Piracy in the Gulf of Aden: Legal Analysis, Strategic Paralysis

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List of Abbreviations

AFRICOM	Africa Command
AMISOM	African Union Mission in Somalia
AO	Area of Operations
AU	African Union
CIC	Council of Islamic Courts
CTF 150/151	Combined Task Force 150/151
EEZ	Exclusive Economic Zone
EUNAVFOR	European Union Naval Force
GOA	Gulf of Aden
GOG	Gulf of Guinea
IGAD(D)	Intergovernmental Authority on Drought and Desertification
IMB	International Maritime Bureau
IMO	International Maritime Organization
JTF	Joint Task Force
LIC	Low Intensity Conflict
MDA	Maritime Domain Awareness
PMC	Private Military Contractor
PSC	Private Security Contractor
ROE	Rules of Engagement
SOP	Standard Operating Procedure
SUA	Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation
TFG	Transitional Federal Government
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNOSOM I/II	United Nations Operation in Somalia I/II
VBSS	Visit, Board, Search & Seizure

WFP   World Food Programme

Chapter 1 - Introduction

Since piracy has increased dramatically in the past four years, the global maritime response has responded in force.[1] However, problems in both International Law and strategic framework in which these states operate have hampered the ability to deter pirates from attacking the lucrative shipping traffic in the gulf. From the basic tactical requirements such as Visit, Board, Search and Seizure (VBSS) through to the prosecution of pirates, all aspects of counter-piracy warfare is affected by International Law.[2] If the International Laws on piracy are vague this will reflect in the naval deployments seeking to combat pirates. The lack of cohesive and coherent international and domestic laws has unnecessarily restricted the way military forces can act. This strategic 'shackling' is one of the more amendable shortcomings in dealing with piracy that can be resolved, given sufficient identification and policy recommendations.

This paper will make explicit the causal relationship between the legal shortcomings in addressing piracy in the Gulf of Aden (GOA hereafter) and the strategic effects that has. Certainly the problem and any potentially-permanent solution of piracy are not strictly bound by the above confines. The underdevelopment of Somalia serves to provide a perpetual source of pirates who will eagerly replace those captured or killed in the GOA. The inability of Somalia to govern itself and secure its own ocean territory must factor into any long-term policies aimed at curbing piracy.[3] Add to this a wealth of transnational issues in the GOA including the political climate surrounding Somalia as a whole and the general lack of African Union Mission in Somalia (AMISOM) capability in addressing the basic peacekeeping needs of Somalia, and the problems facing both counter-piracy strategy and regional security become myriad. By providing a descriptive account of piracy in the GOA in strategic and legal terms, the possible avenues of improvement in both can be isolated and examined fully.

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[1] *International Maritime Organisation.* "Piracy Off Somalia" http://www.imo.org/home.asp?topic_id=1178 Briefing 48, November 2005.
[2] Boot, M. "Pirates, Terrorism and Failed States", *Council on Foreign Relations.* December, 2008.
[3] Lennox, Patrick "Canada's Presence in the Arc of Instability" *Diplomat and International Canada* (November/December 2008), 15.

Nonetheless, protecting civilian shipping in the GOA is a priority given the importance thereof. Thus evaluating the strategic capability of the naval deployments, both Task Force and national, in the context of current International Laws on Piracy is of value regardless of the broader issues surrounding Somalia and the GOA as a whole. Improving intelligence networks in the GOA can break the current strategic paralysis experienced in the GOA, as well as circumventing any confusion generated by International Law.

1.1 Aim and Rationale

Given the fluid nature of the ongoing problems in the GOA, this paper aims to highlight the current legal and strategic difficulties faced by the piracy repression forces in the Gulf. By illustrating the international and institutional legal vacuum and the resultant strategic handicapping, one might better understand the need for overarching coherency in counter-piracy operations in the GOA. This research paper will be to provide a strong analysis of the causal relationship between international maritime law with *specific* regard to the GOA's context and the strategic schools of thought currently being employed by the navies operating there.

The purpose is to provide a contribution to the literature the hampering of counter-piracy strategic thought due to legal constraints and vacuums. Further investigation into either aspect might draw on this work in the future.

1.2 Literature Review

The recent rise of piracy in the GOA is unprecedented in modern naval circumstances, but does bear resemblance to other instances of piracy which have occurred both historically and recently. This paper analyses three major periods of piratical activity, all of which explain in some aspect the nature of piracy in the GOA.

Firstly, this foundation will begin with early accounts of counter-piracy operations, from the scourge of the Uskok and Barbary pirates in 16th and 17th century Venetian seas to the more formalised English piracy which brought Venetian merchant shipping to a virtual halt. [4] The contexts of early piracy are well-documented in popular media and highlight the basic objectives of the pirates, such as the focal economic ends rather than political, together with the difficulties in combating them. One crucial author therein is Captain A. Mahan's

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[4] Tenenti, A. "Piracy & The Decline of Venice 1580-1615". *Longmans, Green and Co. Ltd,* London. 1967.

conceptualisation of naval strategy in the 16th-18th century, detailing the pivotal point at which naval strategy becomes naval tactics, and the appropriate uses against piracy.[5] While the traditional nature of Mahan's pre-steam-powered naval age is not perfectly compatible with modern approaches, there do exist, within reasonable bounds, various crucial overlapping concepts which carry through to modern naval strategy.

The modern definition of piracy must be clearly identified. This entails providing a solid conceptualisation of modern 20th and 21st Century piracy involving the Straits of Malacca precedents as well as the broader, 'war on terror' implications for counter-piracy operations.[6] One prominent author in this regard is Martin van Creveld's remarkable reconceptualisation of warfare as it related in both the 20th and 21st century provides a solid preparatory explanation of the importance of adapting naval power for emerging "low intensity warfare."[7] This is of particular relevance given van Creveld's explanation of the challenges facing modern state naval power in fighting a perceived enemy who may employ tactics and weapons which violate virtually all laws on war under the broader aegis of "Low-Intensity Conflict" (LIC).[8] LIC essentially poses a new challenge for conventional military forces, both on land and at sea. In the complete overmatch situation which small pirate skiffs with lightly armed crew still manage to create problems for large warships festooned with an array of weaponry epitomizes the challenges of LIC.[9]

Finally, modern strategy in addressing similar problems of counter-piracy, particularly the JTF assembled by the US Navy and South East Asian counterparts in combating pirates in the Straits of Malacca bears some relevance in the GOA context.[10] The lessons of Malacca are certainly relevant to the current conceptualisation of modern piracy, but the GOA presents a basket of new issues which challenge this. The importance of thus defining piracy in this *specific* context and illustrating the historically-unique example it establishes is made clear.

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[5] Mahan, A. T. "The Influence of Sea Power Upon History 1660-1783", *Little Brown, and Company*, Boston. 1928.

[6] Garamore, J. "Piracy in Straits Highlights Need for Maritime Security. *American Forces Press Service*. June 2005

[7] Van Creveld, M. "The Transformation of War", *The Free Press*, New York. 1991. Pp204-205.

[8] Loc. Cit. P18-19.

[9] "The Most dangerous seas in the world". *Economist Print Edition* Jul 17th 2008

[10] Garamone, J. "Piracy in Straits Highlights Need for Maritime Security", *American Forces Press Service*, June 2005.

Strategic problems of piracy in the GOA possess unique characteristics which are not easily explained through similar contexts, and this paper aims to create some of the first literature on this field. Put simply, the situation in the GOA has the potential to make a unique contribution to strategic thought on piracy. Nevertheless, this paper draws heavily on the substantial literature available on the GOA problem through two primary channels, namely the *Council of Foreign Relations* and the *International Maritime Bureau*.[11] Both produce informative and valuable literature, the value of which increased by the paucity of widespread literature specifically-relating to the strategic and legal problems facing counter-piracy in the GOA.

Since 2005 piracy has experienced a surge in attacks within the GOA. With 12% of the world's petroleum products being shipped through the Gulf the strategic importance of maritime security in this area is self-evident.[12] The immense shipping activity through the GOA in general, with 20,000 vessels transiting the GOA each year highlights this importance beyond the domestic threats to legitimate fishing vessels from littoral states in the Gulf.[13] The impact of piracy is far-reaching, from containerised cargo to fishing. Piracy in the GOA had risen to prominence largely due to the International Maritime Organisation's (IMO) request to the United Nations to act against the increasing attacks on shipping in the area by pirates operating out of Somalia.[14] With the creation of "Combined Task Force 151" (CTF 151), the international response to this rise in piracy has become far more robust in its force composition and mandate.[15]

Given that CTF 151's predecessor, CTF 150, comprised of many states' naval vessels which had neither the capability nor the mandate to actively mount counter-piracy operations the new task force has contributed more effectively to suppressing piracy in the region.[16] But eliminating the scourge of piracy in the 21st century is beset by numerous obstacles. The

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[11] *International Maritime Bureau* Website. www.imb.org
[12] National Security Council. "Countering Piracy Off the Horn of Africa: Partnership & Action Plan ," December 2008, 4,
http://www.globalsecurity.org/military/library/policy/national/0812_nsc_counter-piracy-action-plan.pdf.
[13] Lennox, P. Op. Cit.
[14] "Piracy in waters off the coast of Somalia," *International Maritime Organization*, November 2005,
http://www.imo.org/home.asp?topic_id=1178.
[15] Commander, Combined Maritime Forces Public Affairs, "New Counter-Piracy Task Force Established," *U.S. Naval Forces Central Command, U.S. Fifth Fleet, Combined Maritime Forces*, January 2009,
http://www.cusnc.navy.mil/articles/2009/001.html.
[16] Lennox, P. Op Cit.

nature of piracy has changed significantly since the heydays of the 16th and 17th century Barbary pirates, and the strategic requirements have shifted as well.[17] It is thus important to investigate whether or not the world's navies are adapting to the current strategic context in this ocean space. While the primarily-economic objectives of piracy remain remarkably similar to that of their historical counterparts, gone are the days where legitimate navies and states are able to apply brutal counter-piracy tactics and bring justice to bear.[18] The strategic and legal context of counter-piracy challenges in the GOA has created a unique scenario in the 21st century wherein the historical legal and strategic approaches no longer provide any feasible solution.

But International Law remains a contentious subject in of itself. The question of whether International Law is in actuality *law* was addressed in somewhat extensive detail by John Dugard. According to Dugard, International Law can indeed constitute 'law' in the conventional understanding regardless of whether sufficient capacity for punishment or enforcement exists because firstly, "Few serious jurists insist on effective sanctions as a requirement for the existence of international law."[19] Secondly, Dugard cites Sir Frederick Pollock who argues that a legal legitimacy merely requires a surrounding political community and the recognitions by these members of the binding rules placed upon them.[20] Although in modern international law a 'political community' is by no means in consensus on International Laws, particularly amongst developing nations. Thus consensus by majority has largely taken precedence over outright consensus. While this is due to the broadening of what the global community comprises of post-reformation and the creation of the United Nations, it raises questions over just how legitimate International Law could be if there is no global consensus.[21]

For the scope of International Laws on Piracy, however, it is justifiable in most courts to invoke current International Laws due to the generally 'despicable' nature of the crime. Moreover, enforcement of International Laws on Piracy, while a major problem tactically

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[17] Boot, M. "Pirates, Then and Now," *Council on Foreign Relations*. July/August 2009.
http://www.foreignaffairs.com/articles/65156/max-boot-pirates-then-and-now
[18] Tenenti, A. Op. Cit.
[19] Higgins, R, "Problems and Process. International Law and How We Use It." 1994. Pp13-16.
[20] Dugard, J. "International Law, a South African Perspective." *Second Impression*, 2nd edition. Landsdowne: Juta. 2001. P08.
[21] Ibid. P14.

and politically-speaking, they are at least feasible to some degree, which removes any major doubt over the legitimacy of International Laws of the Sea.

International Law has originated in no small part from the Law of the Sea. Indeed, the first recorded International Crime was that of Piracy.[22] With the Reformation arose the need for an International Law amongst European states, with its precepts laid out by St Thomas Aquinas.[23] But the Law of Sea was originally codified by Grotius for the purposes of the Dutch East India Company in order to secure open and free shipping rights.[24] Therein lies a part of the problem in International Law on Piracy. It is historically codified as a specific act in a specific context over a specific part of the seas (high seas) throughout several major Laws on the Sea, elaborated in Chapter 3. This historical precedence has so far failed to keep pace with the changing nature of maritime boundaries and the evolution of piracy itself. In failing to do so, the problem of International Laws governing what to do with pirates with regards to engaging them and when on trial have become unclear or, at the very least, unhelpful.

Maritime security has evolved considerably since the days of the Dutch East India Company, and up until the mid 20th Century International Laws on Piracy kept pace. However, in the 21st Century there is a lot of room for contention on these original authors' notions of what the International Laws of the Sea should be, with Piracy in the GOA (and Malacca) serving as a strong advocate for change. Piracy laws represent one aspect of International Law which appears to have progressed comparatively slowly to its terrestrial counterpart (conventional laws on war).

International Law by definition places piracy only on the high seas, and not in the Exclusive Economic Zone (EEZ) of a littoral state (full definition on page 39).[25] This cannot be a feasible definition of piracy for the context of the GOA given that the sheer number of piracy-related incidents in the region can in no small part be attributed to Somalia. Somalia, as the world's worst failed state, does not have government institutions, such as a coast guard and

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[22] Rubin, AP. "The Law of Piracy" *EPIL.* *2*nd Ed. 1999.

[23] Dugard, J. Op Cit. P11.

[24] Ibid. P280.

