

Ending the “Catch and Release” Game:
Enhancing International Efforts to Prosecute
Somali Pirates under Universal Jurisdiction

by

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*To my Father,
far before the beginning and long after the end*

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ABSTRACT

Once thought relegated to the dustbins of history, living on only through Hollywood's romanticized portrayals of the swashbucklers of old, maritime piracy reemerged in the public eye with a vengeance in the last few years, highlighted by the surge in hijackings off the coast of Somalia in 2008. While piracy on the high seas was certainly not wholly extinct, widespread pirate activity had been successfully suppressed to a large degree for centuries by a combination of robust naval enforcement and a highly-responsive and reliable legal establishment. That piracy not only reemerged but boldly thrived off the Horn of Africa has been both puzzling and deeply concerning for many policymakers, security specialists, and legal experts alike. At a time when international law has been increasingly trumpeted as an answer to such global crimes as genocide and territorial aggression, the international legal regime's inability to resolve what some have referred to as the international law equivalent of an ordinary street crime serves as a glaring embarrassment to international order.

While successful hijackings and ransoms off the coast of Somalia have abated over the past year, the inability of the international community to provide an effective and consistent legal deterrent to pirate activity remains. Even as military efforts and regional coordination help to thwart pirates at the literal point of attack, the prevailing policy of "catch and release" enables pirate activity to persist in international waters – allowing criminals to roam the seas as a constant threat to commercial shipping and with a sense of impunity. This thesis explores the weaknesses of the international legal regime in combating piracy, focusing on the inability and unwillingness of states to prosecute captured pirates under universal jurisdiction.

Accordingly, this thesis first examines the relevant international law that both defines piracy and provides for its criminalization and punishment by individual states. In order to ground the successes and failures of international prosecution efforts in their all-important context, this thesis also explores the characteristics of Somali piracy, including the root causes of pirate activity and the mechanics of piracy operations. Likewise, this text surveys the conventional efforts to combat piracy in the region and the interaction between naval personnel and captured piracy suspects. Additionally, this thesis focuses on the legal capability of states to arrest and prosecute pirates that are captured on the high seas.

This thesis highlights that one of the greatest impediments to prosecutions is a lack of legal capacity by states to charge and punish individuals for the crime of piracy. An absence of domestic legislation either criminalizing piracy or providing for the exercise of universal jurisdiction directly prohibits certain nations from bringing to justice many of the pirates captured on the high seas. This thesis also presents evidentiary issues as a crucial factor in the persistence of the "catch and release" policy. Accordingly, this text explores how the adoption of "equipment articles" could mitigate some of these issues and facilitate the prosecution of maritime piracy. Furthermore, the thesis directly addresses how equipment articles and domestic legislation would be added to the current international legal framework.

While the conclusions in this thesis are specifically tailored to the pirate activity off the coast of Somalia and the unique characteristics of this incidence, wider implications for the deterrence of global maritime piracy can be gleaned from the analysis and arguments herein.

TERMINOLOGY

CMF	Combined Maritime Forces
CGPCS	Contact Group for Piracy off the Coast of Somalia
CTF-151	Combined Task Force 151
DCoC	Djibouti Code of Conduct
DTVIA	Drug Trafficking Vessel Interdiction Act of 2008
EU NAVFOR	EU Naval Force
HRA	High-Risk Area
ICU	Islamic Courts Union
IMB	International Maritime Bureau
IMO	International Maritime Organization
MSC-HOA	Maritime Security Centre – Horn of Africa
MOU	Memorandum of Understanding
PAG	Pirate Action Group
PCASP	Privately Contracted Armed Security Personnel
PMSC	Private Maritime Security Company
SUA Convention	Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation
UNCLOS	United Nations Convention on the Law of the Sea
UNODC	United Nations Office of Drugs and Crime

INTRODUCTION

“We may be dealing with a 17th century crime, but we need to bring 21st century solutions to bear.”¹

– U.S. Secretary of State Hillary Clinton

On March 31, 2010, at the break of dawn, a Sierra Leone-flagged tanker, the *MV Evita*, was approached by several small boats full of men.² To the untrained eye, these skiff boats were identical to those used by local fishermen in the area. However, rather than nets and fishing rods, these Somali nationals brandished rifles and rocket-propelled grenade launchers as they sped towards the cruising oil-tanker. These were no fishermen. The three skiff boats that surrounded the *MV Evita* carried seasoned pirates, ready to swing themselves aboard the nearly 11,000-ton ship via grappling hooks and ladders and fight their way to the bridge of the ship from where they would be able to commandeer the entire vessel. Employing a combination of industry-recommended “best management practices,” the *MV Evita* was able evade the pirates and sail away, avoiding a hijacking and alerting coalition naval forces operating in the area in the process.³

The suspected pirate skiffs of this Pirate Action Group (PAG) were subsequently found nearby by coalition naval forces. After halting and capturing the pirates, personnel from the USS *Farragut* found grappling hooks and prodigious fuel drums aboard the skiffs of these “fishermen,” in addition to the ladders and equipment they had previously watched them throw overboard.⁴ Despite this wealth of evidence, the call inevitably came into the *Farragut* from half-a-world away: release the pirates. After destroying their

¹ Hillary Rodham Clinton, “Announcement of Counter-Piracy Initiatives,” address presented in Washington, DC, April 15, 2009, U.S. State Department, accessed March 25, 2013.

² “EU NAVFOR Swedish Patrol Aircraft Locates UAE MV EVITA after Failed Pirate Attack,” news release, March 10, 2010, accessed March 25, 2013.

³ “Combined Maritime Forces Flagship Intercepts Somali Pirates,” news release, April 2, 2010.

⁴ Ibid.

supply vessel, or “mother ship”, the crew of the *Farragut* could only watch as the pirates were allowed to sail away in the remaining two skiffs – back to their homes and to presumably a life of piracy the next day. Such is the “catch and release” policy practiced far too often by naval forces in the seas around the Horn of Africa.

Although a longtime problem, piracy has exploded off the coast of East Africa in the past five years. Operating primarily out of ports in lawless Somalia, pirates harass merchant and passenger ships in the busy shipping lanes in the western Indian Ocean.⁵ Bearing little resemblance to the romantic, swashbuckling brigands of Hollywood, Somali pirates wreak havoc on the shipping industry. According to the most recent comprehensive estimate, the economic cost of Somali piracy is nearly \$7 billion dollars a year, with 80 percent of the losses borne by the shipping industry and 20 percent by governments worldwide.⁶ Truly an “enemy to all mankind,” pirates can be prosecuted under universal jurisdiction – meaning that any state can prosecute acts of piracy, even when such acts occur outside its territory and when none of its citizens are involved. Despite this robust tool against these international criminals, a “culture of impunity” reigns.⁷ According to a comprehensive report commissioned by the Secretary-General of the U.N., some 9 out of 10 captured pirates are released without facing prosecution.⁸

⁵ Henceforth, the term “Somali pirates” will be used to refer to the perpetrators of pirate attacks off the Horn of Africa. For more information on the individuals responsible for such attacks, see Chapter II. For a map of the geographic area in which Somali pirates target ships, see Appendix A.

⁶ Oceans Beyond Piracy, Anna Bowden, and Shikha Basnet, “The Economic Cost of Somali Piracy 2011” (One Earth Future Foundation, 2012). There is considerable debate on the total cost of Somali piracy, but experts agree that the losses are in the billions. For a more recent and more conservative estimate focusing on the shipping industry (~\$3 billion), see Timothy Besley, Thimo Fetzer, and Hannes Mueller, “The Welfare Cost of Lawlessness: Evidence from Somali Piracy” (London School of Economics, Oct. 1, 2012).

⁷ Yvonne Dutton, “Maritime Piracy and the Impunity Gap: Domestic Implementation of International Treaty Provisions,” 2012, in *Maritime Piracy and the Construction of Global Governance*, ed. Michael J. Struett, John D. Carlson, and Mark T. Nance, 71.

⁸ U.N. Secretary-General, *Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia*, 2-3, UN Doc. S/2011/30 (Jan. 25, 2011), [Henceforth, “Jack Lang Report”] para. 43.

While this deficiency no doubt stems from a combination of factors, chief among the impediments to prosecution is the evidentiary burden to prove that captured pirates are, indeed, pirates and not simply armed fishermen. In the current state of international law, it is difficult to legally prove such individuals are pirates unless caught in the act – which is a small window, especially since the aftermath of a successful attack often leads to a hijacking and ransom situation in which the perpetrators are able to walk – or sail – away freely. Furthermore, some states worry about pursuing such legal action. The risk of a failed prosecution includes the resulting asylum claims and civil suits by acquitted Somali nationals.⁹ Thus, prosecutions under universal jurisdiction only proceed when the evidence is overwhelming – and even then only where there is a state that has incorporated the legal doctrine of universal jurisdiction into its domestic legal system.

Encouragingly, 2012 brought a precipitous drop in Somali piracy. Of the 297 pirate attacks and 28 hijackings worldwide last year, only 75 involved Somali pirates, who captured a total of 250 hostages. This represents nearly a 30 percent drop since 2009.¹⁰ While seemingly the result of increased naval patrols in the area, the use of privately contracted armed security personnel (PCASP), and the increased adherence to industry-sanctioned Best Management Practices, exploring the exact cause of this reduction in piracy is beyond the scope of this thesis. Despite this reduction in successful piracy attacks, the underlying difficulty remains of what to do with pirates once they are captured – other than simply releasing them to harass more ships at a later date. Further,

⁹ For more information on the intersection between the prosecution of Somali piracy under universal jurisdiction and human rights concerns, see Saoirse de Bont, “Prosecuting Pirates and Upholding Human Rights Law: Taking Perspective” (working paper, One Earth Future Foundation, September 2010).

¹⁰ Figures courtesy of the International Maritime Bureau’s Reporting Centre. For constantly-updated figures on piracy attacks, as well as historical data, see: “Piracy & Armed Robbery News & Figures,” IMB Reporting Centre, <http://www.icc-ccs.org/piracy-reporting-centre/piracynewsfigures>.

even if finding a defenseless ship is more difficult due to these preemptive measures, it does not mean that pirates in the area will simply cease their efforts entirely.

Piracy certainly poses a grave threat in other parts of the world as well, including the emerging activity in the Gulf of Guinea. Yet, the ongoing internal strife and poor economic prospects for young Somalis portends the persistence of piracy and criminal activity in Somalia. The inability of the federal government and local governments within Somalia to enforce the rule of law and deter piracy means that piracy in Somalia uniquely necessitates strong action by the international community. In particular, the unparalleled ability of pirates to find sanctuary and support on land distinguishes the case in Somalia.

Furthermore, even as Somali piracy is curbed in part by preventive military measures, the legal challenges to enforcement remain – making the case of Somali piracy uniquely suited for examining the legal impediments to the successful and consistent prosecutions of maritime piracy. Of all places, more flexible standards of evidence would be a boon for international efforts targeting pirates off the Horn of Africa, both under domestic and universal jurisdiction prosecutions. Beyond that, successful reforms could have ramifications for anti-piracy efforts around the globe.

This thesis argues that the current state of international law remains ill-equipped to contest the continuing scourge of piracy off the coast of Somalia. Universal jurisdiction is an incredibly powerful weapon with which to combat piracy; yet, its efficacy is dependent on its wielder. This paper joins the myriad of previous calls for states to codify maritime piracy as a universal jurisdiction crime under their domestic laws and prosecute it as such. At the same time, this weapon can and should be

sharpened. States should also amend their domestic laws to include “equipment articles” that will facilitate piracy prosecutions.

While not defining a new crime, equipment articles would clarify elements of proof for the existing crime of piracy or, more specifically, “operating a pirate vessel” under established international law. These additional statutes, codified under domestic laws, would delineate certain circumstances as evidence leading to a presumption of pirate activity, such as individuals on certain types of vessels, in possession of grappling hooks, grenade launchers, et al., in areas plagued by piracy, etc. Such laws have historical precedent in maritime law to combat other international criminal enterprises, such as the transatlantic slave trade and the illegal drug trade. The addition of equipment articles to domestic law would ease the expected cost of pursuing prosecutions under universal jurisdiction and promote greater enforcement by all states.

While this thesis engages some quantitative data in explaining the problem of Somali piracy and its proposed solutions, this work is at its core a qualitative analysis, exploring the current limitations to impeding piracy and arguing how the capacity to deter piracy can be augmented. This thesis begins by establishing the current state of international law with respect to the crime of piracy and by explaining the mechanism of universal jurisdiction. Chapter II elucidates the current piracy problem off of the Horn of Africa by explaining its foundations and describing the nature of pirate attacks. Next, this thesis outlines the current operations addressing the Somali piracy issue and relates the state of international prosecutions. Chapter IV examines domestic legislation incorporating universal jurisdiction, noting the deficiencies in certain national laws and explaining the elements of piracy that domestic laws should address. Chapter V provides

an overview of equipment articles, their historical basis, and the best mechanism for their implementation. The penultimate chapter will analyze the expected diplomatic support for equipment articles and the projected implications of their use. Lastly, this thesis will conclude with a summation of the arguments herein and with a few parting thoughts on the wider implications of such an “antiquated” solution to a very modern occurrence of a supposedly “17th century crime.”

Chapter I: THE INTERNATIONAL LEGAL LANDSCAPE

“For a pirate is not counted as an enemy proper, but is the common enemy of all.”¹¹
– Cicero

Pirates are not born. Whether they are “made” is up for debate. Even if one is said to be “born into” a life of piracy, pirates are a class defined not by inherent characteristics but by their behavior. Like the terrorist and the guerilla operating outside the law – and even the sailor and the warrior within the law – pirates are best described by the activity that determines their title: piracy. Beyond that, piracy is a way of life; unlike a “murderer” – or even a “mutineer” – a pirate is not defined by a singular event, allowing for the existence of ex-pirates and those who have resorted to piratical acts on occasion. Historically, pirates come from all backgrounds – joined together by their actions and the international condemnation, both moral and legal, of their behavior.

That pirates are connected and even identified by their deeds and not their motivations is a crucial distinction, as is noting that piracy is nearly always a collaborative activity. Hijacking a commercial ship would be exceedingly difficult for a lone individual. Further, unlike murder, as an example, piracy cannot just be a singular event and actually requires prior planning and coordination. While it might be a coincidence that one cannot spell *conspiracy* without *piracy*, the latter lends itself to collaborative criminal behavior. This fact gives all the more reason that the elements of piracy leading up to a hijacking be taken into account when judging piratical behavior.

¹¹ Harry D. Gould, “Cicero's Ghost: Rethinking the Social Construction of Piracy,” in *Maritime Piracy and the Construction of Global Governance*, ed. Michael J. Struett, Jon D. Carlson, and Mark T. Nance (New York: Routledge, 2013), 25.

In order to assess the existence piracy off of the Horn of Africa and the legal remedies to combat it, it is important to first establish the definition of piracy from an international legal perspective. Elucidating the current definition of piracy is essential to explaining how states exercise jurisdiction over captured pirates and are able to prosecute them for their “universal” crime. In turn, this explanation will demonstrate the necessity of additional domestic laws to criminalize and deter piracy.

This chapter will first examine UNCLOS, the current basis for defining piracy under customary international law, and the powers and obligations it extends to the international community. This will be followed by an outline of the other most relevant source of authority for international prosecutions of piracy: the SUA Convention. After describing the international legal mechanism of universal jurisdiction, by which jurisdiction over crimes at the international level are transferred to states, this chapter will conclude by highlighting the inefficacy of the current system of universal jurisdiction.

U.N. CONVENTION ON THE LAW OF THE SEA (UNCLOS)

Of all international treaties on the subject of the high seas and maritime issues, the 1982 United Nations Convention on the Law of the Sea (UNCLOS) is chief among them. In its preamble, UNCLOS describes itself as a comprehensive “legal order for the seas and oceans.”¹² However, UNCLOS transferred the articles on piracy verbatim from the prior 1958 Convention on the High Seas to constitute Articles 100-107. This includes a

¹² United Nations Convention on the Law of the Sea, Dec. 10, 1982, no. 31363, U.N.T.S. 397 [hereafter “UNCLOS”].

mandate in Article 100 compelling all states to “cooperate to the fullest possible extent in the repression of piracy.”¹³ The term “piracy” is defined by Article 101 as:

- (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).

UNCLOS provides a very liberal definition of piracy, including both successful acts of piracy and those acts inciting or facilitating piracy. Yet, there seem to be some limiting factors on the definition of piracy, namely its occurrence only on “the high seas,” its motivation for “private ends,” and its necessity of the involvement of two ships.¹⁴ Further, the central provisions of UNCLOS provide obstacles to the prosecution of piracy. A separate article in UNCLOS extends a nation’s territorial seas to twelve miles from the coast; this means all piracy occurring within this zone to *not* be “occurring on the high seas.”¹⁵ However, this limitation is not fatal for the prosecutions of Somali piracy, as nearly all piracy attacks by Somali pirates against merchant vessels occur outside of the state’s twelve-mile limit.¹⁶

¹³ UNCLOS, Article 100. For a reproduction of the articles related to piracy, see Appendix B.

¹⁴ The limitations constitute the three reported “gaps” in the UNCLOS definition. The implications of these supposed gaps are tangential to this thesis. However, more information on the subject, as well as the proposed resolution of the latter two, can be found in: Michael Bahar, “Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations,” *Vanderbilt Journal of Transnational Law* 40 (2007): 16-40.

¹⁵ UNCLOS, Article 3.

¹⁶ International Maritime Organization, comp., *Reports on Acts of Piracy and Armed Robbery against Ships: Annual Report 2011*, MSC.4/Circ. 180 (n.p.: IMO, 2012), Annex 2, 1-2.

Another crucial provision of the definition of piracy within UNCLOS is Article 103. In providing a “definition of a pirate ship or aircraft,” it states:

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.¹⁷

While seemingly an important provision in simply defining a pirate ship for administrative purposes, this article can actually be critical in the prosecution of piracy. Article 101(b) establishes that one is guilty of piracy through “any act of voluntary participation in the operation” of a pirate ship. Thus, proving that a ship is, in fact, a pirate ship – under the Article 103 definition – can be an essential element of a piracy prosecution. Therefore, the circumstances and evidence regarding not just piratical activities but the characteristics of alleged pirate vessels are of paramount importance based on the definition of piracy provided by UNCLOS.

Article 105 is also particularly relevant to the prosecution of piracy under international law. This article, on the “seizure of a pirate ship or aircraft,” states:

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.¹⁸

Thus, while UNCLOS defines the crime of piracy in the previous articles, it leaves it up to the states to interpret the language and apply it. It is through Article 105 that universal

¹⁷ UNCLOS, Article 103.

¹⁸ UNCLOS, Article 105.

jurisdiction is established (explained below). However, the language is permissive, not prescriptive.¹⁹ In spite of this power and authority, Article 105 does not obligate a nation to prosecute any crime it comes across – apart from the general obligation outlined in Article 100 (explained above). Thus, few states ultimately accept the responsibility given in Article 105 to prosecute pirates under international law. Rather, some states instead opt to transfer pirates to other nations for prosecution. Article 105 is unclear on this issue, leading to varying interpretations and scholarly debate on the issue.²⁰

Finally, Article 110 provides the authorization for the use of force against suspected pirate ships, providing that a “reasonable ground for suspecting that... a ship is engaged in piracy” allows the crew of a warship to board a vessel and perform a search.²¹

SUA CONVENTION

In 1985, Palestinian terrorists hijacked the *Achille Lauro*, an Italian cruise ship, killing one person and terrorizing the passengers. In response, 156 nations drafted and ratified the Suppression of Unlawful Acts against the Safety of Maritime Navigation (or the SUA Convention).²² While it was written primarily to counter maritime terrorism, the SUA Convention, and the 2005 Protocol that strengthens it, also further expounds on the crime of piracy and the international legal status of pirates.²³ The SUA Convention does not contain the limiting language of UNCLOS, such as the “private ends” and “two

¹⁹ de Bont, “Prosecuting Pirates and Upholding Human Rights Law: Taking Perspective,” 7.

²⁰ For more on this debate, see Eugene Kontorovich, “A Guantanamo on the Sea: The Difficulties of Prosecuting Pirates and Terrorists,” *California Law Review* 98, no. 1 (2010): 270-272.

²¹ UNCLOS, Article 110.

²² Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221, 27 I.L.M. 668 (1998) [hereafter “SUA Convention”].

²³ For more information on the impetus and scope of the SUA Convention, see: Malvina Halberstam, “Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety,” *The American Journal of International Law* 82, no. 2 (April 1988).

ships” requirements, instead focusing on a very broad prohibition on all forms of violence against ships and their crews. Moreover, the document applies to violence against ships in territorial waters as well, while UNCLOS only applies to acts on “the high seas.”²⁴

Notably, the Convention mandates the prosecution or extradition of arrested piracy suspects. Yet, the text does not obligate a state to formally arrest every suspect, allowing for the avoidance of this mandate. Moreover, as a treaty between nations, the provisions are only binding on signatories of the convention – not all nations. Crucially, the SUA Convention, while an international treaty, is not considered a source of customary international law and does not grant states universal jurisdiction over acts of piracy under its definition as does UNCLOS. This distinction is vital, and it demonstrates the need for states to adopt sufficient definitions of piracy under their domestic laws – a fact that will be explained in greater detail in Chapter IV.

UNIVERSAL JURISDICTION

In International Law, or under any system for that matter, a state must have some connection to a crime in order to have jurisdiction over the offense and be able to legally punish a perpetrator for his behavior. International law recognizes several distinct bases of jurisdiction, which are:

- The *principle of territoriality*, which determines jurisdiction by where the crime is committed;
- The *principle of nationality*, which determines jurisdiction by the nationality of the person(s) committing the crime;
- The *passive personality principle*, which determines jurisdiction by the nationality of the person(s) injured by the crime;

²⁴ SUA Convention, Article 3.

- The *protective principle*, which determines jurisdiction by the national interest that is injured by the crime;
- The *universality principle*, which determines jurisdiction by the current custody of the person(s) committing the crime.²⁵

Most pirates captured off of the Horn of Africa are apprehended in international waters, meaning *territoriality* does not apply. Only the nation of Somalia would have jurisdiction over pirates from its soil under the *nationality* principle, yet the nation has continued to demonstrate an inability to police its shores and citizens. In contrast, many nations are able to prosecute piracy under the principle of *personality*. When a nation's own citizens have been victimized by pirates, governments have often seen fit to pursue prosecutions against captured pirates, even going as far as to accept pirates captured by another nation and incurring the expense of transporting suspected pirates to their soil for prosecution.²⁶

Protective jurisdiction is another possible vehicle for states to pursue prosecution against pirates in international waters. The United States has used protective jurisdiction in maritime law against ships believed to be smuggling drugs, even against ships from foreign nations and in international waters, simply on the basis of the perceived threat drug trafficking poses to the United States.²⁷ In fact, protective jurisdiction has also been applied in piracy cases, particularly by the United States; however, these cases occurred

²⁵ For more information on these distinctions, as well as their origins, see: Maria Gavouneli, *Functional Jurisdiction in the Law of the Sea*, Publications on Ocean Development (Leiden, Netherlands: Martinus Nijhoff Publishers, 2007), Ch.1.

²⁶ Dutton, "Maritime Piracy and the Impunity Gap," 76-77.

