88] UNCLS, supra, art 111.
[89] Craig J. Forsyth, ET AL., *supra at* note 56.

attacking the problem.[90] Despite the fact that piracy is an internationally recognized crime, states' national legislation is a step behind. And internal laws do not fully incorporate the crime of piracy. Since there are no international tribunals for pirates, they are placed on trail in front of a national court. The absence of national laws on piracy constrains local courts' ability to prosecute pirates. Even countries which have legal grounds to prosecute pirates are not always keen and willing to do so.

The lack of evidence is another serious challenge in prosecuting pirates. Pirates tend to drop their weapons on the sea before their arrest which frustrate possible legal actions taken against them.. Witnesses, on the other hand, are on the move and very reluctant to engage in a long journey of prosecution and subsequent trials.

Another common problem of enforcement rises when piracy, although illegal, is sometimes socially accepted practice with a community. Indeed, piracy is an accepted aspect of the culture in Southeast Asia and Africa and other parts of the world. In this regard, piracy is a source of supplemental income and means of survival.[91] Therefore, it is extremely difficult to prosecute an entire community. And individual arrest of pirates is ofthen pointless.

In the final analysis, international law is very brief and "has little to say about the manner, in which piracy may be suppressed."[92] Rules of engagement governing the conduct of suppressing piracy on the high seas remain "embryonic, found in a limited case law and inferences from treaties."[93] Still, any use of force in suppressing acts of piracy must be "necessary, proportionate, and should be proceeded by warning shots where practicable."[94]

The legal framework applicable to the crime of piracy has to be re-examined. Piracy poses a difficult test for the current international legal system governing seas. The shaky maritime legal foundation creates a fragile security on the high seas, threatening maritime navigation.

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[90] *Id.*
[91] *Id.*

[92] Douglas Guilfoyle, *supra* note 17, at 692.
[93] *Id.* at 696.
[94] *Id.*

IV. Measures against Somali Piracy

In the wake of the unprecedented upsurge of pirate attacks in the Gulf of Aden in 2008, the global shipping industry and its insurance companies have called on governments to take immediate action to suppress piracy in the Gulf of Aden and Indian Ocean.[95] The international community reacted quickly to the danger of piracy given the region's strategic location.[96] Right now, "the Gulf of Aden is currently being patrolled by one of the largest anti-piracy flotillas in modern history."[97] This chapter explores international and regional efforts taken to counter Somali piracy.

A. International Measures

The unprecedented threat of Somali pirates on international trade and freedom of navigation in the strategic area of Gulf of Aden have provoked a decisive international response. The repeated attacks on vessels of Word Food Program have induced United Nations to alarm international community of the growing piracy off the Somali coast. The growing number of victims of Somali pirates from crew members, ship owners, and insurance companies, had pressured their government to take active measure to put and end to piracy. The international community decisively responded by deploying the biggest modern anti-piracy mission under United Nations new mandate which unleashed naval warship to take all necessary means to pursue, arrest and prosecute pirates.

1. United Nations Security Council

The Security Council has played an active role in fighting Somali piracy. A series of resolutions have been dedicated to tackling Somali piracy apart form Somalia's ongoing situation. Resolution 1816 of June 2008 authorized states acting in cooperation with and with prior notification of the TFG to:

   (a) Enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law; and
   (b) Use, within the territorial waters of Somalia, in a manner consistent with action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery.[98]

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[95] Rawle O. King, *supra, at note 4.*
[96] Rubrick Biegon, *supra* note 13.
[97] *Id.*
[98] S.C. Res. 1816, ¶ 7, U.N. Doc. S/RES/1816 (June 2, 2008).

This was a proactive stance in fighting piracy. For the first time, a state warship can suppress acts of piracy and armed robbery not only on the international waters, but also in the territorial waters of Somalia. This only requires the permission of the Somali Transitional Federal Government (TFG) and its notification of the UN Secretary General. The initial authorization lasted for six months from June 2008. The absence of effective coast guards, police, and efficient judicial system in Somalia encouraged the Security Council to adopt such unprecedented resolution acting under Chapter VII of the Charter of the United Nations. This resolution was passed with Somalia's consent.[99] However, this resolution is contrary to states' obligations under the UN Convention on the Law of the Sea and High Seas Convention. That is why the resolution affirms that the authorization to enter the territorial water of a state applies only with respect to Somalia and "shall not affect the right or obligations, or responsibilities of member states under international law…and shall not be considered as establishing customary international law."[100] Thus, the authorization was exceptional to the case of Somalia.

In addition, resolution 1816 leave the choice of jurisdiction to be determined by the concerned states and list possible jurisdictions such as "flag, port, and costal states, state of the nationality of victims or perpetrators and other states with relevant jurisdiction and international law and national legislation."[101]

Subsequent Security Council Resolution 1838, adopted on the 7th of Oct. 2008 called on all states in the region to deploy their naval vessels to participate in the fight against piracy on the high seas off the coast of Somalia.[102] This resolution urged states to continue to help protect the World Food maritime convoys.[103]

Another Security Council Resolution 1846 extended the mandate established in Resolution 1816 to enter Somali territorial waters and the use of all necessary means to repress acts of piracy and armed robbery. Resolution 1846 extended this mandate for another period of twelve months.[104]

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[99] Douglas Guilfoyle, *supra* note 17, at 692.
[100] S.C. Res. 1816, *supra,* ¶ 9.
[101] S.C. Res. 1816, *Id,* ¶ 11.
[102] S.C. Res. 1838, ¶ 1, U.N. Doc. S/RES/1838 (Oct. 7, 2008).
[103] S.C. Res. 1838, *Id,* ¶ 5.
[104] S.C. Res. 1846, ¶ 10, U.N. Doc. S/RES/1846 (Dec. 2, 2008).

On the 16th of December 2008, UN Security Council adopted Resolution 151 inviting states fighting piracy off the coast of Somalia to conclude a special agreement or arrangements with countries willing to take custody of pirates in order to embark law enforcement officials ("shipriders") from the latter countries, in particular countries in the region, to facilitate the investigation and prosecution of persons detained.[105] In actuality, most pirates arrested by navel vessels were delivered to Somalia's neighboring countries, mainly Kenya and Yemen. It seems that the UN seeks an official arrangement in this respect, after serious doubts were raised about the judicial capacity of those two states. Another key issue Resolution 1851 touched upon is the importance of establishing a cooperation mechanism between states fighting piracy off the coast of Somalia to form a regional center to coordinate information and increase regional capacity.[106]

As a result, a multilateral Contact Group on Piracy off the Coast of Somalia (CGPCS) made up of 24 member governments and five regional and international organizations was formed based on Resolution 1851. In January 2009, the contact group's first meeting was held. The main goal of the Contact group is to "improve operational coordination, information sharing, and the effectiveness of legal enforcement activities among all regional and international actors combating piracy in the region."[107]The latest meeting of the CFPRS was held in New York in September 2009, in which a U.N. administrated trust fund to help to finance the costs assumed by regional states for the prosecution of piracy suspects.[108]

The latest Security Council Resolution concerning Somali piracy was adopted in November 2009, renewing the authorization of states to enter Somali territorial waters to fight piracy and armed robbery against ships with the permission of the TFG and the notification of the UN General Secretary. The authorization was renewed for another twelve months.[109] In the Meantime, the Security Council expressed its intention to renew the authorization for additional periods upon the request of the TFG. The most recent development was adoption of a new Security Council Resolution 1918, on 27 April 2010, calling for states especially states in the region to criminalize piracy under their domestic

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[105] S.C. Res. 1851, ¶ 3, U.N. Doc. S/RES/1851 (Dec. 16, 2008).
[106] S.C Res. 1851, *Id,* ¶ 4.
[107] Lauren Ploch ET AL., *supra* note 7, at 22.
[108] *Id.*
[109] S.C. Res. 1897, ¶ 3, U.N. Doc. S/RES/1897 (Nov. 30, 2009).

law and favorably consider the prosecution of suspected pirates apprehended off the coast of Somalia. Most importantly, the Secretary-General was asked to present a report on possible options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements taking into account the existing practice in establishing international and mixed tribunals and the time and resources necessary to achieve and sustain substantive results.[110] Still, the situation is evolving. International efforts to prevent piracy in Somalia have rapidly developed at an unprecedented pace.