[25] P.K. Mukherjee, "Editorial," *Journal of International Maritime Law* September 2004. P301.

judiciary, to combat and prosecute pirates off its coast, it is unreasonable to define the scourge of piracy in the GOA as anything but the menace it is.[26]

Nonetheless it is important to note that the rise in piracy in this strategically-vital area has not been matched by similar agility from International Law. The insistence that eleven pirates captured by US forces in March 2006 be tried in Kenya instead of in the United States under an archaic 18th century law is testament to the unpreparedness of legal systems in dealing with this unique manifestation of a traditionally ancient crime.[27] The International Laws that determine just when, where and how pirates are defined, captured and tried is ineffective in the GOA.[28] Combined with the truly multinational makeup of virtually every civilian vessel transiting the gulf, from flag, port of origin and crew, navigating the legal waters can understandably have a trying effect on commanders attempting to actually mount counter-piracy operations.[29]

Unfortunately this lag contributes towards the strategic shackling of the various coalition task forces mounting counter-piracy operations in this region, in the sense that Somali pirates resemble honest fishermen, as they pilot vessels captured *from* fishermen.[30] This then compounds the problem of identifying and interdicting piracy attacks in an efficient manner. At present, state warships are predominantly limited to the mere escort and protection of friendly vessels, as opposed to seeking out the pirates offensively or mounting strikes against the friendly ports and pirate havens. Identifying and tackling the problem of piracy on a military level is not only tactically complex, but the high rate of releases on the rare occasions when pirates are positively identified and apprehended cripple what few offensive counter-piracy operations are carried out.[31] Without the prosecution of captured pirates, nor the active seeking out of their home ports and vessels, the military response to

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[26] *Somalia: Countering Terrorism in a Failed State*, Africa Report (Nairobi/Brussels: International Crisis Group).
[27] Stephens, B, "Opinion: Why Don't We Hang Pirates Anymore?" *wsj.com*, November 25, 2008, sec. Global View,
http://online.wsj.com/article/SB122757123487054681.html?mod=loomia&loomia_si=t0:a16:g12:r2:c0.577948:b19711063.
[28] Harwood, M. "Pirates Frustrate US Navy in the GOA," *Security Management*. Nov 2008.
http://www.securitymanagement.com/news/pirates-frustrate-u-s-navy-gulf-aden-004865
[29] Hanson, S, "Combating Maritime Piracy," *Council on Foreign Relations*, April 2009,
http://www.cfr.org/publication/18376/combating_maritime_piracy.html
[30] IMB, Pictures of suspected pirate mother vessels, 13 August 2008. http://www.icc-ccs.org/main/piracy_al.php?newsid=20, accessed 21 August 2008.
[31] Deheza, E, *The Danger of Somali Piracy*, Biuletyn Opinie (Amicus Europae Foundation, 2009),
http://www.kwasniewskialeksander.pl/attachments/BIULETYN_OPINIE_The_Danger_of_Somali_Piracy.pdf.

piracy in the GOA only partially addresses the initial deterrence of pirates. The strategic response to the post-2005 surge in piracy, then, has been greatly influenced by International law.

By analysing the historical roots of piracy, as well as the approaches towards eliminating it the unique context of the GOA, however different, can be crystallised effectively. Furthermore, by examining the strategic approaches to counter piracy from the Uskoks to the Somalis in the light of International Laws surrounding piracy (some of which have remained unchanged over centuries), there is the potential for understanding just how these counter-piracy operations might be improved conceptually and operationally. With correct multilateral cooperation combined with a clear, coherent interpretation of International Law, containing the surge of piracy in the GOA is certainly within reach.

Contemporary movies often depict a highly-romanticised version of piracy and pirates, portraying them as dashing swashbucklers. Indeed the infamous pirate Captain Henry Morgan who raided and sacked Panama has been immortalised through a popular brand of rum in modern times.[32] In reality the scourge of piracy is a recurring and cyclical problem for legitimate sailors both civilian and military, and stemming the rise in attacks has traditionally been just as difficult.[33] Between the Barbary pirates of old and their 21st century counterparts, ranging from the Straits of Malacca, Gulf of Guinea (GOG), Niger Delta and GOA, the tactics and methods by which piracy is committed have changed, but several commonalities do arise. The rise of piracy, particularly in the GOA, has embodied in part what Martin van Creveld has termed "Low-Intensity Conflict" (LIC).[34] LIC's generally manifest in a noticeably lower 'tempo' in terms of the impact of the conflict itself. Unlike conventional warfare, LIC's represent people fighting over individual or group interests rather than state-on-state objectives.[35] This then implies that the resolution of an LIC requires an entirely different strategy, often utilising conventional military forces as a peripheral tool, rather than a primary one.[36] Alternatively, Mary Kaldor argues for a conceptualisation of LIC's not as a new form of conflict different from 'war', but rather a

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[32] Esquemeling, J, *The Buccaneers of America* (New York: Dover, 1967).
[33] Watts, W. "Supertanker's hijacking underlines pirate threat," *Marketwatch*. Nov 2008.
http://www.marketwatch.com/story/supertankers-hijacking-highlights-piracy-threat-in-somalia
[34] van Creveld, M. "The Transformation of War" (New York: The Free Press, 1991).
[35] Ibid.
[36] Ibid.

different manifestation of the same set of principles.[37] This means that piracy is, in the framework of 'new wars', simply a set of belligerents pursuing specific strategic and political objectives – much like a state – and inflicting similar consequences upon the landscape in the process.[38] However, piracy in the GOA has a characteristically economic motive in that well-organised syndicates wage piratical attacks against civilian ships for monetary gain rather than for any political motivation, as argued in the subsequent chapters. Moreover, there is the justification that Somali piracy emerged as a direct result of illegal fishing in the Gulf, depriving legitimate Somalis of the livelihoods.[39]

While there is a school of thought on GOA piracy which claims that the hard-line Islamist organisation *Al-Shabaab* has a hand in piracy, this is convincingly refuted by a distinct lack of evidence, even though it is believed that the organisation receives funds from pirates.[40] *Piracy* and counter-piracy represent a new conflict environment, and thus pose challenges for strategic and legal approaches thereof, but the apolitical motives of piracy in the GOA effectively preclude it from being classified as a "new war".

The violence perpetrated off the coast of Somalia and Yemen no longer resembles the historical showdowns between state militaries for political objectives. Indeed, Clausewitzian interpretations of the purpose of armed conflict cannot apply to the GOA, where Somalis wage piracy against multi-flagged, multi-national-crewed shipping out of sheer economic desperation. Ultimately, piracy in general has changed significantly from its historical roots, but still resemble a strategic threat to shipping in the 21st century, regardless of the plethora of military technology at the hands of legitimate state navies to counter it. The nature of piracy is such that even a minor presence in a critical shipping lane such as the GOA can prove disastrous in terms of global economic and human security.

While piracy has been a problem for almost as long as man has been sailing the ocean, the 16th and 17th century piracy which raged through the Mediterranean, Adriatic and Aegean

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[37] Schouten, P. "Theory Talk #30: Mary Kaldor on Framing War, the Military-Industrial Complex, and Human Security", *Theory Talks*. 2009. http://www.theorytalks. org/2009/05/theory-talk-30.html Pp04-05.

[38] Ibid.

[39] Illegal, Unreported and Unregulated Fishing. 4th Chatham House Update and Stakeholder Consultation Meeting – Report, Chatham House, April 2008.

[40] 'Pirates fire rockets at French boat far off Somalia', Reuters, 14 September 2008. http://africa.reuters.com/wire/news/usnLE339233.html.

seas still provides a clear precedent as to the risk and complications surrounding the fight against pirates due to the extensive and preserved literature surrounding the period, as well as the scale of the problem.[41] Although dating even as far back as the Viking long-boat raids as far away as the shores of America, the piracy emerging from the Mediterranean and Caribbean from the 16th century onwards provides a far better sequential conceptualisation of piracy when contrasted with its 21st century resurgence.[42]

Operating in small galleys powered by sail and oar, pirates from a variety of nationalities wrought constant havoc upon merchant shipping moving to and from the then powerful Venetian Republic.[43] Ranging from the Slavic-origin *Uskoks* to the more malevolent English interests, Venetian shipping suffered immensely as piracy continued uncontrolled by any naval presence deployed.[44] While the former's motivations tended to be economic and religious, the English were following orders from the political leadership, wherefrom the economic benefits provided added incentive.[45] These pirates traditionally sought to capture the crew and cargo of a chosen target, occasionally keeping the vessel itself, whereupon ransom could be negotiated for the release of the crew and/or ship or the hostages pressed into slavery.[46] The pirates relied chiefly on their numbers and speed to overwhelm their target before they managed to reach a safe haven or friendly military galley, resorting to murderous reprisals should their victims resist boarding.[47] Indeed, it is important to note that the objectives of the Barbary pirates, as well as most non-state privateers operating in the Mediterranean, were largely commercial, namely the capture of as much valuable cargo and crew as possible. With the exception of the English and Dutch vessels that were operating in the Mediterranean for political and strategic reasons just as much as for sheer commercial gain, the scourge of piracy remained largely beneath the realm of state on state warfare.[48]

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[41] Tenenti, A. Op. Cit. i-ii.
[42] Archer, C, "Review: [untitled]," *The Americas* 51, no. 3 Jan 1995: 438.
[43] Tenenti, A. Op. Cit. 154.
[44] Ibid.
[45] Ibid. Pp 154-155.
[46] Korin, A & Luft, G, "Terrorism Goes to Sea," *Foreign Affairs*, December 2004,
http://www.cfr.org/publication/7545/terrorism_goes_to_sea.html.
[47] Tenenti, A. Op. Cit. 22-24.
[48] Ibid.

It was in the waters of the Caribbean and Pacific in the 17th and early 18th centuries where piracy began to 'evolve' into several forms, a number of which still exist in 21st century case studies. In a review by Marcus Rediker, three primary types of piracy existed: officially sanctioned piracy, commercial piracy, and marauding.[49] Furthermore, he argues that these forms of piracy formed a sequence in which each stage fed into the other:

> "these types of piracy existed in a general (though over-lapping) chronological sequence, with officially-sanctioned piracy dominant between roughly 1570 and 1670, followed by commercial piracy between 1660 and 1700 and anarchistic marauding between 1690 and 1730."[50]

Given that a similar pattern of the nature of piracy can be said to have occurred in the Mediterranean as in the Caribbean, it follows that piracy historically follows a path of evolution; that of semi-legitimated or justified acts of piracy in defence of state or sovereignty, then into a quasi-accepted form of violent commerce in poorly-governed provinces, and lastly into all-out anarchic marauding, whereupon piracy is waged purely for profit with barely any political motivation whatsoever.

The first, officially sanctioned piracy is best typified by the privateers operating both in the Caribbean and elsewhere : English and allied vessels hired by the crown to raid Spanish territories and vessels on the seas.[51] In this regard, piracy can manifest into a truly crippling threat to a state's economic well-being, particularly during the colonial era. Indeed, during the decline of Venice due to rampant piracy, the emergence of English-crewed and English-sponsored vessels contributed almost beyond the scourge of the Uskok or Barbary pirates towards the downfall of Venetian shipping.[52] In the 21st century, this first type of state-sponsored piracy has ceased to exist as a major threat and, given the international nature of global shipping lanes and commerce, it is unlikely to arise as a major threat to maritime security in the foreseeable future considering the expense and skillsets required to effectively crew even one warship to wage large-scale state-on-state piracy. It is worthy of noting, however, how the state intervention into a practice by people whom Cicero aptly termed *hostes humanis generis*, enemies of the human race, essentially legitimised a far

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[49] Rediker, M, "Review: Pirates and the Imperial State," *Reviews in American History* 16, no. 3 September 1988: 353.

[50] Ibid, 354.

[51] Barbour, V, "Privateers and Pirates of the West Indies," *The American Historical Review* 16, no. 3. Apr 1911: Pp 529-531.

[52] Alberto Tenenti, *Piracy & The Decline of Venice 1580-1615*, 56-60.

more targeted - yet by no means less detrimental – form of maritime piracy against state enemies, rather than sheer targets of commercial opportunity.[53] Nonetheless, threats to contemporary shipping no longer fear this state-level piracy so much as far less controlled forms thereof.

The second form of piracy, that of commercial profiteering off the 'spoils' of the pirates themselves, presented immense benefit to citizens in the affected region who dwelled on the "periphery of the empire", as a means of gaining currency by conducting business with the pirates themselves.[54] This form of piracy can be argued to have persisted into the 21st century, but manifested in a slightly different manner, particularly within Somalia (see Chapter 3). The semi-autonomous area of Puntland exists in a similar function, at least economically, as the citizens of these fringe colonial provinces of old: purely as a territory for pirates to spend and enjoy the fruits of their criminal activities.

Finally, the final stage of piracy in the Caribbean was that of "marauding".[55] This final form of piracy can be further divided into two categories, that of "organised marauding", where a home port is adopted, and "organised marauders", where no home port is generally used. Both are the popularly known 'brands' of piracy glamorised in books and movies by the buccaneers who generally have little or no political affiliation, but rather seek fame and fortune through sea robbery. The former category of "organised marauding" is typified by the Barbary pirates and Caribbean counterparts who took to well-defended, permanent ports of origin, from which their attacks were launched.[56] The infamous Captain Kidd was largely a pirate of this type once his political backers revoked his status as privateer, thereby classifying him squarely as a pirate, rather than a hunter thereof.[57] "Organised marauders" consisted largely of free-roaming pirates with no permanent home port or origin, instead living largely at sea and epitomising the notion of 'anarchy' at sea. Of chief importance is the scourge of "organised marauding" in the sense that this is largely the form of piracy which manifests in the GOA and elsewhere in the 21st century. Without overt state support and precious few coastal provinces or cities willing to accommodate pirates on a long-term

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[53] *Countering Piracy off the Horn of Africa: Partnership & Action Plan.* Op. Cit.
[54] Rediker, "Review," 354.
[55] Ibid, 354-355.
[56] Rediker, M. Op. Cit. P354.
[57] Rediker, M. Op. Cit. Pp 352-354.

basis, the rise of remote, inaccessible 'pirate ports' in-unstable regions is the broad context of modern piracy.

Piracy in the GOA today is thus quite different from its historical roots in the Mediterranean and Caribbean. When one examines the small, fast speedboats and limited small-arms employed by contemporary pirates, it seems a far cry from the heavily-armed light galleys of the Barbary pirates or the sloops of their Caribbean counterparts.[58] Pirates of the 21st century operating in the GOG, Straits of Malacca and GOA, amongst other regions, generally use small speedboats with minimal numbers armed with an array of light weapons, ranging from knives, pistols and AK-47s to Rocket-Propelled Grenades and similar weaponry, quickly and effectively overwhelming their victims.[59] While there are adaptations of this strategy by pirates, particularly in the GOA, it is certainly indicative of general practice by modern pirates.[60] In the 21st century, military vessels create complete force overmatch, which means that pirates effectively have little choice but to operate unconventionally, lest their skiffs be blown out of the water by grey-painted warships many times their size. Furthermore, this contemporary form enables pirates not only the ability to effectively elude traditional forms of detection and identification for the simple reason that they resemble the civilian fishing and transport boats operating in these areas.

Much like the "organised marauding" nature of piracy in centuries past, modern pirates in the Straits of Malacca, GOG and GOA all rely on local compliance in providing friendly ports where they are able to hide from barely-functioning coast guards or, if a foreign naval task force should be present, blend in with the local population.[61] This modern day return "organised marauding" raises a host of complications in any counter-piracy strategy which might be adopted. In addition, counter-piracy strategies which may have worked in the Malaccan Straits would not necessarily be effective in the GOA. The narrow corridor of ocean space which the former consists of means that a concerted joint effort by South East Asian littoral states was effective, whereas the GOA is a comparatively vast area to patrol,

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[58] Ibid.
[59] Fouché, H. "Policing Piracy and Armed Robbery of Ships in South Africa's Territorial Waters and Contiguous Zone" (Tshwane University of Technology, 2006). P0 6.
[60] Ibid.
[61] Vrey, F, "Examining threats to the Gulf of Guinea and suggested countermeasures," presented at the Maritime Security Africa 2009, Cape Town, Oct 2009.

surrounded by littoral states who are neither capable of counter-piracy operations nor functioning fully as governments to begin rudimentary steps towards that aim.[62]

Historically-speaking, piracy has been countered with large-scale military engagement both on land and at sea, whereby pirate vessels and havens were destroyed through violent means.[63] When Captain Kidd and his ilk were no longer deemed useful to the English state, which by then had stabilised as a hegemonic power economically and militarily, pirates were stamped out by 1726.[64] In this sense the application of a large military force served to eradicate piracy in the affected regions when sufficient political will and incentive was reach by the government affected to act against it.