²⁷ See *U.S. v. Peterson*, 812 F.2d 486, 494 (9th Cir. 1987) and *United States v. Marino-Garcia*, 679 F.2d 1373, 1380 (11th Cir. 1982). For more on the U.S. use of protective jurisdiction in drug trafficking cases, see: Eugene Kontorovich, "Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction Over Drug Crimes," *Minnesota Law Review* 93 (Winter 2009): 1229-31.

in the early 19th century – long before the advent of UNCLOS and its establishment of universal jurisdiction over piracy.²⁸

Furthermore, the extent and applicability of protective jurisdiction remains ambiguous, especially since the perceived harm of piracy off the Horn of Africa would conceivably be different depending on the country involved. For example, nations such as Kenya or the Seychelles have a much stronger basis for protective jurisdiction than the United States, even though the latter has many more warships in the area to capture pirates. Protective jurisdiction remains a controversial aspect of international law, and its extension to the instances of Somali pirates has yet to be fully explored.²⁹

In contrast, universal jurisdiction functions as a much clearer basis for prosecuting Somali pirates, as evidenced by successful convictions in a number of countries. Universal jurisdiction specifically exists to allow the global community to ensure the punishment of serious crimes that are deemed a threat to all. Universal jurisdiction allows any state to prosecute an act of piracy. Under customary international law, pirates have been deemed *hostis humani generis* – or “an enemy of all mankind” – for centuries.³⁰ Piracy as a universal crime is much older than the concept of universal jurisdiction itself.³¹

Despite universal condemnation of piracy, the international record on universal jurisdiction to combat piracy as a crime is abysmal. Even with the liberal scope and

²⁸ See *U.S. v. Furlong*, 18 U.S. 184, 185-86 (1820) and *U.S. v. Smith*, 18 U.S. 153, 154 (1820).

²⁹ For more information on the ambiguity and conceptual difficulties of protective jurisdiction, see Noah Bialostozky, “Protective Jurisdiction as a Circumstance Precluding Wrongfulness” (working paper, University of Cambridge, June 2012).

³⁰ M. Cherif Bassiouni, “The History of Universal Jurisdiction and Its Place in International Law,” in *Universal Jurisdiction: National Courts And the Prosecution of Serious Crimes Under International Law*, ed. Stephen Macedo (Philadelphia, PA: University of Pennsylvania Press, 2004).

³¹ Eugene Kontorovich, “The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation,” *Harvard International Law Journal* 45, no. 1 (Winter 2004): 190.

jurisdiction provided by the piracy articles in UNCLOS, universal jurisdiction has been rarely used. For example, the United States has only attempted one prosecution under universal jurisdiction in connection with Somali piracy, and it is still underway.³² In fact, a 2010 study found that between 1998 and 2007 only four out of 754 reported piracy attacks in international waters resulted in universal jurisdiction prosecutions.³³ While some nations prosecute captured pirates, almost always they have relied on the passive personality principle because their citizens were victims in the case; this allowed them to prosecute pirates directly under domestic law.³⁴

The reasons for this neglect are two-fold. The first is jurisdictional. To prosecute a pirate under universal jurisdiction, a state must simply have custody of the accused and be willing to charge him under its domestic laws against piracy. However, these laws must *exist*. Further, that the crime of piracy exists in customary international law, as now prescribed by UNCLOS Article 101, gives every state jurisdiction over piracy, but a state must also be able to exercise this jurisdiction under its own laws.³⁵ This ability can be achieved by enacting legislation authorizing domestic courts to directly apply and interpret international law in domestic court cases, by legislation incorporating international law into domestic law, or a mixture of the two. The merits of these methods will be contrasted in the Chapter III.

The other reason universal jurisdiction too often lies dormant is practical. Nations will decline to prosecute if they are not confident that a pirate they take custody of will

³² *United States v. Ali* (D.D.C. July 13, 2012).

³³ Eugene Kontorovich and Steven E. Art, "An Empirical Examination of Universal Jurisdiction for Piracy," *American Journal of International Law* 104 (March 2010): 32-33.

³⁴ Dutton, *Maritime Piracy and the Impunity Gap*, 76.

³⁵ UNCLOS is considered a source of international law for the 165 states that have ratified it. However, it is also considered a source of customary international law, meaning it is a source of international law even for states that have not ratified the treaty. This includes the United States, who is a signatory of the treaty but has yet to ratify it.

indeed be convicted – and that the cost of extradition, trial, and imprisonment is not more trouble than it is worth. The logistical and political considerations that go into such decisions are explored in greater detail in Chapter III. Nevertheless, that states refrain from exercising universal jurisdiction to prosecute pirates in their custody, whether willfully or otherwise, has led to a collective action problem; if states only prosecute piracy cases in which their citizens or interests are directly threatened, then many captured pirates will be set free, able to return to pirating with a renewed sense of impunity. It is this recurrence of “catch and release” that this thesis in part tries to reverse, by providing for more states to pursue prosecutions under universal jurisdiction and making the exercise of that jurisdiction a more attractive option by expanding the evidence admissible in prosecutions.

CONCLUSION

This chapter has illuminated the legal foundations for piracy prosecutions under international law, in particular explaining the exercise of universal jurisdiction and the importance of UNCLOS as the textual basis for the modern crime of piracy under international law. Despite this international framework, “catch and release” prevails. One international legal commentator, John Bellish, notes that prosecutions under universal jurisdiction suffer from a “tragedy of the commons” dilemma, in that all nations would benefit from the deterrent effect of greater piracy prosecutions but individual states do not want to incur the possible cost of failed prosecutions.³⁶ Regardless, it is the “cost” side of this equation that later chapters of this thesis will address, particularly by

³⁶ Jon S. Bellish, “A High Seas Requirement for Inciters and Intentional Facilitators of Piracy *Jure Gentium* and Its (Lack of) Implications for Impunity” (working paper, February 27, 2013), 41- 47.

expanding the number of nations eligible to prosecute pirates and by increasing the likelihood that prosecutions end in conviction. The exact extent that the “tragedy of the commons” socio-economic metaphor applies to Somali piracy can be and has been debated elsewhere; regardless, the current environment seems a far cry from what Cicero had in mind when he proclaimed piracy a “common enemy of all.”³⁷

³⁷ For more on this ongoing debate, see *Ibid.*, note 158.

Chapter II: THE PIRACY PROBLEM

“In an honest service there is thin commons, low wages, and hard labor; in [piracy], plenty and satiety, pleasure and ease, liberty and power; and who would not balance creditor on this side, when all the hazard that is run for it, at worst, is only a sour look or two at choking. No, a merry life and a short one shall be my motto...”³⁸

– Captain Bartholomew “Black Bart” Roberts

Regarding the scourge of piracy off the coast of Somalia, it is a popular mantra to proclaim that while the problem is at sea, the “solution is on land.”³⁹ This assertion is an apt one, in that it highlights the undeniable fact that the roots of piracy run very deep and ultimately lead back to shore. One does not decide to become a pirate one afternoon on a whim and then immediately steer towards the nearest oil tanker. Yet, the roots of piracy are also like that of a tree in that they spread widely – grounded in a range of different areas and issues. The decision to engage in piracy, especially contemporary maritime piracy, is a complex equation; factors run the gamut from the degree of real economic necessity, to the opportunity cost of legitimate endeavors, to the calculated physical risk, to the desire of the “merry life” espoused by Black Bart. Altering any one of the variables in the equation will adjust the decision of potential and current pirates to set out from the Somali coastland with the equipment and intention to commit piracy. To say “the solution” to piracy is on land is a misconception; there are a myriad of possible solutions to the many variables that are encouraging piracy off the coast of Somalia – or at the very least not deterring it sufficiently.

³⁸ Terry Breverton, *Black Bart Roberts: The Greatest Pirate of Them All* (Gretna, LA: Pelican Publishing, 2004), 73.

³⁹ For examples of academic references to this argument, see Jay Bahadur, *Deadly Waters: Inside the Hidden World of Somalia's Pirates* (London, UK: Profile, 2011), 247 and Andrew Luszyk, “Somali Piracy: The Solution is on Land, not at Sea,” *The Globe and Mail*, July 21, 2011. For policy declarations to this effect, see Andrew Shapiro, “Piracy Off the Horn of Africa,” address presented at Center for American Progress, Washington, DC, March 27, 2012.

One such factor is the slim chance of punishment, due to the unwillingness of more nations to exercise universal jurisdiction to prosecute captured pirates. While this problem and its solutions are not strictly on Somali soil – and perhaps could be said to take place in courtrooms and policy meetings thousands of miles away – elements of the problem are both on the land and the sea right off of the coast of Africa. Indeed, the greater goal is to prevent individuals from leaving the beaches of Somalia with the intent to commit piracy.

In order to understand the necessity of domestic criminalization of piracy and of the benefits of legislation implementing equipment articles in the fight against piracy, it is important to understand how maritime piracy operates off the Horn of Africa and the reasons it occurs at all. This chapter will first provide a brief history of Somalia and explain the political and cultural characteristics on land that allows for pirates to operate from Somali shores with impunity. Next, this chapter will explain the particular genesis of Somali piracy, its escalation into a modern epidemic, and the greater societal organization that facilitates the piracy operations. Lastly, this chapter will describe the mechanics of piracy missions and of specific attacks on ships in order to provide the context necessary to judge the applicability of equipment articles.

THE ROOTS OF DISORDER

Somalia, as a state, is a cliché. Somalia is often paraded as the prototypical “failed state” – a place where Western interventionism failed and the country wallows in poverty as a result. In fact, according to the “Failed States Index” published annually by the Fund for Peace in collaboration with the magazine *Foreign Policy*, Somalia received 2012’s

highest ranking as a failed state – for the fifth year in a row.⁴⁰ This included an abysmal 10/10 ranking of the failure of the state’s “Security Apparatus.” Many observers lament the status of the government in Somalia, noting that the country had a stable, albeit authoritarian, central government for the first few decades of existence.⁴¹ However, in examining the history of the modern Somali nation, one can see the elements of a “failed” state even during the supposed “stable” regime of President and Dictator Mohamed Siad Barre from 1979 to 1991.⁴² A strong central government has always been an elusive proposition for Somalia.

Many of the challenges of nation-building in Somalia can be attributed to the robust system of lineage-based clans that dominates Somali society. As these clans are the chief source of identity and security within Somalia, recognizing their role is crucial to understanding the genesis of Somali piracy. While Somalia is largely ethnically homogenous, it is fractured by major clan families: the Dir, Isaaq, Haqiye, Darood, and the Rahanweyn – of which the Digil is a major sub-group. While the first four are pastoral groups by nature, the latter two are farmers or agro-pastoralists by tradition and are known collectively as the “Sab.”⁴³ Roughly inhabiting separate sections of Somalia, these “upper –level clans” are also geographically split as well. Northern Somalia is divided between the Darood, the Dir, and the Isaaq; the borders of the autonomous region of Somaliland lie approximately along those of the Isaaq. Puntland is inhabited by

⁴⁰ “The Failed States Index 2012,” The Fund for Peace, <http://ffp.statesindex.org/rankings-2012-sortable>.

⁴¹ Martin N. Murphy, *Somalia: The New Barbary? Piracy and Islam in the Horn of Africa* (London, UK: C. Hurst & Co., 2011), 5.

⁴² Characteristics and criteria for judging a “failed state” are derived from the metrics used by the Failed States Index. For more information, see note 40 of this thesis.

⁴³ There are slight variations in the names and spelling of the clans when translated into English. For a more comprehensive explanation of the breakdown of Somali clans, their geography, and their historical relationships, see: I. M. Lewis, *Understanding Somalia and Somaliland* (New York, NY: Columbia University Press, 2008), Ch. 1.

elements of the Darood. Southern Somalia has experienced such a large degree of migration and resettlement that the distinct clan areas have blurred to a large degree, with the Rahanweyn still situated as the principal group.⁴⁴

The criteria for the divisions of clans are genealogical, meaning one is born into a distinct clan, which are reinforced by strong familial ties. Yet, the major clans are not the only divisions, as they are further broken down into smaller entities and other sub-clans. Anthropologists note that Somali society is still very individualistic and decentralized, with family units as the most important groupings.⁴⁵ Rather, clans are relied upon primarily for security and legal purposes; these groups serve as a collection of “interlocking, emergent groupings” mobilized at different levels depending on the size of the conflict.⁴⁶

More than one commentator has likened this segmentary political system to the Arab Bedouin saying: I against my brother, my brother and I against my father, my father’s household against my uncle’s household, our two households against the rest of our kin, our kin against our clan, our clan against other clans, and our clans against the world.⁴⁷ Thus, this segmentation leads to a constant shifting of alliances and loyalties, lending to the aphorism that, in Somalia, “one does not have a permanent enemy or a permanent friend – only a permanent context.”⁴⁸

The fluidity of alliances is extended to societal justice as well. Both customary law within Somalia, *xeer*, and the system of blood re-payment, *diya*, operate through the

⁴⁴ Murphy, *Somalia: The New Barbary*, 41.

⁴⁵ *Ibid.*, 42.

⁴⁶ *Ibid.*, 39.

⁴⁷ There are many variations and extensions of this saying. For an example of its application to Somali society, see I. M. Lewis, *A Pastoral Democracy: A Study of Pastoralism and Politics among the Northern Somali of the Horn of Africa* (Oxford University Press, 1961; Oxford, UK: International African Institute, 1999), xi.

⁴⁸ Murphy, *Somalia: The New Barbary*, 40.

clan system. *Xeer* more aptly refers to customary procedures and cultural practices that are founded on longstanding contractual and societal agreements.⁴⁹ In order to prevent feuds and escalating conflict between families and sub-clans, *xeer* and *diya* are employed to resolve conflicts. For example, restitution of one hundred camels (approximately \$20,000) is a typical demand for the murder of a man.⁵⁰ However, this repayment is traditionally only backed by the threat of retaliatory force – whether at the familial level or higher. Therefore, strong groups could refuse to pay weaker groups, who could not prevail in a greater conflict and thus would not force the issue.⁵¹

This entire system of compensation for injuries is rooted in Islamic *sharia* law.⁵² While clan identity remains the dominant societal force in Somalia, Islam is an additional, robust element of Somali culture that cuts across clan lines. Thus, religious leaders typically only hold authority within their respective clans, except in instances when they are able to help mediate disputes based on *sharia* law.⁵³ Islam does have the potential to act as a greater unifying force, seen through the more recent success of political movements such the Islamic Courts Union (ICU) and the militant Islamist group al-Shabaab. Yet, as Martin Murphy of the Atlantic Council notes, any movement to unify the entire nation on the basis of Islamic faith, or otherwise, is conditional on the effect it will have on clan interests and allegiances.⁵⁴ Compared to the influence of clans, Islam in Somalia is considered “a veil lightly worn.”⁵⁵

⁴⁹ I.M. Lewis, *A Pastoral Democracy*, 162. Note: *Xeer* is sometimes written as *heer*.

⁵⁰ Bahadur, *Deadly Waters*, 27.

⁵¹ I.M. Lewis, *A Pastoral Democracy*, 163. For more information on contracts within *xeer*, see Ch. 6.

⁵² *Ibid.*, 162-63.

⁵³ Murphy, *Somalia: The New Barbary*, 42.

⁵⁴ *Ibid.*

⁵⁵ David Anderson, “Clan Identity and Islamic Identity in Somalia” (unpublished manuscript, The Centre for Security, Armed Forces and Society - Royal Military College of Canada, March 2012), 15-30.

For most of Somali history, this dominant clan structure was more than adequate to serve the predominantly nomadic pastoralists who inhabited the region.⁵⁶ Colonial rule treated the clan system very differently. In the British territory of modern day Somaliland, the largely nomadic clans persisted under a policy of salutary neglect; in Italian-administered territory to the east and south, clans were more heavily involved in the politics of the Italian authorities and engaged with them and their ambitious economic plans for the region. Britain and Italy both granted independence to their holdings in Somalia in 1960, and these territories combined almost immediately to form the Republic of Somalia. The idea of Pan-Somalism, including incorporation with Somali people in neighboring Djibouti, Ethiopia, and Kenya was popular among the majority of Somali citizens at the time; yet, divisions among the clans remained, sprouting pseudo-political parties representing the north and south regions.⁵⁷

The ultimate success or failure of the Republic of Somalia will never be known. In 1969, President Abdirashid Ali Shermanke was murdered by one of his own bodyguards, who justified the assassination as a member of a lineage that claimed to have been mistreated by the president.⁵⁸ In the resulting upheaval, Major General Mohamed Siad Barre seized control over the government in conjunction with the new Supreme Revolutionary Council (SRC), which declared him President. As the head of state, President Barre was initially extremely popular, especially through his ardent embrace of Pan-Somalism and his perceived rejection of Western imperialism and all “colonial

⁵⁶ I. M Lewis, *Understanding Somalia and Somaliland*, 3.

⁵⁷ Christopher L. Daniels, *Somali Piracy and Terrorism in the Horn of Africa*, Global Flashpoints (Lanham, MD: Scarecrow Press, 2012), 4-6.

⁵⁸ *Ibid.*, 12.

hangovers.”⁵⁹ This included installing an entirely new form of written Somali in place of Italian and English, which had dominated different regions of the nation.⁶⁰

Also in President Barre’s crosshairs was the clan-based identity of the Somali people. Barre blamed “tribalism” for the country’s lack of economic development, labeling it a “disease.”⁶¹ Tribalism was further denounced as a form of class-conflict in order to conform to the new government’s adoption of “scientific socialism” and its new status as a Soviet satellite. Barre’s purge included exerting control over Somalia’s massive nomadic population. The government resettled 140,000 pastoralists to separate them from their tribal homelands.⁶² These people were encouraged to take up agriculture and even fishing – an alien activity for traditional Somali pastoralists.⁶³

Siad Barre ultimately badly overplayed his hand. Under his direction, Somalia invaded neighboring Ethiopia in 1977 in an attempt to expand “Greater Somalia” and annex the Ogaden region inhabited by a large ethnic Somali population.⁶⁴ The Soviet Union backed Ethiopia in the conflict, leading to a cessation in diplomatic relations between Somalia and its greatest political and financial benefactor as well as a disastrous military defeat. Substantially weakened, the Barre regime turned to the United States and the Arab League for foreign aid and support.⁶⁵ In the post-war turmoil, Barre also abandoned his socialist and Pan-Somali ideologies. Now on the defensive, Barre closed ranks and only retained advisors from his own clan, the Marehan, which is a subset of the

⁵⁹ Siad Barre, “A Heavy Responsibility,” speech, November 9, 1969, Jaalle Siyaad, last modified May 29, 2011.

⁶⁰ John L. Hirsch and Robert A. Crocker, *Somalia and Operation Restore Hope: Reflections on Peacemaking and Peacekeeping* (Washington, DC: United States Institute of Peace, 1995), 5.

⁶¹ Daniels, *Somali Piracy and Terrorism in the Horn of Africa*, 14.

⁶² Ibid.

⁶³ Jatin Dua and Ken Menkhaus, “The Context of Contemporary Piracy: The Case of Somalia,” *Journal of International Criminal Justice* 10 (2012): 753.

⁶⁴ Daniels, *Somali Piracy and Terrorism in the Horn of Africa*, 17.

⁶⁵ Murphy, *Somalia: The New Barbary*, 43-44.

Darood clan.⁶⁶ Further, the regime reignited tension between the clans, pitting one against another in order to weaken internal opposition to his regime.⁶⁷

Over the course of the 1980s Barre's regime became increasingly dictatorial, as he used the military and police force as his personal political instruments of oppression. Numerous clan-based insurgent groups formed to oppose the government that was increasingly dominated by Barre's Darood clan and limited to control over the southern part of the nation. An all-out civil war from 1988-92 led Barre to flee Somalia entirely, leading to the collapse of the national economy and the dissolution of his government and any semblance of national governance. In the resulting turmoil, the northwestern region (now called Somaliland) declared independence in 1991. The region struggled with self-governance at first, but in recent years it has made great strides and functions as a multi-party democracy with a bicameral legislature.⁶⁸ Yet, Somaliland lacks recognition as an independent nation in the international community and it currently functions as an autonomous region within Somalia.

The Puntland region in northeastern Somalia also reverted to quasi-autonomous rule at the outbreak of civil war. As in Somaliland, there is widespread distrust of federal administration and of any government based in the southern part of the nation after decades of neglect and exploitation at the hands of both the Italian and Barre governments.⁶⁹ In 1998, local leaders established the Puntland State of Somalia as the seat of a more localized administration. Puntland has maintained its status as an autonomous state within the state of Somalia, not declaring outright independence like

⁶⁶ Hirsch and Oakley, *Somalia and Operation Restore Hope*, 9.

⁶⁷ Terrence Lyons and Ahmed I. Samatar, *Somalia: State Collapse, Multilateral Intervention, and Strategies for Political Reconstruction* (Washington, DC: Brookings Institution, 1995), 15.

⁶⁸ Daniels, *Somali Piracy and Terrorism in the Horn of Africa*, 25-26.

⁶⁹ *Ibid.*

Somaliland. However, this status has come into question in recent years, with Puntland exerting increasing influence over administrative and even diplomatic duties – especially concerning international agreements and anti-piracy operations.

The fall of the Barre regime led to a collapse of the Somali national government from which it has still not recovered. In fact, the United States did not formally recognize any Somali regime from 1991 until 2013, despite over a dozen separate attempts to form a national government.⁷⁰ Prolonged civil war between many bitterly opposed factions created a highly militarized and fragmented nation dominated by violent militias and distrustful of foreign intervention. In this environment, a reliance on non-state actors for security and order reigns in many parts of the country. In short, the lasting effects of the failed Somali state left an environment dangerously ripe for terrorism and piracy.

THE GENESIS OF SOMALI PIRACY

There is no single date that one can easily point to and declare as the beginning of modern piracy in Somalia. If you ask the Somali pirates themselves, they will undoubtedly point to the appearance of foreign trawlers in Somali waters in the early 1990s that devastated the Somali fishing economy through harmful fishing techniques and the illegal dumping of toxic waste. As the narrative goes, Somali citizens were compelled to take matters into their own hands and turn to piracy as a deterrent to foreign vessels exploiting the waters of Somali's exclusive economic zone in the absence of a functioning national government to stop them.⁷¹

⁷⁰ Hillary Rodham Clinton, "Remarks With President of Somalia Hassan Sheikh Mohamud After Their Meeting," January 17, 2013.

⁷¹ Daniels, *Somali Piracy and Terrorism in the Horn of Africa*, 33-35.

However, piracy off the coast of Somalia, and particularly hijackings, began before the fall of the Barre regime. British colonial records mention piracy as a nuisance; yachts and fishing vessels were occasionally ransomed in the Gulf of Aden beginning in the 1950s. This activity intensified during the lawlessness of the fall of the Barre government, with some militia factions encouraging their members to act as a “coast guard” and intercept foreign aid vessels headed to Somalia.⁷² At this time, the United Nations was heavily involved in Somalia, attempting to both quell the continued violence between factions as well as deliver badly needed aid to the destitute Somali population. Much of this aid came via the ocean, making attractive targets for the militias operating along the coasts. Such aid came under heavy guard by United Nations forces to the frustration of would-be looters, many of whom turned to kidnapping.

By 1998, two-thirds of all maritime abductions in the world were taking place in the Gulf of Aden along Somalia’s northern coast.⁷³ Although the sophisticated pirate networks that have been seen in recent years were not yet in place, some of the pirate operations during this period were extremely well-organized and efficient. Yet, these operations were still smaller in scale and, instead of hijacking large merchant vessels, the operations could better be describe as “armed sea robberies” where pirates would rob a ship and its crew and then quickly leave.

That piracy has existed off the coast of Somalia for generations does not completely discount Somali claims of the connection between illegal fishing and the rise in pirate activity. There is significant evidence that the presence of foreign vessels, and

⁷² Murphy, *Somalia: The New Barbary*, 11.