In the final analysis, the long series of resolutions adopted by the Security Council has focused in three levels; the first is to develop a coordinated response among countries engaged in fighting piracy in Somalia. The UN succeeded in this respect with the formation of the Contact Group on Piracy off the Coast of Somalia (CGPCS). The second is to encourage states to assist TFG to bring justice to pirates operating in their land. The third is to support International Maritime Bureau (IMB) to continue to develop and implement avoidance, evasion, and defensive best practices and guidelines to follow when under attack or sailing in waters of the Coast off Somalia with coordination with shipping and insurance industries.[111]

2. International Anti-Piracy Operations

Somali pirates attracted the biggest modern anti-piracy military operation, given the number of the countries taking apart and the size of naval presence dedicated to counter Somali pirates. In this regard, there are three coalitions of naval forces have been deployed on the Gulf of Aden operating under different umbrellas but unified on one goal to stop and deter Somali pirate attacks. Besides, individual countries unilaterally sent its warships to protect vessels carrying their flags passing off Somali waters. Thus, the area of the Gulf of Aden and surrounding Somali waters experiencing extraordinary military presence.

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[110] S.C. Res. 1918, ¶ 4, U.N. Doc. S/RES/1918 (April 27, 2010).
[111] Lauren Ploch ET AL., *supra* note 7, at 19

I. Combined Task Force 151 (CTF-151)

In January 2009, the United States Naval Forces Central Command (NAVCENT) established Combined Task Force 151 (CTF-151) with the sole mission of conducting anti-piracy operations in the Gulf of Aden and the waters off the Somali coast in the Indian Ocean. The CTF-151 composes of naval ships and assets from more than twenty nations,[112] under the US commander Terence Mcknight.[113] The CTF-151 consists of approximately two dozen ships. The command center of CTF-151 is located in Bahrain. Before the establishment of CTF-151, this area was under the charge of CTF-150 which has performed counter-terrorism and maritime security operations since 2001. In August 2008, CTF-150 and partner forces established the Maritime Security Patrol Area (MSPA) in the Gulf of Aden "to serve as a dedicated, more secure transit zone for merchant vessels."[114] MSPA was effective in reducing Somali pirates' attacks in the Gulf of Aden transit zone.

According to United States Naval Forces Central Command (NAVCENT), in the period of January 2009 to August 2009, CTF-151 "encountered 527 pirates; 282 of which were disarmed and released, 235 disarmed and turned over for prosecution, and 10 were killed."[115]

2. NATO: Operation Ocean Shield

In addition to Combined Task Force 151, NATO deployed its own anti-piracy operation. In October 2008, the North Atlantic Treaty Organization (NATO) deployed its first anti-piracy operation, named Operation Allied Provider, to serve as a temporary protection force for World Food Program assistance shipments in the Horn of Africa.[116] This operation only lasted for two months, before NATO end it and reassigned the task of protecting WFP maritime cargos to the European Union's new naval operation. In March 2009, NATO initiated a new anti-piracy mission named Operation Allied Protector under the command of Standing NATO Maritime Group 1 (SNMG1). The

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[112] Combined Task Force 151 consist of: United States, the United Kingdom, Canada, Denmark, France, Germany, Greece, Italy, the Netherlands, Pakistan, Saudi Arabia, Spain, South Korea, Turkey and Yemen, among others

[113] *New Counter-Piracy Task Force Established*, US Navy, Jan. 1, 2009, http://www.navy.mil/Search/display.asp?story_id=41687

[114] Lauren Ploch ET AL., *supra* note 7, at 19.

[115] *Id.* at 20.

[116] *Id.*

mission was to deter, defend against and disrupt pirate activities. In August 2009, NATO replaced Operation Allied Protector with a new anti-piracy mission, named Operation Ocean Shield, under the command of Standing NATO Maritime Group 2 (SNMG2). The new mission of Operation Ocean Shield is to fight piracy and contribute in capacity building efforts with regional governments. Warships form United Kingdom, Greece, Italy, Turkey, and US are taking part in Operation Ocean Shield.[117]

3. European Union: Operation Atlanta

European Union joined international anti-piracy efforts The European Union launched its first naval operation, EUNAVFOR Somalia-Operation Atlanta, under the framework of the European Security and Defense Policy (ESDP). Operation ATALANTA's mission is to: "provide protection for vessels chartered by the WFP; provide protection for merchant vessels; employ the necessary measures, including the use of force, to deter, prevent and intervene in order to bring to an end acts of piracy and armed robbery which may be committed in the areas where they are present."[118] Rear Admiral Peter Hudson (UK) commands the operation from the Operational Headquarters at Northwood, United Kingdom. More than twenty vessels and aircraft take part in EUNAVFOR, i.e. more than 1,800 military personnel. The main EU countries taking part in the operation are: Netherlands, Spain, Germany, France, Greece, Italy, Sweden, Belgium and Luxembourg. Non-EU countries which have joined the operation are: Norway, Croatia and Montenegro. The running costs of the Atlanta Operation amount to EUR 8.3 millions for the first year shared between EU member states.[119]

Under Operation Atlanta, military personnel can arrest, detain, and transfer suspects who may be prosecuted by an EU member state or by Kenya, under an agreement signed on March 2009, with the EU and Kenyan authorities, or to Seychelles.[120] In the period of August 2009 to January 2010, the number of WFP vessels escorted by Atlanta reached 57 plus 20 escorts for AMISOM.[121]

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[117] *Id.*

[118] *EU naval operation against piracy: EUNAVFOR Somalia - Operation ATALANTA*, European Union Common Security And Defence Policy, February 2010, http://www.europarl.europa.eu/meetdocs/2009_2014/documents/sede/dv/sede040310factsheetsomalia_/sede040310factsheetsomalia_en.pdf.

[119] *Id.*

[120] An exchange of letters concluded on October 2009 between the EU and Seychelles in this regard.

[121] *Id.*

According to the EU, its naval force in the Horn of Africa is a part of a global action initiative conducted by the EU to tackle the Somali crisis with its political, security and humanitarian dimensions. On hand, EU supports the African Union military mission in Somalia (AMISOM) financially, in terms of planning, and capacity building to increase the efficiency of the Somali police force. On the other hand, the Joint Strategy Paper for Somalia for 2008-2013 provides an allocation of EUR 215, 8 million under the EC's 10th European Development Fund (EDF). Further, On 22 and 23 April 2009, the International Conference in support of the Somali Security Institutions and the AMISOM was held in Brussels, organized by the UN, the EU and the African Union. Almost USD 213 million was pledged to help the Somali Transitional Federal Government bring about peace and stability.[122]

4. National Escort

Other countries have deployed their naval forces to the Horn of Africa to take part in monitoring and anti-piracy "National Escort system" operations. Those countries main task is to protect vessels carrying their flag passing by the Gulf of Aden. Although those countries are not operating under CTF-151 or Atlanta, they coordinate with other coalitions through a military coordination mechanism known as Shared Awareness and De-confliction (SHADE). The main countries taking part in the anti-piracy national escort system are Russia, China, and India.[123]

B. Regional Measures

Paralleled to international efforts to suppress Somali pirates, regional efforts are also taken. There are many regional efforts such as Arab League conference on Somali pirates. However, Djibouti Code of Conduct is the most important regional mechanism because it contains new measures and rules of engagement to counter Somali pirates. Also, Djibouti Code of Conduct was sponsored by key international and regional organization and contains practical steps tackling Somali piracy. Therefore, this section focus on Djibouti code of conduct as unique regional anti-piracy effort against Somali pirates.