In the contemporary Straits of Malacca, the challenges of counter-piracy reflected the considerably more complex nature of maritime security in modernity. Given that pirates in the Malaccan Straits posed a threat to several different nations, and the difficulty in chasing such an elusive enemy as modern pirates in speedboats across several state territories, the obstacles towards effectively stamping out piracy was not as simple as the application of sheer military force.[65] Ultimately, piracy in the Straits of Malacca was effectively countered through a host of multilateral joint operations headed by the United States, which included training programmes of coast guard and naval services in Singapore, Indonesia, Malaysia and Thailand, and legislation authorising hot pursuit.[66] But in the context of the GOA, a similar approach has not applied for the reason that the foundations for such broad-based strategic cooperation by a number of neighbouring littoral states who possess a coast guard and/or naval force is virtually impossible in the GOA, in light of the littoral states involved and their poor state of development and naval deficiency.

Combined with the Horn of Africa's lack of development in terms of maritime security regimes, another factor compounding the capability of anti-piracy vessels and measures in the GOA is that of the restrictive human rights and international legal opposition towards

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[62] Brown, N. "Somalia Calls for Piracy Help," *Jane's Defence Weekly,* 02 Nov, 2005.

[63] Puchala, D, "Of Pirates and Terrorists: What Experience and History Teach," *Contemporary Security Policy* 26, no. 1. Apr, 2005. P02.

[64] Ritchie, R, "Captain Kidd and the War Against the Pirates," *Reviews in American History* 16, no. 3. Sep 1988. P236.

[65] Garamore, J, "Piracy in Straits Highlights Need for Maritime Security," *American Forces Press Service*, June 2005

[66] Hanson, S. Op.Cit.

taking more aggressive, historically-proven methods of tackling pirates that is strong military action:

> "The main reason for this lack of an offensive element in the response is the international human rights regime, which makes it difficult for western warships to aggressively stamp out this scourge against humanity as they have done in the past. Instead of killing pirates and destroying their hide-outs and boats and all of their equipment, there is now a necessity to provide them with fair trials, even if the international legal architecture necessary to do so does not exist."[67]

The old methods of applying sound counter-piracy strategies do not apply in the GOA's context. Gone are the days of pirates being enemies of *humani generis*, perhaps for the better. Whether the human rights regime is correct or not in advocating gentler action against pirates, heedless of whether the Legal and Policy frameworks exist to implement it, is a matter beyond the scope of this paper.

Within the context of the GOA, however, it need only be observed that navies and legal thinkers are faced with tougher problems in dealing with pirates than their historical counterparts. To be sure, the human rights regime has allowed for a great deal of change in land-based warfare, often informing ROE amongst Western militaries beyond mere strategic utility. The recent ban on cluster munitions which recently came into enforcement being a prime example.[68] However, if one of the goals of the human rights regime is to prevent civilian casualties, then the current approach on piracy in the GOA could well serve to *increase* the chances of pirates to kidnap innocent sailors for ransom.

However, the problem of counter-piracy operations in the GOA is not simplified by the lack of military and political agency to chase and kill or capture pirates. With the advent of the human rights regime, the problems of dealing with piracy in the 21st century is compounded by the lack of aggressiveness, and the context of international legal lag in reflecting this new regime further muddies what was historically a straightforward, if expensive and large-scale, strategy for countering piracy. Lastly, the unique context of the GOA's littoral states ensures that, even if a historically-military solution were applied, the actual *source* of piracy in Somalia would not necessarily be defeated.

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[67] Patrick Lennox. Op. Cit. P13.
[68] *Convention on Cluster Munitions*. DIPLOMATIC CONFERENCE FOR THE ADOPTION OF A CONVENTION ON CLUSTER MUNITIONS. Dublin. 2008.

1.3 Analytical Framework

In order to fully appreciate the complexity of the security issues at hand it is necessary to devote some attention to the region of the Gulf, particularly that of Somalia. It is important to note that while solving Somalia's failure as a state is of utmost importance to the overall resolution of the incessant conflicts waging both on sea and land in the country, the developmental challenges surrounding Somalia are largely beyond the scope of this paper. Instead, being able to adequately explain Somalia's collapse and the overall situation is sufficient to place it in the context of 21st century piracy and both the strategic and legal obstacles faced by actors in this region.

The case of piracy in the GOA is examined under a realist framework, as the power relationships within the naval powers operating in the area reflect this quite effectively. With the lack of effective government and diplomatic ties with Somalia itself, let alone Puntland, the realist approach to International Relations could potentially assume centre role by default. The realist paradigm does not place emphasis on diplomacy and related aspect absent of military force. Martin Wright argues that the power of a state "did the talking."[69] Put plainly, the more powerful a nation, the more weight it throws around the globe. As one state gains more and more power, be it economically or militarily, so others of lesser power must either band together in order to become of equal stature, or fall by the wayside and become mere observers.

Never has this power dynamic been more plainly exhibited than by the naval forces deployed in the GOA. With strong naval powers (or even just strong powers) preferring unilateral deployment as is the case of rising stars China and India, as well as the USA, who do still allow for 'alliances' in the sense that it cooperates willingly with the task forces assembled by several less-powerful nations. In explaining the naval presence in the GOA, one can clearly observe these dynamics in action.

Furthermore, the current international maritime laws of the sea is scrutinised and the lack in addressing this problem and context highlighted. Particularly important is the current

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[69] Simpson, M. "The Chimera of Normalcy: Reflections on Development of International Relations Theory", *International Affairs Bulletin*, Vol. 16 No 3, 1992. Pp. 47-97.

United Nations "Law of the Sea" and the problems therein.[70] As one of the most recent and important components of International Law, this will provide a key insight into the legal failings and what the consequences thereof are for strategic capabilities of naval command in the GOA. As a major component of this thesis, understanding both the historical and contemporary nature of International Laws of the Sea is necessary in order to place them in the context of the Indian Ocean. The problems of definitions on what the "high seas" are combined with overlapping and contradictory municipal laws abound. Moreover, the failed state that is Somalia, replete with a lack of functioning judiciary as Westerners know it, results in jurisdiction problems both for the trying of pirates as well as *who* is responsible for captured merchant vessels flying flags from all manner of states.

The evaluation of actual current operations being mounted in the GOA, ranging from basic tactical procedures and capabilities to the broader strategic approaches adopted by several national naval deployments, as well as multilateral JTF (JTF) previously and currently operating in the region, are all necessary. In doing so, one shall be able to gain a far more detailed grasp of just what is being done in the sea to curb pirate attacks on civilian shipping. This is not strictly limited to purely naval operations as civilian shipping has a similar track record of countering piracy through their own tactics.[71] Understanding the context and tactics employed by Somali pirates versus the military responses will aid in appreciating the strategic difficulties in building an effective policy response to thwarting pirates in this 'Area of Operations' (AO).

Finally, comprehending the task of counter-piracy will aid in exploring potential improvements on policy which could aid in several avenues. Firstly, the problem of 'deterrence' measures and how to successfully improve the ability to discourage pirate attacks in the first place is discussed. A key part of this is what is termed "Maritime Domain Awareness" (MDA), or effectively broadening the overall intelligence picture of the GOA. In LIC, information can often be key in improving strategies geared towards resolving or minimising the effects of the belligerents (pirates, in this case.)

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[70] Borgerson, S. "The National Interest and the Law of the Sea", *Council on Foreign Relations*, No. 46, May 2009.
[71] Lennox, P. Op. Cit. P14.

Secondly, taking the fight to the pirates *without* a hypothetical large -scale intervention in Somalia is discussed. The importance of exploring realistic strategies towards countering piracy is primary in this paper. While intervention in Somalia as a whole is a worthy of extensive study, this paper seeks to provide short to medium-term containment policies specifically geared towards fighting pirates at sea and, to a reasonable extent, on land. Destruction of motherships is a key component of this, as they play a pivotal role in pirates' ability to extend their range far beyond territorial shores of Puntland and Somalia as a whole.

Lastly, before concluding remarks the potential for improved mechanisms which civilian actors can utilise is briefly discussed. However, due to the limited utility of Private Military Contractors (PMCs) and the inability of maritime organisations to enforce stricter security measures, the constraints for civilian shipping in the GOA remains quite tight.

1.4 Evidence Requirements and Collection Plan

In addition to extensive literature on naval strategy spanning centuries combined with current journal contributions such as the *Council on Foreign Relations* and direct military-related material, this thesis has gained valuable insight into the contextual importance of the GOA and the problems of piracy repression at sea through a small but useful pool of interview subjects.

Given the current nature of piracy in the Gulf, this is not an entirely unreasonable expectation. Major contributors to this paper include a senior fellow from a respected South African International Affairs think tank and a senior research at the Institute for Security Studies, both of whom are outstanding experts in their related fields. This small collection of interviews has enabled the thesis to provide an extra layer of insight beyond that garnered from text books, journals and contemporary commentary pieces.

Chapter 2 – Somalia and the Gulf of Aden

Somalia has seen a plethora of mediations, negotiations and interventions in the past two decades, all aimed at solving the chronic collapse of the world's most failed state.[72] The fall of Siad Barre's regime in 1991 effectively served to end what little semblance of unitary government Somalia enjoyed.[73] The region essentially "suffered a rupture" in the subsequent years so debilitating that it has yet to recover.[74] Therefore the rise of piracy in 2005 and its subsequent escalation into an organised form of "marauding" can be said to reflect the economic incentives behind Somali piracy which are ultimately based on land. Somalia's troubles have fluctuated from political to the more recent economic interests behind maintaining instability, which thus pose a key obstacle towards any lasting power-sharing negotiation.[75] Somalia's collapsed state thus ushered in Piracy, as legitimate fishermen were deprived of a living and fellow Somalis are driven to desperation in search of an income.

It is understandable in contemporary international relations to consider the failed state of Somalia as a lost cause, politically, economically and strategically.[76] With clan-based strife ranging from Mogadishu and further south through all of Puntland and parts of Somaliland, the recent post-2005 surge of piracy off the coast, and constant political upheaval between the internationally-recognised Transitional Federal Government (TFG) and various hard-line Islamic groups such as the Council of Islamic Courts (CIC) or *Al-Shabaab*, Somalia is indeed a veritable cornucopia of insecurity.[77] The intervention of the United Nations into Somalia in the early 1990's being a colossal failure in terms of conflict prevention and resolution, precious little effort has been made by the international community other than World Food Programme (WFP) shipments being made regularly through the piracy-affected waters.[78]

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[72] *Somalia: Countering Terrorism in a Failed State*, Africa Report (Nairobi/Brussels: International Crisis Group)
[73] Lennox, P. Op. Cit. Pp 5-6.
[74] Roque, P. Interview. Pretoria. (Notes in possession of author).
[75] Ibid.
[76] Spielmann, P. "Ethiopia: Somalia Looks Like a Lost Cause," *Associated Press*. Sep 2009.
http://www.addiszena.com/ethiopia-somalia-looks-like-a-lost-cause/
[77] International Crisis Group. "Somalia: Countering Terrorism in a Failed State". *Africa Report No. 45*.
Nairobi/Brussels. ppi-ii
[78] WFP, "Where we work – Somalia."
http://www.wfp.org/country_brief/indexcountry.asp?country=706

There is an atmosphere of hopelessness in thought about Somalia, both in how to secure it and in how to conduct any manner of long-term development. By analysing the historical progression of Somalia's politics, clan relations, and the rise of Islamism from the 80's through to the current status quo, one is able to understand not only the mistakes made by international mediators and Somali political agents, but likewise gain a deeper insight into just *why* Somalia is perceived in current international relations to be a hopeless case.[79]

Somalia's political context, both historical and contemporary, are essential in understanding the emergence of the majority of pirates in the area, along with a particular emphasis on the United Nations Operation in Somalia (UNOSOM). Furthermore, the broader understanding of *why* Somalia's mediations have failed in light of the historical precedents set at international and local negotiations, military offensives and religious divisions aid in understanding the incentives structure and origin of piracy off the coast. Finally, the GOA's importance as a shipping chokepoint for global commerce is detailed below, as well as the evolution of tactics by pirates, together with the initial response thereof by international governments and civilian shipping organisations.

The importance of Somalia in terms of the impact piracy has on shipping in the GOA is profound. The rise of attacks as well as the increased range in which piracy is occurring has created a permanent threat to sailors transiting the region.[80] Somalia's instability from Kismayo to Puntland has generated an almost limitless supply of desperate men willing to venture out to sea to make what is seen to be easy money, in a region where *any* cash whatsoever is a luxury.[81]

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[79] Menkhaus, K. "Protracted State Collapse in Somalia: A Rediagnosis." *Review of African Political Economy.* 2003. P01.
[80] Lennox, P. Op. Cit.
[81] Pham, P. "The Pirate Economy," *Foreign Policy.* Apr 2009.

2.1 The Collapse of Somalia

Somalia's spiralling crises began with the Somali National Movement's (SNM) offensive against the government and its forces in the north in 1988. [82] With a distinct absence of mediation or conflict resolution efforts, the country's government fell and along with it the stabilising presence of the regime's head, Siad Barre three years later.[83] The lawlessness manifested thereafter in the form of pillaging, looting of cities and emergence of a famine which claimed an estimated 250,000 lives.[84] From the outset, the silence of the international community in response to the outbreak of widespread violence and human displacement characterised the early "wait and see" approach, which has proven over time to be one of the key problems towards solving the crises in Somalia. [85]

Following the fall of Barre's regime in 1991, a struggle of control over the capital Mogadishu waged over several years between two rival clan warlords, Ali Mahdi and General Mohamed Farah Aidid.[86] With this escalation in violence in Mogadishu, the 1991 collapse of government in Somalia represented the first of several "missed opportunities" in the sense that the United Nation's unwillingness or inability to pay attention to the warning signs within the failed state, which pointed to the protracted conflict not only within Mogadishu, by Aidid and Mahdi, but also throughout Somalia.[87]

Should UN intervention have occurred at this critical juncture, it is possible that the consequent civil war and instability, including the rise of piracy, could have been avoided or at the least minimised.[88] The failure to put a swift and decisive cap on the rise of violence following Barre's removal cannot be ignored when considering the years of instability which followed due, at least in part, to the inaction of the international community, as it is an important precedent from which future planners of Somalia's post-conflict reconstruction can learn from.