⁷³ *Ibid.*, 14.

their illegal activity, did spur the rise of “defensive piracy” beginning the 1990s.⁷⁴

However, the extent that Somali fishermen turned to outright piracy and adopted hijacking as a replacement livelihood is less clear. Academia disagrees over the role of traditional Somali fishermen in the rise of the sophisticated piracy operations we see today – sometimes considered the inventors of the kidnap and ransom model while other times declared to be simple pawns to established warlords who hired their services as navigators and ship-handlers.⁷⁵

What is certain is that the “exploited fishermen” narrative as an explanation for Somali piracy is far from the full story. Despite having the longest coastline in Africa at over 2,000 miles, Somalia is not a nation of fishermen. Only the marginalized Bantu traditionally practiced both catching and eating fish, while ethnic Somalis favored the pastoral lifestyle. In fact, the term “fish-eater” is one of abuse and degradation in Somali society.⁷⁶ Even with the concerted efforts of the Barre regime to resettle pastoralists on the coast and supply them with equipment, the fishing industry always remained largely undeveloped in Somalia and only played a minor role in its economy.⁷⁷

J. Peter Pham, Director of the Michael S. Ansari Africa Center at the Atlantic Council and an expert on the development of Somali piracy, argues that the notion that the Somali pirates are just exploited fishermen is a ruse. Pham contends, “the idea that Somali [fishermen] went out of business because of foreign trawlers is laughable, because any Somali fisherman would’ve been out of business years ago for lack of

⁷⁴ For an exploration of the conflict between fishermen and foreign vessels operating in Somali waters, see: Horand Knaup, “Prelude to Piracy: The Poor Fishermen of Somalia,” *Spiegel* (Germany), Dec.4, 2008.

⁷⁵ Murphy, *Somalia: The New Barbary*, 24-25.

⁷⁶ I. M. Lewis, *Blood and Bone: The Call of Kinship in Somali Society* (Lawrenceville, NJ: Red Sea Press, 1994), 162.

⁷⁷ Murphy, *Somalia: The New Barbary*, 19.

customers.”⁷⁸ Rather, piracy is dominated by local warlords and a criminal enterprise based on the land, whose only connection to the ocean is the opportunity they see in the lucrative ransoming of merchant ships. However, these criminals are adept at more than just large-scale ship hijackings – they have also successfully hijacked the narrative of their own illicit behavior. As Pham succinctly explains:

You have to admire the Somalis. They came up with a storyline that they saw would win. It fits exactly into our preconceived notions of environmental impact, and we buy it lock, stock, and barrel without knowing that Somalis wouldn't touch a fish. The funny thing is, the trawlers have been long gone for most of the decade precisely because of the piracy... Now, it's just a nice justification to make us feel sorry for the poor pirate, when, in fact, it's purely criminal.⁷⁹

Even though Somalia's economy has not been historically linked to fishing, the environment is an integral factor in the economy. The pastoral nomads of northern Somalia rely on seasonal monsoons to replenish the pastoral lands and sustain the herds of livestock.⁸⁰ Beginning in 2002, northern Somalia experienced its worst drought in decades, devastating the herds and sending their owners fleeing to urban centers in search of subsistence. Hundreds of thousands of Somalis were threatened by the dry spell and the governments of both Somaliland and Puntland declared a humanitarian emergency.⁸¹

It is believed that the resulting widespread famine applied increased pressure to the marginal fishing industry as a source of sustenance.⁸² In turn, this led to overfishing off the Horn of Africa, which, in conjunction with illegal fishing off the coast by foreign vessels, led to a dramatic drop in the available catch for the Somali fishing industry.

⁷⁸ J. Peter Pham, interview, in *Pirate Alley: Commanding Task Force 151 off Somalia*, by Terry McKnight and Michael Hirsh (Annapolis, MD: Naval Institute Press, 2012), 49.

⁷⁹ *Ibid.*

⁸⁰ Bahadur, *Deadly Waters*, 39-40.

⁸¹ *Ibid.*

⁸² For one such explanation, see Jonathan R. Beloff, “How Piracy is Affecting Economic Development in Puntland, Somalia,” *Journal of Strategic Studies* 6, no. 1 (Spring 2013): 47.

Then, in December of 2004 – just as the region was recovering from the paralyzing drought – a massive tsunami rocked the coast of Indonesia. The resulting impact produced towering waves off the coast of Somalia that devastated the regional fishing industry; in Puntland alone, 75 percent of the fishing gear was destroyed beyond repair.⁸³ Furthermore, according to local reports from the region, the waves of the tsunami also brought toxic waste previously dumped further out to sea to the shores of Puntland. The veracity and overall effect of such contamination is unknown, but the reports served to further inflame the local population and exacerbate their already hostile view of the foreign shipping industry.⁸⁴

While the encroachment of foreign fishing vessels may not be a direct cause of the explosion of pirate activity, the abject poverty of the population is certainly an undeniable factor. Pirate activity began its most recent crescendo in 2006 – right after the devastation of the tsunami and coinciding with an economic downturn and the appearance of hyperinflation in Puntland. In early 2008, the Puntland government ran out of money to pay its security forces – leaving many poorly educated members of the police and army with little prospect for alternative employment. With increased poverty comes increased incentive to find any source of possible revenue – piracy included. Thus, it is not hard to believe that there may be many young men in Somalia who identify with Black Bart and the allure of piracy in contrast to “honest service” and its “thin commons, low wages, and hard labor.”

Yet, this logic should not lead one to believe that piracy develops organically, simply with the ebb and flow of economic fortunes. The current piracy off the coast of

⁸³ Bahadur, *Deadly Waters*, 40.

⁸⁴ *Ibid.*

Somalia is of such a sophisticated level that it is financed and run by experienced pirate networks based on land. The “pirates” that actually venture out into the waves are on the lowest rungs of tall ladders that constitute the various “pirate networks.”

And who is conspicuously absent from this ladder? The honest Somali fisherman: reaping none of the rewards of pirate activity while ceding his territory and good name to the criminals on land.

THE PIRATE NETWORK

When one proclaims that the real heart of the piracy problem is on land, one may not just be referring to the economic situation. Indeed, the actual seeds of every successful pirate attack are planted on land long before a “pirate action group” (PAG) approaches a ship.⁸⁵ Prior to 2006, there were five main piracy networks that operated out of Somalia’s ports.⁸⁶ These groups shared many common characteristics and tactics and are distinguished by the areas of coastline from which the pirates would launch their missions. Initially, the groups were directly connected to the local clan leaders as part of their influence over local society and security.

The most sophisticated and successful piracy network was the so-called “Somali Marines” based out of Harardhere⁸⁷ on the central coast between Mogadishu and Puntland. Reportedly the brainchild of Mohamed Abdi Hassan, a civil servant from the

⁸⁵ “Pirate Action Group” is not only an academic term; it has actually been accepted by some active pirates to describe their operations. For example, in August of 2012 a commercial ship owner and the owner’s insurance company received a memo “congratulating” them on the hijacking of his oil tanker and informing them it was under the control of Jamal’s Pirate Action Group (J.P.A.G.). For more information on the incident see: Adam Martin, “Pirate Memo to Ship Captains: ‘Congratulations, You’ve Been Hijacked!’” *The Atlantic Wire*. For a copy of the memo, see Appendix E.

⁸⁶ For more information on each of these groups, see “Pirates,” GlobalSecurity.org, <http://www.globalsecurity.org/military/world/para/pirates.htm>.

⁸⁷ Variations include “Hararardheere” or “Xarardheere.”

isolated fishing village of Harardhere, the Somali Marines would wreak havoc on merchant ships beginning in 2003. Known better by his nickname Afweyne (“Big Mouth”), Hassan is credited with envisioning the full potential of piracy in Somalia and for creating the current investment structure.⁸⁸

Afweyne recruited the most seasoned pirate veterans, including the famous Garad Mohammed and Boyah, to serve as instructors and lobbied local businessmen to serve as investors.⁸⁹ The group operated under a strict organizational ladder – employing a military-style hierarchy of admirals and captains in conjunction with a corporate side headed by Afweyne. Beyond that, the group functioned within the existing societal structure dominated by clan alliances, and its operation displays the importance of clan divisions within the world of Somali piracy. Regional expert Stig Hansen explains:

The Harardhere-Hobyo group was based on a clan alliance, mainly between the Suleiman clan [of the larger Hwiye clan] of Mudug and the Majerteen clan [of the larger Darood clan] of Puntland, not in the sense that the leaders of these clans formally decided to create pirate groups, but rather as an entrepreneurial venture between members of Afweyne’s clan, and the more veteran Majerteen pirate leaders. Later members of other clans with a local presence, especially the Saad clan, were to join, but Suleiman and Majerteen still dominate Somali piracy today. The organization of the Harardhere-Hobyo group illustrates how clan considerations influence Somali piracy...Clan considerations will always be an underlying factor influencing group dynamics within the various piracy groups.⁹⁰

What truly distinguished the Harardhere-Hobyo group, and Somali pirates more generally today, is their ability to use the Somali coast as a sanctuary and as a conduit for supplies. Under this system, Somali pirates can hold a ship and their crew hostage as long

⁸⁸ Stig Jarle Hansen, *Piracy in the greater Gulf of Aden: Myths, Misconceptions and Remedies* (n.p.: Norwegian Institute for Urban and Regional Research, 2009), 23-25.

⁸⁹ For more on both of these infamous Somali pirates, including extended interviews with them in Somalia, see Bahadur, *Deadly Waters*.

⁹⁰ Hansen, *Piracy in the Greater Gulf of Aden*, 25.

as necessary to obtain a ransom while receiving constant supplies from the shore.⁹¹ The Somali Marines did not discriminate in choosing targets, routinely hijacking vessels from the World Food Programme with aid destined for the nation.⁹² As a result of the organization's success, many similar groups appeared along the coast. Yet, the local population did not initially support the Somali Marines, even finding them "shaming."⁹³ Furthermore, the rise of the Islamic Courts Union (ICU) in 2006 and its fleeting hegemony over southern and central Somalia led to a reduction of piracy activity.⁹⁴

After the fall of the ICU and the resumption of rule by the Transitional Federal Government (TFG), piracy resumed with a vengeance. The outbreak beginning in 2006 also contained increased incentive for the would-be pirate. In contrast to the strict pay-out system of the Somali Marines, the proceeds of hijackings were now spread more equally among all individuals involved. Flush with cash from successful raids, the formerly lowly foot-soldiers of piracy now spent large sums of money in the urban centers on cars, houses, and the high-life. The more disciplined individuals use their acquired wealth to emigrate.⁹⁵ The influx of wealth has spurred the local economy – making piracy much more socially acceptable and even encouraged by some political and clan leaders.⁹⁶

This increased social acceptability has led to a much broader pool of individuals engaged in piracy. Likewise, this has led to a range of sophistication in the operations

⁹¹ Martin Murphy, "Piracy and the Exploitation of Sanctuary," 2008, in *Armed Groups: Studies in National Security, Counterterrorism, and Counterinsurgency*, ed. Jeffrey H. Norwitz (Newport, RI: Naval War College, 2008).

⁹² Bahadur, *Deadly Waters*, 34.

⁹³ Murphy, *Somalia: The New Barbary*, 32.

⁹⁴ Based on the brief success of the ICU in curbing piracy, some commentators have suggested that Islamist rule could "solve" the problem of piracy in nations such as Somalia. However, Somali pirates for the most part already see pirate activity as clearly operating outside their faith but instead decide to follow local norms that are more lax. For more analysis on the intersection of Islam and Somali piracy, see Bahadur, *Deadly Waters*, 46-51.

⁹⁵ McKnight and Hirsh, *Pirate Alley*, 41.

⁹⁶ Murphy, *Somalia: The New Barbary*, 111.

planned. Yet, any Somali pirates posing an actual threat are not going to be “six kids who found a motor and a boat and are out thinking they’re going to strike it rich.”⁹⁷ The increased heterogeneity of participants aside, a successful piracy operation requires planning and prior investment. This can come in the form of a single pirate investor fronting the necessary funds or a group of pirates pooling resources ahead of time.⁹⁸ However, by far the most popular tactic for large and successful ventures is organization and planning by a fundraiser, with a shareholder structure for expenses and profits.⁹⁹

Piracy is still predominantly financed by well-established operations that have crucial prior experience and the capital to re-invest.¹⁰⁰ Yet, start-up funds are increasingly originating from a wider range of sources. In 2009 an actual piracy “stock exchange” opened in Harardhere. As one resident states, “We decided to set up this stock exchange...The shares are open to all and everybody can take part, whether personally at sea or on land by providing cash, weapons or useful materials...we've made piracy a community activity.”¹⁰¹

Similar systems are functioning in other pirate havens, where community members can walk-up to representatives of the established gangs and submit cash, supplies, and even weapons in exchange for a share in the next operation. While the monetary support is useful, the political and sociological ramifications are more far-reaching. The ability to buy shares leads to a “broader societal buy-in” in which the pirate culture is more likely to be tolerated.¹⁰²

⁹⁷ Pham, interview, in *Pirate Alley*: 46.

⁹⁸ Hansen, *Piracy in the greater Gulf of Aden*, 35.

⁹⁹ McKnight and Hirsh, *Pirate Alley*, 46-47.

¹⁰⁰ Ibid.

¹⁰¹ Mohamed Ahmed, “Somali Sea Gangs Lure Investors at Pirate Lair,” *Reuters*, December 1, 2009.

¹⁰² Pham, in *Pirate Alley*, 47.

There are additional opportunities for local citizens to become indirectly involved with piracy. Any time a hijacked ship anchors off the coast while ransom negotiations occur, the pirates and the hostages need sustenance and supplies; for almost all pirates this includes *khat* – an amphetamine-like stimulant whose leaves are chewed by many native Somalis as a social drug.¹⁰³ Local citizens are able to supply the hijacked ships from the shore, usually greatly marking up prices for basic provisions and *khat*. Thus, coastal communities can become connected to the piracy industry, even if their town does not serve as a pirate haven but just happens to be near an anchored ship.

That the pirates on a captured ship are charged highly inflated prices by local suppliers usually does not pose a problem, as supplies are provided on credit against the likely millions of dollars a large merchant vessel will claim via ransom. In fact, the pirates pass along the costs directly to the shipping companies – in some cases even with itemized statements with expenses listed – including *khat*.¹⁰⁴ The finances of an operation are often managed by a committee that organizes and structures all of the costs. The start-up costs for an operation can vary a great deal, especially when smaller low-level schemes are included; a smaller operation requires as little as \$6,000 up front, while a sophisticated piracy operation usually calls for around \$30,000.¹⁰⁵

Once a ship is captured by pirates, many more professionals become involved in the operation. This includes cooks, accountants, interpreters, additional guards for the hostages, and negotiators. Because of the language skills and industry knowledge necessary to effectively negotiate with shipping companies for the return of their crews,

¹⁰³ Bahadur, *Deadly Waters*, 90-91.

¹⁰⁴ Pham, interview, in *Pirate Alley*, 51.

¹⁰⁵ Rob Walker, “Inside Story of Somali Pirate Attack,” *BBC*, June 4, 2009. For a comprehensive breakdown of an entire piracy operation, from planning to the final successful pay-out, see the example of the MV *Victoria* in Bahadur, *Deadly Waters*, 223-33.

vessels, and cargo, piracy negotiation has become a lucrative side-profession for educated and multilingual Somalis and Somali ex-patriots.¹⁰⁶ With the “professionalization” of the ransom business, negotiations are typically conducted out of London or Dubai, where many of the shipping companies and maritime insurance corporations are based.¹⁰⁷

Over the past several years, pirate groups have become increasingly stubborn in their ransom demands. No longer content to be talked down to a smaller figure in the hundreds of thousands, pirates are now more willing to hold ships longer, waiting for the multi-million dollar ransoms that they believe are due.¹⁰⁸ The MV *Iceberg-1* was held off the coast of Somalia for 33 months, the longest ordeal to date, as the pirate hijackers continued to demand upwards of \$10 million for the ship’s release; the stand-off finally concluded when a local anti-piracy force from Puntland stormed the ship in response to signs the pirates might kill the hostages and abandon the ship when negotiations failed.¹⁰⁹

Although many governments, including the United States, condemn the payment of ransoms,¹¹⁰ hijackings usually end with a hefty pay-day for the pirates. In most instances, the ransom money is dropped in containers directly onto the hijacked ships or in the nearby ocean; ransom drops sometimes even include currency counting machines to speed up the transaction process.¹¹¹ The proceeds are then divided among the

¹⁰⁶ For the description and profile of typical Somali negotiators, see U.N., *Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 1916 (2010)*, U.N. Doc. S/2011/433, (Jul. 18, 2011), [Henceforth “Monitoring Group Report”], 221-26.

¹⁰⁷ For more information on the increasingly professionalization of ransom negotiations, as well as an analysis of the tactics used and duration of bargaining, see: Olaf de Groot, Matthew D. Rablen, and Anja Shortland, “Barrh-gaining with Somali Pirates” (working paper, European Security Economics (EUSECON), DIW Berlin, Berlin, Germany, 2012).

¹⁰⁸ Jatin Dua, interview, in *Pirate Alley*, 42.

¹⁰⁹ Nick Meo, “Longest Somali Pirate Ordeal Ends for *Iceberg-1* Crew,” *Telegraph*, December 29, 2012.

¹¹⁰ For a definitive statement on the U.S. “no concessions” policy, see Andrew Shapiro, “Counter-Piracy Policy: Delivering Judicial Consequences,” address presented at American University Law Review Symposium, Washington, DC, March 31, 2010.

¹¹¹ James Kraska, “Freakonomics of Maritime Piracy,” *Brown Journal of World Affairs* 16, no. 2 (Spring/Summer 2010): 113-114.

individuals involved in the operation – depending on their roles. The initial investors get the lion’s share of the profits, as high as 60 percent of the initial cut.¹¹² As little is known about the mysterious “backroom” investors, where exactly this money goes is unclear. This has led some commentators to argue that piracy is being organized by an international criminal cartel. However, evidence for these theories is lacking.¹¹³ Ransom money does leave Somalia though, laundered back through Dubai or Kenya to wealthy investors living abroad.¹¹⁴

Ransom money is also difficult to track because of Somalia’s *hawala* system of monetary exchange. The system, spread across the Muslim world, eschews formal documentation and works via verbal contracts and transactions.¹¹⁵ Thus, some pirate experts, such as Peter Pham, fear that ransom proceeds reach across the globe, even to Europe and the United States.¹¹⁶ *Hawala* also enables the massive Somali diaspora community – 15 percent of the nation’s total population – to remit money earned abroad to their families and clans in Somalia. Remittances from overseas are vital to the Somali economy, pumping billions of dollars a year into the nation.¹¹⁷

Aside from the cut to the initial investors, both at home and abroad, ransom payments are part of a “very redistributive system.”¹¹⁸ Apart from the profits that trickle down to local businesses during a hijacking and immediately afterwards, clan leaders and

¹¹² McKnight and Hirsh, *Pirate Alley*, 41.

¹¹³ Bahadur, *Deadly Waters*, 46-52.

¹¹⁴ Michael Moutot, “Somali Piracy Flourishes into Lucrative Business,” *AFP*, November 12, 2010.

¹¹⁵ For more on following ransom money and the use of *hawala*, consult: Mary Harper, “Chasing the Somali Piracy Money Trail,” *BBC News*, May 24, 2009.

¹¹⁶ McKnight and Hirsh, *Pirate Alley*, 53.

¹¹⁷ James Kraska, *Contemporary Maritime Piracy: International Law, Strategy, and Diplomacy at Sea* (Santa Barbara, CA: Praeger, 2011), 51.

¹¹⁸ Dua, interview, in *Pirate Alley*, 40.

local officials receive a direct cut of the profit – in the range of 10 to 20 percent.¹¹⁹ In most operations, around 30 percent falls to the pirates themselves – those actually incurring the risks in an operation. Under the “no prey, no pay” system, pirates are only paid in the event of a successful mission. However, individual shares generally provide each pirate with around \$30,000 - \$50,000 in profit: more than the typical Somali male in the same socio-economic situation would earn in a lifetime of honest work.¹²⁰ This payout increases substantially for the first pirate to board a ship, increasing the incentive for aggressive tactics at sea.¹²¹ The prospect of securing a lifetime’s worth of salary in a single trip out to sea is understandably alluring to young Somalis.

MECHANICS OF A PIRATE ATTACK

Understanding the environment and society that permits piracy to flourish in Somalia is vital, as is acknowledging the planning and investment that goes into every piracy operation. However, understanding the actual mechanics of a pirate attack and the characteristics of a PAG is crucial to recognizing the benefits of equipment articles in deterring piracy. Despite the efforts of pirates to conflate their nefarious behavior with legitimate fishing operations, piracy and the artisanal fishing that is practiced by real Somali fishermen are quite different activities.

Currently, the coastal fishing industry in Somalia only engages about two percent of the population.¹²² The industry is dominated by extremely poor, subsistence fishermen who venture from the coast daily in small row boats and return to shore at night. These

¹¹⁹ In areas controlled by the Islamist militant group al-Shabaab, they demand 20 percent. For more information, see Kraska, *Contemporary Maritime Piracy*, 50.

¹²⁰ Daniels, *Somali Piracy and Terrorism in the Horn of Africa*, 39-40.

¹²¹ Bahadur, *Deadly Waters*, 194.

¹²² FAO Somalia, comp., *FAO/Somalia Plan of Action 2011-2012* (n.p.: Food and Agriculture Organization of the United Nations, n.d.), 5.

fishermen rely mainly on simple handline fishing with bait. Larger, mechanized boats also employ a range of large nets and longlines. However, many of the fishing dhows operating near Somali waters are not Somali in origin at all. Rather, they are based out of nearby nations, such as Yemen or Oman, or are even from farther away Asian nations.¹²³

Traditional wooden sailing dhows have been used for fishing for hundreds of years in the western Indian Ocean. Today, such vessels are capable of holding thousands of pounds of captured fish and supplies and even contain refrigeration systems in order to stay at sea for weeks at a time; furthermore, they are motorized with diesel engines, enabling them to cover much further distances than traditional dhows.¹²⁴ Yet, many of these unregistered vessels are still quite primitive and return to some of the poorest coastal areas around the Horn of Africa.

Unlike the regional fishermen, the pirates that leave Somali shores depart with different intentions – and different equipment. A typical PAG departs Somalia shores with a crew of approximately ten pirates in several small skiff boats. These sleek open-air vessels are usually equipped with two outboard motorized engines or a single, larger 60hp engine allowing them to travel up to 30knots (nearly 35mph).¹²⁵ Typically, a “mother ship” is designated among the skiffs to carry the supplies necessary for the open ocean, including fresh water, food, extra canisters of fuel – and, of course, khat. Other essential materials include ropes, grappling hooks, and various types of ladders.¹²⁶ In addition, these voyagers are well-equipped with an assortment of weapons – including

¹²³ Robert D. Kaplan, *Monsoon: The Indian Ocean and the Future of American Power*, 302.

¹²⁴ Erika Solomon, “Somali Pirates Vary Tactics, Use Gulf Dhows,” *Reuters* (India), May 12, 2010. For more information on specific types of dhow and skiff boats, see *Dhow and Skiff Recognition Chart* (n.p.: Maritime Security Centre – Horn of Africa (MSCHOA), n.d.).

¹²⁵ UKMTO, et al., *Best Management Practices for Protection against Somalia Based Piracy - Version IV* (Edinburgh, UK: Witherby Publishing Group, 2011) [Henceforth “Best Management Practices IV”], 9.