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[122] *Id. at 3.*
[123] Lauren Ploch ET AL., *supra* note 7*,* at 19

1. The Djibouti Code of Conduct

The International Maritime Organization (IMO) launched a successful international anti-piracy program in the late of 1990s which successfully engaged regional countries in on multilateral basis to improve anti-piracy cooperation. This program succeeded in suppressing piracy in the Strait of Malacca and other regions in Asia.[124]

With the emergence of piracy in the Gulf of Aden, the IMO has attempted to adopt the same cooperative mechanisms against piracy in the Horn of Africa. In 2005, the IMO began sponsoring consultation meetings on piracy in the Horn of Africa region, which developed into a draft of a cooperative framework agreement in early 2008. In January 2009, representatives of seventeen regional governments met at an IMO-sponsored meeting in Djibouti and adopted a Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the western Indian Ocean and the Gulf of Aden. By the end of January 2009, nine regional governments had signed the Code of Conduct, which remains open for signature by other parties.[125] The agreement established procedures for coordinating responses to piracy and sharing best practices among law enforcement and security personnel. Accordingly, three regional facilities—the Maritime Rescue Coordination Centre in Mombasa, Kenya, the Sub-Regional Coordination Centre in Dar el Salaam, Tanzania, and a regional maritime information center that is to be established in Sana'a, Yemen—are planned to support the information sharing components of the agreement. The parties also agreed to resolutions on technical cooperation and the establishment of a regional training center in Djibouti. In September 2009, Japan made a contribution of $14 million to in support for the IMO's Djibouti Code-related training and capacity building operations.[126]

The importance of the Djibouti Code comes from "addressing local concerns over sovereignty, territorial water rights, and the presence of foreign military forces in regional waters."It was a proactive imitative to engage regional countries in the international anti-piracy measures taking place off the coast of Somalia.[127]

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[124] *Id.* at 20
[125] The Code of Conduct was signed by: Djibouti, Ethiopia, Kenya, Madagascar, Maldives, Seychelles, Somalia, the United Republic of Tanzania, and Yemen.
[126] Lauren Ploch ET AL., *supra,* at 22
[127] *Id.*

V. Critical Analysis of Anti- Somali Piracy Measures

To begin with, the international community should be accredited for its unusual proactive stance toward the crisis of piracy in the Gulf of Aden. For the first time, genuine anti-piracy measures were adopted. In fact, those measures went far beyond the traditional measures specified in international law. Indeed, throughout the entire crisis, Somalia has been used as a testing ground to new set of tryout rules of engagement and anti-piracy measures. To now, multiple measures are developing in multiple directions.

Briefly, the top three new measures adopted by international community are the following: (a) deploying the biggest anti-piracy fleet in the modern history, (b) allowing anti-piracy navies to enter the territorial waters of Somalia upon the consent of TFG and notification of UN Secretary-General, and (3) the current attempt to bring pirates into justice while considering establishing special tribunals for pirates.

Actually, deploying those massive anti-piracy missions shows an unprecedented level of coordination among states in suppressing piracy. No piracy activities have received such attention before.

Signs of Failure of Anti-Somali Piracy Efforts

However, the difficult question is, whether those genuine anti-piracy measures have been effective in suppressing Somali pirates. The answer is negative. Facts on the ground and statistics on pirates' attacks prove the negative outcome of anti-piracy measures adopted in the Gulf of Aden. Despite the intensive military presence off the coast of Somalia, it is clear that both international and regional efforts to suppress piracy off the coast of Somalia have miserably failed.

Statistics have shown a major boost in piracy activities off Somali waters. A special increase was noted in pirate attacks in terms of range, number of captured vessels, and number of attempted attacks. Five years ago, the maximum range of attacks was 287km, now it reached 2,037km from the Somali coast and only 926km from the coast of India.[128] In March 2010 alone, there were nine hijackings. Currently, there are eight vessels being held by Somali pirates, with roughly 160 hostages on board. The EU naval force (Navfor) says the rate of pirate activity in March 2010 alone was double that of the

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[128] Nick Childs, *supra* note 50**.**

three months from September to November 2009.[129] Pirate's big appetite for ships seems to be unaffected by the intensive forces patrolling waters off the Somali coast. Therefore, warships have failed to deter pirates.

International anti-piracy measures have failed in another respect. Although all anti-piracy resolutions adopted by the UN Security Council stressed upon: "*reaffirming* of the relevant provisions of international law with respect to the repression of piracy… *Reaffirming* its respect for the sovereignty, territorial integrity, political independence and unity of Somalia,"[130] international anti-piracy measures adopted by UN Security Council go beyond the traditional anti-piracy measures specified by international law; allowing navies not only to track pirates in Somali waters but also to target pirates' land bases. Those anti-piracy measures undermine sovereignty and the territorial integrity of Somalia. Further Security Council stresses that those measure exceptional and are only applicable for Somalia. Therefore, the UN Security Council seems to be intentionally infringing Somalia's sovereignty contrary to the preamble of its anti-piracy resolutions on Somali piracy.

Despite the scale of the anti-piracy mission dedicated to curb Somali pirates, international measures against Somali piracy are counter-productive because such measures are impractical and misguided. Practical constrains and legal complexities make Somali anti-piracy efforts appear to be futile.

A. Practical Constraints

Policing the waves is an impossible task, given the size of the area within the reach of Somali pirates. Somali piracy is an "expanding phenomenon, both in terms of level of activity and range."[131] International naval forces operate in a zone extending from south of the Red Sea, the Gulf of Aden and part of the Indian Ocean, including the Seychelles, which represents an area comparable to that of the Mediterranean.[132] The chief commander of EU's operation Atlanta said that there are altogether about twenty

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[129] *Id.*

[130] S.C. Res. 1816, ¶ 5, U.N. Doc. S/RES/1897 (June. 2, 2008).

[131] Nick Childs, *supra* note 50.

[132] *EU naval operation against piracy: EUNAVFOR Somalia - Operation ATALANTA*, European Union Common Security And Defence Policy, February 2010, http://www.europarl.europa.eu/meetdocs/2009_2014/documents/sede/dv/sede040310factsheetsomalia_/sede040310factsheetsomalia_en.pdf.

warships to cover an area ten times larger than Germany.[133]Given the massive volume of shipping in the region "the safety of all ships can not be guaranteed due to the often long response times due to the considerable distances involved."[134]

Therefore, there is a significant challenge for international navies to patrol the massive waters surrounding the long Somali coast, even with its largest anti-piracy fleet in modern history. The geographical location is a major practical constraint in the way of international efforts to suppress piracy in the Gulf of Aden. Somali pirates simply adapted their technique to the presence of naval powers. Pirates have simply shifted their operations from the Gulf of Aden towards the open waters, in the direction of the western Indian Ocean.

Another practical constraint facing anti-piracy missions is the factor of time. According to reports, "most vessels under attack have less than 15 to 30 minutes between the first sighting of the pirates and their boarding of the ship and taking of hostages." If a naval ship fails to arrive on the scene within those first 15 to 30 minutes, it will be too late to prevent the ship's capture. Generally, naval combatant ships can steam at speeds of up to 30 knots, while the speed of pirates' skiffs reach 53 knots using the Yamaha 150 horsepower motors.[135] Pirates' boasts are faster than warships. Thus, unless a naval ship happens to be few miles away when a commercial ship comes under attack, it will not arrive until after (perhaps long after) the fifteen to thirty minutes window has come and gone. Given the large area of water to be patrolled and the relatively small number of naval ships available means that the closest naval ship is often far too distant to arrive within that tight timeframe.[136] Once pirates are on board and the hijacked vessel under control, any attempt of rescue becomes too risky.

To sum up, considerable practical factors stand in the way of international anti-piracy missions operating in the Gulf of Aden. Somali pirates continue to be successful in what they do, as factors of time, distance, and speed are on their side. The element of surprise puts anti-piracy navies on the defensive. The phenomenon of Somali piracy has illustrated the limits of a military option in preventing or even suppressing piracy.

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[133] *Id.*
[134] Lauren Ploch ET AL., *supra,* at 1.
[135] *International Expert Group on Piracy off the Somali Coast, supra* note 20*,* at 16.
[136] Lauren Ploch ET AL., *supra,* at 10.