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[82] Lennox, P. Op. Cit. 5-6.
[83] Ibid.
[84] Menkhaus, K. "Mediation Efforts in Somalia," *Africa Mediator's Retreat*. Geneva. 2007. P36.
[85] Ibid.
[86] Menkhaus, K. "Mediation Efforts in Somalia". Op. Cit. P36.
[87] Roque, P. Op. Cit.
[88] Ibid. P40.

With Mohammed Aidid of the Habr Gidr clan and Ali Mohamed Mahdi of the Abgaal waging war on the streets of Mogadishu, and a number of smaller clans who allied themselves with one or another patron warlord, the UN Operation in Somalia, or UNOSOM, mission was deployed to enforce a Chapter VII mandate against both parties in Mogadishu and surrounds, effectively attempting to enforce a ceasefire.[89] However, by the time UNOSOM II was authorised by the Secretary-General in order to ensure the distribution of food aid and disarmament measures through Somalia as a whole, Aidid was refusing to accept negotiations, opting instead to continue waging war against political rivals and the UN forces in general.[90]

UNOSOM has thus been the historical benchmark of failed mediation in Somalia, and a 'warning' of sorts to any intervening state or organisation wishing to mend the crises-ridden state.[91] But it is important to bear in mind, as argued below, that the intervention was flawed in strategic composition as well as in terms of leadership clashes between the UN Secretary-General and the United States.[92]

What was initially an unknown (albeit UN-sanctioned) attempt at feeding a starving nation amidst a civil war, ended in a tremendous outcry from Americans back home at the witnessing of such graphic violence against their fellow Americans.[93] With the ultimate withdrawal of US forces from the region, and the eventual breakdown of the UN humanitarian mission, UNOSOM served as not only a warning for future intervening powers, but also as an indictment of the top-down, poorly-managed approach by the UN.

The UN departure from Somalia in 1995 following UNOSOM I & II's failure was swiftly followed by the constant civil war at the hands of several clan warlords vying for their own segment of the region.[94] The collapse of Siad Barre's regime at the hands of rebels in 1991 effectively ignited the beginning of the end of any semblance of stability in Somalia.[95] With Mohammed Aidid and Ali Mohamed Mahdi waging vicious war on the streets of Mogadishu,

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[89] Department of Public Information (DPI), (1997). United Nations Operation in Somalia II. http://www.un.org/Depts/DPKO/Missions/unosom2b.htm
[90] Department of Public Information (DPI), Op Cit.
[91] Ibid.
[92] Durant, M & Hartov, S. Op. Cit.
[93] Ibid.
[94] International Crisis Group. Op Cit.
[95] Lennox, P. Op. Cit. Pp 5-6.

not excluding the scores of smaller clans who allied themselves with one or another patron warlord, the UNOSOM I mission was deployed to enforce a Chapter VII mandate against both parties in Mogadishu and surrounds, effectively attempting to enforce a ceasefire.[96] However, by the time UNOSOM II was authorised by the secretary-general in order to ensure the distribution of food aid and disarmament measures through Somalia, Aidid was ultimately responsible for refusing to accept negotiations, preferring instead to continue waging war against political rivals and UN forces in general.[97]

With an American Ranger and Quick Reaction Force (QRF) operating within Somalia independently towards detaining Aidid himself and his staff, the October 3 'Blackhawk down' operation created an international scene.[98] When the militia forces paraded a dismembered American body through the streets of Mogadishu which was quickly televised, the message that hit the United States had significant consequences.[99] What resulted was a tremendous outcry from Americans back home at the witnessing of such graphic violence against their countrymen for no apparent objective or gain. What subsequently resulted were the withdrawal of US forces from the region, and the eventual breakdown of the UN humanitarian mission.[100] In the case of Somalia, not only was the premise for the military intervention justified by the United Nations the public support, before Blackhawk Down, remained by large unaware.

Somalia has been ignored as a worthwhile endeavour after this failure precisely because it has been perceived as a 'trouble child' without military or political solution. With the failure of *Operation Gothic Serpent,* the objective of which was to capture Aidid himself as well as the general ineffectiveness of UNOSOM II to ensure peace and stability while distributing aid, military intervention has not been seriously considered since with the possible exception of CMF 151's presence in limited counter-piracy operations off the Somali coast and the small AMISOM force currently deployed in Mogadishu.[101] It is not ridiculous to claim that the probability of success of an overall humanitarian intervention, including peace

[96] Department of Public Information (DPI), Op Cit.
[97] Department of Public Information (DPI), (1997). Op. Cit.
[98] PBS.org. "Ambush in Mogadishu: Interview with Ambassador Robert Oakley,"
http://www.pbs.org/wgbh/pages/frontline/shows/ambush/interviews/
[99] Durant, M J and Hartov, S. "In The Company of Heroes", Bantam Press. 2003. Kent Pp 216-222.
[100] DPI. Op. Cit.
[101] Commander, Combined Maritime Forces Public Affairs. Op. Cit.

enforcement, conflict resolution, Disarmament, Demobilisation and Rehabilitation DDR, humanitarian aid and so on, is minimal at best.

However, there were several mitigating factors in 1993 which provide a valid counter-argument to this assumption, such as the actual strategic purpose of intervention in Somalia, which mutated significantly over the period in which UN forces were actively involved in the country.[102] While the Secretary-General had accepted the option endorsed by the Security Council in Resolution 94 a major, US-led "enforcement operation" also under American command, the initial objectives were almost immediately altered by Boutros-Ghali acting in his capacity as Secretary-General, resulting in the above -mentioned confusion of strategic purpose.[103] What had been stressed by President Bush as a limited, near-term operation designed to keep the channels of food aid open and secure, almost immediately was warped in concept by the Secretary-General:

> "American forces entered Somalia on December 9. Later that day, however, the secretary-general told a delegation from Washington sent to brief the secretariat that he wanted the coalition not only to disarm all of the Somali factions, but also to defuse all mines in the country (most mines were in the secessionist north), set up a civil administration and begin training civilian police."[104]

This inability to clearly and coherently establish the political goals of the military intervention is important when evaluating the probability of success in intervention in Somalia. The objectives of the military forces were never coherent outside of the Resolution's papers, and this fed directly into the initial misunderstanding as to the strategic purpose of the operation.[105] While state leaders are effectively responsible for this lack of cooperation, the same phenomena can *easily* be repeated by institutions in which state leaders operate.

When President Clinton took over from President Bush in 1992, the mission in Somalia warped further, ultimately providing one major obstacle towards any tangible success in *Operation Restore Hope* at all.[106] With Clinton came the beginnings of "assertive multilateralism" and the notion of not just keeping open the channels for food aid, but also

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[102] Bolton, J. "Wrong Turn in Somalia," *Foreign Affairs*, Vol. 73, No. 1 Jan - Feb. 1994. 59 -60.
[103] Ibid.
[104] Ibid. Pp 60-61.
[105] Ibid,
[106] Ibid.

of encouraging the broader ambit of nation-building and development as a whole.[107] This was not the original intention for UNOSOM forces, nor was it able to respond to the mounting violence on the streets of Mogadishu and surrounds.[108] Effectively, Clinton's almost *ad hoc* dabbling with foreign policy shifts manifested into a strategic quagmire in Somalia:

> "The administration immediately reached for new options, deciding to double the total American military presence in Somalia and offshore, while announcing the intention to withdraw entirely by March 31, 1994. Nation building' had thus become a desperate search for a face-saving American withdrawal, exactly one year after Americans would have departed under President Bush's original plan."[109]

If the reasonable probability of success for a contemporary intervention is to be seriously considered, it is important to take heed of the above mistake committed by the change of presidents and foreign policy in the United States. In order to embark on a large-scale intervention, especially with the leading state actor cooperating with a UN task force, the strategic evaluation of what objectives are attainable with the forces available, as well as a clear and coherent timetable, must be established beforehand.

UNOSOM typified the problem of "missed opportunities" in the sense that the conception, commitment and execution of the mission were all flawed in approach, which resulted in ultimate failure. According to Paula Roque of the *Institute for Security Studies* (ISS), the problem of the UNOSOM intervention rested in some part on the possibility that there had not yet been achieved a "maturity of conflict", in the sense that warlords and their associated militias were not yet prepared to negotiate a settlement, nor could they be easily coerced into doing so with simple military force.[110] Furthermore, during the dialogue between Boutros-Ghali, President Bush and subsequently President Clinton, Roque points out that there was very little *commitment* by any of the leading powers towards a long-term, sustainable effort to stabilise Somalia.[111]

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[107] Bolton, J. P62.
[108] Durant, M & Hartov, S. Op, Cit.
[109] Bolton, J. Op Cit. P65.
[110] Roque, P. Interview. Pretoria. (Notes in possession of author).
[111] Ibid.

Following UNOSOM, the majority of the subsequent mediations focused on the question of whether Somalia could function best, or indeed at all, with a federal or centralised form of governance. The Sodere talks in 1996 and 1997 were convened with this in mind, but ultimately failed to reach a consensus.[112] Likewise, a 1998 effort led by Ethiopia incorporated a "building-blocks approach" through which "existing regional governments in Somalia (such as Puntland) would federate into a decentralized state."[113] However, clans who wielded power in Mogadishu vigorously opposed this, as it was perceived to be of harm to their own interests.[114]

The 'interests' of clan leaders in Somalia raises an important contributing factor to Somalia's chronic instability. Political leaders within the country are historically unwilling to commit to any manner of mediation or compliance with other parties if a loss in their own interests, largely economic, is believed to be a possibility.[115] Federalisation of Somalia could ultimately marginalise clan leaders in Mogadishu as their spheres of influence would be restricted by negotiated lines rather than territory held through military force.[116] Conversely, however, a unitary government process faces precisely the same obstacle, as clans have not historically proven willing to share power with a coalition, nor are they prepared to maintain a federalised system.[117] The 2000 Arta Peace Process hosted in Djibouti sought to implement a power-sharing, unitary government based on the "4.5 formula", whereby parliamentary seats are allocated proportionally to the four main clans, with half that number being attributed to the collective minority groups.[118] The process ultimately failed as the plethora of clans and factions shifted in terms of power gained and loss, ultimately rendering the power-sharing model incapable of maintaining proportionate representation.[119] The problem of building peace amidst continued clan and religious-based mobility (in the form of Al-Shabaab) is thus self-evident.

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[112] Menkhaus, K. "Mediation Efforts in Somalia". Op. Cit. P37.
[113] Ibid.
[114] Menkhaus, K. Op. Cit. P37.
[115] Roque, P. Op. Cit.
[116] Ibid.
[117] Ibid. Pp37-38.
[118] Roque, P. "The battle for Mogadishu: Revealing Somalia's fluid loyalties and identities," *Africa Security Review,* Vol 18. No 3. September 2009. P75.
[119] Roque, P. Roque, P. Interview. Pretoria. (Notes in possession of author.

In October 2004, after prolonged negotiations and ceasefire violations, continued external pressure bolstered mediation and resulted in the formation of the Transitional Federal Government (TFG).[120] Composed of a narrow clan coalition, the proportionality of the TFG is questionable at best. The TFG's hold on power has remained tenuous since its formation despite continued support by AU and the Intergovernmental Authority on Drought and Desertification (IGADD, now IGAD.)

The 2006 May offensive by the Council of Islamic courts (CIC) – or Islamic Courts Union (ICU) - saw the defeat of rival militia in the capital and outwards, extending throughout South-central areas.[121] The CIC maintained power until Ethiopia ousted the ICU in a December 2006 offensive.[122] This was ironically one of the most peaceful periods in Somalia's recent history, despite the radical brand of Sharia law under which it existed:

> "the Islamic Courts Union (ICU), a coalition of Sharia courts, united Mogadishu and helped restore peace and stability in a lawless and chronically insecure South/Central Somalia, providing this region with its first period of relative order and governance since the demise of Siad Barre's regime in 1991."[123]

Ironically, the CIC managed to effectively eradicate piracy altogether during its six month reign of power by attacking the pirate 'haven' ports and aggressively rooting out pirates on land and sea.[124] Indeed, for the brief period in which the CIC maintained control of greater-Somalia, piracy ceased to be a major issue. This was achieved not because the CIC saw piracy as a reprehensible breach of International or even Islamic Law, but rather because the pirate warlords were political enemies.[125] When the TFG, backed by Ethiopian troops, wrested power from the CIC in late 2006, piracy surged once more as the TFG's control over the country lapsed in the south, leaving Puntland once again to the pirates.[126]

Eliminating the scourge of piracy in exchange for hardline CIC rule is simply exchanging one political and security threat for another. Eliminating the scourge of piracy in exchange for a Taliban-esque repressive Muslim theocracy or vice versa is ultimately unsuitable for either in

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[120] Menkhaus, K. "Mediation Efforts in Somalia". Op. Cit. P38.
[121] Ibid.
[122] Roque, P. "Somalia: Understanding Al-Shabaab," *Institute for Security Studies – Situation Report.* June 2009. P02.
[123] Ibid.
[124] Lennox, P. Op. Cit. 05.
[125] Ibid.
[126] Ibid.

the long-term. Nonetheless, it did highlight the phenomenon that, with a sufficiently-unified governing body and sufficiently aggressive military action, piracy can indeed be eradicated. The crux of the issue then is a matter of achieving a stable government with sufficient military clout to eliminate pirates not because they are political rivals but simply due to their burden upon Somalia's development.

The final iteration of Somalia's series of failed mediations and interventions is that of the AU-sanctioned African Union Mission in Somalia (AMISOM). [127] Formulated in 2007, AMISOM has seen a deployment of 5000 out of a maximum 8000 sanctioned by the organisation. When considering that the failed UNOSOM intervention of 1992/1993 comprised of 30000 troops, this number from the AU is woefully inadequate.[128] Furthermore, the lack of any meaningful logistical support for these troops spells disaster for any progress towards peace which neighbouring states might hope for, as the lack of any firepower beyond small arms will not dissuade Somalis from continuing the LIC's which have plagued the country since the fall of Barre's regime. However, given that a centralised government has not historically represented Somalia's clans, even when based on the 4.5 formula, Somalis will continue to perceive any central government or even the process through which it is formed as a zero-sum game. This makes mediation incredibly complicated, as no single significant clan leader or Islamist leader can be marginalised for fear of a prolonged insurgency emerging.

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[127] Khadiagala, G. "Eastern Africa: Security and the Legacy of Fragility" *International Peace Institute*, October 2008. p11.
[128] Roque, P. Op. Cit.