¹²⁶ Robert D. Kaplan, *Monsoon: The Indian Ocean and the Future of American Power* (New York, NY: Random House, 2010), 302.

knives, AK-47 assault rifles, PKM machine guns, various types of grenades, improvised explosives, and occasionally RPG-7 anti-tank rocket launchers for good measure.¹²⁷

For the more sophisticated operations, pirates are given extensive training before launching a mission, usually by former pirates with considerable experience. Andrew Palmer, chief executive officer of Idarat Maritime Ltd, a London-based maritime security firm, explains:

Each man is trained in certain aspects, they are trained in navigation, trained in the equipment they use to operate, they are given weapons training, they are told about what type of ship they are going to board, and so they are very much aware of the environment that they are operating in.¹²⁸

Despite this training, a PAG will often just sail directly to the nearest international shipping lane and “just hope and wait to pick the first slow-moving boat that comes along.”¹²⁹ Even if the pirates have GPS, it is likely to be a commercially-available device with little capability to track and predict the routes of vessels.¹³⁰

More often than not, the first ship encountered will not be a large commercial vessel but an open whaler or a fishing dhow. Undeterred, PAGs will raid these smaller ships for supplies. If deemed suitable, the crews will be held hostage and the dhows will be converted by the pirates into a new “mother ship” – now a floating pirate base of sorts. While Somali fishing ships are fair game, PAGs have increasingly preferred foreign-flagged vessels that are often larger and arouse less suspicion.¹³¹ With the larger yet slower dhows, PAGs are capable of traversing the entire western Indian Ocean, an area

¹²⁷ V. Montgomery, “Keeping Somali Pirates away from a ‘Floating Bomb,’” in Oceanuslive.org (2013). For more information on typical pirate equipment, see “U.N. Monitoring Group Report,” 214-218. For an example capture of pirates and the evidence collected, see: *The Republic vs. Liban Mohamed Dahir & Twelve (12) Others, Criminal Side No. 7 of 2012* [henceforth “*Republic v. Dahir*”], para 19.

¹²⁸ “The Losing Battle Against Somali Piracy,” *BBC News*, February 10, 2011.

¹²⁹ Dua, interview, in *Pirate Alley*, 37.

¹³⁰ Bahadur, *Deadly Waters*, 53.

¹³¹ Scott Fitzsimmons, “Privatizing the Struggle against Somali Piracy,” *Small Wars & Insurgencies* 24, no. 1 (2013): 86-87.

spanning 2.8 million square miles, and attack ships over 1,000 nautical miles from the coast of Somalia.¹³²

With a mother ship in the lead and skiffs in tow, PAGs will sail around waiting to encounter a large merchant vessel.¹³³ Once a target is spotted, individual pirates will pile back into the skiffs and will set-off to intercept the ship. A low freeboard,¹³⁴ the absence of lookouts, and a low travelling speed (under 18knots) are all factors that make a ship vulnerable to attack. Care is taken to try and avoid warships – but sometimes the inexperienced pirates make a mistake.

When possible, pirates prefer to commence attacks in the early light just after dawn. Launched from the mother ship, the skiff boats will pursue a targeted vessel and use a characteristic “swarm technique” to surround it and attack from multiple angles. Individual pirates will fire at the ship and, when available, launch rocket-propelled grenades over the bow of the ship to intimidate crew members into surrendering the ship without resistance.¹³⁵ When near the ship, pirates will toss long ropes with grappling hooks at the deck and throw ladders up the side of the ship. The vessel may have protective razor wiring around the edges of the ship that must be cut with wire-cutters.¹³⁶

If a PAG is able to successfully board a ship, the pirates will seize control of the entire vessel by making their way to the bridge and subduing the crew. Pirates attempt to avoid harming any of the crewmembers at nearly all costs during a boarding, as the

¹³² Frank Gardner, “Hunt. Capture. Kill. At Sea with the Pirate Police,” *GQ*, October 1, 2012.

¹³³ Montgomery, “Keeping Somali Pirates away, from a ‘Floating Bomb,’” at Oceanuslive.org.

¹³⁴ This denotes the distance between sea level and the “upper surface of the *freeboard* deck amidships at the side of a hull.” For more information see: “U.N. Monitoring Group Report,” 208.

¹³⁵ Fitzsimmons, “Privatizing the Struggle against Somali Piracy,” 87.

¹³⁶ Although they can vary in style, the long, narrow and light-weight ladders made of aluminum are overwhelmingly the most popular and most efficient for boarding.

survival of the hostages is paramount in securing a ransom.¹³⁷ Once in command of the vessel, the pirates will reconnect with the mother ship and sail back towards Somalia as a group, using the crew as hostages to ensure their freedom from attack by a warship. All told, successful piracy hijackings are usually completed in 15 minutes or less.¹³⁸ If an attack is repelled or aborted, the pirates will simply sail the skiffs back to the mother ship, RPGs and ladders in hand, to regroup and wait for the next unsuspecting vessel.

CONCLUSION

There is a familiar saying in Somalia: “When in Mogadishu, you have to earn your money; when in Harardhere, just use guns.”¹³⁹ There is a lot packed into this one expression. As this chapter has shown, the roots of piracy in Somalia run deep – not the least of which is the failure of the national government based in Mogadishu to exert control over the nation’s territory and enforce law and order. While piracy may or may not have begun in part with an honest attempt to protect the nation’s waters, it has now been hijacked by the pirate networks based on land and funded by wealthy investors.

Somalia is a stubborn country with a stubborn society. Combating the allure of piracy involves disincentivizing it – at the individual level, the clan level, and the national level. However, as the piracy problem festers and the extravagant rewards remain a skiff-boat ride away, young Somalis will continue to grab a gun and head for the shoreline to channel their inner-Black Bart.

¹³⁷ Dua, interview, in *Pirate Alley*, 39.

¹³⁸ Roger Middleton, *Piracy in Somalia: Threatening Global Trade, Feeding Local Wars* (London: Chatham House, 2009), 4.

¹³⁹ Jean-Marc Mojon, “Harardhere: The Cradle of Somali Piracy,” *Middle East Online*, October 29, 2009.

Chapter III: BRINGING PIRATES TO JUSTICE

“In such an enlightened, in such a liberal age, how is it possible the great maritime powers of Europe should submit to pay an annual tribute to the little piratical States of Barbary? Would to Heaven we had a navy able to reform those enemies to mankind, or crush them into non-existence.”¹⁴⁰

– General George Washington, 1786

Certainly, much has changed since the days of George Washington, from the seat of international hegemony to the venue of the latest scourge of piracy. However, one can easily sympathize with Washington’s incredulity at the ability of such a small force to hold hostage one of the world’s largest industries. Recent analysis suggests that Somali pirates have earned about \$120 million per year in net profits, while costing the shipping industry and international governments billions of dollars a year.¹⁴¹ These numbers might lead one to wonder if the “annual tribute” of Washington’s day is preferable to the current system.

However, pure economics aside, the international community has committed itself to combating the scourge of piracy off the Horn of Africa – as demonstrated most notably by the many U.N. Security Council Resolutions addressing the issue. International action has focused on targeting the determinants of Somali piracy and attempting to disincentivize piracy for Somali citizens.¹⁴² A crucial component of the combined effort to deter piracy is a system of consistent and effective prosecution for the perpetrators of piracy, which is currently flawed due to the weakness of universal jurisdiction.

¹⁴⁰ George Washington, “Letter to Marquis de LaFayette,” August 15, 1786.

¹⁴¹ Besley, Fetzer, and Mueller, “The Welfare Cost of Lawlessness.”

¹⁴² For an examination of the determinants of Somali piracy, see: Sarah Percy and Anja Shortland, “The Business of Piracy in Somalia” (working paper, DIW Berlin, July 2010).

In order to properly assess the importance of a strengthened system of universal jurisdiction, it is instructive to first understand the mechanism by which captured pirates are prosecuted and how such efforts fit into the grander counter-piracy campaign. This chapter begins with a brief overview of international efforts to contain and combat Somali piracy and a review of the recent success of such measures. Next, this chapter will explain the method by which pirate suspects are thwarted at sea and captured. Finally, this chapter will survey the international legal landscape for prosecuting pirate suspects and the weaknesses in the current system.

INTERNATIONAL COOPERATION COMBATING PIRACY

The escalation in pirate activity beginning in 2006 did not go unnoticed by the international community – and particularly not the international shipping industry. Indeed, the United Nations (UN) has been at the forefront of counter-piracy efforts; this focus was initially spearheaded by the International Maritime Organization (IMO), which is a specialized agency of the U.N. that oversees the safety and security of shipping and the prevention of marine pollution. Yet, the rising threat that piracy poses to commercial shipping and international order also prompted the U.N. Security Council to take action.

In 2008, the U.N. Security Council unanimously adopted four resolutions specifically aimed at combating piracy off the coast of Somalia.¹⁴³ Among other provisions, these resolutions permitted warships to “enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea” for a specified period of time;¹⁴⁴ encouraged states to “take part actively in the fight against piracy on the high seas off the coast of Somalia...by deploying naval vessels and military

¹⁴³ U.N. Security Council Resolutions 1816, 1838, 1846, and 1851 (2008).

¹⁴⁴ U.N. Doc. S/Res/1816 (June 2, 2008).

aircraft”;¹⁴⁵ called upon states to “cooperate in determining jurisdiction, and in the investigation and prosecution of persons responsible for acts of piracy and armed robbery”;¹⁴⁶ and authorized states to “use...all necessary means to repress acts of piracy and armed robbery.”¹⁴⁷ The final resolution, 1851, also encouraged states to establish an “international cooperation mechanism” to target the issue of Somali piracy.

Accordingly, the Contact Group on Piracy off the Coast of Somalia (CGPCS) was established in early 2009, pursuant to Resolution 1851. Made up of more than 60 countries and international organizations, CGPCS “facilitate[s] the discussion and coordination of actions among states and organizations to suppress piracy off the coast of Somalia.”¹⁴⁸ The CGPCS has established five distinct Working Groups to address different aspects of the piracy problem, including naval and operational coordination, judicial issues and capacity building, best management practices of the shipping industry, public diplomacy and awareness, and the financial flow of piracy investments and proceeds. In addition, CGPCS manages an international multi-donor Trust Fund that helps to “defray the expenses associated with prosecution of suspected pirates, as well as other activities related to implementing CGPCS’s objectives in combating piracy in all its aspects.”¹⁴⁹ Since its inception, the CGPCS has been at the forefront of nearly all collective international efforts to counter piracy off the Horn of Africa.

However, not all of the recent and widespread efforts to challenge the success of Somali pirates occur at the diplomatic level or involve sovereign nations. The private

¹⁴⁵ U.N. Doc. S/Res/1838 (Oct. 7, 2008).

¹⁴⁶ U.N. Doc. S/Res/1846 (Dec. 2, 2008). In addition, this resolution also encourages those states party to the SUA Convention to “fully implement their obligations” under the Convention and to “create criminal offences, establish jurisdiction, and accept delivery” of pirate suspects. See paragraph 15.

¹⁴⁷ U.N. Doc. S/Res/1816 and reaffirmed in U.N. Doc. S/Res/1851.

¹⁴⁸ “Background,” The Contact Group on Piracy off the Coast of Somalia [Henceforth “CGPCS”], <http://www.thecgpcs.org/about.do?action=background>.

¹⁴⁹ “Trust Fund,” CGPCS, <http://www.thecgpcs.org/trustfund.do?action=trustFund>.

shipping companies have taken more ownership of the piracy issue. Measures adopted include altering shipping routes and bolstering training for ship personnel. Most importantly, shipping companies have increasingly adopted “best management practices” written by experts. These practices include steps to take before a ship launches – such as designing ships with higher freeboards – to the suggested actions a crew should take in the event a ship comes under attack.¹⁵⁰

In addition, some shipping companies have hired privately contracted armed security personnel (PCASP) for their vessels. The employment of Private Maritime Security Companies (PMSCs) began in earnest after the rise in expensive hijackings in 2008. The companies often employ ex-military personnel, such as former Navy SEALs, and hire them out in professional teams to large commercial ships that carry expensive cargo through Somali piracy’s high-risk area (HRA).¹⁵¹ Sporting body armor and automatic weapons, security personnel are well-prepared for the famous swarming and boarding tactics of PAGs.¹⁵² Although approaching pirates generally abort attacks when they encounter a ship with such security, these groups serve as more than a simple deterrent and have engaged in direct firefights with approaching pirates.

Initially, the use of PCASP was highly controversial and even condemned by organizations such as the IMO, the International Maritime Bureau (IMB) and the International Chamber of Shipping (ICS).¹⁵³ Opposition to the hiring of armed security warned of the potential escalation of violence on the part of the pirates and also raised

¹⁵⁰ “Best Management Practices IV,” 6.

¹⁵¹ This thesis will accept the BMP’s boundaries for the high-risk area, bounded by Suez Canal and the Strait of Hormuz to the North, 10°S, and 78°E. For more information on the extent of this zone, see: “Best Management Practices IV,” 3-4.

¹⁵² Gardner, “Hunt. Capture. Kill. At Sea with the Pirate Police.”

¹⁵³ Joel Christopher Coito, “Pirates vs. Private Security: Commercial Shipping, the Montreux Document, and the Battle for the Gulf of Aden,” *California Law Review* 101, no. 173 (February 2013): 181.

human rights concerns, based on the trigger-happy reputation of the “mercenaries.”¹⁵⁴

However, the private security industry has become increasingly professionalized, especially by acknowledging and accepting international standards of conduct.¹⁵⁵

In late 2009, only about 10-20 percent of merchant ships sailing through the HRA carried armed guards; by the beginning of 2013, it was over 50 percent.¹⁵⁶ Official state attitudes towards the use of PCASP are varied.¹⁵⁷ The United States government has been outspoken on the issue of private security personnel, praising their deterrent capabilities. In a speech given in October of 2012, Andrew Shapiro, Assistant Secretary for Bureau of Political-Military Affairs at the U.S. State Department declared that “the use of armed security teams has been a potential game changer in the effort to combat piracy.” He further added, “To date, not a single ship with armed security personnel aboard has been successfully pirated.”¹⁵⁸

While this statement is true, PMSCs cannot just declare victory on a job well done and announce that Somali piracy is dead in the water. To be fair, sample size matters; not a single ship named the *MV Easy Target* has ever been attacked either, but that does not mean shipping companies should rush to start renaming ships. Furthermore, based on the plethora of ships that travel through the HRA every day, the probability of being attacked

¹⁵⁴ *Ibid.*, 181-183.

¹⁵⁵ For more information on the move to accept PMSCs and the importance of codes of conduct such as the Montreux Document, consult: Coito, *Pirates vs. Private Security*, Ch. 4.

¹⁵⁶ Some estimates put the number as high as 70 percent. For more information, see: Ben West, “The Expensive, Diminishing Threat of Somali Piracy,” Stratfor Global Intelligence, November 8, 2012, <http://www.stratfor.com/weekly/expensive-diminishing-threat-somali-piracy>.

¹⁵⁷ Oceans Beyond Piracy, comp., *Introduction to Private Maritime Security Companies (PMSCs)* (n.p.: n.p., 2012), 8.

¹⁵⁸ Andrew Shapiro, “Turning the Tide on Somali Piracy,” address presented at Atlantic Council, Washington, DC, October 26, 2012.

by pirates is very slim. Even in the hotbed Gulf of Aden in 2009, a given merchant vessel only had a 0.58 percent chance of being attacked, let alone successfully hijacked.¹⁵⁹

Nevertheless, pirate attacks dropped substantially in 2012. According to European Union's anti-piracy naval taskforce, EU NAVFOR, there were only 36 confirmed attacks and an additional 73 "suspicious events" reported in 2012. This constitutes a significant fall from 2011, which had 176 attacks and 166 "suspicious events." Further, only five ships were captured in 2012, down from 25 in 2011 and 27 in 2010.¹⁶⁰

It is unclear to what extent these falling numbers are actually indicative of the successful use of armed security – especially since a significant amount of attacks go unreported. This underreporting often reflects the widespread hijacking of smaller vessels, such as the local fishing dhows ultimately converted into mother ships.¹⁶¹ Glen Forbes, leader of Oceanus Live, a counter-piracy information website, notes that in fact there has been "an increase in approaches but not actual attacks and that's not being reported, or being under-reported as navies often say ships are mistaking pirates for fishing vessels."¹⁶² It is often only after an attack, when a warship confronts a suspicious dhow in the area, that it is discovered to have been previously hijacked.

More likely than not, the use of private security is a helpful deterrent but is still only one variable. As alluded to previously, anti-piracy naval taskforces also operate to

¹⁵⁹ "About 20,000 vessels pass through the Gulf of Aden every year, and the IMB recorded 116 attacks on vessels there in 2009. Twenty of these incidents were successful hijackings." Analysis from: Stormy-Annika Mildner and Franziska Groß, "Piracy and World Trade: The Economic Costs," 2011, in "Piracy and Maritime Security: Regional Characteristics and Political, Military, Legal, and Economic Implications," ed. Stefan Mair (Berlin: SWP (German Institute for International and Security Affairs). Facts and figures from: International Maritime Bureau (IMB), comp., *Piracy and Armed Robbery Against Ships*, 2009 (London: ICC International Maritime Bureau, 2010), 8-9.

¹⁶⁰ All statistics courtesy of "Key Facts and Figures," EU Naval Force Somalia – Operation Atalanta, <http://eunavfor.eu/key-facts-and-figures>.

¹⁶¹ Kaija Hurlburt, *The Human Cost of Somali Piracy* (n.p.: Oceans Beyond Piracy, 2011), 10.

¹⁶² Michelle Wiese Bockmann, "Piracy Plunges to Lowest in Years on \$1 Trillion Trade Route," *Bloomberg*, January 16, 2013.

deter piracy in the waters near Somalia, now in greater numbers and in greater coordination with one another. Each naval operation has its own specific mandate, based on its participants, goals, funding, and legal foundation for its capabilities. However, these collective naval operations engage in similar enforcement duties and also work in tandem with the fleets of individual nations in the area. NATO's Operation Ocean Shield concerns both protecting shipping vessels around the Horn of Africa and halting piracy. The operation was launched in 2009 to replace the similarly focused Operation Allied Provide and has a mandate through the end of 2014.¹⁶³

Combined Task Force 151(CTF-151) also patrols the seas around the Horn of Africa – but with a dedicated focus on counter-piracy operations. CTF-151 is one of three existing task forces in the region under the Combined Maritime Forces (CMF): a multi-national voluntary naval partnership of 27 nations. CTF-151's mandate stems from the authority of the U.N. Security Council Resolutions targeting piracy in the western Indian Ocean.¹⁶⁴ A frequent partner is the European Union's Naval Force (EU NAVFOR) for Somalia and its Operation Atalanta.¹⁶⁵ This operation was commissioned in December of 2008 to battle the rising tide of piracy off the Horn of Africa. It has since expanded its operations to cover the western Indian Ocean.

EU NAVFOR, like the other naval forces in the region, has the authority to engage pirates on the high seas, especially to thwart an attack as it happens. They can seize the vessels and goods of the pirates following a suspected act of piracy.¹⁶⁶ These

¹⁶³ For more details, including the participating nations, see "Counter-Piracy Operations," NATO, http://www.nato.int/cps/en/natolive/topics_48815.htm.

¹⁶⁴ "CTF-151 Counter-Piracy," Combined Maritime Forces, <http://combinedmaritimeforces.com/ctf-151-counter-piracy>.

¹⁶⁵ "Mission," EU Naval Force Somalia – Operation Atalanta, <http://eunavfor.eu/mission>.

¹⁶⁶ Ibid.

warships can also capture, hold, and if necessary arrest individuals who are suspected of committing acts of piracy or armed robbery in the area where they are encountered. Through these actions, naval forces play both a responding role – to halt attacks when they may occur – and a deterrence role, by spotting and reporting the position of PAGs and by providing escorts for merchant ships as they travel through the area.

However, in May of 2012, EU NAVFOR took actions a step further, and, as a part of Operation Atalanta, conducted a quick air raid against a pirate base on the coast of Somalia.¹⁶⁷ The nighttime strike near Harardhere employed helicopters to destroy piracy equipment and weapons, including motorized skiff boats.¹⁶⁸ While not replicated since, the raid demonstrates the capabilities of the international naval forces to preemptively disrupt pirating activities, even on land.

This capacity to frustrate pirate activity is magnified by the growing coordination and information-sharing among naval forces and between such forces and the commercial ships at sea. Mechanisms for reporting the position of suspected pirates and disseminating such information have expanded in the past few years. The Maritime Security Centre – Horn of Africa (MSC-HOA) is an initiative promoted by EU NAVFOR that operates in conjunction with other naval forces and the shipping industry. The MSC-HOA located in Bahrain provides constant monitoring of vessels traveling near the Horn of Africa and communicates the latest news and piracy warnings to ships in transit.¹⁶⁹

Another regional mechanism instituted to help combat piracy is the Djibouti Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the

¹⁶⁷ EU Naval Force, “EU Naval Force Delivers Blow Against Somali Pirates on Shoreline,” May 15, 2012.

¹⁶⁸ Yara Bayoumy, “EU Helicopters Strike Somali Pirate Base on Land,” *Reuters*, May 15, 2012.

¹⁶⁹ MSC-HOA, “About MSCHOA and OP ATALANTA,” Maritime Security Center - Horn of Africa, <http://www.mschoa.org/on-shore/about-us>.

Western Indian Ocean and the Gulf of Aden (DCoC).¹⁷⁰ Signed by 20 nations on January 29, 2009, this regional agreement aims to increase cooperation and communication between regional states in combating piracy.¹⁷¹ In particular, the DCoC addresses the recommendations presented in UN Security Council resolutions 1816, 1838, 1846, and 1851 (outlined above), and attempts to implement some of their recommendations for regional coordination. Among other provisions, the signatories of the DCoC agree to review their domestic legislation to ensure that piracy is a criminal offense and affirm a commitment to investigating and prosecuting of suspected offenders.

Considering the rise in additional counter-piracy measures such as the adoption of best management practices and the increased efficiency and presence of regional naval forces, in conjunction with the addition of PCASP to ships, it is not altogether surprising that successful hijackings have dropped off in the past year. Some observers argue that this reduction in attacks signifies a new status quo and that the “business model” of Somali piracy is broken.¹⁷² In contrast, other commentators contend that it is too soon to declare victory and that pirates might simply be waiting for better weather – or waiting until shipping companies tire of paying exorbitant security and insurance fees.¹⁷³

Either way, the current counter-piracy model is in large part focused on lowering the chances of success for a given hijacking and by increasing the personal risk to individual pirates – especially during an attack. The current system does not dissuade Somali criminals from leaving the shore in skiff boats – automatic weapons and RPGs

¹⁷⁰ This treaty should not be confused with the Djibouti Agreement, which is cease-fire agreement between rival factions within Somalia sign in 2008. Text of the DCoC can be accessed at: IMO, *Code of Conduct Concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden*, IMO Doc. C/102/4 (2009), [hereafter, “Djibouti Code of Conduct”], <http://www.imo.org/OurWork/Security/PIU/Documents/DCoC%20English.pdf>

¹⁷¹ South Africa and Mozambique have since signed the agreement.

¹⁷² Frank Gardner, “Somali Piracy: A Broken Business Model?,” *BBC News*, November 29, 2012.

¹⁷³ D. H., “Somali Piracy: Just Taking a Break,” *The Economist*, October 23, 2012.

included – to sail out into the ocean to look for easy prey. It does not even prevent PAGs from targeting every commercial vessel they see and initiating an attack until they fail to board it or spot armed security personnel. The degree of violence used in a given attack is also raised by the increased possibility for pirates that they will encounter armed resistance.

Furthermore, while the hijacking of large merchant ships has dropped, the often defenseless dhows of artisan fishermen are still at risk to frustrated PAGs looking for a better mother ship or just any target to successfully raid. There is a Somali proverb that states, “The aggressive man ultimately encounters a more aggressive man.”¹⁷⁴ The current system lends itself to the development of an increasingly hyper-militarized area, where the possession of automatic weapons is a necessity just to sail into the area.

A crucial missing piece of international counter-piracy efforts off the Horn of Africa is consistent, effective prosecution to serve as a deterrent. Clearly, the current system is far from perfect, especially with the regrettably common practice of “catch and release” – as illustrated through the example of the MV *Evita* in the introduction of this thesis. International prosecution efforts must be strengthened to not only punish those criminals that take part in hijacking a ship but also to deter similar individuals from ever leaving the shore with that intention.