1. The Negative Implications of Military Intervention in Suppressing Piracy in the Gulf of Aden:

After examining the practical constraints facing international navies, it is time to explore the serious negative implications of using force in suppressing Somali piracy. The Security Council was *acting* under Chapter VII of the Charter of the United Nations allowing the use of force. All Security Council Resolutions regarding Somalia have one sentence in common which is "states fighting piracy may *use all necessary means* to repress acts of piracy and armed robbery."[137] Many voices are demanding the use of decisive force in dealing with Somali pirates in support of risky rescue military operations. The UN envoy to Somalia, Ahmedou Ould-Abdallah, backed military operations saying they "are sending a strong message to the pirates and, more importantly, to their backers who are exploiting the poverty and desperation of their young, unemployed compatriots."[138] Also, the UN International Maritime Bureau (IMB) head Noel Choong said: "We support the robust response against the pirates."[139] Indeed,CTF-151 killed alone 10 pirates in a period of 7 months.[140]

However, excessive use of force by international navies in suppressing Somali pirates has four serious repercussions. It leads to retaliation. It causes further humiliation to Somali people, as it eradicates the sovereignty of Somalia. In addition, it increases the death tool among civilians.

First and foremost, the use of force in suppressing Somali pirates has proven to be counter productive. Although Somali pirates use heavy weapons in their hijacking, they rarely inflict any harm on their hostages, cargo, or the hijacked ship. Most hostages acknowledge the humane treatment they receive during their detention. Hostages' personal belongs have not been touched. The content of the hijacked cargos is kept safe. Unlike traditional pirates who accompany their piratical activities with long list of crimes which expand to include murder, rape, and theft. Although Somali pirates are heavy armed, they have used violence under precautions. Somali pirates have only one single demand, ransom. Pirates of the Gulf of Aden directly communicate with the ship owner.

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[137] S.C. Res. 1816, ¶ 7, U.N. Doc. S/RES/1816 (June 2, 2008).
[138] *Pirates stage rocket attack on US freighter*, AFP, Apr 13, 2009,
http://www.google.com/hostednews/afp/article/ALeqM5h-m6UAWni8_Vq9bcITMicgxLF5YA
[139] *Id.*
[140] Lauren Ploch ET AL., *supra,* at 20.

However, in a number of incidents, anti-piracy missions' use of violence has provoked Somali pirates groups to take revenge. Consequently, a cycle of violence and retaliation between the two sides has been initiated. Use of force by warships to apprehend or kill pirate suspects has raised feelings of revenge especially among pirates whose associates are killed or captured.[141] For example, after three Somali pirates were killed in the US military rescue operation to release the captain of the MV Maersk Alabam, Somali pirates attacked an American freighter with rockets to "destroy" the ship in revenge. A Somali pirate commander Abdi Garad told AFP, that:

> We intended to destroy this American-flagged ship and the crew on board but unfortunately they narrowly escaped us. The aim of this attack was totally different. We were not after a ransom. We also assigned a team with special equipment to chase and destroy any ship flying the American flag in retaliation for the brutal killing of our friends.[142]

According to sources close to the pirates, French ships were also prime targets following the rescue of the Tanit yacht in which a hostage and two pirates were killed.[143] Violence only begets violence. Further, escalation of violence seems to be the new trend. The paradox is that warships, which are responsible for protecting vessels carrying their state's flag, maximize the threat of pirate attacks upon its flag vessels rather alleviating the threat. In other words, warships are doing more harm to vessels carrying their flag then.

Secondly, authorizing warships to enter Somali territorial waters to fights pirates violates the sovereignty of Somalia which leads to further humiliation of the Somali people. There are widespread feelings of suspicion among Somalis toward foreign navies. Many are skeptical of their agenda, while other fear those anti-piracy missions might be a form of indirect occupation. Feelings of animosity were aroused after French military executed land operations against Somali pirates. From time to time, US send missile attacks against targets of Al-Qaeda in Somalia. Many innocent Somalis fall dead in such land operations. Somalis feel that the international community has failed them and give the green light to superpowers to hunt Somalis. Indeed, a sense of conspiracy and mutual mistrust dominates the feelings of Somalis toward warship patrolling Somali waters. That

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[141] Lauren Ploch ET AL., *supra,* at 9.
[142] *Supra, Pirates stage rocket attack on US freighter.*
[143] *Id.*

is largely due to UN did not extend its mandate allowing warships patrolling Somali waters to prevent illegal fishing or nuclear waste dumping. None of the Security Council resolutions mentioned illegal fishing or hazardous waste dumping.[144] That is why the Somalis accuse Security Council of double standards. For example, Obama said that the pirates must be held accountable for their crimes. Many Somalis want to know when the western world will be held accountable for dumping nuclear toxic waste and illegal fishing.[145] Consequently, international anti-piracy coalitions lost the hearts and minds of Somalis, while pirates gain more popularity inside. Thus, excessive use of force against pirates sometimes leads to unfavorable outcomes.

In the final analysis, although deploying warships to suppress Somali pirates is a needed measure to deter them, this measure failed to achieve its purpose because of serious practical constrains limits its effectiveness. Further, excessive use of force in apprehending or killing pirates has danger implications on the long run.

B. Legal Complexities

A long list of various legal complexities, related to capturing, holding, and prosecuting of Somali pirates, has doomed international anti-piracy missions to failure. Serious legal complexities surrounding anti-piracy operations in the Gulf of Aden do exist.

The case of Somali piracy sheds light upon logistic and legal difficulties face anti-piracy effort which attempt to bring Somali pirates into justice, in order to be held accountable for their crimes. However, this appears to be difficult task. Mix of logistical, legal, operational and political difficulties make chances to bring pirates to justice are remote.[146] There are challenges to prosecute pirates in the stages of capturing, detention, and trial.

To begin with, capturing of pirates by warship is extremely difficult because Somali pirates use smart evasive strategies to escape navies. If a warship appears in the scene before pirates can take control of the attacked ship, then there is a fair chance of catching them. However, once pirates see a warship approaching

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[144] Saeed Shabazz, *supra* note 18.
[145] *Id.*
[146] James Kraska & Brian Wilson, *Fighting Pirates: The Pen and The Sword,* World Policy Institute, 2008, at 41.

their speedboats, they flee in different directions, making it impossible to catch all of them. Therefore, a warship will decide to go after one speedboat and leave the rest of the pirates in other speedboats escape. If the warship is about to capture pirates onboard the speedboat, pirates quickly drop their weapons in the sea and destroy evidence. Therefore, when the military personals search the boat, they find nothing. When pirates are faced with the crime of piracy, they deny the crime and claim that they are illegal migrants to a neighboring state. Now, it is extremely hard to prove their crime. Lack of evidence is e a major challenge which undermines the process of prosecution. Prosecution and bringing pirates to trail becomes pointless and a waste of time and resources. Large numbers of pirates have been acquitted due to lack of material evidence.[147]

The second stage towards bringing pirates to justice is holding them after their capture and transferring them to the country in which they will be prosecuted. After the capture of Somali pirates, they will be detained within the warship which made the arrest. However, the task of transferring pirate suspects to face trial is a heavy burden on navies operating in the region. The process of transferring arrested suspects is both costly and time consuming which affects the overall performance of warships' roles in patrolling their assigned area. Therefore, many pirate suspects spend long duration of time in detention on board of warships without facing any crime. This delays their prosecution with no specific time table for their prosecution.[148] Because of lack of evidence and logistical difficulties in transferring pirates to face trial, many navies avoid this complication by releasing pirates from their custody after disarming them. For example, in the period of January 2009 to August 2009, CTF-151 "encountered 527 pirates; 282 of which were disarmed and released, 235 disarmed and turned over for prosecution, and 10 were killed."[149] It is worth noting that the number of released pirates is larger than the number of those turned in prosecution.[150] As a result, anti-piracy navies

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[147] James Kraska & Brian Wilson, *Id.* at 41

[148] Imagine you are a relative or a lawyer to one of the arrested pirates; you would certainly spend considerable time trying to figure out where he was detained and where his trail would be held.

[149] Lauren Ploch ET AL., *supra,* at 20.