2.2 Factors in Somalia's Continued Collapse

Somalia stands out amongst the many weak or collapsed governments in Africa as being particularly plagued with an inability to bring together even the most basic, cynical form of governance. Somalia has been seen then as a "failure among failed states".[129] But the collapse of the state can be explained in three aspects as defined below, all of which possess potential for solution: Domestic factors, external interests and interferences and the failure of diplomacy.[130] Domestically, Somalia's failures in mediation and eruptions in violence can be attributed largely to the sheer number of actors involved in the political affairs of the country. Moreover, many of Somalia's influential actors have an active interest in stalling the peace process.[131] While warlords have largely been the typical scapegoat, often fomenting violence against rival clans, other spoilers of the mediation process includes that of the merchant classes, who profit greatly from the conflict, or even from the ownership of vital ports, from Bossasso upwards.[132] Furthermore, the businessmen of Somalia are increasingly responsible for hiring large security militias to secure and guard assets, often confronting rival merchants over makeshift ports and lucrative trading areas.[133]

Externally, Somalia has experienced several international spoilers who have an interest in maintaining the constant state of war and conflict. Ethiopia, for example, has intervened on several occasions to 'restore stability' in Somalia, but have often served only to destabilise the collapsed state further.[134] Their intervention in December 2006 to oust the CIC, whilst endorsed by international actors such as the United States, toppled an otherwise functioning, if somewhat hard-line, Islamist CIC which had been able to not only maintain peace and stability in the south-central areas of Somalia (no small feat by any means) but also eradicate pirate attacks in the GOA during their regime. Ethiopia's interests in Somalia extend, it can be argued, only in as much as Ethiopia can minimise the effect which conflict in the failed state spills over into Ethiopia itself. Menkhaus maintains that "(a) lively debate exists over whether Ethiopia is willing to support the revival of a Somali state as long as that

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[129] Menkhaus, K. "Protracted State Collapse in Somalia: A Rediagnosis." Op. Cit. P01.
[130] Ibid.
[131] Ibid. Pp01-02.
[132] Menkhaus, K. "Mediation Efforts in Somalia". Op. Cit. P39.
[133] Roque, P. Interview. Op Cit.
[134] Menkhaus, k. Op. Cit.

state exists on its terms."[135] The importance of external spoilers rests more in the implications it has for winning the trust of the Somali people. With actors both outside the state and within attempting to derail peace processes, Somalis tend to view international interference in their affairs negatively.

Perhaps most importantly, however, the historical pattern of the international community in "missed opportunities" best defines most attempts to pacify and stabilise Somalia. The immediate aftermath of Siad Barre's downfall, together with the administrative incoherence of UNOSOM serves as early examples of the international community's failure to capitalise on rare opportunity to influence Somalia greatly, together with the United States' reluctance to become involved once again in Somalia. While these states and organisations do take an active role in counter-piracy in the GOA from the safety of vast naval vessels, incursions on land in Somalia remain minor operations designed either for counter-terrorism roles or food aid protection.[136]Somalia by no means presents a simple solution for mediation, but so have mediators also missed key opportunities to effect meaningful change at the critical time, resulting in stagnation in terms of Somalia's political development.

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[135] Ibid.

[136] National Security Council. "Countering Piracy Off the Horn of Africa: Partnership & Action Plan ," December 2008, 4, http://www.globalsecurity.org/military/library/policy/national/0812_nsc_counter-piracy-action-plan.pdf.

2.3 Emergence of Piracy in the Gulf of Aden

When Menkhaus wrote on Somalia's failings in 2003, he wondered at the distinct lack of evolution in Somalia's lawlessness, not then aware of the imminent emergence of piracy as another manifestation of banditry.[137] From 2006 onwards piracy originating directly from Somalia has been on the rise.[138] When considering the endemic poverty, particularly in comparison to the rest of Somalia, in Puntland, the home region of the majority of Somali pirates, poverty provides a strong incentive to resort to Piracy. Furthermore, with the rise in illegal fishing off Puntland's coasts, the majority of legitimate Somali fishermen have likewise resorted to piracy as a means of income, as their fishing grounds are overwhelmed with foreign vessels poaching their harvest on a regular basis.[139]

The GOA itself is a major artery in global commerce, transporting roughly 8% of global commerce and, as mentioned in the first chapter, 12% of the world's oil, all transported annually in 22,000 vessels.[140] Since the rise of piracy, however, shipping has increasingly come under attack further and further away from Somalia's shores. Although ostensibly by pirate groups calling themselves the "Somali Coast Guard", these attacks are aimed not at curbing illegal fishing off Somalia's coasts, but rather at capturing valuable cargo and/or crew to hold ransom:

> "Armed groups such as the 'Somali Marines' out of Haradarre formed amongst the fishermen at first in self defence against the range of technically advanced foreign trawlers pillaging their waters and sabotaging their equipment. They engaged these foreign trawlers with rocket propelled grenades and assault rifles, and were responded to in kind. In one particularly telling incident, a group of young fishermen calling themselves members of the Somali Volunteer National Coast Guard 'impounded' three Taiwanese trawlers in August 2005, and placed a ransom of US$5000 on the heads of each of the 48 crew members as a fine for poaching in Somali waters.[141]"

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[137] Menkhaus, K. "Protracted State Collapse in Somalia: A Rediagnosis." Op. Cit. P 08.
[138] International Maritime Organisation."Piracy Off Somalia" http://www.imo.org/home.asp?topic_id=1178 Briefing 48, November 2005.
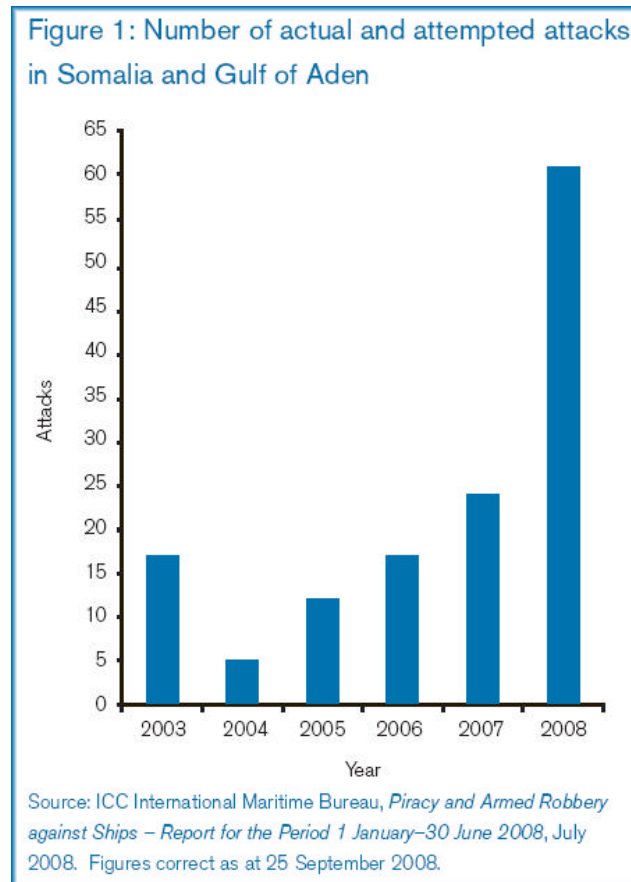[139] Illegal, Unreported and Unregulated Fishing. Op. Cit.
http://www.illegal-fishing.info/item_single.php?item=event&item_id=136&approach_id=8.
[140] International Maritime Organisation. Op. Cit.
[141] Lehr, P & Lehmann, H. Op. Cit. Pp 05- 14.

Certainly the pretence of Somalis taking justified retaliatory action against illegal fishing can provide a good premise for the emergence of Piracy off the GOA, but the taking of hostages for ransom, combined with the evolution of attacks to target super tankers, cargo vessels and other non-fishing vessels lay bare the fallacy of Somali piracy as a 'coast guard' countermeasure.

Figure 1: Number of actual and attempted attacks in Somalia and Gulf of Aden

Source: ICC International Maritime Bureau, *Piracy and Armed Robbery against Ships – Report for the Period 1 January–30 June 2008*, July 2008. Figures correct as at 25 September 2008.

As the above graph shows, the rise in piracy in the GOA is clearly more than just a retaliation against illegal fishing in Somali waters. Much like the evolution of Somalia's clan-based conflict into that of hired militia fighting for merchants for control of lucrative ports or cities, so too has the rise in piracy reflected the change from that of a small-scale operation into a broader, more formalised manifestation.[142] Lawlessness and banditry on land in Somalia has flourished into a million-dollar business, and thus piracy in the GOA can be argued to be a simple extension of the conflict into more lucrative waters.

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[142] Lehr, P & Lehmann. Op. Cit.

2.3 Somalia – Hope for the Future?

Somalia has indeed "suffered a rupture" since the fall of Barre in 1991, and the subsequent years of conflict serves as a stark reminder to the series of blunders and inactivity of the international community towards preventing this.[143] Regardless of the zero-sum expectations of a centralised government, be it the TFG, CIC, or even potentially Al-Shabaab, or the more-rational efforts towards federalised regions, none of these mediations have proven successful, largely due to a clear and distinct lack of commitment in terms of political or logistical support of peacekeeping missions, but also because of the array of 'spoilers' within and without Somalia's borders, who effectively stand to profit from Somalia's failings.

It is thus no surprise that the international response to the surge in piracy has *not* been on land, but rather purely maritime-focused, with several task forces and uniliateral deployments operating in the GOA on counter-piracy missions. While the tactics and strategies of both the pirates and the navies involved in their removal shall be discussed further on in this paper (Chapter four), it is important to understand fully how chronic Somalia's failure as a state is, and more importantly how this will effectively feed into the long-term existance of piracy in the GOA *regardless* of tactics employed to counter them. Indeed, according to Lehr, piracy can never be eradicated by a western armada, and rather the global community should look towards developing littoral states' naval capacities around the Horn of Africa.[144] But even this is optimistic given the absence of naval powers both within Somalia and in neighbouring countries. Indeed, with only South Africa as a major naval force on the coast between the GOA and beyond, the prospects of African navies eradicating a uniquely African scourge (in this context) is slim. Poverty on land and at sea serves to drive Somalis towards banditry again and again on land and on sea in turn, and without a determined, sustainable intervention within Somalia's borders, taking full cognisence of previous failures at mediation and conflict resolution, piracy shall never be fully eradicated.

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[143] Roque, P. Op. Cit.
[144] Lehr, P. Op. Cit.

Chapter 3 – International Maritime Laws and the Rules of Engagement

International Law plays a significant role in understanding the nature of the response of navies in counter-piracy operations within the GOA. The definition of where ocean territorial boundaries end and the high seas begin is crucial in determining just what piracy is and what constitutes hijacking at sea. The jurisdiction, pursuit, boarding procedures and subsequent prosecution of suspected pirates all involve matters of International Law. However, one major obstacle towards effective international maritime laws pertaining to piracy is the question of law enforcement and whether both the former and latter are required for the actual existence of International Law. According to Dugard there is a debate, albeit a minor one, over whether International Law can actually exist if there are no means of enforcement or sanctions.[145] Provided the law itself is recognised by political interests affected, is an absence of enforcement acceptable as International Law? Within the context of Somalia and its immediate littoral neighbours, the question of maritime enforcement plays a very real part in the operational challenges within the GOA as well as the relevance of International Law pertaining to piracy.

In the 21st century, piracy repression in the GOA is influenced by two major international conventions that essentially codify the principles of customary law: the United Nations Convention on the Law of the Sea (UNCLOS) and the IMO's own Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA).[146] But these International Laws possess several flaws which in turn severely hamper counter-piracy operations, or at the very least the formulation of ROE for the task forces deployed to the GOA. For example, a major point of contention is that of the UNCLOS definition of piracy existing purely on the high seas, and not within the current 200nm exclusive economic zone (EEZ) of littoral nations as stated in Article 57.[147] This combined with other glaring problems, discussed in this chapter, in international maritime law serve only to obscure the mandates of commanders actually operating in the GOA and elsewhere.

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[145] Dugard, J. Op Cit.

[146] Gibson, J. "Maritime security and International Law in Africa," *African Security Review*. Vol 18, No 3. P61, 64.

[147] UNCLOS. (United Nations Convention on the Law of the Sea). 1982. New York: United Nations. Part V, Art 57.

Laws assisting the capture and prosecution of pirates have existed for centuries, and therein lies the problem.[148] The laws governing the security of the seas tend to reflect an outdated problem which has only recent manifested in the GOA in a different form. International Law has thus become a disadvantage to naval planners and political organisations seeking to reduce or repress piracy rather than a clear toolset for enforcement because of the historical influence of International Law.[149] The current surge in piracy in the GOA is of a unique nature both in terms of the origin and tactics of the pirates themselves and the navies involved in fighting them, and in terms of the inability by littoral states to enforce what is legally their own ocean territory. International Law is, even if perfectly conceptualised, ineffective if it cannot be enforced by domestic and international police/military organisations or legitimate, stable governments.[150]

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[148] Meija, M. & Mukherjee, P.K. "Selected issues of law and ergonomics in maritime security." *Journal of International Maritime Law*, 10(4) August – September 2004: 301-325.
[149] Wander, KA. "Implications of Maritime Piracy in the Failed State of Somalia," *Naval War College*, Newport, RI. October 2006. Pp 08.
[150] Jacobs, P.C. "Policing Maritime Piracy: International Legislation." *Article in Servamus .* 2005.

3.1 United Nations Convention on the Law of Sea

Ratified by over 159 states, UNCLOS serves as the definitive and primary conceptualisation of the lawful suppression of piracy, even if it possesses several flaws when placed in the GOA context.[151] In this sense, UNCLOS represents the codification of centuries-old customary law which has been generally accepted by mariners across the globe. As such, UNCLOS is effectively the primary source of maritime laws, particularly with regards to piracy. While this convention elaborates on many aspects of maritime law, the most pertinent is that of its definition of piracy. According to article 101 of the convention, which in turn is derived directly from article 15 of the Geneva Convention of 1948, piracy can be defined 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).[152]

The two most important points in this definition of piracy is that of the notion of "high seas" and the question of jurisdiction. The latter because of Somalia's status as a collapsed state and the complete lack functioning, unified judiciary, police force, coast guard and navy which all combine to ensure a lack of capability for maritime enforcement.[153] Furthermore, that the TFG is by no means the undisputed governing authority in Somalia has the consequence of undermining its bargaining power at the Security Council's desk. And the former, that of the notion of "high seas", is important because of the implications in

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[151] Gibson, J. Op.Cit. P61

[152] Fouche, H. "Policing piracy and Armed Robbery of Ships in South Africa's Territorial Waters and Contiguous Zone." Dissertation. Tshwane University of Technology. July 2006. P62.

[153] Africa Report . Op Cit.

definition of piratical attacks and the measures taken against the perpetrators are significantly affected by this demarcation, as shall be explained further in this section.

Within the convention, there are three major flaws which can serve to impede both further operations in piracy repression as well as in creating future international and domestic criminal laws to better serve the problem of piracy in the GOA.[154] Firstly, there is the sheer lag in the convention's formulation and implementation which potentially renders it automatically redundant in several areas. Secondly, the nature of piracy as a "two-ship" problem, ie that piracy requires a belligerent and victim ship at the least, in order for it to legally 'occur'. The two-ship problem, while not necessarily relevant to the GOA at present, could certainly pose a challenge in the future evolution of piracy, and which the non-universal Suppression of Unlawful Acts (SUA) does not completely solve. Lastly, and most importantly, there is the problem of the definition of maritime boundaries in the sense that the "high seas" exist in such a small ocean space as to make a majority of pirate attacks off the GOA not piracy by definition, but rather hijacking at sea, which raises immediate problems for warships patrolling both territorial and international waters.[155] All of the above problems pose major obstacles for an adequate legal conceptualisation of what piracy is, where it occurs, and how to counter it.