DECISIONS OF PROSECUTION

It is important to understand the considerations that go into deciding if and how to prosecute a suspected Somali pirate in order to comprehend the current obstacles to prosecution. The great majority of pirate captures occur before or after a failed hijacking

¹⁷⁴ Aar Maanta, ed., “Top 50 Somali Proverbs,” <http://www.aarmaanta.com/?p=481>.

– rather than during. First of all, under international law, only a ship belonging to a sovereign state can seize another ship or its crew under suspicion of piracy.¹⁷⁵ Thus, a merchant vessel is not able to chase down its attackers and detain them on charges of piracy.

Secondly, it is an understandably rare occurrence that a PAG is bold enough – or unlucky enough – to target a warship in an attack. As described in the previous chapter, information and experiences are shared within the pirate community as individual pirates move from one operation to another or even launch their own group with the payout from a successful hijacking. Even without the formal training typical of some pirate groups, it is unlikely that pirates will mistakenly target a naval warship and especially unlikely that they would not know better than to do so if they are able to identify a ship as such.

Thirdly, it is unlikely that any warship is close enough to be able to respond to a distress call in enough time to thwart an attack in progress. As mentioned previously, the average hijacking takes about 15 minutes, which leaves a fairly small window of time for any nearby warship to receive word of an attack and scramble a helicopter to the destination.¹⁷⁶ Vice Admiral Gérard Valin of the French Navy went so far as to say, “[Even] when the pirates see a warship on the horizon, they know that they have all the time in the world.”¹⁷⁷ Furthermore, naval personnel are not in the practice of attempting to halt a hijacking if pirates are already on board a hijacked ship. Unless a naval force can guarantee that every member of the merchant crew is safe, they will almost assuredly not intervene - lest they risk a “human shield scenario.”¹⁷⁸

¹⁷⁵ UNCLOS, Article 105.

¹⁷⁶ Fitzsimmons, “Privatizing the Struggle against Somali piracy,” 87.

¹⁷⁷ “World Scrambles to Deal with Pirate Threat,” *Spiegel*, November 24, 2008.

¹⁷⁸ Gardner, “Hunt. Capture. Kill. At Sea with the Pirate Police.”

Thus, many pirate captures occur after a failed hijacking. This capture could take place shortly after the attack and in the vicinity or days later and miles away. The key then, from a prosecution standpoint, is linking a set of captured pirate suspects with the attempted hijacking – or with any act of piracy. Alternatively, a number of pirate captures occur long before any attempted hijacking. According to a report by the Foreign Affairs Committee of the U.K. Parliament, a majority of the “catch and releases” of the Royal Navy were the result of “disruption activities” by naval vessels patrolling closer to shore and intercepting pirate skiffs as they ventured out into the high seas. In these instances, pirate equipment is thrown overboard and the pirates are simply sent back to shore.¹⁷⁹

At the time of capture – whether before, during, or after any attack – a determination must be made on what to do with the captured pirates. Jurisdiction plays a crucial role in understanding the mechanism for prosecuting captured Somali pirates. As outlined in Chapter I, a state must have jurisdiction over a case in order to proceed with prosecution. If pirates are captured by those they attack, or are transferred to the custody of the state of their victims, then jurisdiction is based on the passive personality principle. For crimes on the high seas, the “victims” of piracy are typically the owners of a ship and its crew. This is a common process by which Somali pirates face prosecution, since a nation is motivated to seek retribution for acts against its own citizens or flagged ships. Yet, the prospect that a warship that thwarts a pirate attack and/or captures suspected pirates is of the same nationality as the victims is unlikely.

Part of this issue is the fact that many ships fly “flags of convenience” – meaning that they are registered in countries that they do not have a real national or economic

¹⁷⁹ U.K. Parliament, Foreign Affairs Committee, comp., *Tenth Report: Piracy Off the Coast of Somalia* (n.p.: House of Commons, 2011), Sec. 3, para. 74.

connection to but do so because of that state's lax system of regulation and registration. For example, Mongolia has a thriving registry of ships – despite being landlocked.¹⁸⁰ Under this open-registry system, registration is built on convenience and a ship is technically under the jurisdiction of a nation with whom it has little actual ties, making the latter unmotivated to pursue the prosecution of pirates who attack that ship and incur the costs that go along with legal action.¹⁸¹ For example, in 2011 and 2012, the flags flown by ships most commonly attacked by pirates were Panama, Liberia, Singapore, the Marshall Islands, and Hong Kong.¹⁸² In contrast, the nations that are most likely to capture pirate suspects are those that have a large naval presence in the area and/or are a part of the naval coalitions that patrol the sea, such as the United States and United Kingdom. This dichotomy greatly lowers the chances that captured pirates will be prosecuted under jurisdiction that is based on the *passive personality* principle.

The nationality of the ship attacked aside, captured pirates still can be prosecuted under universal jurisdiction by their captors. In addition, a state can transfer suspects to another state to be prosecuted under universal jurisdiction if that state chooses to accept them.¹⁸³ This practice has actually become increasingly popular. Kenya was the first nation to prosecute pirates captured by other nations under universal jurisdiction in late

¹⁸⁰ For more information on the negative externalities of the “open-registry” system, see: Rose George, “Flying the Flag, Fleeing the State,” editorial, *New York Times*, April 24, 2011.

¹⁸¹ Andrew Shapiro, “U.S. Approaches to Counter-Piracy,” address presented at International Institute for Strategic Studies, Washington, DC, March 30, 2011.

¹⁸² IMB, *Piracy and Armed Robbery Against Ships, 2011*, 15-17; IMB *Piracy and Armed Robbery Against Ships, 2012*, 15-17.

¹⁸³ It has been argued by some international law scholars that Article 105 of UNCLOS limits the prosecution of piracy suspects under universal jurisdiction to only that state which successfully captured the pirates in a given instance; others contend that universality extends beyond the arrest to the prosecution and punishment as well. Despite these objections, the transfer of piracy suspects for universal jurisdiction prosecution has become common practice. For more background on this debate, see Robin Geiß and Anna Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (New York: Oxford University Press, 2011), 149-150.

2008 and early 2009, when it signed Memorandums of Understanding (MOUs) with the United Kingdom and the United States, respectively.¹⁸⁴ Other nations soon followed suit, including the Seychelles and Mauritius.¹⁸⁵

These MOUs serve as agreements in principle for a regional partner to assume the responsibilities for detention, investigation, and prosecution of piracy suspects captured in international waters. However, these agreements are not binding on either nation to uphold in each and every instance. Instead, they serve more as a bureaucratic rehearsal to describe the process and conditions of transfers. Practically a nation may negotiate a transfer with another nation at any time.¹⁸⁶ Thus, such agreements are more political statements than policy statements. For example, in 2010, Kenya temporarily announced the cessation of such transfers out of resentment over the one-sided nature of the arrangements.¹⁸⁷ This unhappiness stems in part from the significant drain on resources Kenya incurs by prosecuting and then incarcerating convicted pirates. However, several months later, Kenya announced that it was again accepting piracy suspects – right after the U.N. pledged new funding for court personnel and the construction of a new courtroom in Mombasa.¹⁸⁸

While not a perfect system, the transfer agreements allow nations that capture pirates another recourse to bring them to justice – aside from prosecuting themselves

¹⁸⁴ Sandra L. Hodgkinson, “International Law in Crisis: Seeking the Best Prosecution Model for Somali Pirates,” *Case Western Reserve Journal of International Law* 44, nos. 1-2 (Spring 2011): 305-306.

¹⁸⁵ For a timeline of this development, see *Ibid.*, 305-307.

¹⁸⁶ Donna Hopkins, Coordinator, Counter Piracy and Maritime Security, Bureau of Political-Military Affairs (PM/CPMS), U.S. Department of State, telephone interview with the Author, Feb. 1, 2013.

¹⁸⁷ Fred Mukinda and Alphonse Shiundu, “Kenya Laments Pirates’ Burden,” *Daily Nation* (Kenya), March 30, 2010.

¹⁸⁸ Milena Sterio, “Piracy Off the Coast of Somalia: The Argument for Pirate Prosecutions in the National Courts of Kenya, the Seychelles, and Mauritius,” *Amsterdam Law Forum* 4, no. 2 (October 26, 2012): 14. Kenya would again end its transfer program in 2010 under concerns over jurisdiction. However, the Court ruled in late 2012 that the transfers were constitutional, and the transfers resumed.

under universal jurisdiction. When a nation captures pirates it must decide what action to take – whether to prosecute under passive personality or universal jurisdiction; to transfer the suspects for prosecution by the nation of the flag ship, the nation of the crew, the nation of the owners, etc.; to transfer to a regional state for prosecution under universal jurisdiction; or to release the suspects entirely.

Despite the many options available, far too often “catch and release” is practiced. This past year, the Ministry of Defense for the United Kingdom admitted that more than four out of every five piracy suspects picked up off the Horn of Africa is released without facing prosecution.¹⁸⁹ According to a 2011 independent report authored by Jack Lang, Special Advisor to the Secretary-General of the U.N., an estimated 9 out of 10 pirates are released shortly after capture.¹⁹⁰ In fact, according to the same comprehensive report, some captured pirates have been identified as being previously apprehended and released. The report states, “The impunity resulting from such ‘catch and release’ practices tends to make the risk-reward ratio for the pirates negligible and to encourage piracy. This highly attractive criminal activity is perceived as a virtually foolproof way of getting rich.”¹⁹¹

The rampant recidivism among those who are captured demonstrates the lack of a deterrent effect of simply being captured by naval forces. In some instances, captured pirates, as part of their arrests, are treated to complimentary free meals, medical check-ups – possibly even dental work.¹⁹² At best, “catch and release” thwarts a specific PAG

¹⁸⁹ Brian Brady, “Navy Frees Four out of Five Suspected Somali Pirates,” *The Independent*, April 8, 2012.

¹⁹⁰ “Jack Lang Report,” para 43. [See note 8].

¹⁹¹ *Ibid.*, para 14.

¹⁹² See: Tom Kelly and Paul Revoir, “HMS Nursemaid,” *Daily Mail (UK)*, April 12, 2011. The report states: “Commander David Wilkinson, Cornwall’s captain, said: ‘This team admitted their intention was to commit piracy activities.’ But after compiling the evidence against them and submitting it to his superiors he was ordered to ‘set up arrangements for putting them ashore in Somalia.’ Before being freed, the pirates were given a medical check-up in accordance with UK law and food which included a halal option to take

by destroying their necessary equipment, forcing them to return to shore, and hopefully discouraging their efforts to return anew. However, with willing investors on shore to continue the supply of guns and ladders to impoverished young Somalis, such measures constitute a temporary solution. Standing alone, “catch and release” serves more as a strategy of interdiction – delaying but not denying the presence of armed pirates on the high seas cruising for their next victim.

One major factor in the persistence of the “catch and release” policy is the strain on resources – particularly judicial and prison capacity. Those nations on the forefront of piracy prosecutions – namely Kenya, Seychelles, and now Mauritius – have very limited space for Somali pirates in both their prisons and in their court schedules. For example, last year the Seychelles refused to take the case of 25 suspected Somali pirates detained by a Danish warship, citing the difficulty of putting them on trial; not only is there just a single prison in the entire nation, but physical courtroom space is an issue.¹⁹³ During a speech at an anti-piracy conference hosted by the nation in 2011, President James Michel expressed gratitude for the logistical and financial support of the international community, but warned, “With thousands of pirates in operation, however, it is clear that there is not enough prison capacity in this region to deal with this problem.”¹⁹⁴

To that end, the United Nations Office on Drugs and Crime (UNODC) has been actively pursuing a plan to repatriate convicted Somalis to serve their sentences in their home nation. As part of its Counter-Piracy Programme, UNODC has focused on increasing judicial and prison capacity in the region – particularly through the

into account religious needs. After showing they were compliant, some were given cigarettes, and one was given a nicotine patch on medical advice because his tobacco withdrawal had caused his heart rate to soar.”

¹⁹³ “Seychelles Refuse to Take Somali Pirates Held by Danes,” *Reuters*, January 17, 2012.

¹⁹⁴ James A. Michel, “Piracy: Orchestrating a Response,” speech presented at Le Meridien Barbarons Hotel, August 9, 2011.

construction of prisons in Somalia. In March of 2012, UNODC managed its first prisoner-transfer: Seventeen convicted pirates volunteered to be transferred from the Seychelles to a recently-constructed prison in Hargeisa, Somaliland. Further, UNODC plans to open a 500-bed prison in the Puntland city of Garoowe by the end of 2013.¹⁹⁵ This certainly may help reduce the strain on Kenya and the Seychelles, the latter of whom has Somali prisoners making up 20 percent of its prison population.¹⁹⁶

An early concern of such a system was the potential for imprisoned pirates to benefit from the assistance of clan or criminal connections to escape from the prisons in the region. However, the prisons constructed in Somalia, and those remodeled in the region, have been designed by UNODC as high-security environments capable of detaining convicted pirates.¹⁹⁷ Still, the long-term success of UNODC's repatriation program remains to be seen.

Moreover, regional partners like the Seychelles may still have capacity issues even with a successful repatriation program for convicted pirates with long sentences. However, this development opens the door for more states to prosecute pirate suspects under universal jurisdiction; this program need not only benefit regional partners such as the Seychelles. If the option is indeed available to extradite convicted pirates to Somalia to serve out their terms, this program would lower the burden for states to prosecute pirate suspects, as they would not necessarily be committing to incarcerate these individuals for their likely many-year sentences.

¹⁹⁵ U.N. Secretary-General, *Report of the Secretary-General Pursuant to Security Council Resolution 2020* (2011), U.N. Doc. S/2012/783, (Oct. 22, 2012) [henceforth "U.N. Doc. S/2012/783"], para. 44.

¹⁹⁶ *Ibid.*

¹⁹⁷ Glenn Ross, "Prosecuting Somali Pirates: Challenges for the Prisons" (paper presented at Conference on Global Challenge, Regional Responses: Forging a Common Approach to Maritime Piracy, Dubai School of Government, United Arab Emirates, April 18, 2011), 112.

Another crucial factor in a state's decision to prosecute a captured Somali pirate, or not, is the available evidence against the defendant(s). As mentioned previously, pirates are often not captured until they are miles away from the "crime scene" and after much time has elapsed. Any witnesses to the crime are likely to be the crew of merchant ships or naval personnel, thereby out on the high seas and possibly thousands of miles away when a trial would or could come to fruition. Moreover, because the victimized vessel may have its home port anywhere in the globe, a language barrier may exist between the court and any witnesses.

Confirming the identity and actions of specific captured suspects by the intended victims is also implausible, as they are not likely to be able to see a pirate close enough to later identify him unless he already made it onto the boat. Moreover, evidence sought by investigators in more traditional criminal cases – such as fingerprints, DNA, etc. – are understandably absent in an attempted maritime hijacking. Prosecutors are thus left in many cases relying on an assortment of circumstantial evidence to weigh against a Somali being detained on suspicion of piracy.

Prosecutors do not want to pursue a case unless a conviction is likely – and neither do states. With Somali suspects, the costs incurred by prosecuting but failing to convict are magnified because of the expected asylum claims. Fear of these claims alone is enough to dissuade some governments from prosecuting, even in cases with ironclad evidence.¹⁹⁸ These eventual costs, born by the prosecuting government, are only added to the expenses incurred normally through transporting a suspect(s) to national soil for a trial and with all of the logistics involved in seeking conviction. Thus, the dearth of

¹⁹⁸ For more information on the effect of asylum claims on Somali prosecution decisions, see: Yvonne Dutton, "Pirates and Impunity: Is the Threat of Asylum Claims a Reason to Allow Pirates to Escape Justice?," *Fordham International Law Journal* 34, no. 2 (September 18, 2010).

overwhelming and incriminating evidence against Somali pirates on the high seas serves as a serious obstacle to bringing pirates to justice.

CONCLUSION

This chapter began by illustrating the current international efforts to combat the torment of piracy off the Horn of Africa. Although yet unclear, it seems that international efforts have been successful in staving off the pirate threat, as the threat has abated since its all-time peak in 2011. Beyond that, such efforts have not addressed the issue of preventing Somali criminals from sailing out into the high seas to pillage and hijack ships; it is only more difficult for them and now demands more violence to be successful. Still lacking is an effective deterrent that punishes all harassing and violent behavior on the high seas. A gaping hole in these efforts is the establishment of effective, consistent prosecution of those who commit piracy in the area.

While we might sympathize with George Washington's frustration and his desire for a force to simply "crush pirates into non-existence," there are numerous legal protections that defend even these enemies of mankind. But these protections also shield them from justice, making prosecution of their behavior remarkably difficult. Thus, we must find ways to supplement the law so justice can be served without betraying our agreed-upon tenets of morality and international law. After all, we do live in an enlightened and liberal age.

Chapter IV: DOMESTIC PIRACY LEGISLATION

*“Though, damn ye, you are a sneaking puppy, and so are all those who will submit to be governed by laws which rich men have made for their own security...I am a free prince, and I have as much authority to make war on the whole world, as he who has a hundred sail of ships at sea...and this my conscience tells me.”*¹⁹⁹

– Captain Samuel “Black Sam” Bellamy

With his rebellious worldview, disdain for law-abiding merchants, and cavalier attitude towards the international order, “Black Sam” Bellamy would likely find more than a few friends among the pirates of Somalia. The “Prince of Pirates” and his populist sentiment would fit right in with those who leave the shore to covetously hijack the commercial ships sailing by out at sea. While ready to take on the entire world, cutlass in hand, “Black Sam” would scornfully laugh at a system in which warships capture pirates at sea only to release them soon after – following a hot meal and a stern reprimand.²⁰⁰

Whether just a compilation of “laws which rich men have made for their own security,” or a staple of international order, the illegality of piracy clearly exists at the international level and as a part of customary international law. Yet, its lack of enforcement by states renders it ineffectual; it is like a cannon loaded with gunpowder with no one to light the fuse. As previously mentioned in Chapter I, the use of universal jurisdiction to prosecute piracy has stalled, in part, because nations lack the necessary domestic laws. This chapter affirms the need for states to criminalize piracy in domestic law in a way that provides for universal jurisdiction prosecutions. More states must have the ability to light the fuse and enforce international law.

¹⁹⁹ David Marley, *Pirates of the Americas: 1650-1685* (Santa Barbara, CA: ABC-CLIO, 2010), 515. Perhaps it should not go unnoticed that, according to a *Forbes* magazine study, “Black Sam” was actually the highest-earning pirate of all time. See: Matt Woolsey, “Top-Earning Pirates,” *Forbes*, Sep. 19, 2008.

²⁰⁰ See note 192.

This chapter will begin by reviewing the need for domestic legislation that both criminalizes piracy and provides for the exercise of universal jurisdiction. In addition, this chapter will explore the benefits to the international community. Next, the chapter will briefly survey the current landscape of domestic legislation and provide a suggested model for implementation. The chapter will conclude with a review of the information herein, as well as note the remaining aversion to increased prosecutions of piracy.

THE NEED FOR DOMESTIC LEGISLATION AND THE EXERCISE OF UNIVERSAL JURISDICTION

Since the escalation of piracy off the Horn of Africa has had worldwide effects on the shipping industry, costing it over \$5 billion dollars a year, it is understandable why the international community has acted so swiftly to address the issue at the diplomatic level – if not the practical level.²⁰¹ That the international community is in such universal agreement over its condemnation of Somali piracy perhaps shields the fact that so few nations actually exercise their universal jurisdiction and ability to prosecute.²⁰² Apart from a lack of political will, there are two substantive reasons states are unable to pursue universal jurisdiction. They either a) lack domestic law criminalizing piracy; b) lack domestic law allowing for the exercise of universal jurisdiction; or c) both.²⁰³ If a state lacks statute(s) criminalizing piracy, then it clearly cannot prosecute the crime of piracy

²⁰¹ The most cited statistic is a total cost of nearly \$7 billion dollars a year, with 80% of the losses borne by the shipping industry and 20% by governments worldwide. [See note 6].

²⁰² A notable exception to this consensus is the late Prime Minister of Libya, Muammar Gaddafi, who referred to the actions of pirates as “self-defense.” See: Alex Perry, “Muammar Gaddafi Shakes Up Africa,” *Time*, February 10, 2009.

²⁰³ This domestic law incorporating universal jurisdiction need not be explicit. For example, some states follow the monist tradition of international law, meaning national and international law are “part of one and the same legal order.” Thus, these states, by virtue of being a party to UNCLOS, recognize their treaty obligations as functioning law within their states without the need for a statute expressing this fact. For more information on such states, see Dutton, “Maritime Piracy and the Impunity Gap,” 79. For more information on monism, and its contrast with dualism, in regard to international law, see Ward N. Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (The Hague, Netherlands: T.M.C. Asser Press, 2006), 129-132.

under any jurisdiction. If a state does not have legislation implementing international law, it can only prosecute cases with which it has a direct nexus to the crime.²⁰⁴ In order to prevent greater instances of “catch and release,” states should ensure that they both criminalize piracy and are able to exercise universal jurisdiction.

The clearest benefit of such legislative reform by states is the ability to exercise universal jurisdiction and increase the prospect of prosecutions by these states. In particular, the inability to exercise universal jurisdiction can act as a considerable constraint on some of the most active participants in piracy deterrence. For example, Canada criminalizes piracy under its domestic law; in fact, Canada succinctly defines piracy as “one ... who does any act that, by the law of nations, is piracy.”²⁰⁵ Even though Canada uses customary international law, the “law of nations,” to define piracy as a crime, this law does not provide for the exercise of universal jurisdiction for piracy. This point serves as a considerable handicap, considering Canada is an integral contributor to the fight against piracy, with its warships serving on patrols in Combined Taskforce 151 (CTF-151) and Operation Ocean Shield.

Other states with very active naval presences in the area suffer from similar deficiencies in the ability to exercise universal jurisdiction, including Denmark, who is a member of CTF-151, Operation Ocean Shield, and EUNAVFOR.²⁰⁶ The incorporation of universal jurisdiction is especially important for nations with a large naval presence, since they are the most likely to capture pirates on the high seas. If such a state is categorically unable to prosecute captured pirates under universal jurisdiction, then it must rely on the goodwill of another state to accept captured pirates in each case for

²⁰⁴ For more information on all mechanisms for jurisdiction, review Chapter I.

²⁰⁵ Canada, Criminal Code, R.S.C., 1985, c. C-46, s. 74.

²⁰⁶ For the composition of these naval coalitions, see Chapter III, Notes 27-29.

justice to prevail. Even if such nations have MOUs with regional states, these agreements are non-binding for both parties. Thus, if a transfer is denied it can leave “catch and release” as the only recourse.²⁰⁷

Further, the exercise of universal jurisdiction by non-regional states would be prudent from a political and diplomatic standpoint. As mentioned in the previous chapter, Kenya temporarily stopped accepting any captured pirates from foreign nations for detention and prosecution in 2010.²⁰⁸ Then-Attorney General Andrew Wako cited the “inherent contradiction” in the way nations treated Kenya as a destination for captured piracy suspects. Mr. Wako added:

Kenya cannot continue to stand alone in prosecuting pirates...[Foreign nations] keep rubbishing our judicial system...Why then are these countries afraid to prosecute the pirates, arrested by their naval forces in the high seas? As soon as they give us the pirates, they dump them here and forget what happened.²⁰⁹

Commentator Mateo Taussig-Rubbo speculates that the decision to cease accepting pirates was in response to the launch of an investigation by the International Criminal Court into post-election violence in Kenya in 2007.²¹⁰ Whether connected or not, sour feelings remained. Although Kenya resumed accepting pirates shortly thereafter, Mr. Wako’s criticism was not without its supporters.