150 Further, warship used to provide food and enough fuel to pirates' speedboats enough to get them back to Somalia!!

operating off the Somali waters have already lost its deterrence affect upon pirates. This simply sends wrong signals to pirates. In response, pirates have become more aggressive and undeterred by navies patrolling Somali waters.

The last stage is prosecuting the pirates to face a fair trial. The first question is where to prosecute pirate suspects. Although international law gives all the states jurisdiction to prosecute pirates, few states are willing to do so. Few states have adopted the crime of piracy in their national legislation. In the beginning, western navies were eager to prosecute pirates in their countries. However, western navies are now discouraged from doing so for number of reasons. First, the long distance between the theaters of anti-piracy operations from the home country makes the transfer process exhaustive and costly. Secondly, many pirates, who are acquitted of their crimes and released, have turned into asylum seekers and have refused to go back to Somalia. This has created further burden to on the western countries that carry the entire prosecution process.

Therefore, anti-piracy missions in the Gulf of Aden have tried to avoid this complication by transferring pirates to neighboring regional states, mainly Kenya and Yemen. However, those two countries have inefficient judicial systems. Kenya, for example, has been subject to brutal criticism from human rights activists for inhumane acts which suspects commonly receive during detention, prosecution and imprisonment. Kenyan prisons are already overcrowded. It was reported that a suspect may wait as long as a year for his or her trial to be held. Anti-piracy missions, with the support of EU and UN, have allocated funds to improve the judicial systems in those countries. In other words, it was an attempt to buy the consent of Yemeni and Kenyan authorities to receive pirates with no question. A fair trail to pirates is hard to guarantee. That is why many observers see anti-piracy navies useless and are a show for the international media. Others call it "beauty contest." In a recent development, Kenya officially declared its refusal to receive any more pirates for prosecution claiming that the burden of prosecution is not equally shared with other countries concerned with piracy in the Gulf of Aden.

To sum up, legal complexities surround the arrest, detention, transfer, and prosecution of pirates. Legal complexities no longer hold pirates accountable for their crimes and turns piracy into a less risky business.

Anti-piracy operations in the Gulf of Aden are deeply constrained by practical constraints and legal complexities. As a result, Somali pirates continue to expand their operation undeterred. The negative outcome of the biggest anti-piracy mission in modern history fuels feeling of frustration and shock.

c. Misguided Efforts

Although the international community has adopted genuine efforts to suppress piracy in the Gulf of Aden, those efforts are counter productive. That is because these anti-piracy measures are simply misguided, they continue to ignore Somalia and fail to address factors contributing to the spread of piracy in Somalia.

All of the Security Council resolutions have tackled Somali piracy while disregarding to Somalia. In other words, the international community has dealt with piracy as a separate problem without looking to the bigger picture. Thus, the international community needs to look at the bigger picture and to carefully analyze factors contributing to the spread of piracy especially off the cost of Somali. The solution to piracy lies in the land not in the sea.

> The most powerful weapon against piracy will be peace and opportunity in Somalia, coupled with an effective and reliable police force and judiciary. Containing or ignoring Somalia and its problems is not an option that will end well.[151]

As we have seen, little has been done to improve Somalia's harsh realities. The positive side of piracy is shedding some light on the ongoing tragedy in Somalia, the forgotten country. It seems that the international community pretends to ignore Somalia. Nonetheless, Somali piracy has brought Somali back into surface. Ignoring Somalia is not an option.

International efforts have been fixed on the sea and not toward the shore. Commanders of anti-piracy navies have only now realized that the solution to piracy lies on land not in the sea. Warships may reduce the number of pirates' attacks, but they can not uproot piracy form the Gulf of Aden and the Indian Ocean.

Attention slowly is moving toward Somalia. However, efforts continue to be misguided. Funds allocated to Somalia rarely benefit Somalia and its people. It can be

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[151] Roger Middleton, *Piracy Off Somalia: Threatening Global Trade, Feeding Local Wars*, Chatham House, Oct. 2008.

argued that funds allocated to Somalia and fighting Somali piracy ends in foreign pockets away from Somalia.

Regional and international anti-piracy efforts are only focusing on military operations and prosecution of pirates. Instead of fixing Somalia's judicial institutions, massive funds have been assigned to Somalia's neighboring countries to improve their judicial systems to be well-equipped to prosecute Somali pirates. Enormous funds have been directed to that purpose. A US National Security Council report recommends that the US has to seek agreements and arrangements to formalize custody and prosecution arrangements with regional states.[152] In this regard, an agreement was signed between EU and Kenya on the 6th of March 2009, giving the Kenyan authorities the right to prosecute pirates. Indeed, regional countries offered their services on the war against pirates in exchange for funds which should have been spent on Somalia in the first place.

When regional countries, as Kenya, were no longer able to prosecute pirates, international community is considering establishing international tribunals for pirates. Additional funds would be directed in this direction. The international media would closely monitor those tribunals, while Somalia's judicial system would continue to be marginalized.

At the Donor Conference on Somalia, hosted by the EU on 23rd April 2009, UN proposed raising $166 million to be raised- $135 million for African Union's military mission to Somalia (AMISOM) and only $31 million for the Somalia security forces.[153] More than two thirds of the fund is allocated to the 4,350 foreign troops of AMISOM while the Somali army and police force continue to suffer from lack of funds, training, arms and ammunition. The TFG fails to pay the salaries of its police forces because of lack of resources. Somalis have expressed their frustration at the way the funds are allocated.

Massive funds were dedicated to anti-piracy military operations. The joint funding of only the EU's Atlanta operation alone amounts to EUR 8.3 million. The cost of patrolling Somali waters is very expensive. Unfortunately, all those funds are misguided. In a sense, those funds are directed to tackling piracy, apart form Somalia. If those funds were reallocated to development, poverty reduction, supporting Somali police forces and government's institutions, piracy would be affected. The stronger i the government, the weaker the pirates are.

The international community has to reconsider the viability of durable solution for piracy rather than heavily investing in unsustainable military options which have been proven to be

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[152] *Countering Piracy Off the Horn of Africa: Partenership & Action Plan, supra* note 52.
[153] *Background Note: Somalia Donor Conference, The United Nations and Somalia*, Peace and Security Section of The United Nations Department of Public Information, April 20, 2009

ineffective and costly. Neither supporting AMISOM, anti-piracy operations, regional countries' judicial systems nor establishing international tribunals will suppress piracy in the Gulf of Aden. Redirecting a portion of those funds to rebuilding Somalia's government institutions is the key to a durable solution to piracy. The stronger Somalia, the weaker the pirates are. The current misguided anti-piracy efforts have to refocus on rebuilding the Somali state where the roots of the problem are found.

VI. The Way Forward

It is time for the international community to invest in a durable solution for *Somali* piracy. A comprehensive approach has to be adopted in fighting piracy. Ending piracy requires a well-integrated anti-piracy plan with short, medium and long-term measures. Tackling the roots of piracy in Somalia is the way forward.