Firstly, the formulation and drafting UNCLOS took twelve years to draft and another twelve to implement in any meaningful sense, i.e. garner sufficient signatories and ratifications.[156] This is problematic for several reasons: Foremost is the expected difficulty in any future revisions or amendments which shall almost certainly be required as maritime boundaries and security issues evolve. Having taken some twenty four years already, it is not implausible to claim that attempting to actually amend the convention would require substantial effort and delays. When one examines just how piracy in the GOA has progressed in the past four years alone, the expectation that a major, binding International Law such as UNCLOS could keep up in terms of accommodating the rapidly-changing nature of maritime security is optimistic at best. Likewise, the problem with such a delay, as could be said of most International Law, is that it effectively draws a "line in the sand" as it were,

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[154] Fouche, H. Op. Cit. Pp62-64.
[155] Fouche, H. Op. Cit. Pp62-64.
[156] Meija, M. & Mukherjee, P.K. Op.Cit. p322.

whereby the law itself becomes a laborious, negotiated document which is rapidly overtaken by events beyond the scope of the original paper. UNCLOS ultimately puts a modern sheen on a conceptualisation of piracy which is centuries old in the sense that it has failed to account for the rapidly-shifting nature of piracy, which is in itself considerably changed from historical predecessors, be it in the GOA, Straits of Malacca or GOG. [157]

The second critical problem in the convention is that of the "two-ship" prerequisite, meaning that for an act of piracy to occur there must be two vessels involved, aggressor and victim.[158] This then naturally excludes acts of piracy whereby the attackers are passengers on the vessel in question. While the major precedent for this is the 1985 *Achilles Lauro* attack, in which four Palestinian Liberation Front hijacked the ship, the potential this form of passenger-based piracy exists in the GOA.[159] When considering the number of medium-sized fishing vessels, ferries and other local shipping, the chances of a 'one-ship' scenario certainly exist as a possibility. According to the convention, however, this form of attack is not defined as piracy, and thus possesses complications in the procedures for boarding, capture and prosecution of pirates/hijackers who were originally on board the vessel. This is ironically contrary to classical notions of piracy, as John Gibson highlights in the *African Security Review*:

> "Paradoxically, the archetypal fictional pirate, Long John Silver in the novel *Treasure Island*, would not have committed piracy under the convention, as he was already employed as a cook on the ship that he seized; he was in modern parlance a hijacker, but hijacking is not piracy."[160]

Hijacking does not equate with piracy as the legal approaches for prosecution and enforcement differ. Hijacking is essentially a policing issue, whereas piracy is a military problem. The SUA has addressed this issue in part, and shall be elaborated on in 3.2, but is itself flawed for other reasons which in turn serve to undermine the potency of UNCLOS and SUA to provide a comprehensive guide towards countering piracy.

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[157] Wander, KA. Op. Cit. Pp3-5.
[158] Mukherjee, P.K. Editorial in *Journal of International Maritime Law*, Vol 10, No 4 August – September, 2004: p301.
[159] Aust, A. (ed.) Implementation Kits for the International Counter-Terrorism Conventions. London: Criminal Law Section: Legal and Constitutional Affairs Division: Commonwealth Secretariat: Pall Mall, London. 2004.P186.
[160] Gibson, J. Op. Cit. P67.

The final and most important, problem in UNCLOS lies in its definition of the "high seas." As stated in the convention under Articles 3, 33 and 57, the territorial waters of a littoral state comprises of territorial sea (12nm), contiguous zone (24nm) and 'Exclusive Economic Zone' or EEZ (200nm) as illustrated below:[161]
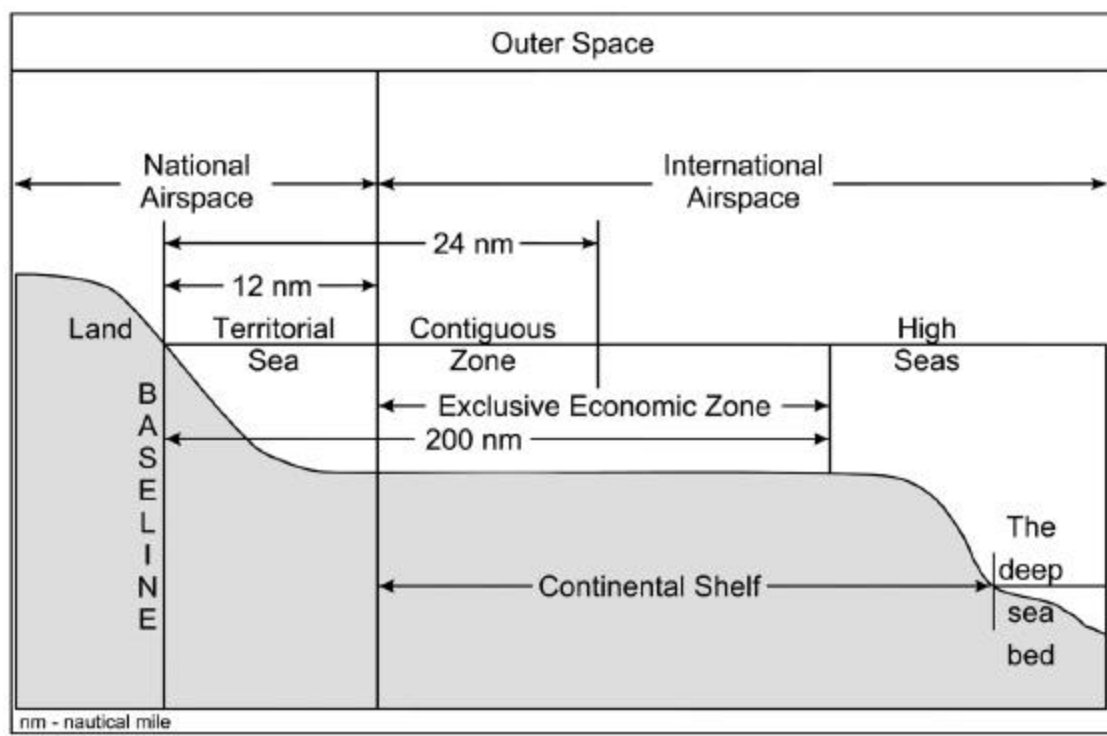
Source: The Commander's Handbook on the Law of Naval Operations,
www.nwc.navy.mil/cnws/ild/documents/1-14M_(Jul_2007)_(NWP).pdf.

The territorial and contiguous boundaries enable littoral states to exercise sovereignty over this range of ocean space and prohibit any non-peaceful navigation by foreign vessels.[162] The EEZ extends partial sovereignty for the littoral state insofar as they possess rights to protect and secure economic assets within the EEZ, and likewise all interceptions of foreign vessels therein must be conducted by the littoral state itself.[163] The problem in the GOA manifests in the legal context when one considers that the majority of the Gulf falls within Somalia's EEZ, contiguous zone and territorial sea. Chapter V of the convention has enabled states to establish their EEZ's if they so desire and the international community has

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[161] UNCLOS. Op. Cit. Art 3, 33, 57.
[162] Gibson, J. Op. Cit. P62.
[163] Gibson, J. Op. Cit. P62.

responded, including Somalia.[164] This has naturally diminished what is classified as 'high seas' around the world, with the result that around 90% of piracy attacks worldwide are actually *not* defined as such according to International Law.[165] Perhaps one of the larger indictments on the convention's relevance is the prevalence of material detailing piracy which largely includes acts committed landward of the high seas, particularly in terms of statistics and maps charting "pirate" activity.[166] If attacks not qualifying as piracy according to International Law are still treated as such, at least on paper, the implication for UNCLOS should be for a reconceptualisation thereof, at least in terms of the definition of the geographical space in which piracy can occur, lest redundancy and confusion remain.

UNCLOS is based on centuries of anti-piracy International Law, and the notion that piracy should remain an international scourge against *humanis generis* has remained resolute.[167] Fouche aptly explains:

> "The right of any state to take action against piracy is considered to be a peremptory norm of International Law, but if the right extends to waters landward of the high seas, it becomes an impingement on the sovereignty and jurisdiction of the coastal state… … Compounding this problem is that the majority of acts today, which would have qualified as piracy had they been committed on the high seas, occur in waters where only the littoral state can exercise jurisdiction under International Law."[168]

Even if piracy occurred under the control of a stable coastal state, the definition under UNCLOS of just where piracy occurs raises a serious obstacle towards exercising correct jurisdiction and operational approaches to counter-piracy. Compounded upon this is the complicated nature of Somalia's coastline. With zero naval capability, the TFG is left incapable of managing the security challenges of securing their EEZ. Moreover, the question of jurisdiction has become a matter of great concern, as foreign coalition warships operating in the Gulf face significant challenges in terms of where they are able to patrol, what level of aggression they may use, and under whose mandate. Therein lies the nut of the problem faced by warships operating in the GOA: the failure of International Law to provide clear and

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[164] Mukherjee, PK. Op. Cit. P324.

[165] Wander, KA. Op. Cit. P7.

[166] IMB (International Maritime Bureau). Live Piracy Map 2009. 2009. http://www.icc-ccs.org/index.php?option=com_fabrik&view=visualization&controller=visualization.googlemap&Itemid=219

[167] UNCLOS. Op. Cit. 1982.

[168] Fouche, H. Op Cit. P62.

useful guidelines on the realistic repression of piracy can only serve to feed into a "better safe than sorry" approach by many coalitions and individual warships operating in the area, in the sense that warships, barring the more belligerent of national, independent vessels, tend to err on the side of caution due to the above legal complications.

Lastly, this paradoxical definition of piracy under UNCLOS leaves states in a catch-22 situation in the sense that they are unable to criminalise piracy which exists in their territorial waters, given that piracy technically does not exist therein. If the convention is to be of optimal use in enabling counter-piracy enforcement, this failure to account for the 21st century manifestation of piracy as an event which occurs landward of the high seas must be addressed. However, as previously mentioned the sheer time lapse in the convention's formulation cannot occur again in any potential amendment process in the future if the changes themselves are to be of any real use in curbing piracy.

3.2 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA)

The SUA convention, introduced in 1988, is essentially designed to account for adequate countermeasures against pirates and hijackers, requiring contracting signatories to extradite or prosecute alleged offenders.[169] According to Article 3 of the convention, unlawful acts of piracy/hijacking are defined as the following:

(a)   seizing or exercising control over a ship (hijacking) by force or threat of force or other form of intimidation,

(b)   performing an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship,

(c)   destroying a ship or causing damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship,

(d)   placing or causing to place on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship,

(e)   destroying or seriously damaging maritime navigational facilities or seriously interfering with their operation, if any such act is likely to endanger the safe navigation of a ship,

(f)   communicating information which he knows to be false, thereby endangering the safe navigation of the ship,

(g)   injuring or killing a person in connection with the commission or the attempted commission of any of the offences set forth in (a) to (f). 170

The important distinction between the SUA convention and UNCLOS from the above definition is in the concept of piracy as an offense which does not necessarily take place on the high seas. Furthermore, SUA removes the "two-ship" problem inherent in UNCLOS. However, SUA is fatally flawed for the simple reason that SUA is designed, throughout all of the above criteria, to avoid the damage or destruction of the ship affected. This has the counterproductive result that, provided pirates do not directly and obviously endanger the

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[169] IMO.(International Maritime Organisation). Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA). 2006.
http://www.imo.org/Conventions/mainframe.asp?topic_id=259&doc_id=686
[170] Fouche, H. Op. Cit. 65-66.

ship's integrity, this International Law does not truly apply. Somali pirates, generally-speaking, operate a skilled boarding and navigation strategy, where the helmsmen is often quite skilled and capable of safely navigating the ship.[171] Regardless of the fact that the vessel is headed towards a pirate port such as Eyl in Puntland, and a subsequent hostage situation, SUA provisions and definitions cannot apply to piracy in the GOA.

The SUA convention is important primarily because of the precedent it sets in updating archaic International Laws on maritime piracy to reflect - at least in some part - the realities of geographical marine boundaries and the nature of pirate attacks in the 21st century.[172] While the SUA convention has yet to gain all twelve ratifications needed to bring it into force, the law itself enjoys a large base of signatories and will at the least in time add an extra layer of much -needed clarification in international maritime law.[173]

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[171] Middleton, R. "Piracy in Somalia: Threatening global trade, feeding local wars", *Chatham House*, Africa Programme, October 2008. P7.
[172] Meija , M. & Mukherjee , P.K. Op. Cit. P325.
[173] Gibson, J. Op. Cit. P68.

3.3 Maritime Enforcement and the Rules of Engagement (ROE)

When encountering the problem of piracy from an operational perspective, the Rules of Engagement (or ROE) are of utmost importance to ensure lawful pursuit and engagement with suspected pirates. Having a clear set of International Laws thus feeds into and influences the ROE of most western navies operating in the GOA. According to the US Military's *Operational Law Handbook*, ROE essentially provides "restraints on a commander's actions, consistent with both domestic and International Law, and may, under certain circumstances, impose greater restrictions than those required by the law."[174] In the GOA, where a plethora of international actors are operating, both in civilian and military capacities, off the coast of a collapsed state with zero coastal enforcement capacity, it is quite reasonable for US planners and commanders to adopt a more-restricted version of ROE than is perhaps completely nece ssary. The problem arises, however, when this restricted ROE directly impedes more effective piracy repression strategies from emerging. If International Law was a prime influence upon ROE, clear and modernised, this phenomenon in the GOA might not exist at all. Unfortunately this is not the case, and ROE has become tainted somewhat in its drawing from the well of UNCLOS.

Historically-speaking, pirates of old would fly the *Jolly Roger* and be clearly identifiable as belligerents upon the high seas, and the p roblem of what legally constitutes piracy did not exist as it does today.[175] The exclusion of 90% of piracy attacks through the definition of UNCLOS has created a serious problem for planners in formulating just what can and cannot be done in terms of engaging suspected pirates when drafting ROE. While the right to self-defence and interdiction remain, the ability for navies operating in the GOA to conduct maritime enforcement effectively is minimalised .

Maritime enforcement off a coast which has no domestic policing mechanisms is an immense challenge, regardless of the overarching International Law restrictions which apply. Boarding procedures for example are immensely frustrating affairs in the sense that the consequences for boarding an innocent vessel carries with it penalties for the

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[174] *Judge Advocate General's Legal Center and School.* "Operational Law Handbook," US Army. Charlottesville, VA. 2007. P85.
[175] Wander, KA. Op. Cit. P7.

intervening state.[176] When placed in the context of the GOA, in which hundreds of legitimate fishing vessels identical to a pirate skiff ply their trade, boarding procedures, while endorsed and encouraged under article 110 of UNCLOS, are practically unfeasible except in the strongest of suspicions of pirate activity.[177] It then stands to reason that taking pre-emptive, offensive action against suspect pirates is virtually unthinkable and has been reflected in the current trend of naval operations in the GOA.