Despite the recent success of transfers, the United States, EU states, and other nations should be wary of appearing to view regional states, like Kenya, as a “dumping ground” for captured pirates. Without any hand in the costs and logistical headaches of detention and prosecution, states with a large commercial presence off the Horn of Africa

²⁰⁷ For an example, see “Seychelles Refuse to Take Pirates Held by Danes.”

²⁰⁸ Mukinda and Shiundu, “Kenya Laments Pirates’ Burden.”

²⁰⁹ Ibid.

²¹⁰ Mateo Taussig-Rubbo, “Pirate Trials, the International Criminal Court, and Mob Justice: Reflections on Postcolonial Sovereignty in Kenya,” *Humanity: An International Journal of Human Rights* 1, no. 2 (2011): 60-61.

could risk being seen as exploitative by the international community or those in the region, driving a wedge into collaborative anti-piracy efforts. Indeed, such an image would reinforce the claims made by resentful Somali nationals about the rapacious presence of the former colonial powers and their merchants. No doubt “Black Sam” Bellamy would nod in agreement from the grave.

After all, piracy prosecutions under universal jurisdiction can be seen as an altruistic act in the abstract. If more states, especially those heavily involved in commercial shipping in the area, were to prosecute captured Somali pirates under universal jurisdiction, it could build goodwill in the region. These prosecutions need not occur as frequently as they do in the courts of regional actors such as Kenya or the Seychelles, but the gesture alone would help solidify the conception of pirates as truly “enemies of mankind” worthy of condemnation by the entire international community.

It is imperative for regional states also to enact legislation criminalizing piracy and exercising universal jurisdiction. As mentioned in the previous chapter, transfers from arresting states to regional states, whether in accordance with a MOU or otherwise, have been functionally successful. In conjunction with financial and logistical support from the UNODC Counter-Piracy Programme, Kenya and the Seychelles have convicted over 150 pirates in their domestic courts under universal jurisdiction since 2008.²¹¹ One of the reasons for the successful transfers is the practicality of regional prosecution. While “catch and release” is never an enthusiastic decision on the part of a capturing nation, the benefit of prosecution, which is not a guaranteed conviction, must be balanced with the costs incurred of transporting the suspect(s) to home soil half-a-world away.

²¹¹ “U.N. Doc. S/2012/783,” para. 44. For more figures on the total prosecutions by all states, under universal jurisdiction and otherwise, see Appendix D.

In contrast, regional prosecution removes some of these burdens of transportation on the part of the capturing nation by allowing suspects to be taken to a closer regional prosecution center. However, as piracy continues to spread further east into the Indian Ocean, such sites as Kenya and the Seychelles become less attractive. In fact, recent attacks have occurred over 1,000 miles from the coast of Somalia – making countries such as India and the Maldives actually much closer in proximity.²¹²

However, these countries have not been charging captured Somali with piracy under universal jurisdiction. India has had to settle for charging pirates with such crimes as “trespassing.”²¹³ Likewise, 41 pirates currently sit in the Maldives awaiting possible extradition, unable to be charged with piracy in their current venue because the Maldives has no piracy law at all. Both of these nations are currently reviewing proposals for new legislation.²¹⁴ Other nations should follow suit and be sure to incorporate mechanisms for exercising universal jurisdiction. With the geographic expansion of pirate attacks, the “region” component of “regional prosecution” expands as well.

If an increased number of states have the capability for prosecutions under universal jurisdiction and exercise this ability, it will make prosecution more of an international norm and put pressure on those states that have *not* made any effort towards addressing the scourge of Somali piracy. Furthermore, even if a state takes no action towards criminalizing piracy itself, a greater number of nations with systems ready and

²¹² See Appendix A for a map detailing this geographic growth.

²¹³ Raghevendra Mishra, “Draft Indian Piracy Bill – Preliminary Assessment,” National Maritime Foundation, <http://maritimeindia.org/article/nmf-exclusive-draft-indian-piracy-bill-preliminary-assessment-raghevendra-mishra>.

²¹⁴ Ibid; Mohamed Naahe, “Proposed Anti-Piracy Bill Outlines Legal Framework for Punishing Suspects,” *Minivan News* (Maldives), January 3, 2013.

able to prosecute under universal jurisdiction could accept captured pirates from this state, opening more alternatives to “catch and release” and disincentivizing its practice.

As explained in detail in Chapter II, piracy operations are typically well-financed by investors on shore – who themselves are often former pirates. Experience from the high seas is often disseminated within the pirate community, spreading through clan affiliations and other relations. Knowledge shared among the Somali pirate community includes the different responses to pirate activity among states whose ships frequent the region and the nearby shipping lanes. In fact, this has led directly to varying rates of attack against ships flying certain nations’ flags.

It is an open secret that certain nations have a more...“robust approach” when encountering pirates at sea.²¹⁵ In other words, particular nations, notably Russia and India, are known for taking a more uncompromising line against pirate vessels and their behavior. U.S. Rear Admiral (Ret.) Terry McKnight writes that, while Commander of Task Force 151, he was well aware of the “Russian solution” to piracy. He states that, “Flying a Russian flag – and keeping it well lit, even at night – was enough to ward off pirates, who were well aware of the Russian solution” and what it might mean for their likelihood of ever making it back to shore alive.²¹⁶ Adm. McKnight adds, “We were all well aware that when the Russian Navy caught a bunch of pirates one afternoon, by the next morning the pirates would be gone. ‘It’s a very big ocean out here, gets very dark at night.’ That became known as the Russian solution.”²¹⁷

For example, in May 2010, the Russian Navy came under heavy criticism after it reported that ten pirates it had previously captured and released “probably died” on their

²¹⁵ This term is borrowed from Lt. Commander Sam Goode, in McKnight and Hirsh, *Pirate Alley*, 187.

²¹⁶ McKnight and Hirsh, *Pirate Alley*, 186.

²¹⁷ *Ibid.*, 31.

way back to shore. After disrupting a hijacking, Russian naval personnel released the pirates back into their skiff boats without their navigation equipment to sail the 300 miles back to the Somali coast.²¹⁸ While diminishing chances of attack based on the behavior of naval forces is a positive sign – suggesting that Somali pirates respond to incentives and value their safety – there are serious human rights concerns with the approach taken by the warships of some nations.

While pirates are considered the “enemy of all mankind,” international norms dictate that they still deserve humane treatment, as well as the opportunity for a formal prosecution for any crimes. However, the policy of “catch and release” hardly presents a just outcome for such criminals in the eyes of many. Thus, an international system with a stronger capacity for universal jurisdiction prosecutions could help prevent violations of human rights at sea when no one is watching – providing a strict but still humane alternative to “catch and release.”

Recent developments in the region have also further demonstrated the opportunity for effective domestic prosecution by regional and non-regional states. As described in Chapter III, UNODC has been actively engaged in constructing and expanding prisons in the region, particularly within Somalia, as well as aiding in the repatriation of convicted pirates to their homeland. The planned opening of the 500-bed Garoowe prison by the end of 2013 will free up considerable space in Kenyan and Seychellois prisons. This increased space opens the door for more prosecutions of Somalis, whether under universal jurisdiction or otherwise. Previously, prison capacity was a major “bottleneck”

²¹⁸ Sarah Childress, Abdinasir Mohamed, and Greg White, “Freed Pirates May Have Drowned,” *Wall Street Journal*, May 12, 2010.

in the prosecution efforts, as there was simply not enough space in the jails of those willing to prosecute piracy under universal jurisdiction.²¹⁹

Moreover, when declining to prosecute under universal jurisdiction, states often cite the cost of incarcerating Somalis for long prison sentences; further, the issue of having to accept Somalis on asylum claims after the conclusion of their sentences is also an impediment to prosecution.²²⁰ In fact, some Somalis have stated that they welcomed stays in European prisons in contrast to freedom in Somalia. As one Dutch defense attorney stated, “My client feels safe here. His own village is dominated by poverty and *sharia*, but here he has good food and can play football and watch television. He thinks the lavatory in his cell is fantastic.”²²¹

Under this new system monitored by UNODC, pirates will serve their sentences in their home country – reentering society in Somalia when set free. This development significantly reduces the expected financial burden on states when calculating whether or not to pursue prosecution of a suspected pirate. Thus, with the expected costs of successful prosecution much lower, all states should be fully equipped with the ability to pursue cases against suspected pirates under universal jurisdiction.

OPTIONS AND IMPLEMENTATION

As mentioned in the previous section, a number of states lack the domestic legislation necessary to exercise universal jurisdiction over piracy; this includes some of the most prominent states in the region with large commercial and military fleets. Such states should have laws at least criminalizing piracy against their flagged vessels, in order

²¹⁹ “Seychelles Refuse to Take Somali Pirates Held by Danes,” *Reuters*.

²²⁰ “Mukinda and Shiundu, “Kenya Laments Pirates’ Burden.”

²²¹ Bruno Waterfield “Somali Pirates Embrace Capture as Route to Europe,” *The Telegraph*, May 19, 2009.

to satisfy Article 94(1) of UNCLOS and Article 5bis of the SUA Convention.²²²

Likewise, Article 100 of UNCLOS states: “All States shall 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.”²²³

Even more directly, the DCoC expressly addresses the issue of domestic legislation, as mentioned in Chapter III. In particular, Resolution 1 of the DCoC calls on states to “review [their] national legislation...towards ensuring that there are national laws in place to criminalize piracy... and adequate guidelines for the exercise of jurisdiction, conduct of investigations, and prosecutions of alleged offenders.”²²⁴ While other provisions of the DCoC have been accepted more readily, some states still lack such domestic capacity. The failure of states to adequately criminalize piracy or hijacking could actually be seen as a breach of these states’ international obligations to the DCoC and other treaties, depending on to which agreements they are parties.

To their great credit, a number of states have made the effort to review and update their domestic laws – perhaps in part due to repeated calls by the U.N. National Security Council in their resolutions for more widespread criminalization and prosecution of piracy suspects.²²⁵ On March 23, 2012, the Secretary-General released a report presenting a compilation of information received from 42 Member States on the statuses

²²² Kraska, *Contemporary Maritime Piracy*, 168.

²²³ UNCLOS, Art.100.

²²⁴ “Djibouti Code of Conduct,” [see note 170].

²²⁵ In the latest, Res. 2077 (2012), the Security Council “Not[ed] with concern that the continuing limited capacity and domestic legislation to facilitate the custody and prosecution of suspected pirates after their capture has hindered more robust international action against the pirates off the coast of Somalia, too often has led to pirates being released without facing justice, regardless of whether there is sufficient evidence to support prosecution.” U.N. Resolution 2077 (2012) can be accessed at http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/2077%282012%29

of their domestic laws criminalizing piracy.²²⁶ The submissions illustrate an encouraging trend of more nations willing to review and revise their laws. In addition, the responses to the report show a wide range of approaches to the criminalization of piracy at the domestic level. Nevertheless, this process need not be arduous.

For example, the definition of piracy under Chapter 18, Section 1651 of the U.S.

Code states:

Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.²²⁷

The U.S. Code has additional statutory language defining the crime and penalties for acts of piracy by or against its citizens.²²⁸ However, the above section is the only text addressing the prosecution of piracy on the high seas. This language perhaps seems very close to that of Canada's code, which also cites the "law of nations" when defining piracy. However, that the U.S. Code states that this activity applies to whoever commits piracy "on the high seas" allows for the prosecution on the basis of universal jurisdiction. A simple alteration in language can have major legal implications, including the ability to exercise universal jurisdiction.

The U.S. statute addressing piracy on the high seas and providing for the exercise of universal jurisdiction is pithy yet effective. However, there can be drawbacks to this laconic approach, depending on the state. For example, in *United States v. Said*, a Federal Court judge dismissed the indictment against six Somali nationals who had attacked the

²²⁶ U.N. Secretary-General, *Letter from the Secretary-General to the President of the Security Council*, UN Doc. S/2012/177, (Mar. 26, 2012).

²²⁷ 18 U.S.C. § 1651.

²²⁸ 18 U.S.C. § 1652-61.

USS *Ashland*, a U.S. naval warship, off the coast of Djibouti in 2010.²²⁹ Judge Raymond Jackson concluded that the “law of nations” was unclear and that U.S. precedent defined piracy as “sea robbery,” meaning the pirates needed to have completed their attack on the ship rather than merely attempting a hijacking.

Ultimately, the case was overturned on appeal, and the pirates were convicted.²³⁰ However, it is vital that domestic statutes against piracy cover all of the illegal activity under customary international law, especially when considering the tactics of the pirates off the Horn of Africa. As described in Chapter II, Somali pirates will often swarm a vessel in their skiff boats prior to an attack and attempt to board from several sides. These assaults are often unsuccessful, especially in light of increased security measures by ships. It would be disastrous for prosecution efforts if pirates were routinely able to avoid conviction on technicalities such as failing to fully succeed in a hijacking. With such a proposition, it would greatly decrease the incentive for states to attempt to prosecute captured Somalis – whether under universal jurisdiction or otherwise.

The *U.S. v. Said* case demonstrates that precision can trump brevity – especially in formulating law and policy. While states are free to define piracy however they want, states cannot prosecute pirates on the basis of universal jurisdiction under definitions of piracy that go beyond acts described in UNCLOS 101.²³¹ Acts that are criminalized beyond the scope of Article 101 can be prosecuted internally or on the basis of

²²⁹ *United States v. Said*, 757 F. Supp. 2d 554 (E.D. VA 2010). Although this case was not prosecuted under universal jurisdiction, it demonstrates the perils of such a vague definition of piracy.

²³⁰ Brock Vergakis, “5 Somalis Convicted of Piracy in USS *Ashland* Case,” *Yahoo News*, Feb. 27, 2013.

²³¹ As mentioned in Chapter I, UNCLOS is not a criminal law code; Article 101 does not prohibit piracy and provide a penalty. Rather, the provisions define piracy for the purposes of defining the scope of acts for which nations themselves can prosecute. Thus, laws criminalizing acts beyond those described in Article 101 violate the legal principle of *nullum crimen sine lege* (“no crime without law”), also known as the principle of legality. For background information on this principle and how it pertains to the exercise of international criminal law, see Fredinandusse, *Direct Application of International Criminal Law in National Courts*, Ch. 6. This principle will be explored in greater detail in Chapter VI of this thesis.

jurisdiction other than universal jurisdiction. This limit aside, drafting domestic statutes criminalizing piracy need not be a laborious and prolonged exercise to strike the right balance in the language. For example, the Seychelles took a very direct approach in updating their piracy laws in March of 2010. The relevant section of the Seychelles Penal Code, Cap 158, § 65(4), now states:

Piracy consists of any of the following acts:

- (a) Any illegal act of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or aircraft and directed-
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such a ship or aircraft;
 - (ii) against a ship or an aircraft or a person or property in a place, outside the jurisdiction of any State;
- (b) Any act of voluntary participation in the operation of a ship or an aircraft with knowledge of facts making it pirate ship or a pirate aircraft; or
- (c) Any act described in paragraph (a) or (b) which, except for the fact that it was committed within a maritime zone of Seychelles, would have been an act of piracy under either of those paragraphs.

If this looks familiar, it should. In updating its piracy legislation, the Seychelles simply directly duplicated the text from UNCLOS Articles 101.²³² This approach ensures that, at the very least, the scope of acts covered by UNCLOS is also covered by domestic law and that such acts are able to be prosecuted. Moreover, that this statute contains specific language providing for prosecutions of acts committed “on the high seas” and “outside the jurisdiction of any state” ensures that acts of piracy with no direct nexus to the Seychelles can still be tried in its courts on the basis of universal jurisdiction. The

²³² This duplication in the Seychelles Penal Code is also extended to the other articles of UNCLOS dealing with piracy, with some slight variations in order but with the same apparent meaning. For more on domestic legislation of the Seychelles criminalizing piracy, see Appendix C.

success of Seychelles as a regional center for prosecution, with over 100 piracy convictions since early 2010, confirms the strength of its domestic legislation.

As briefly discussed in Chapter I, some scholars take issue with the UNCLOS definition of piracy, citing it as too narrow and limiting for the proper international enforcement and prosecution of piracy.²³³ States may certainly choose to leave this language out when designing legislation to prosecute offenses by or against its citizens. For the purposes of combating Somali piracy and universal jurisdiction, these limitations have either been mitigated or do not apply to the circumstances. For example, since the tactics of Somali pirates up to this date have exclusively involved attacking vessels from their skiff boats and then attempting a hijacking, the “two-ship” requirement encased in Article 101 does not pose a foreseeable problem. Accordingly, the domestic statute implemented by the Seychelles serves as a sterling example for domestic legislation – both in its scope and its straightforward implementation.

Nevertheless, it is important to note that even if more nations do follow the example of the Seychelles, it does not ensure that states will forgo “catch and release” in favor of universal jurisdiction prosecution. Prosecution is still an unattractive option in many instances, simply because of the difficulties in actually convicting Somali pirates for their crimes based on the circumstances in which they are captured. This crucial hindrance to prosecutions – and ultimately justice – will be addressed in the next chapter.

CONCLUSION

In a speech to the U.N. Security Council on the “scourge of piracy,” Former Secretary of State Condoleezza Rice proclaimed that “through international law...the

²³³ For an overview of some of these issues, see Geiß and Petrig, *Piracy and Armed Robbery at Sea*, 60-64.

international community already has sufficient legal authority and available mechanisms to apprehend and prosecute pirates, but sometimes the political will and the coordination has not been there to do so.”²³⁴ While it is that true political will and coordination are very real problems, these are issues that affect the proper exercise of international law as well. Indeed, not all states actually have the available mechanisms to exercise universal jurisdiction to prosecute pirates, while still others lack domestic law to prosecute the crime of piracy in any capacity.

This chapter began by explaining some of the legal deficiencies for prosecuting pirates of various nations around the world, including those who are already most involved in the issue. In addition, this chapter expounded some of the political, diplomatic, and of course practical benefits to states’ revising their laws and agreeing to prosecute suspected pirates under universal jurisdiction. Finally, this chapter supplied a model statute that criminalizes piracy and provides for universal jurisdiction. This model, or a variation, can be used by nations to enact their own legislation to criminalize piracy and provide for universal jurisdiction. While “Black Sam” Bellamy might rail against such laws and the “sneaking puppies” who follow them, states must live up to their international diplomatic obligations. After all, if pirates such as “Black Sam” want to “make war on the whole world” en route to securing their ill-gotten fortunes, then the whole world should universally respond and recognize them for what they are: criminals.

²³⁴ Condoleezza Rice, “Combating the Scourge of Piracy,” statement at the United Nations, Dec. 16, 2008.

Chapter V: A 19TH CENTURY SOLUTION? “EQUIPMENT ARTICLES” FOR PROSECUTION

“That on 10th of February last, in a ship ye were possessed...as traitors, robbers, Pirates and commons enemies to mankind...did maintain a hostile defence and resistance for some hours against His Majesty’s ship...under a Black Flag, flagrantly by that denoting yourselves common robbers and traitors, opposers and violators of the Laws.”²³⁵

– Indictment, The Trial of Black Bart’s Crew, 1722

If only modern day pirates would agree to “flagrantly denote themselves” as “opposers and violators of the law,” much of the legal minefield surrounding maritime piracy prosecutions could be happily avoided. Even if all states would update their domestic laws to criminalize piracy and would agree to accept universal jurisdiction cases, the greatest obstacle to prevalent and effective piracy prosecutions remains: evidence. Indeed, the lack of sufficient evidence is continually cited as the principal reason states decline to prosecute captured pirates and instead release them at sea.²³⁶

However, just because pirates have stopped hoisting a black flag above their vessels does not mean that states should remain powerless and allow them to roam the seas, cruising in wait for a vulnerable target. That these pirates operate pirate ships with impunity must be addressed by the international community and in fact used by states to prosecute pirates for their unabated harassment. To that end, states should enact a modern version of equipment articles to prosecute Somali pirates for their criminal operations.

This chapter will begin by introducing the conceptual idea of equipment articles and how they are distinguished from both laws criminalizing “intent” and those criminalizing “possession.” Next, the chapter will highlight the historical basis for

²³⁵ Charles Johnson, *A General History of the Robberies and Murders of the Most Notorious Pirates*, 226.

²³⁶ UN Secretary-General, *Report of the Secretary-General*, UN Doc. S/2010/394 (July 26, 2010), para 20.

equipment articles and their record of success in addressing crises in international maritime security. Finally, this chapter will explain how such legal principles can be implemented and highlight the best mechanism to do so.

EQUIPMENT ARTICLES: WHAT THEY ARE AND WHAT THEY ARE NOT

In discussing the need for expanding legal authority to bolster prosecution efforts, much rhetoric has been devoted to exploring the “intent” to commit piracy and how that might be applied to pirates at sea. In his comprehensive report on Somali piracy to the Secretary-General of the U.N., Special Advisor Jack Lang stated, “Unless perpetrators are caught in the act, many acts of piracy are not prosecuted. National judicial systems must therefore also criminalize intention.”²³⁷ Mr. Lang is certainly correct in his assertion about prosecutions and the current standards for prosecution.

However, Mr. Lang’s suggestion stands on shaky legal ground; as mentioned in Chapter IV, states cannot prosecute individuals on the basis of universal jurisdiction for acts that are not considered crimes based on customary or codified international law. Mr. Lang’s recommendation would thus entail new international law to this effect, since “intention to commit piracy” is not currently an act described in UNCLOS Article 101.²³⁸

Instead, there is a slight variation of this idea that is more procedurally and diplomatically feasible, while still retaining the desired effect. States should adopt equipment articles that target the “operation of pirate ships” by Somali pirates both before and after hijackings. The term “equipment articles” is borrowed from Professor Eugene Kontorovich of Northwestern Law School, who defines such laws in the context

²³⁷ “Jack Lang Report,” para. 59 [see note 8].

²³⁸ Note that “intention to commit piracy” is distinct from “attempt to commit piracy.” The former has a broader scope, as it includes the steps taken leading up to a crime, without the acts of the crime itself.

of piracy as “rules that create a judicial presumption of guilt on piracy charges for crews of civilian vessels possessing certain specified equipment within a certain defined area of the high seas plagued by pirate attacks.”²³⁹

Equipment articles would define evidence for the established international crime of piracy, not create new offenses that individuals could violate. In contrast, laws such as those proposed by Mr. Lang would introduce a new crime of “intent to commit piracy” based on circumstantial evidence, including but not limited to the possession of equipment used for piracy. These crimes would be analogous to statutes in the United States that make the possession of burglary tools a crime in conjunction with the intent to burgle. Courts have ruled that states do not have to prove a defendant committed an actual burglary, nor even tie the intent to burgle to a specific target. While such laws similarly use the possession of equipment as evidence, equipment articles are distinct from these laws in that they do not focus on criminalizing intent; the text of equipment articles would strictly concern the evidence.

Equipment articles are also distinct from those crimes that directly criminalize possession of prohibited equipment. There is no international crime of possessing piracy equipment, under customary international law or otherwise. Thus, any state that codifies language criminalizing such possession could only prosecute individuals under its own laws – not on the basis of universal jurisdiction. A relevant example can be seen in Cap 200 § 22 of the Hong Kong Criminal Code, which states:

(1) Any person who is found within Hong Kong on board any vessel equipped for the purposes of piracy, shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for 3 years.

²³⁹ Eugene Kontorovich, “Equipment Articles for the Prosecution of Maritime Piracy” (discussion paper, One Earth Future Foundation, May 17, 2010), 1.