First, international community need to openly confront the issue of illegal fishing and dumping of nuclear waste off Somali waters, in order to gain credibility form the Somali people. Indeed, international community should provide technical assistance to developing countries unable to protect its territorial waters, and its economic interests in their exclusive economic zones. Continuing to be silent about illegal fishing and waste dumping committed by European and Asian commercial vessels would strengthen the pirates' claim of protecting Somali waters. Second, improving the conditions of coastal communities is a good starting point. Third, international community should fight piracy by fighting poverty, unemployment in Somalia. Therefore, international community needs to adopt radical changes in its strategies to combat piracy.
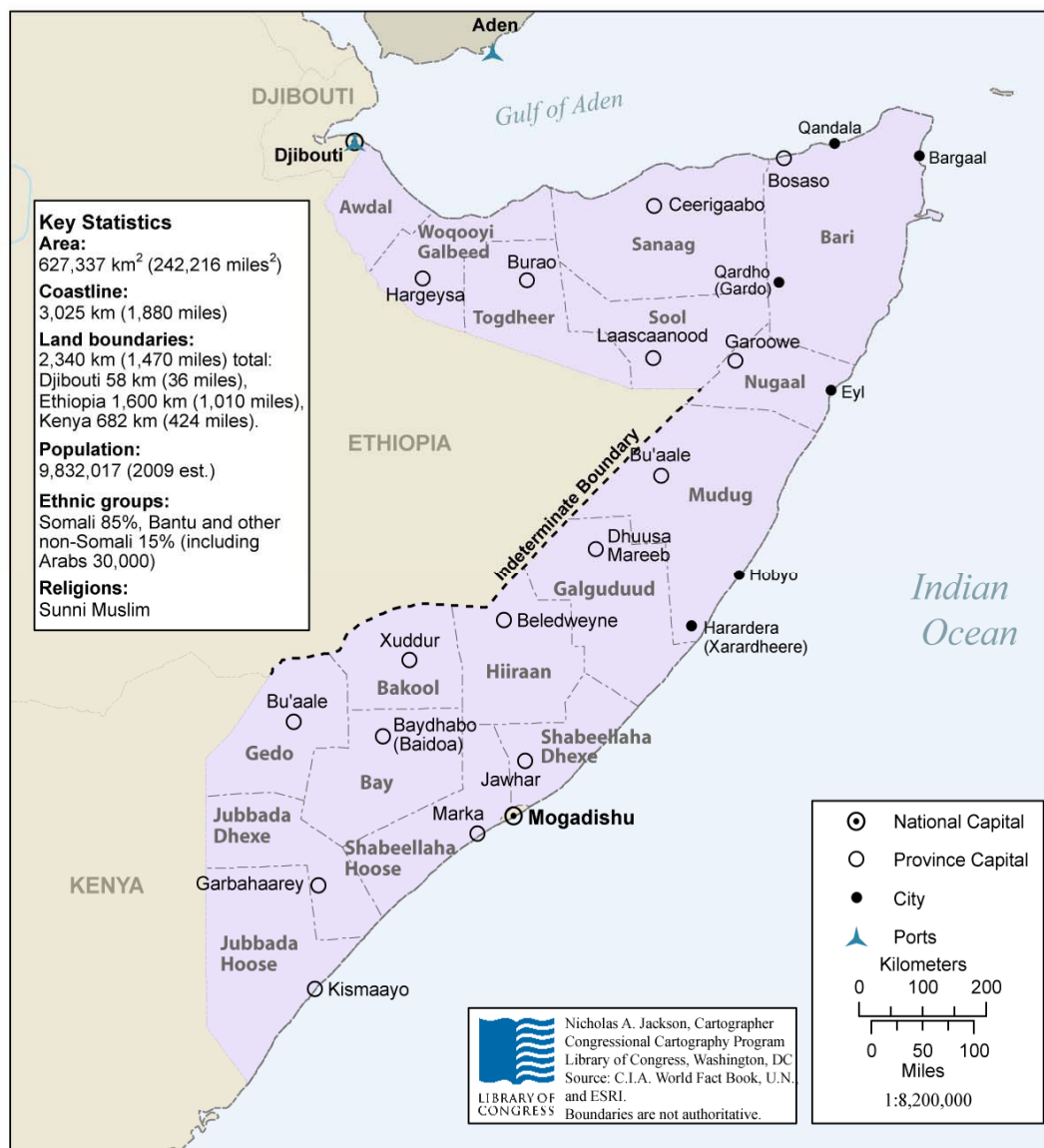
In the final analysis, I would argue that there are two set of factors contributing to Somali piracy: factors relating to Somalia in general and factors relating to coastal Somali communities specifically. The first set of factors feeding piracy is the current chaotic political situation which is marked by an ineffective central government, civil war, and tribal welfare. The second set of factors contributing to piracy originates from Somali coastal communities, the breeding ground of pirates. What drives coastal communities toward piracy are illegal fishing, nuclear waste dumping, and poverty. Consequently, anti-piracy measures have to respond to those two sets of factors feeding piracy in Somalia. Before the situation can be resolved, international and regional anti-piracy efforts will continue to be misguided and surely ineffective. Generalized responses to piracy are a shortcut to failure.

Anti-piracy measures have to respond to the roots of the problem in order to guarantee its effectiveness in the long-term. Undoubtedly, building a military coalition to patrol ships passing by Somali waters is a needed measure to deter pirates. However, it is crucial to ask ourselves to what extent such measures are sustainable and to what extent they responds to the roots of the problem.

Regional and international anti-piracy efforts should meet the following three goals: (1) strengthening Somalia's central government to impose rule of law, (2) reviving Somalia's economy to provide an alternative to piracy, and (3) solving the problems of Somali coastal communities' especially illegal fishing and nuclear waste dumping off Somali waters.

Any future anti-piracy measure has to comply with the following criteria. Firstly, the anti-piracy measure has to be compatible with international law. Secondly, it has to respond to the social and economic factors contributing to the emergence of piracy. The arsenal of anti-piracy tools has to expand to include trust building mechanisms with local communities. New and customized anti-piracy measures should be tailored to the specific circumstances of each case of piracy. In this decisive moment, the international community must revise its strategies in responding to piracy and today's fragile maritime security regime has to be re-examined. Difficult questions have to be answered. Only then Somali piracy becomes a history.

Appendix A: Map of Somalia[154]

Key Statistics
Area:
627,337 km^2 (242,216 miles^2)
Coastline:
3,025 km (1,880 miles)
Land boundaries:
2,340 km (1,470 miles) total:
Djibouti 58 km (36 miles),
Ethiopia 1,600 km (1,010 miles),
Kenya 682 km (424 miles).
Population:
9,832,017 (2009 est.)
Ethnic groups:
Somali 85%, Bantu and other
non-Somali 15% (including
Arabs 30,000)
Religions:
Sunni Muslim

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154 *Somalia Map,* Congressional Cartography Program, Library of Congress, adapted by CRS
Graphics.(US. Sept.28, 2009) http://www.fas.org/sgp/crs/row/R40528.pdf