The frustration in counter-piracy operations is self-evident. US vessels are several restricted in their ROE as to just what they can and cannot do to fight piracy:

> "the U.S. Navy can only directly engage pirate skiffs during an attack on another ship or in self defense if pirates fire on U.S. sailors. Even when the U.S. Navy witnesses a successful attack it can do nothing for fear of harming the pirate's hostages. Because of the concern for hostage casualties, the U.S. Navy even stands by as pirates refuel and resupply their captured vessels."[178]

This shackling of capabilities is not limited to the US counter-piracy efforts. During of the hijacking event of the *MV Saldahna* in February, the British Royal Navy vessel *HMS Northumberland* was prohibited from attempting any manner of hostage rescue:

> "the Royal Navy commander 'was forced to watch as the *Saldanha* with its crew of 22 below deck drifted past the bridge windows and on towards the Horn of Africa.' Fisher observed correctly, 'The mandate of the European Union taskforce – of which the *Northumberland* is part – is to act as a deterrent and try and stop acts of piracy in process or about to take place. It does not have the mandate or capability to retake captured ships like the *Saldanha.*'"[179]

This scenario of prohibitive ROE is ironically one of the few aspects of counter-piracy in the GOA which *is* generally-accepted as standard customary practice. But this is not necessarily a permanent state of strategic paralysis. To date, Somali pirates do not traditionally harm their hostages and have yet to intentionally execute any captured civilians. This would explain to some degree the reluctance of states to literally fire the first salvo against pirates who hold hostages. However, given the rapidly-evolving nature of piracy in the region, bearing in mind the increasing radicalism of al Shabaab, it is not unreasonable to suppose

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[176] Gibson, J. Op. Cit. P62.
[177] UNCLOS. Op. Cit. Art 110.
[178] Harwood, M. "Pirates Frustrate U.S. Navy in the GOA," *Security Management* Nov 2008.
http://www.securitymanagement.com/news/pirates-frustrate-u-s-navy-gulf-aden-004865
[179] Pham, P. "A Sustainable Response to the Scourge of Somali Piracy", *World Defense Review.* February 2009. 01.

that pirates and terrorists in the AO will resort to more aggressive tactics. This then could necessitate a relaxing of Navy ROE, thereby escalating the entire context to a state which might see navies mounting offensive operations, raising casualties but also, and most importantly, increasing the strategic utility of sailors and marines in the GOA. Finally, had the *Northumberland* received earlier intelligence indicating the hijacking, it might well have moved to intercept the pirates before they became a danger.

In the few instances where pirates are actually detained, the problem of prosecution again compounds one of the final stages of counter-piracy operations. There is currently no consensus as to just what is to be done with detainees. On the international level, European states are reluctant to deal with pirates in their own courts, while local littoral neighbours to Somalia, such as Kenya, which holds agreements with the USA to try pirates, often refuse to try suspected pirates when they are returned to a friendly port, often resulting in the pirates simply being repatriated back to their homeland.[180] American law is also plagued by similarly hypocritical legal instructions. For example, the US *Law of Naval Operations* dictates that pirates should be taken to the nearest American port and handed over to authorities for prosecution.[181] International Law however defines piracy as an international crime and pirates should thus be taken to the nearest friendly port for trial, which the US Navy has done on several occasions.[182] Thus it is quite apparent how outdated domestic maritime law is in direct contradiction to that of International Law, and can affect SOP by US Navy vessels and personnel.

Ultimately the absence of a clear understanding of just what a pirate is has obscured the ability nations to capture and prosecute suspects. The SUA conceptualisation of piracy including the shrinking high seas and beyond is a promising start, even if it has not yet been brought into force, and only comes into effect when the safe ty of the ship itself is threatened. ROE is directly influenced by codified customary laws, particularly that of UNCLOS and SUA, yet the actual failings of these laws have manifested through all stages of maritime enforcement. The right to board suspected vessels and the consequences of errors

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[180] Schofield, C. "Plaguing the Waves – Rising piracy threat off the Horn of Africa," *Jane's Intelligence Review*, 01 July 2007, Date Posted: 13 June 2007. HTTP://www8.janes.com
[181] U.S. Department of the Navy, The Commander's Handbook on the Law of Naval Operations, NWP 1-14M, July 2007, pg 306, article 3.5.3.1.
[182] Nick Brown, "Taking the Fight to the Pirates," Jane's International, May 01 2006, Date Posted: 20 April 2006, Internet http://www8.janes.com,

in an ocean space the size of the GOA, travelled by thousands of international and commercial vessels is practically unfeasible, particularly when considering the score or so of naval vessels patrolling such a large area.[183] State naval forces are thus far more prone towards avoiding employing any sort of VBSS operation and focus more on pure deterrence measures. Likewise, the question of jurisdiction, precisely *where* navies are allowed operated in the GOA is dangerously obscure in the context of the TFG's inability to wield coastal enforcement itself. Furthermore, the prosecution of piracy is hampered not only by UNCLOS' definition of where piracy occurs and what piracy is but also in conflicting domestic laws and a general reluctance to actually deal with the problem in the absence of binding, overarching judicial bodies capable of putting pirates on trial. If International Law is not reconceptualised in the near future to better reflect the challenges of piracy in the 21st century, it stands to reason that the ROE of navies mounting counter-piracy operations will err on the side of caution, thereby hampering any remotely effective strategy of containing or dissuading piracy.

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[183] Pham, P. Op. Cit. P1 -2.

Chapter 4 – Strategic Responses to Piracy in the GOA

The steep increase in piracy attacks within the GOA has produced a combined counter-piracy naval presence of over thirty vessels as of June 2009.[184] With navies from Russia, China, India, Iran, the United Kingdom and the United States, the response to the GOA piracy threat represents one of the largest multinational anti-piracy deployments in recent history.[185] But while the scale of counter-piracy operations appears impressive on paper, the actual operational components present clear problems and frustrations in deterring piracy in the AO. Currently, the majority of vessels operating in the GOA adhere to stringent Rules of Engagement, sticking to purely defensive tactics and interdiction roles which are designed more towards securing the waters of the GOA and deterring attacks rather than actively seeking out pirates on an offensive basis, either on land or sea.[186] Moreover, having such a large naval presence is mitigated by the sheer size of the ocean in which they operate, as well as the simple reality that not all of the nations involved in combating piracy communicate and cooperate with other vessels or with the task forces.[187]

Given the legal problems already argued in Chapter 3, the resultant hesitation by navies over just how to proceed from the current status quo can attributed to the opacity of the law. While interdiction escort tactics are effective enough in a limited capacity, the pursuit, arrest or attack of pirates and their subsequent prosecution has proven far more troublesome. Furthermore, the tactics employed by the pirates, while rudimentary, have adapted and expanded to match those of the most sophisticated drug cartels or the Sunni Arab Insurgencies in Iraq, in terms of communications networks and operational range.[188] But there exists several examples of both effective and ineffective counter-piracy tactics already exhibited within the GOA, which can be examined and their failures or successes utilized to provide a better understanding of just how counter-piracy operations can or should be conducted. The *HMS Northumberland's* frustrating back-and-forth encounter over

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[184] Upadhyaya, S. "Piracy in GOA – Emerging Trends and Challenges," *National Maritime Foundation*. July 2009. Pp01-02.
[185] Ibid.
[186] Raman, B." Rules Of Engagement In Maritime Counter-Terrorism & Counter-Piracy," *International Terrorism Monitor.* No. 469. Nov 2008.
[187] Ibid.
[188] Lennox, P. Op. Cit. Pp09-10.

twenty-four hours with the *MV Saldahna* both before and after capture, for example, exemplifies the paralysis navies experience in pre and post-capture situations of the targeted vessel.[189] Likewise the Indian Naval vessel *Tabar's* engagement of a pirate 'mother ship' exemplified the hazards of a purely "gung-ho" approach to identifying and engaging with suspected pirates, as the vessel contained the Thai crew held hostage beneath the decks.[190]

Ultimately counter-piracy operations do not solely rely on military solutions. The responses by civilian shipping remains the first, and perhaps most important, deterrent against pirate attacks at sea. But the commercial shipping response to piracy has been minimal at best, with few shipping companies uniformly securing their vessels and training their crew in rudimentary counter-piracy drills.[191] The strategic approach to minimizing the threat of piracy off the coast of Somalia must draw inspiration from both the military and non-military potential for improvements in tactics, equipment and training, while still drawing as much as possible from International Laws on piracy. With the heavy emphasis on a defensive posture within the task forces operating in the GOA, reflecting the extreme frustration of those involved in counter-piracy, and the "shoot first" approach of non-Western navies representing a clear danger of overly-aggressive tactics, formulating a strategy for counter-piracy between the two is paramount.

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[189] Pham, P. Op. Cit. P01.
[190] DeshGujarat.com, "Three naval ships open to the public in Porbandar," December 2009.
http://deshgujarat.com/2009/12/01/three-naval-ships-open-to-the-public-in-porbandar-today/
[191] Patch, J. "The Overstated Threat," *Proceedings Magazine*. Vol 134, No. 12. Dec 2008.
http://www.usni.org/magazines/proceedings/archive/story.asp?STORY_ID=1694#footnotes

4.1 Strategic Framework

While many experts on piracy advocate the broader development and intervention into Somalia as a sound step forward in combating piracy, there are aspects of the strategic, military-based approach which can be improved. These strategic recommendations can be loosely-oriented around Raman's threefold categorization of the counter-piracy objectives in the GOA.[192] Firstly, the inability of over a score of warships in the GOA to effectively secure a 1.1 million mile ocean space must be addressed in order to ensure safe transit of civilian shipping. The lack of military assets, civilian precautionary measures and technological improvements in domain awareness (such as small-target trackers) mean that warships often arrive too late to interdict pirate attacks, and civilian ships themselves are unable to correctly employ countermeasures to prevent, deter or evade capture. Secondly, pursuing and destroying pirate motherships and their skiffs must be recategorised as a priority by states willing and capable of doing so.

All naval warships patrolling the area enjoy a complete force overmatch compared to the lightly-armed pirates, but the political will must back this up in order to begin effectively eliminating motherships as a viable tactic for pirates while still reducing the potential for civilian casualties. Lastly, taking the fight to the pirate warlords themselves is crucial in providing increased disincentive for piracy in the first place. The counter-terror strikes by US forces, as well as the French commando raid again *Le Ponant's* captors prove that limited, precision strikes against pirates can work. However, the large number of hostages still in custody around Puntland's ports must be taken into full consideration.

Regardless, these three aspects of counter-piracy all possess potential for strategic improvement, even within the current opaque legal context. Long-term grandiose plans for Somalia's political and economic development are undoubtedly crucial in finding a permanent solution to piracy off the Somali coast, but adapting the current military strategy on the seas can go a long way towards curbing piracy and its effects.

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[192] Raman, B. Op. Cit.

4.2 Military Responses to Piracy in the GOA

There are four broad categories of counter-piracy deployments in the GOA, arranged loosely on national or strategic lines. The European Union's Naval Force (EUNAVFOR), the UN-sanctioned Combined Maritime Force 150/151, the plethora of independent warships such as those of China, India, Republic of Korea and Iran, and finally the US Navy's own peripheral initiatives operating in a broader, counter-terrorism capacity, under the command of Africa Command (AFRICOM).[193] While each nation or task force certainly regards counter-piracy as a priority, their strategic approaches often differ.

EUNAVFOR, consisting of several European nationalities including British, Spanish, French and Germans vessels, acting within "Operation Atalanta", was formed specifically to deter pirates from operating in the GOA.[194] More importantly, EUNAVFOR places the protection of WFP vessels as a primary objective therein, aiming to ensure that what aid does flow into Mogadishu is not captured by pirates.[195] By the end of November 2009, EUNAVFOR vessels have successfully guarded almost 300 000 tons of food aid to Somalia.[196] Although valuable in ensuring that WFP aid safely reaches the shores of Somalia, EUNAVFOR's track record in actually preventing piracy is downplayed in official European Union Security and Defence Policy (ESDP) documentation, which prefers to highlight the impressive statistics in food aid delivery.[197] When considering the proportionally low chance of a successful pirate attack, even in the GOA, the inability of naval forces to comprehensively deter piracy is often underemphasized in favour of peripheral successes.[198] With around 40 vessels out of the roughly 16 000 transiting the gulf annually being successfully hijacked, attempting to find the 'needle' responsible for the attack, in the giant 'haystack' that is the GOA, heavily-fished with identical civilian fishing skiffs, is a daunting task.[199] The protection of food aid shipments is certainly important for EUNAVFOR, but while there have been successful cases

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[193] Fage, J. "Piracy Task Force Welcomes New Commander," *Navy Newsstand*. July 2009.
[194] Council of the European Union, "EUNAVFOR Somalia," July 2009. http://www.consilium.europa.eu/showPage.aspx?id=1518&lang=en
[195] Ibid.
[196] European Union Security and Defense Policy (ESDP), "EU Naval Operation Against Piracy," December 2009. P02.
[197] ESDP. Op. Cit. P03.
[198] Munich Re Group, Piracy—Threat at Sea: A Risk Analysis, September 2006, p. 7, 18.
[199] Africa Confidential. "Somalia: pirates of the horn," Vol 49. No15. Jul 2008. P09.

of interdiction and the arrest of pirates, the tactics employed by captains have proven to place far more emphasis on deterrence rather than direct engagement with suspects.[200] The arrest of nine suspect pirates almost 200nm off the coast of the Seychelles in April 2009, for example, required extensive communication between a French EUNAVFOR maritime patrol craft as well as a nearby Indian warship.[201] Furthermore, the suspects were eventually released due to insufficient evidence.[202]

EU NAVFOR could be better employed in direct piracy interdiction roles if a smaller force would take up WFP escort duties and the political will existed to scale up the aggression levels of European vessels. While the latter can always pose a major obstacle to taking more direct action against pirates, the former responsibilities could be taken up by a continental organization, such as the South African Navy (SAN) acting under an AU mandate. Indeed, the WFP did indeed request the SAN to contribute towards counter-piracy escort duties, but was duly decline as the cost of such a deployment would have had to be shouldered by South Africa rather than the United Nations.[203] According to Capt. Van Rooyen (Ret.), the South African Navy has the capability to tackle pirates, particularly in as defensive a posture as escort duty, which in turn may well free up EU vessels to provide a far more proactive presence in counter-piracy operations.[204] However, if the entire cost of such a deployment is shouldered by the SAN, even of a single frigate, the length of any such escort mission would potentially be limited to several short months. Naturally the benefit of this hypothetical SAN deployment could only ever be considered if the states providing vessels for non-aggressive escort duties would be willing to shift to the more offensive role of pirate-hunting in the GOA as a whole.