(2) It shall be a defence to a charge under subsection (1) if the person charged proves-

(a) that he was not on board the vessel willingly; or

(b) that he did not know that the vessel was equipped for the purposes of piracy.²⁴⁰

Similar to equipment articles, this statute targets individuals through the composition of their vessels. In essence, it criminalizes the possession of pirate equipment. However, the law does nothing to define what “equipped for the purposes of piracy” means, and it criminalizes the mere presence aboard such a vessel. Furthermore, this law only applies “within Hong Kong territory” and does not provide for the exercise of universal jurisdiction and thus for prosecution of activity on the high seas.

Unlike the Hong Kong statute, equipment articles do not need to define a new offense; rather, equipment articles would establish the elements of proof for the act of “operating a pirate ship” – which is already a part of the crime of piracy. These articles, in defining the equipment and behavior of a pirate ship, would be used to establish that a vessel is a “pirate ship” as named but not adequately described in UNCLOS Articles 101 and 103. Thus, like the Hong Kong statute, the language of equipment articles would be directed at the pirate ships, not directly at the intent of the pirates.

The tactics of Somali pirates were outlined in detail in Chapter II. When leaving the shore, the criminals in skiff boats are not going fishing – for fish at least. Unlike the lawful fishermen who, like their ancestors generations before them, sail out into the nearby waters in their canoes and dhows to earn their living from the sea, the pirates speed out from the shore to commit acts of piracy, terrorizing large commercial tankers and simple fishing boats alike. Their ships are accordingly outfitted for the task.

²⁴⁰ “Being Found on Board Piratical Vessel and Unable to Prove Non-Complicity,” Cap. 200, § 22 (H.K.).

Equipped with menacing weapons including rocket-propelled grenade launchers and specially-designed boarding contraptions like hooked ladders, these vessels are not just crafts for sea travel – these are pirates ships; that they lack the characteristic yet anachronistic black flag is lamentable yet immaterial.

This same clear characterization as pirate ships holds for hijacked fishing dhows and whalers. While originally legitimately-operating fishing boats, these vessels are illicitly appropriated and transformed into piratical mother ships. These pirate ships are subsequently furnished for launching pirate action groups and are operated by pirates who redirect them to hunting unsuspecting prey. Despite the clear status of these vessels as pirate ships, maritime law is lacking in classifying them as such; this void must be addressed by the international community to ensure successful criminalization of the operation of such ships. Before addressing the implementation of such policy, it is first instructive to highlight the historical basis of equipment articles and their success.

HISTORICAL BASIS FOR EQUIPMENT ARTICLES

Equipment articles have their genesis in the international effort to curb the slave trade in the 19th century. This effort was spearheaded by Great Britain, who abolished the slave trade within its empire in 1807 and outlawed slavery outright in 1833. Despite these steps, slavery and the slave trade were still legal under international law, meaning Britain was powerless to stop foreign slave vessels, even when its warships encountered them at sea. Thus, Britain signed several bilateral treaties with nations who had also abolished the slave trade, providing for warships from either party to stop, and if necessary seize, merchant ships from either state that were engaged in the slave trade. These treaties

stipulated that seized vessels would be brought before special “mixed courts of justice” to decide the fate of the ship and its cargo.²⁴¹

However, enforcement of these seizure agreements was initially stymied by the need to prove that a captured ship was engaged in the slave trade. This was a manageable exercise when a vessel had a cargo full of slaves returning from Africa; not so much on the way there. Even when a ship was clearly outfitted for the slave trade, it could not be seized for lack of evidence. To remedy this situation, Britain and its partner nations amended their treaties to include supplemental “equipment clauses” concerning the evidence that could be used to determine the status of a ship when considering seizure.

With slavery as a sustained legal practice in half of its states, the U.S. was one of the last of the maritime powers to agree to such a treaty with Britain, finally signing the Treaty between United States and Great Britain for the Suppression of the Slave Trade in the spring of 1862.²⁴² This treaty contained the usual framework for adjudication of seized ships, as well as a provision that stipulated ten different classifications of a ship’s features and equipment. Some of the equipment listed was specific to the practice of transporting slaves, such as “shackles, bolts, or handcuffs.” Other stipulations assessed the circumstances of the equipment in possession, such as “a quantity of mats of matting greater than is necessary for the use of the crew of the vessel as a merchant-vessel, unless such mats or matting be entered on the manifest as part of the cargo for trade.”²⁴³

²⁴¹ For more information on the negotiation and establishment of these treaties, see Jennifer S. Martinez, “Anti-Slavery Courts and the Dawn of International Human Rights Law,” *Yale Law Journal* 117 (Fall 2007): 576-579.

²⁴² “Treaty between United States and Great Britain for the Suppression of the Slave Trade,” April 7, 1862 [henceforth “Anglo-American Slave Trade Treaty”].

²⁴³ *Ibid.* Article VI.

For these categories of equipment, if “any one or more of the articles” were found on board then “that fact [would] be considered as *prima facie* evidence that the vessel was employed in the African slave trade.” However, the treaty also allowed for the determination above to be rebutted with “clear and incontrovertible evidence” that the vessel “was employed in a lawful undertaking” and that the equipment in question was “indispensable for the lawful object of her voyage.” Furthermore, the text also specified the zones of operation of the treaty as “within the distance of two hundred miles from the coast of Africa, and to the southward of the thirty-second parallel of north latitude, and within thirty leagues from the coast of the Island of Cuba.”²⁴⁴

There is an important distinction between the international slave trade and Somali piracy that impacts the use of equipment articles. Ships involved in the slave trade only carried slaves onboard for part their voyage – when returning from Africa. During this portion of their overall voyage, presumably half of it, their violation of the ban on the slave trade would be readily apparent to anyone who searched onboard and saw a crowd of humans as cargo. In contrast, the guilt of Somali pirates is currently only apparent, from a legal if not practical standpoint, during an attempted hijacking or possibly directly after a failed one. A typical pirate operation with the proper supplies can last up to three weeks out on the high seas; this leaves precious and narrow 15-minute windows in which pirates can be caught in the act of hijacking before taking control of a ship or, if unsuccessful, returning to float out at sea as “fishermen.” Thus, modern equipment articles designed for Somali piracy would be even more impactful than their 19th century

²⁴⁴ Ibid.

counterparts in targeting pirates during the time they can cruise the ocean without fear of legal reprisal.²⁴⁵

The legacy of the 19th century equipment articles has not lain completely dormant until now. This same creative approach to enforcement has been employed to combat another pattern of criminal behavior on the high seas: maritime drug smuggling. The most relevant example involves the propensity for drug smugglers to use a specific type of submersible vessels in trafficking operations headed for U.S. shores; if encountered by the authorities, such ships can easily be scuttled, along with the drug evidence, forcing U.S. personnel to rescue the perpetrators instead of arresting them.

In response, the U.S. has criminalized the mere operation of such ships on the high seas by enacting the Drug Trafficking Vessel Interdiction Act of 2008 (DTVIA).²⁴⁶ In arguing for the passage of the new law, Representative Daniel Lungren (CA-3) explains:

Some people say...why don't we just sink [the ships smuggling drugs]? Why don't we just shoot them down. If this were wartime, we would do that sort of thing. This is not wartime in the judicial sense of the word. So...how we can successfully prosecute them to get around their evasive tactics...That's why we need this legislation, to allow us to have a legal premise for prosecuting them for actually being on the high seas.²⁴⁷

The DTVIA applies to “stateless” ships on the high seas, for which there are no country of origin and no legitimate purpose other than maritime smuggling, in order to combat a practice that is analogous to the “catch and release policy” off the Horn of Africa.

There are some characteristics that distinguish the DTVIA as a law. For one, the United States acted unilaterally in outlawing such vessels on the high seas, making their

²⁴⁵ Kontorovich, “Equipment Articles for the Prosecution of Maritime Piracy,” 4.

²⁴⁶ The bill’s language became part of the U.S. Code as 18 U.S.C. § 2285.

²⁴⁷ U.S. Cong. Rec. H7239-40 (110th Cong.).

operation a new offense under U.S. criminal law; that such vessels were stateless not only gives the U.S. jurisdiction but is an element of the crime.²⁴⁸ In addition, the DTVIA provides for a clear presumption of guilt, since merely being present on the vessel is a crime. The law itself then furnishes the only acceptable affirmative defenses.²⁴⁹ Despite these distinctions, the successful prosecutions under DTVIA demonstrate that states can proactively target clearly illegal activity on the high seas and are not forced to allow it to fester because of an apparent loophole in the law.

IMPLEMENTATION

The historical success of equipment articles in curbing such criminal activity as the slave trade and drug smuggling should be emulated in the case of Somali piracy. As it stands, individuals captured at sea may be convicted of piracy in domestic courts under the limits of acts stipulated in Article 101 of UNCLOS. This includes Paragraph (b), which states:

Any act of voluntary participation in the operation of a ship or an aircraft with knowledge of facts making it pirate ship or a pirate aircraft;²⁵⁰

UNCLOS defines the term “pirate ship” in Article 103, entitled “definition of a pirate ship or aircraft,” which states:

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

²⁴⁸ The U.S. has claimed extraterritorial jurisdiction over these vessels since they are stateless. For a discussion and critique of this jurisdictional exercise, see Allyson Bennett, “That Sinking Feeling: Stateless Ships, Universal Jurisdiction, and the Drug Trafficking Vessel Interdiction Act,” *Yale Journal of International Law* 37, no. 2 (2012).

²⁴⁹ 18 U.S.C. § 2285 (e). Among these defenses include that the ship is in fact properly registered with a nation or that there is a preponderance of evidence it is lawfully engaged in a licensed activity.

²⁵⁰ UNCLOS, Article 101 (b).

used to commit any such act, so long as it remains under the control of the persons guilty of that act.²⁵¹

This definition is not terribly enlightening, as it defines “pirate ship” in reference to the acts of piracy outlined in Article 101; the language is circular. However, this does not mean that it is inescapably limiting. Rather, domestic legislation can be implemented to help define “pirate ship” in Article 103.

As mentioned earlier in the chapter, the operations of Somali pirates and the composition of their vessels are well documented. Like the equipment clauses in Britain’s bilateral treaties to suppress the slave trade, states that both capture and prosecute Somali pirates should adopt similar equipment articles. However, these articles should be implemented under domestic laws, as part of their definitions of piracy. These articles would supplement the crime of piracy by providing what characteristics can and should be used as evidence to determine that a ship is a “pirate ship.” Article 103 states that pirate ships are “intended by the persons in dominant control to be used for the purpose of committing [an act of piracy].”²⁵² While not criminalizing intent outright, equipment articles would use the equipment and circumstances of the capture to demonstrate that the ship was operated as, and intended to be, a pirate ship.

Paralleling the 1862 treaty between the United States and Great Britain, these articles would note both the possession of equipment directly incriminating as pirate gear, as well as the context of this possession and the characteristics of the ship. For example, the lightweight, hooked ladders possessed by pirates have no legitimate purpose, especially for fishermen, and are clearly designed to latch onto larger ships during an

²⁵¹ UNCLOS, Article 103.

²⁵² *Ibid.*

unrequited and forceful boarding.²⁵³ Likewise, a rocket-propelled grenade launcher is not a fishing tool.

In contrast, AK-47 rifles may be carried by legitimate fishermen; after all, the high seas are teeming with threatening pirates! Yet, AK-47s found in possession of six men in a skiff boat with hooked ladders, RPGs, grenades, with little or no food or fresh water (evidence of a nearby mother ship), and no fishing equipment of any kind may contribute to the aggregated evidence. The equipment articles should also specify clearly defined zones of exclusion, where the presence of these predefined items is relevant; these laws need not apply to the high seas around the entire world. After all, the appearance of boats so-equipped in busy commercial shipping lanes off the Horn of Africa and far from reasonable fishing locations is part of the circumstantial evidence that could lead to a ship being determined in a court of law to be a “pirate ship” and thus operated by those guilty of “piracy.”

However, it is crucial to note that these equipment articles should not attach an automatic presumption of guilt to the presence of any one item, even the hooked boarding ladders. Rather, all of the evidence, including the possession of items and the circumstances of capture, should be judged in the aggregate. Like all cases built on circumstantial evidence, the determination of guilt should be rebuttable – by the

²⁵³ As Judge Gaswaga of the Supreme Court of Seychelles ruled in recent judgment: “A narrow, lightweight ladder some twenty feet in length with a sharply hooked top is a tool clearly designed to board another ship, especially a larger ship...Even the most basic knowledge of shipping indicates that peaceful mariners do not board a larger ship by hooking themselves onto it from below. The peaceful transfer of personnel between a larger and a smaller vessel is effected by dropping a ladder down from the larger vessel avoiding the unnecessary risk attendant to trying to hook oneself on via a long flimsy ladder. Such ladders, narrow and weak as they are, are equally ill suited for transferring cargo or personnel between ships or between a ship and the dock. These ladders are clearly designed to effect [*sic*] a boarding without aid from the larger ship, a forceful boarding. The Court is of the opinion that such ladders lack an innocent purpose and are therefore key evidence of pirate activity.” *Republic of Seychelles v. Mohamed Abdi Jama & Six Others*, Judgment, Crim. Side No. 53 of 2011 (Jul. 25, 2012) [hereafter, *Republic v. Jama*], para 51.

testimony of, and possible introduction of evidence by, the captured suspects. The burden would remain on the prosecution to prove the guilt of the defendants according to the standards of the court system wherever they are tried, just like all other piracy cases.²⁵⁴

This last point is especially crucial for those instances in which a warship captures pirates operating a mother ship. Since these mother ships are often previously-hijacked fishing dhows, they will likely have individuals on board who are captives and perhaps forced to help sail the boat or cook food. By helping to operate a pirate ship, these individuals could unjustly be found guilty of piracy – unless they are able to argue that their participation was not “voluntary,” as described in Article 101(b). This same safeguard is also critical in those instances when a minor is among the group of pirates; even if willing participants, minors are not eligible to be legally prosecuted under universal jurisdiction and should be repatriated to Somalia. Thus, these individuals need an opportunity to present this defense without being presumed to be automatically guilty by virtue of helping to operate a proven “pirate ship.”

Equipment articles should be implemented by nations as part of their domestic laws criminalizing piracy, especially if these nations already have to update their deficient or non-existent statutes that criminalize piracy. This action is especially important for those nations that have the potential to be regional centers for prosecution, like the Seychelles. Nevertheless, that does not mean that individual states should simply quickly and unilaterally pass such laws and start rounding up all of the ships in the sea. Rather, equipment articles should be implemented in conjunction with an agreement among relevant states. For example, equipment articles could be instituted as part of a

²⁵⁴ This is almost always “beyond a reasonable doubt” or a practical equivalent in judicial systems around the world.

new protocol to the Djibouti Code of Conduct (DCoC); as described in Chapter III, the DCoC already condemns piracy and mandates that states criminalize piracy and actually prosecute captured pirates.

A regional agreement would not be legally necessary for implementation, but it would have political benefits. Rather than having one nation unilaterally institute equipment articles and become the single destination for all pirates captured not during an attack, an agreement among states would promote the idea of a regional solution to this regional problem, as well as avoid the appearance of there being one “dumping ground” state. In addition, an agreement among nations that resulted in several or more states implementing equipment articles would help such legislation become an international norm and thus more likely to become a part of customary international law.

Furthermore, a regional agreement would ensure that the equipment articles implemented in the domestic legislation of regional states would be uniform so that there would not be a patchwork of different zones of exclusion and views on the incriminating nature of certain pieces of equipment. Such an incongruity could give rise to additional legality and foreseeability concerns, which will be addressed in Chapter VI.

An international agreement would also permit the Federal Government of Somalia (FGS) and representatives from Somaliland and Puntland to be involved in determining the details and scope of the equipment articles, helping to ensure that innocent parties – such as local coast guard units – do not have their legitimate efforts inadvertently obstructed by this new legislation in foreign nations. Likewise, commercial shipping representatives and maritime security experts should be consulted in the drafting of the equipment articles.

While implemented at the national level, the international community should still have an active role in promoting equipment articles. The U.N. Security Council could include a recommendation for such legislation in its many continuing resolutions on the situation in Somalia.²⁵⁵ This action would help spur nations to join the efforts to implement equipment articles, as resolutions encouraging the criminalization of piracy at the national level induced nations to review and update their laws.

CONCLUSION

The crucial benefit to equipment articles is their ability to bolster what is currently the most ineffectual deterrent to Somali piracy, successful prosecutions, by helping to eliminate their weakest component: the lack of evidence of piracy. This chapter began by explaining the conceptual idea of equipment articles and reviewing their historical success in combating criminal activity at sea. The chapter also elucidated how equipment articles should be implemented in order for them to be most effective, procedurally and politically. It certainly may be true that gone are the days when pirates would hoist a black flag and openly accept the label of “pirate.” However, through equipment articles, the international community can respond in kind and recognize that a black flag need not be the only obvious sign of a pirate ship at sea.

²⁵⁵ J. Ashley Roach, “Suppressing Somali Piracy – Next Steps,” Insights, December 1, 2010.

Chapter VI: DIPLOMATIC IMPLICATIONS

*“What do you want to be a sailor for? There are greater storms in politics than you will ever find at sea. Piracy, broadsides, blood on the decks. You will find them all in politics.”*²⁵⁶

– David Lloyd George

Perhaps Prime Minister Lloyd George’s assertion is a bit overwrought. After all, the incessant intrigue and the passionate sparring in Westminster cannot possibly compare to the very real and very brutal reality that is the life of most Somali pirates. Even as a metaphor, Prime Minister Lloyd George neglects to consider that piracy itself has a good deal of politics within it as well – great storms and all. Chapter II detailed the emergence of the roots of piracy and pirate networks in the failed Somali state, while Chapter IV highlighted the political elements that are crucial to understanding the obstacles to routine and effective prosecution of Somali pirates. While equipment articles would provide a much needed boost to international prosecution efforts, they raise important diplomatic and legal considerations that cannot be ignored. Indeed, this “19th century solution” must be instituted in our 21st century world.

This chapter will begin by examining the current and expected diplomatic attitude and international support towards equipment articles legislation. Next, this chapter will present some anticipated criticism of equipment articles, as well as address and contrast alternatives to the mechanism for implementation that was described in Chapter V. Finally, this chapter will highlight the implications of the successful application of equipment articles on prosecution efforts and the deterrence of piracy altogether.

²⁵⁶ QuotationsBook. <http://quotationsbook.com/quote/30959>.

SUPPORT FOR EQUIPMENT ARTICLES

The specifics of equipment articles aside, representatives from around the international community have continually called for the implementation of measures to strengthen prosecution efforts by states. As detailed in Chapter III, the U.N. Security Council has been very active in promoting the increased ability of states to prosecute pirates by updating domestic laws to provide for universal jurisdiction. There is little doubt that the Security Council would not also encourage measures that bolster the efficacy of such prosecutions, such as equipment articles, provided that these actions are consistent with international law.²⁵⁷

Moreover, the addition of equipment articles to international prosecution efforts has received indirect endorsement by the United States. Thomas Countryman, then-Principal Deputy Assistant U.S. Secretary of State for Political-Military Affairs, mentioned the possibility of such laws in response to a question at a Special Briefing on Anti-Piracy Efforts in February of 2010. Among other statements, Mr. Countryman declared, “There’s no need to have ladders and grappling hooks in a fishing vessel.”²⁵⁸ This sentiment was echoed a month later by Andrew Shapiro, Assistant Secretary of State for Political-Military Affairs. In a March 31, 2010 address Mr. Shapiro offered:

[For] those cases where we do not capture the [piracy] suspects in the act of attempting to pirate a vessel but do encounter them laying in wait for their next victim ship with all the trappings of would-be pirates...perhaps states could agree that the mere possession of certain ladders, grappling hooks, and certain

²⁵⁷ For example, S.C. Res. 1844, para. 14 “calls upon all States...with relevant jurisdiction under international law and national legislation, to cooperate in determining jurisdiction, and in the investigation and prosecution of persons responsible for acts of piracy and armed robbery off the coast of Somalia...and to render assistance by...providing disposition and logistics assistance...”

²⁵⁸ Thomas Countryman, “Anti-Piracy Efforts,” address presented at U.S. State Department, Feb. 18, 2010.

armaments at sea in an area known to be a high risk area for piracy attacks should be sufficient to establish intent to commit an act of piracy.²⁵⁹

While not a definitive endorsement, the encouraging recognition of such a possibility by these officials suggests that actors in the international community would be open to the idea of promoting equipment articles. Indeed, Working Group 2 of the Contact Group on Piracy off the Coast of Somalia (CGPCS), chaired by Denmark, has discussed steps to enhance the prosecutions of Somali pirates but has not publicly endorsed equipment articles as legislation that should be adopted by states.

Despite the lack of official endorsement by states at the diplomatic level, equipment articles have received praise in the legal realm. In particular, Judge Duncan Gaswaga of the Supreme Court of the Seychelles noted the concept of equipment articles in two prosecutions of Somali pirates in July 2012.²⁶⁰ In both cases, the Seychelles exercised universal jurisdiction and convicted the pirates of “operation of a pirate ship,” rather than a traditional prosecution focusing on violent acts of hijacking.²⁶¹

In this regard, the Seychelles is a pioneer in piracy prosecutions through these cases. While the capture of the ships in each case was initiated after a report of a failed hijacking in the area, both sets of pirates were convicted without a connection to a specific attack on a specific ship; rather, the court used the equipment found aboard ships and the circumstances of the capture to convict individuals of piracy through the mere operation of a pirate ship. In effect, Judge Gaswaga interpreted the facts of the cases directly, seemingly without the need to consult equipment articles specifying such

²⁵⁹ Andrew Shapiro, “Counter-Piracy Policy: Delivering Judicial Consequences,” address presented at American University Law Review Symposium, Washington, DC, March 31, 2010.

²⁶⁰ *The Republic vs. Jama* [see note 253] and *The Republic vs. Dahir* [see note 127].

²⁶¹ In particular, the pirates were found in violation of sections 65(4)(b) and 65(5)(b) of Cap 158 of the Seychelles Penal Code. For a review of the Seychelles Penal Code, see Chapter IV or see Appendix C for a reproduction of the relevant provisions.

evidence, to conclude that the circumstantial evidence proved guilt of operating a pirate ship “beyond a reasonable doubt.”²⁶²

However, Judge Gaswaga also referenced equipment articles by name in his opinion in *Republic vs. Mohamed Abdi Jama*. While mentioning them in the text of his opinion to lend credibility to his decision to consider a ship’s equipment and its context in determining it to be a pirate ship, Judge Gaswaga also took time in the opinion to “impress upon the relevant authorities in Seychelles the need to amend the piracy laws” in order to more clearly define what kinds of equipment and circumstances should be used to create a rebuttable presumption that a ship is in fact a pirate ship.²⁶³ As of this writing, authorities in the Seychelles have taken no steps to implement equipment articles as per Judge Gaswaga’s suggestion.

ANTICIPATED OBJECTIONS

In addition to the mechanism outlined in Chapter V, equipment articles could be promulgated in other ways. The circumstances of the recent cases in the Seychelles suggest that one way would be for courts simply to accept the evidence of operating a pirate ship on a case-by-case basis. For example, in the *Jama* and *Dahir* cases, the court simply weighed the circumstantial evidence itself, without consulting legislation stipulating and clarifying what evidence should be considered. This approach is the equivalent of equipment articles in the desired effect of expanding the evidence that is used in a piracy trial to help secure convictions against those pirates that previously could have gone free for not being caught in the act. Furthermore, this approach avoids the

²⁶² “*Republic vs. Jama*.” para. 57.

²⁶³ *Ibid.*, para. 88. Special thanks to Matthew Williams, law clerk to Judge Duncan Gaswaga, Supreme Court of the Seychelles, for his correspondence in clarifying the intent of the dicta in the opinion. E-mail from Matthew Williams to author (March 20, 2013).

logistics and diplomatic red tape inherent in bringing nations together to sign an agreement about implementing equipment articles.