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Appendix B: Horn of Africa: Shipping Routes[155].
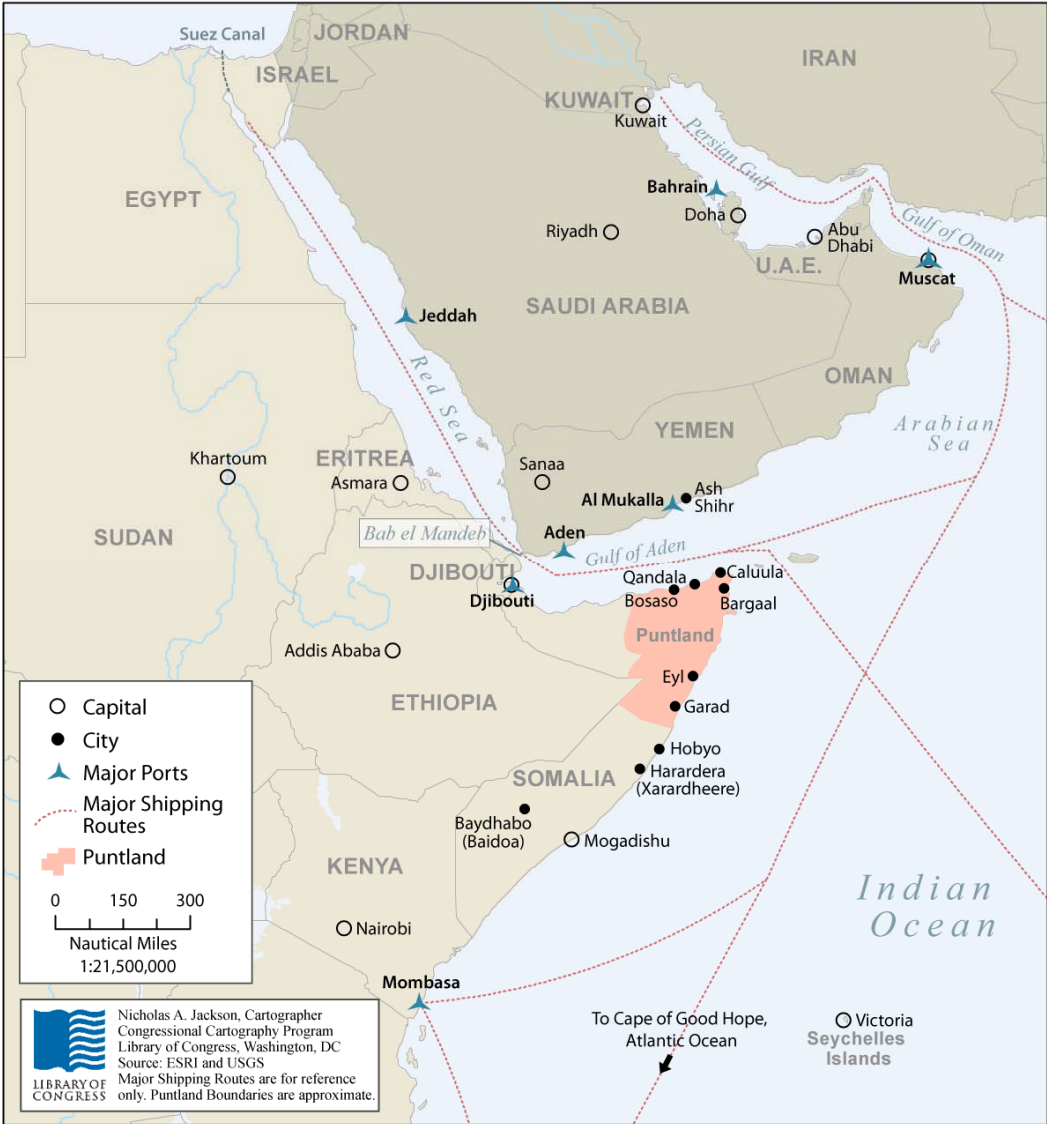
[155] *Piracy off Africa, Surrounding Waters, and Key Locations,* Congressional Cartography Program, Library of Congress, adapted by CRS Graphics.(US. Sept.28, 2009) http://www.fas.org/sgp/crs/row/R40528.pdf

Appendix C: Range of Attacks[156]

Expansion of pirate operations
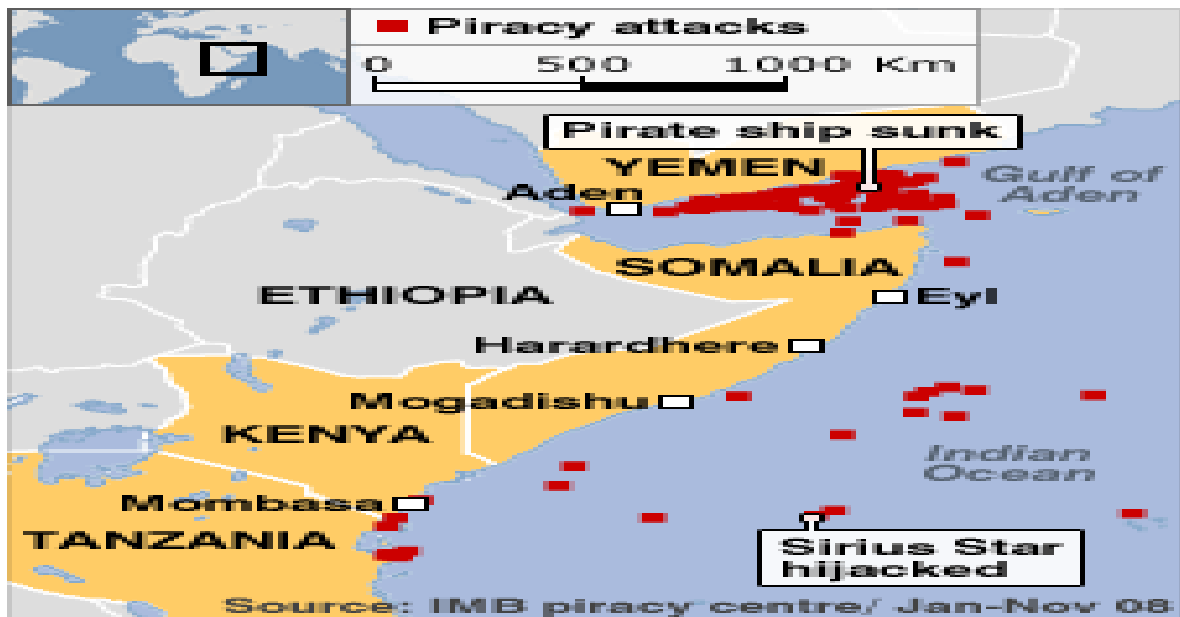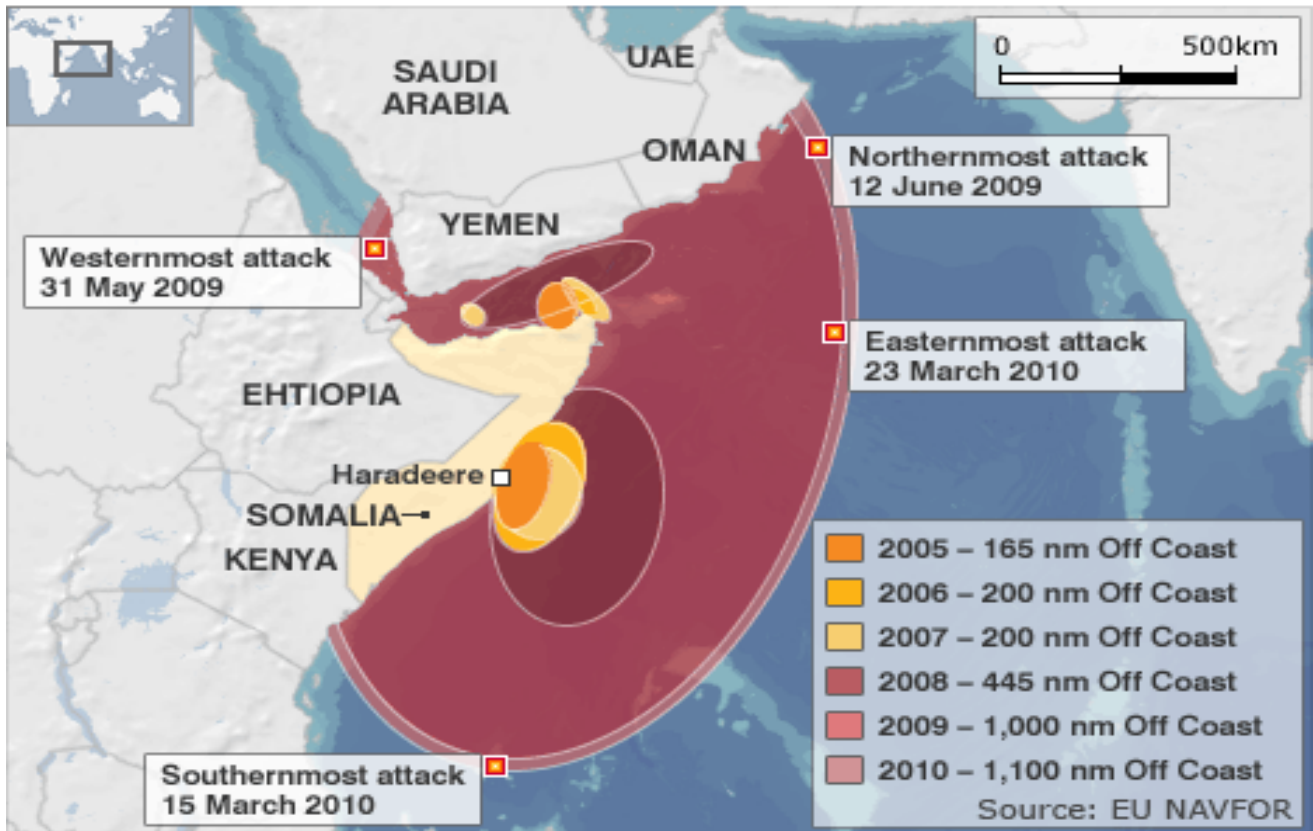
[156] *Expansion of Pirate Operations, (May, 29, 2010)* http//www.bbc.co.uk.

Appendix D: Statistics Jan-Sept. 2009[157]

CHART A: The following locations shared approximately two third of the incidents i.e. 208 from a total of 306 attacks reported in the period January – September 2009.
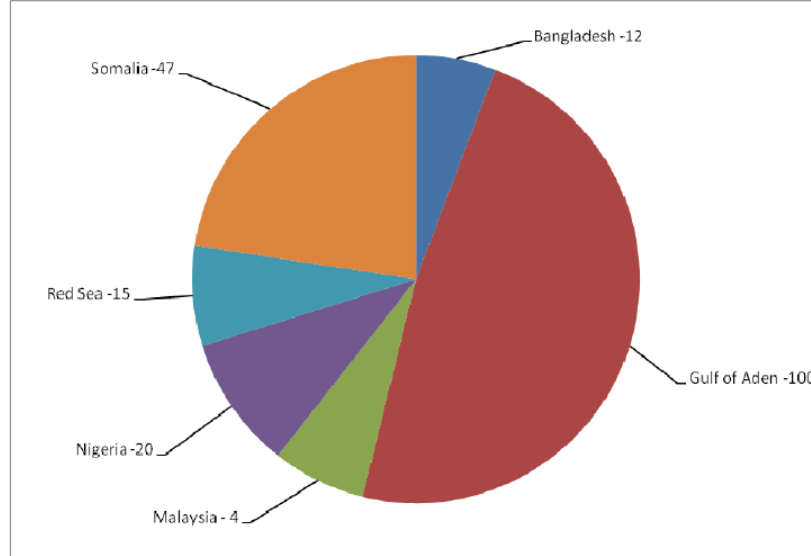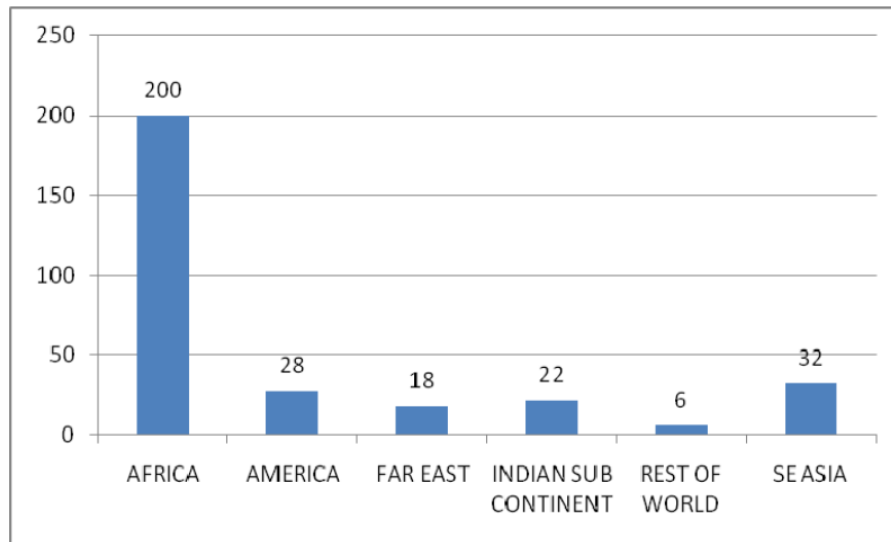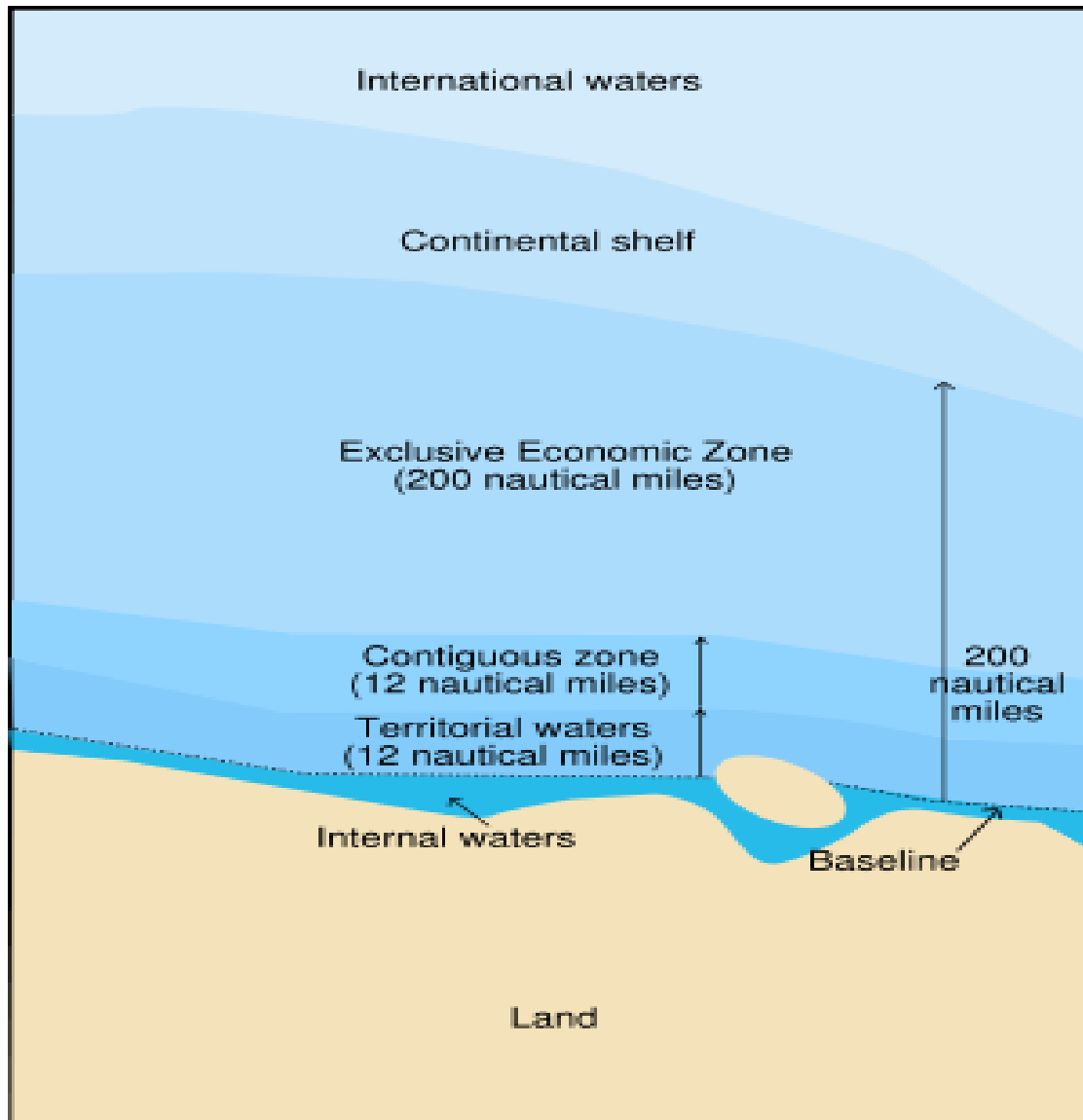

CHART C: Total incidents as per Regions of the world January – September 2009

Source: 2009, ICC International Maritime Bureau

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[157] *Piracy and Armed Robbery Against Ships Report of the Period 11 January-30 September 2009, (Jan. 12, 2010)* http://www.icc-ccs.org/

Appendix E: Territorial Waters, Economic Zone and International Waters[158]

International waters

Continental shelf

Exclusive Economic Zone
(200 nautical miles)

200
nautical
miles

Contiguous zone
(12 nautical miles)

Territorial waters
(12 nautical miles)

Internal waters

Baseline

Land

[158] Territorial Waters, Economic Zone and International Waters, (May, 10, 2010)
wmmbb.wordpress.com/2008/01/16/under-the-radar/