Despite these advantages, having different judges in different courtrooms in different nations each deciding unilaterally what evidence and circumstances should be or should not be used in assessing a boat's status as a "pirate ship" is problematic. For one, some judges might reject the use of pirate equipment as circumstantial evidence entirely, defeating the purpose of equipment articles. In contrast, even for those judges that do accept such evidence, there will be no formal guidance for them; thus, the emergence of many different standards is likely, all depending on what a specific judge is willing to accept from the prosecution as evidence on a case-by-case basis.

Holding pirate suspects to vastly different standards of what constitutes "operating a pirate ship" would be inherently unfair. Furthermore, it could violate the principles of "foreseeability" and "notice" under international criminal law, which state that an individual cannot be prosecuted for a crime that he or she could not reasonably have known about when they committed the crime.²⁶⁴ For example, one judge might on his own decide that the possession of any type of weapon at sea by captured individuals off the Horn of Africa is incriminating evidence of operating a pirate ship. As described in Chapter II, some legitimate fishermen do operate out of Somalia, as well as some local coast guard units, and they sometimes carry guns for their own protection. There would be no way for these individuals to confidently know how their actions and possessions on the high seas would be interpreted by a judge thousands of miles away.

²⁶⁴ For greater detail on these principles, and how they relate to piracy prosecutions based on equipment articles, see Samuel Shnider, "Universal Jurisdiction Over 'Operation of a Pirate Ship': The Legality of the Evolving Piracy Definition in Regional Prosecutions," *North Carolina Journal of International Law & Commercial Regulation* 38 (Winter 2013).

Such an unregulated system could also strain diplomatic relationships in the region. For example, if Somalia – or one of its autonomous states like Puntland or Somaliland – felt that its citizens were being treated unfairly or were being over-prosecuted, it could damage relationships in the region and derail other cooperative efforts that are crucial to deterring piracy, such as the sharing of information about recent attacks. For example, if Somaliland perceived that its citizens were being unfairly targeted and convicted by courts in the Seychelles, they could stop accepting the transfer of convicted pirates to be incarcerated from foreign states altogether, reinstating what has traditionally been a major hindrance to more widespread regional prosecutions of pirates.

Despite the allure of greater expediency provided by judges unilaterally accepting equipment as evidence of the crime of “operating a pirate ship,” the approach outlined in the previous chapter, with nations codifying equipment articles under domestic legislation, is still much preferable. As it is, equipment articles could fall under scrutiny for prosecuting crimes that are “effectively” new, even if not technically new. If states were to implement equipment articles under their own domestic legislation, they could then begin prosecuting captured pirates for piracy and “operating a pirate ship” which would be novel. Observers in the international community might argue that these prosecutions, while using evidence that is codified under domestic law, still violate the principles of foreseeability and notice.²⁶⁵

In concurring with this point, Samuel Shnyder of the International Criminal Tribunal for the Former Yugoslavia (ICTY) argues that equipment articles addressing the “operation of a pirate ship” may violate the principle of legality. He contends:

²⁶⁵ For background on the principle of foreseeability as it applies to International Criminal Law, see Ferdinandusse, *Direct Application of International Criminal Law in National Courts*, 238-248.

Since setting foot on board a ship with pirate equipment is not clearly illegal, it is unforeseeable to declare it punishable under UNCLOS Article 101(b) and to make cruising itself piracy, even where the intent of those in control is to attack should an opportunity present itself. Such prosecutions must be avoided to ‘prevent the prosecution and punishment of an individual for acts which he reasonably believed to be lawful at the time of their commission.’²⁶⁶

At the core of Mr. Shnider’s argument is determining if a law is “reasonably foreseeable” for an individual to know about to adhere to; after all, ignorance of the law is traditionally no excuse, but this ignorance must to some extent be willful, as there needs to be at least the chance an individual *could* consult this law if they so desired.²⁶⁷ Accordingly, it would be nearly impossible for an impoverished Somali teenager to ever know the laws and evidentiary procedures of a judge in the Seychelles or anywhere else – much less be able to follow them to the letter. Thus, the argument follows, nations should not be able to prosecute the crime of piracy under universal jurisdiction by using evidence of “operating a pirate ship.”

For this reason, it is vital that equipment articles not only be clearly codified under domestic laws but also materialize as the result of a regional or international agreement. As described in the mechanism outlined in Chapter V, a regional agreement would bring many nations to the diplomatic table and establish a uniform text for nations to consult and duplicate when implementing equipment articles. Not only would this input likely produce a better and more comprehensive version of such legislation, but it would also increase the publicity and foreseeability of such equipment articles.

Challenges to prosecutions using evidence from equipment articles based on the lack of “reasonable” foreseeability of such rules of evidence would wither in the face of an international agreement creating such laws, especially if Somalia itself was a signatory

²⁶⁶ Shnider, “Universal Jurisdiction Over ‘Operation of a Pirate Ship,’” 506.

²⁶⁷ For more on this point, see *Ibid.*, 503-4.

to the agreement.²⁶⁸ Likewise, the suggestion from Chapter V that the U.N. Security Council encourage equipment articles via a resolution would also help combat claims that prosecutions for illegally “operating a pirate ship” would not be legally foreseeable.

Another alternative method to implementing equipment articles would be to simply directly target the equipment. Indeed, why not just criminalize the possession of hooked ladders on skiff boats on the high seas and be done with the issue? This plan would be infeasible. As explained in Chapter IV, individuals cannot be prosecuted for piracy under universal jurisdiction for acts that go beyond the definition of piracy under international law.²⁶⁹ Currently, “possession of a hooked ladder” – or of any specific item – is not part of the definition of piracy provided in Article 101 of UNCLOS. States could decide to criminalize the possession of certain items, but these offenses could not be applied when universal jurisdiction is exercised to prosecute suspected pirates – which is the case when pirates are captured while cruising on the high seas instead of being caught in the act of hijacking a vessel. Thus, criminalizing the mere possession of piracy equipment is not an effective measure to increase prosecutions of Somali pirates under universal jurisdiction, which is what is lacking from the current legal environment.

IMPLICATIONS

The most apparent and immediate implication of the successful adoption of equipment articles is the prospect for increased prosecutions by states that capture suspected pirates at sea. Rather than being forced to practice “catch and release,” states

²⁶⁸ Arguments against the lack of foreseeability have also been dismissed in the face of the “manifest illegality” of some crimes, such as murder and genocide. The degree to which piracy, and operating a pirate ship, falls under this category is a matter of ongoing debate. For more on this point, see: Shnider, “Universal Jurisdiction Over ‘Operation of a Pirate Ship,’” 505-6.

²⁶⁹ See Chapter IV of this thesis, in particular note 231.

will feel more confident exercising universal jurisdiction and actually prosecuting individuals at sea who are clearly operating a pirate ship and will soon terrorize ships in the region – if they have not already been doing so. As stated previously, the lack of solid evidence for prosecution is the principal reason states decline to prosecute captured pirates, especially coupled with the threat of asylum claims if a Somali national is acquitted.²⁷⁰ The ability to build stronger cases against captured pirates will help alleviate this legitimate impediment to prosecution.

In addition, equipment articles will bolster the efforts of regional states already engaged in many prosecutions. States such as the Seychelles will not only be able to solidify their cases against pirates who are caught in the act of hijacking, perhaps hooked ladder in hand, but these states will also be willing to take on less traditionally apparent cases of piracy, such as when pirates are captured by a warship while cruising in sea lanes looking for a target.

The implementation of equipment articles is not only crucial to combating piracy in the near term, but it will also become even more imperative in the long term. The growing use of aerial drones to survey the surrounding waters by warships allow naval patrols to increasingly spot pirates while they are roaming on the high seas, long before any overt hijacking operations.²⁷¹ Without equipment articles that allow for these pirates to then be arrested for “operating a pirate ship,” the best a naval patrol can do is confront the pirates in their boats, perhaps confiscate their menacing weapons, and then send them back to shore. While certainly a positive development, this does not ensure that these same pirates will not simply be back tomorrow terrorizing the seas again.

²⁷⁰ U.N. Secretary-General, *Report of the Secretary-General*, UN Doc. S/2010/394 (July 26, 2010), para 20.

²⁷¹ “British Drones May Strike Pirate Boats,” *Telegraph* (UK), December 4, 2012.

The capacity to prosecute Somali pirates for operating a pirate ship is such a crucial addition to the international efforts to halt piracy off the Horn of Africa because of its robust deterrent effect. The threat of prosecution for operating a pirate ship will directly disincentivize pirates from ever leaving the shore armed for a hijacking. After all, the wealthiest investors of piracy who live comfortable lives on shore can always afford to send more destitute young men out to sea because of the extraordinarily high rate of return on their personal investments.²⁷² Thus, encouraging young Somalis to give up piracy as an attractive option for their future is a much more effective way to disrupt the pirate network than the Sisyphean task of locating every skiff boat on the high seas and tossing its equipment overboard, only to see the same pirates again the next day.

Curbing the practice of “catch and release” is a valiant goal, but an even better one is ensuring that fewer young Somalis fall victim to the allure of riches and decide to turn to piracy in the first place. Fewer pirates leaving Somali shores means less violence on the high seas, with fewer young Somali lives wasted – through either decades in prison or death at sea. Furthermore, disincentivizing piracy and decreasing the number of pirates around the Horn of Africa will also help protect some of the most helpless victims of the scourge of Somali piracy: the legitimate Somali fishermen. Rather than sharing the seas with criminals who hijack their boats and their good name, these fishermen will be freer to pursue their livelihoods in peace.

²⁷² For more detailed information on the return on investment for individual pirates and for piracy financiers, see Chapter II.

CONCLUSION

This chapter examined the expectations and implications of the promulgation of equipment articles. The chapter began by examining the diplomatic foundation for equipment articles, highlighting the likely international support for their implementation. Next, the chapter briefly addressed some expected criticism of equipment articles, including possible arguments for similar but alternative mechanisms for prosecuting pirates via their obvious operation of private ships. After establishing the supremacy of the elements of the model outlined in Chapter V, this chapter concluded by exploring the benefits to implementing equipment articles as a deterrent to not only hijackings but a life of piracy in general. After all, there needs to be some counterargument to Black Bart and his promise of a merry life of “plenty and satiety, pleasure and ease, liberty and power.”

CONCLUSION

*“They can’t stop us – we know international law.”*²⁷³

– *Jama Ali, Somali Pirate*

Jama Ali certainly has a point. While he may be a pirate and an international criminal, and an arrogant one at that, his characterization of his chosen profession needs no amending. Jama is also likely the wealthiest person in his family – having led the successful hijacking of a Ukrainian freighter headed for Kenya and ransomed it back to its owners for a hefty \$3.2 million dollar fee.²⁷⁴ That Jama and his fellow marauders happened to incite an international scandal by exposing a secret arms shipment destined for Sudan – uncovering 32 T-72 Soviet-era tanks, 150 grenade launchers, and 6 anti-aircraft guns in the cargo hold of the vessel – only serves to further highlight the sensitive political and diplomatic environment in which Somali pirates operate.²⁷⁵

All pirates take a risk in turning to a life of crime – but for young Somalis like Jama, it was neither a difficult decision nor a difficult transition. Jama and his men left the shores of Somalia, waited for the “big gray ships with guns to pass,” and then headed straight for a slow-moving tanker to come along. After all, even if his crew was captured by a naval patrol it would almost assuredly get no more punishment than “a free ride back to the beach” – which he has experienced several times.²⁷⁶ With this kind of impunity, Jama was able to make an easy cost-benefit analysis – and make a quick fortune.

The focus of this thesis has been on the “cost” side of this equation and on exploring what is lacking from the international effort to thwart and deter the scourge of

²⁷³ Jeffrey Gettleman, “Pirates Outmaneuver Warships Off Somalia,” *New York Times*, Dec. 15, 2008.

²⁷⁴ Jeffrey Gettleman and Graham Bowley, “Hijacked Ukrainian Arms Ship Limping into Port,” *New York Times*, February 12, 2009.

²⁷⁵ Michael R. Gordon and Jeffrey Gettleman, “Pirates’ Catch Exposed Route of Arms in Sudan,” *New York Times*, December 8, 2010.

²⁷⁶ Gettleman, “Pirates Outmaneuver Warships Off Somalia.”

Somali piracy. At the individual level, consistent and effective prosecution of Somali pirates is essential to addressing the piracy problem, not only to bring perpetrators to justice but also to dissuade any young Somalis from sailing out into the ocean, AK-47 in hand, excited and confident about a fruitful life of piracy. This thesis has shown how states can improve their capacity to prosecute these criminals on the high seas and forgo the prevailing “catch and release” policy. In particular, this includes the need for states to update their domestic legislation addressing piracy – not only to criminalize it outright and provide for the exercise of universal jurisdiction but also to implement mutually-agreed upon equipment articles tailored to the case of Somali piracy.

The analysis hitherto has taken care to illuminate the specific characteristics of Somali piracy and how they lend themselves to the need for increased universal jurisdiction prosecutions and more efficacious use of evidence. However, the conclusions and even analysis herein need not only apply to combating piracy off the Horn of Africa. After all, as the immortal words of “Black Bart,” “Black Sam Bellamy,” and others have demonstrated, certain aspects and allurements of piracy are timeless.

While 2012 saw a hopeful wane in piracy attacks off the coast of Somalia, it was complemented by a 42 percent rise on the other side of the African continent in a potentially new piracy hot-spot: the Gulf of Guinea.²⁷⁷ This politically sensitive region is highly dependent on the maritime exportation of its vast oil reserves and is greatly threatened by the prospect of piracy operations targeting the oil tankers leaving the gulf for Europe and North America. Unlike the failed state of Somalia, the concentration of

²⁷⁷ Rayna Breuer and Dirk Kaufman, “Emerging Threat: Piracy in the Gulf of Guinea,” ed. Simon Bone, DW Akademie, February 8, 2013, <http://dw.de/p/17a9q>; “Anti-Piracy Service Offered by Eos Risk,” United Press International, February 20, 2013.

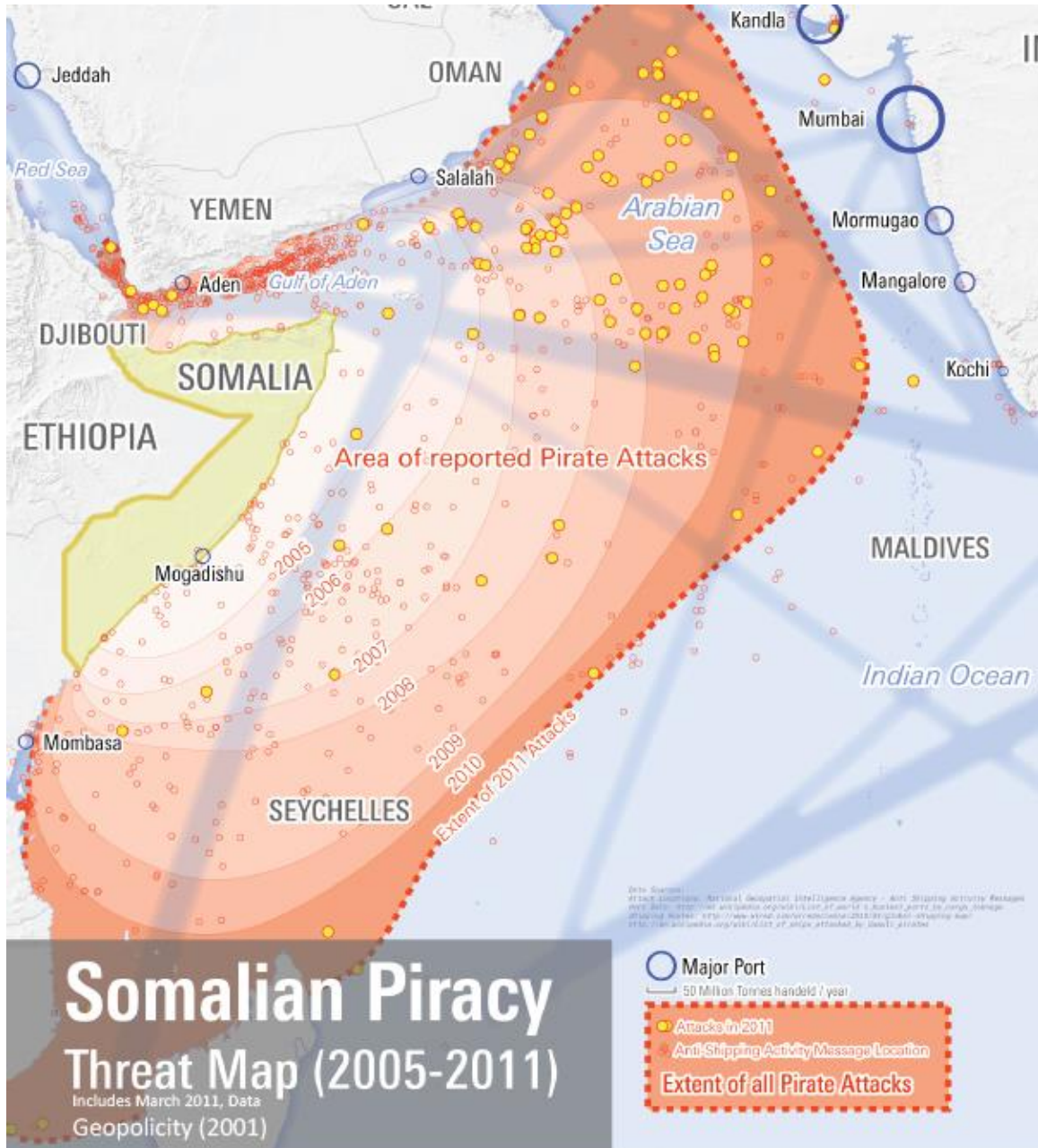
struggling yet sovereign states bordering the Gulf of Guinea are less than amenable to the idea of international flotillas and ships manned by heavily-armed private security personnel traversing their waters.²⁷⁸ As a result, a more robust legal deterrent to piracy – such as the one explored and advocated for in this thesis – may be even more relevant and efficacious in that region.

However, for any concrete determinations, more research is certainly needed in assessing the rise of piracy in the Gulf of Guinea and comparing its occurrence to that of the Horn of Africa. Likewise, Somali piracy should also continue to be monitored and analyzed, especially in regard to the seeming success of counter-piracy operations in 2012 and 2013. Future research aside, the international community should not neglect the value inherent in gleaning lessons from current and past instances of maritime piracy. The beginning of this thesis highlighted Former U.S. Secretary of State Hilary Clinton’s grand pronouncement on piracy that while the international community “may be dealing with a 17th century crime” it needs “to bring 21st century solutions to bear.”²⁷⁹ Nevertheless, if there is one lesson from this thesis, it is that sometimes seemingly archaic, even 19th century solutions, can be brought to bear against 21st century crimes.

²⁷⁸ Ibid.

²⁷⁹ Clinton, “Announcement of Counter-Piracy Initiatives,” address.

APPENDIX A: Geographic Expansion of Somali Piracy



Source: “Geographical Expansion of Piracy (2005-2011),” The European Institute.

APPENDIX B: UNCLOS Articles Related to Piracy

[Article101]: *Definition of piracy*

Piracy consists of any of the following acts:

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

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

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

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

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

[Article102]: *Piracy by a warship, government ship or government aircraft whose crew has mutinied*

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

[Article103]: *Definition of a pirate ship or aircraft*

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

[Article104]: *Retention or loss of the nationality of a pirate ship or aircraft*

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

[Article105]: *Seizure of a pirate ship or aircraft*

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

[Article106]: *Liability for seizure without adequate grounds*

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

[Article107]: *Ships and aircraft which are entitled to seize on account of piracy*

A seizure on account of piracy may be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

APPENDIX C: Relevant Statutes under the Penal Code of the Seychelles

[Cap 158, Revised § 65]

(1) Any person who commits any act of piracy within Seychelles or elsewhere is guilty of an offence and liable to imprisonment for 30 years and a fine of R1 million.

(2) Notwithstanding the provisions of section 6 and any other written law, the courts of Seychelles shall have jurisdiction to try an offence of piracy whether the offence is committed within the territory or Seychelles or outside the territory of Seychelles.

(3) Any person who attempts or conspires to commit, or incites, aids and abets, counsels or procures the commission of, an offence contrary to section 65(1) commits an offence and shall be liable to imprisonment for 30 years and a fine of R1 million.

(4) For the purposes of this section “piracy” includes –

a) Any illegal act 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 or a private aircraft and directed –

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

ii. Against a ship, an aircraft, a person or property in a place outside the jurisdiction of any State;

b) Any act of voluntary participation in the operation of a ship or an aircraft with knowledge of facts making it a pirate ship or a pirate aircraft; or

c) Any act described in paragraph (a) or (b) which, except for the fact that it was committed within a maritime zone of Seychelles, would have been an act of piracy under either of those paragraphs.

(5) A ship or aircraft shall be considered a pirate ship or a pirate aircraft if –

a) it had been used to commit any of the acts referred to in subsection (4) and remains under the control of the persons who committed those acts; or

b) it is intended by the person in dominant control of it to be used for the purpose of committing any of the acts referred to in subsection (4).

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

(7) Members of the Police and Defence Forces of Seychelles shall on the high seas, or may in any other place outside the jurisdiction of any State, seize a pirate ship or pirate aircraft, or a ship or an aircraft taken by piracy and the control of pirates and arrest the persons and seize the property on board. The Seychelles Court shall hear and determine the case against such persons and order the action to be taken as regards the ships, aircraft or property seized accordingly to the law.

APPENDIX D: Prosecutions of Somali Pirates in Domestic Courts (2006 – Oct. 2012)

Individuals suspected or convicted of piracy

Country	Number currently held	Number released	Total
Belgium	2 (1 convicted)		2
Comoros	6		6
France	18 (3 convicted, 5 convictions under appeal)	3 acquitted, 1 completed sentence	22
Germany	10		10
India	119		119
Italy	20		20
Japan	4		4
Kenya	137 (74 convicted)	17 acquitted, 10 completed sentence	164
Madagascar	12		12
Malaysia	7		7
Maldives	41 (Awaiting deportation since Maldives has no law criminalizing piracy)		41
Netherlands	29 (10 convicted)		29
Oman	32 (25 convicted)		32
Seychelles	105 (83 convicted)	2 repatriated to Puntland	107
Somalia: Puntland	290 (Approximately 240 convicted)		290
"Somaliland"	35 (All convicted) (including 17 transferred from Seychelles)	76 released	111
South-central	18 (Status of trial unclear)		18
Republic of Korea	5 (All convicted)		5
Spain	8 (2 convicted)		8
United Arab Emirates	10		10
United Republic of Tanzania	12		12
United States	28 (17 convicted)		28
Yemen	123 (123 convicted)	6 acquitted	129
Total States: 21	1 071	115	1 186

Source: U.N. Doc. S/2012/783, (Oct. 22, 2012), para. 44.

Note: these prosecutions include those under universal jurisdiction and those under other bases of jurisdiction, usually via the *passive personality principle*.

APPENDIX E: Ransom Note from a PAG

To Whom It May Concern:

Subject: Congratulation to the Company/Owner

Having seen when my Pirate Action Group (P.A.G) had controlled over your valuable vessel we are saying to you Company/Owner welcome to Jamal's Pirate Action Group (J.P.A.G) and you have to follow by our law to return back your vessel and crew safely.


In order to fulfill my suggestion you have to accept every step I want you to do it, otherwise you will lose the vessel and the crew because of we have entitled to do everything if you do not obey our regulations.

Do not imagine that we are making to you intimidation, but we send this message to every Company/Owner we hijack from vessels, luxury cruises and etc when the vessel anchored to my station.

Best regards,

The General Commander of the Group
Jamal Faahiye Culuso

Signature _____



Source: *Atlantic Wire*, August 13, 2012.

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This thesis represents my own work in accordance with University Regulations.

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