One of the foremost counter-piracy task forces in the GOA is that of the Combined Task Force 151. While the Task Force strength and command rotates regularly, CTF 151 represents one of the more cohesive multinational approaches to fighting piracy in the GOA. CTF 151 is Operating under a United Nations mandate according to Security Council

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[200] US Naval Institute, "Observing the Establishment of CTF 151," Jan 2009.
http://blog.usni.org/2009/01/09/observing-the-establishment-of-ctf-151/
[201] EU NAVFOR, "EU NAVFOR apprehends suspected pirates," *EU NAVFOR Public Affairs Office*. April 2009.http://www.eunavfor.eu/2009/04/eu-navfor-apprehends-suspected-pirates/
[202] Ibid.
[203] Engelbrecht, L. "SA Navy not yet scheduled to go pirate-hunting," *DefenceWeb*. Nov 2009.
[204] Van Rooyen, F. "Maritime Security Africa 2009", *DefenceWeb Conference.* 2009. Cape Town.

Resolution 1846, which effectively endorses navies in the area to take "all necessary means" to deter piracy and capture or eliminate pirate-related equipment within the boundaries of International Law. [205] [206] With the backing, and current command, of the US Navy's 5th Fleet, CTF 151 is responsible for patrolling a 1.1 million square mile ocean space and ultimately represents the primary force against piracy in the GOA.[207] CTF 151 is the effective extension of its predecessor, CTF 150, in an effort to enable those states willing to take more active action against pirates to do so without the operational confusion of a mixed mandate under a single task force.[208] A US Armed Services press release confirmed this:

> "Some navies in our coalition did not have the authority to conduct counter-piracy missions," and thus ""The establishment of [Combined Task Force] 151 will allow those nations to operate under the auspices of CTF 150, while allowing other nations to join CTF 151 to support our goal of deterring, disrupting and eventually bringing to justice the maritime criminals involved in piracy events."

It is important to note that states contributing towards CTF 151 have expressed a clear willingness to take part in not just 'security operations' within CTF 150 (which does not therefore place an emphasis on other objectives) but in a counter-piracy framework. This willingness can be translated into more effective counter-piracy strategy if given sufficient improvements, such as the ability to actively hunt pirates in territorial waters on a more offensive posture, free from the binding, defensive nature of simple escort and interdiction operations.

At present, CTF 151 has enjoyed -high success rates in apprehending pirates, however it is again constrained from the visit, board, search and seizure (VBSS) techniques in making contact with suspected pirates, as the costs incurred if a suspected pirate vessel is discovered and deemed innocent are high, both in re-compensation to the vessel in question and in the lengthy, time consuming procedures required to board another vessel, which then enables the destruction of evidence by the pirates themselves. Secondly, the broader ROE with regards to when intervention/interdiction can be pursued, as shall be

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[205] Department of Public Information (DPI)," Security Council decides states, regional organizations may use 'all necessary means' to fight piracy off Somalia coast for 12-month period," *UN.org.* Dec 2008. http://www.un.org/News/Press/docs//2008/sc9514.doc.htm .
[206] Ibid.
[207] Combined Maritime Forces. "Combined Task Force (CTF) 151," 2009. http://www.cusnc.navy.mil/cmf/151/index.html
[208] Patrick Lennox. Op. Cit.
Pp 24-29.

elaborated on further in the *HMS Northumberland* example, as it highlights the frustration in current ROE employed by British warships, which are indicative of the fleet at large. Lastly, the problem of evidentiary requirements in prosecuting pirates and in finding a port and jurisdiction willing and capable of placing suspects on trial bears mention.[209]

Of particular note are the many independent naval vessels from the international community operating in the area. With nations such as Russia, India, Korea and elsewhere all present in the GOA, piracy repression in the GOA incorporates a plethora of naval powers which would not ordinarily share the same ocean space in a common strategic effort. China, for example, has deployed two destroyers and a supply ship to the GOA in its first major deployment since 1949.[210] The presence of strategic rivals often results in peripheral effects, such as the above deployment sparking renewed Japanese interest in sailing the GOA as well in an effort to gain diplomatic credit as "doing its bit" along with other global naval partners.[211]

Moreover, this non-Western naval presence has been involved in unprecedented levels of aggressive counter-piracy action, such as the aforementioned Indian vessel, the *Tabar*, destroying a suspected pirate mother ship despite the consequent discovery of the original Thai crew still on board.[212] Likewise, the presence of Chinese Navy in the GOA could be construed more as a precautionary measure to protect Chinese-flagged vessels transiting the Somali coast.[213] Given that illegal Chinese poaching of Somalia's tuna stocks is one of the original explanations given by the "Somali Coast Guard" for the rise in piracy this greater effort at counter-piracy deployment from the East is ironic.[214]

One major problem with non-coalition warships operating in the GOA is their reluctance to get involved when vessels not of the flag-state's nationality are at risk, as well as the problem of adapting to the ROE requirements which hinder naval vessels:

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[209] Wander, K. Op. Cit. Pp05-06.

[210] Lennox, P. Op. Cit. P12.

[211] Ibid.

[212] DeshGujarat.com. Op. Cit.

[213] Upadhyaya , S. Op. Cit. Pp01-03.

[214] Illegal, Unreported and Unregulated Fishing. 4th Chatham House Update and Stakeholder Consultation Meeting – Report, Chatham House, April 2008.
http://www.illegal -fishing.info/item_single.php?item=event&item_id=136&approach_id=8

"The laudable naval response has been crippled by the apparent inability of naval contingents to quickly adapt to international rules and to overcome (self) imposed obstructions; the tendency of navies to depart when their own interests or citizens are no longer under threat and maritime transgressors not being significantly deterred the naval show of force."[215]

The contribution of independent vessels from Asia and elsewhere is certainly useful in increasing the patrolled or guarded ocean area, but when pirates are not deterred by the immediate threat or presence of these grey-hulled warships, often very little is done by commanders to interdict pirates when not directly in accordance with their ROE.[216] Negotiating with these states to second vessels into CTF 151, for example, would provide an immense benefit in creating a watertight counter-piracy net.

Nonetheless, actions by independent vessels, particularly that of the Indian Navy, have proven to be effective in applying sheer destructive force against pirates. If the *Tabar's* lessons could be applied on a basis where civilian hostages can be identified prior to engagement, it would serve as a good step forward in taking the fight to the pirates themselves, in the sense that it would increase deterrents beyond simple policing actions and lower the incentives of piracy by making civilian ships much harder to seize.

Overlapping these deployments to some degree is that of the USA's Combined Task Force – Horn of Africa, which includes CTF150 and 151, but extends into more counter-terrorism-oriented operations as well.[217] While overt military action against Somali militants on land has yet to occur beyond small interventions, the United States does mount limited operations therein. On September 14, 2009, US forces launched a strike against suspected Al-Qaeda operatives in Barawe, south of Mogadishu.[218] Operation *Celestial Balance* showed the effectiveness of limited precision strikes, in this case AH-6 'little bird' helicopters armed with rockets, and more importantly highlighted how US forces in the GOA are not concerned with just counter-piracy as a strategic objective.[219]

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[215] Vreÿ, F. "Bad order at sea: From the GOA to the Gulf of Guinea," *African Security Review.* Vol 18. No 3. P21.

[216] Vreÿ, F. Op. Cit.

[217] Chalk, P. "The Maritime Dimension of International Security," *RAND Project Air Force*.

[218] Roque, P. "US War on Terror: Failing Somalia and its best chance for peace," *The Institute for Security Studies*. Pretoria. Sep 2009.

[219] Ibid.

Such interventions threaten the authority of the TFG as American forces raid Somali territory under the principle of 'hot pursuit' (detailed in Article 51 of the UN Charter), and further threaten AMISOM peacekeepers who must cope with the retaliation long after the AH-6's have left Somalia for their home vessels. Indeed, retaliation for the strike led to a massive suicide attack against an AMISOM base in Mogadishu, killing a score of personnel, as well as the deputy commander of the AMISOM mission.[220] The importance of this rapid retaliation is the lesson it teaches any potential literature on counter-piracy strategy. Given the strength of arms of pirate havens in Puntland, intervening on land would require a significant feat of arms by coalition naval forces, and retaliations on land and sea would be likely.

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[220] Roque, P. Op. Cit.

4.3 Tactical Approaches

Somali pirates use basic small arms and rudimentary equipment in the process of seizing a targeted vessel, but the broader tactical and strategic process whereby pirates in the GOA go about capturing a victim is far from basic.[221] Likewise, the methods employed both by military assets in the area and civilian organizations have changed rapidly since the rise in piracy four years ago.

4.3.1 Organisation

Somali pirates in their current form operate under broad 'syndicates', enjoying the patronage of one of Puntland's major pirate warlords.[222] For example, one major warlord, 'General' Garaad Mohamud Mohamed is believed to have hijacked two South Korean fishing vessels in 2007.[223] Likewise, the ranges which pirates can operate indicate more than just disorganized brigands roaming the sea in small skiffs. With attacks occurring hundreds of nautical miles offshore, the communication, equipment and tactics have to originate from a network of contacts and procurers, something which Somalia's warlords are certainly adept at managing.[224] The Strategic blanket under which the pirates operate extends even to the highest levels of government. According to Roger Middleton, President Abdullahi Yusuf, whose home region is Puntland, likely receives a payment from pirates as a "gesture of goodwill".[225] Thus while not directly sponsoring piracy in the GOA, one can infer that government officials benefit in some part from the pirate syndications. Pirates in the GOA thus operate from large syndicates with relative impunity on land, their only major threat coming from a counter-piracy flotilla which is largely defensive in posture.

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[221] Upadhyaya , S. Op. Cit. Pp01-03.
[222] Middleton, R. Op. Cit. P05.
[223] Africa Confidential. Op. Cit.
[224] Onuoha, F. "Sea piracy and maritime security in the Horn of Africa: The Somali coast and GOA in perspective," *African Security Review*. Vol 18. No 3. P36.
[225] Middleton, R. Op. Cit. P05.

4.3.2 Tactics

Somali pirates have developed tactics along what Onuoha calls a "horizontal and vertical" basis.[226] Horizontally in the sense that the weaponry and equipment used has developed immensely since piracy began its rise in 2005, and vertically in that the targeted victims which pirates pursue has expanded to incorporate virtually every kind of civilian shipping in the GOA.[227]

Pirates roam in groups of small but fast wooden skiffs powered by large outboard motors, from which they quickly outpace slow, cumbersome containers, oil tankers and the like. Once in range, pirates generally attempt to board the target vessel as quickly as possible, often firing shots as a clear warning of their hostile intent.[228] Once boarded, the captured vessel normally begins transiting back to the safety of Puntland's territorial waters where many military vessels cannot enter in pursuit due to their prohibitive mandates.[229] But both before and after the successful capture of a vessel, pirates employ an array of tactics to ensure a swift and profitable operation. The use of 'motherships', larger fishing ships captured earlier to tow the skiffs hundreds of miles out to sea in order to increase operating ranges has become the SOP for most pirates.[230] The tracking of ships via Global Positioning Satellite systems and through early communications with contacts in Yemen and elsewhere further expand the eyes and ears of Somali pirates in their search for an easy capture whilst avoiding hostile warships patrolling the gulf.[231] The use of motherships has proven extremely effective in enabling bolder pirate attacks further out to sea. Furthermore, by docking into ports in Yemen and elsewhere, they are further able to elude capture or destruction by naval forces as they are never effectively tracked back to Somali ports.[232]

Following the successful hijacking of a vessel, pirates quickly identify and open up the channels of communication with the ship's owner or company, whereupon negotiations

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[226] Onuoha, F. Op. Cit. Pp35-36.
[227] Ibid.
[228] Ibid. P36.
[229] Ibid.
[230] Upadhyaya , S. Op. Cit. Pp02.
[231] Pham, P. "The Pirate Economy," *Foreign Policy*. Apr 2009.
http://www.foreignpolicy.com/story/cms.php?story_id=4817
[232] Ibid.

ensue.[233] Typically ransoms average around $1 million, but in the case of the *Faina* and *Sirius Star* payments over $3 million were made, the latter being delivered via parachute onto the deck.[234]

It is important to thus note how Somali piracy has evolved into a -sophisticated form both tactically and strategically, 'horizontally' and 'vertically'. When the navies operating in the GOA inevitably shift their own strategies from lessons learned during deployments, the probability of Somali pirates doing is quite high. This has implications in both legal and strategic circles, as drafting or revising piracy legislation will inevitably lag behind the reality on the water, as well as the importance for naval commanders to maintain a constant ability to shift their own enforcement procedures to reflect the challenges they face.

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[233] Munich Re Group. "Piracy – Threat at Sea," *Knowledge series.* 2006. P15.
[234] BBC.co.uk. "Saudi tanker 'freed off Somalia'," 9 Jan 2009.
http://news.bbc.co.uk/2/hi/africa/7820311.stm

4.4 Successes

The difficult task of dealing with pirates who adapt rapidly to security challenges and act in a murky legal environment is not entirely without hope. There have been several cases where military vessels in the GOA have taken comparatively offensive measures against pirates to rescue hostages and apprehend the perpetrators. The *Maersk Alabama* intervention highlighted how highly-skilled military tactics can provide a positive outcome not only in deterring pirates, but also in safely rescuing hostages after the hijacking has occurred.[235] Likewise, the less-risky action of French commandos against pirates and pirate-collaborators who hijacked the French yacht *Le Ponant* showed how limited intervention on land can still serve to reduce the incentives for pirates.[236]

4.4.1 The Maersk Alabama

The cargo ship *Maersk Alabama* was seized approximately 240nm off the Somali coast, highlighting again the ability of pirates to hijack ships far from territorial waters.[237] Crew members had successfully overpowered several of the pirates and regained control of the ship, but the captain of the *Alabama* had remained in pirate hands on board one of the ship's life boats.[238] At this point the SOP for most military vessels in the GOA is to back away and continue negotiation for the hostage's release. However, US Special Forces snipers aboard the USS *Bainbridge* successfully killed the pirates and rescued Captain Philips, bringing a positive end to the hostage situation.[239]

The *Alabama* case is important as it proves that taking hostile action, when the correct military assets with the right skillsets, in this case Special Forces snipers, are present and available can prove far more effective than a defensive posture followed by post-hijacking ransom negotiation. Such aggressive measures to rescue just *one* hostage should by no means be interpreted as an endorsement of this as tactical SOP, however, as hostage situations, particularly on open water, can prove tricky. If there had been several crew

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[235] Pham, P. "The Pirate Economy," Op. Cit.

[236] Ibid.

[237] Pham, P. Ibid.

[238] Sanders, E & Barnes, J. "Somalia pirates hold U.S. captain," *Los Angeles Times.* 09 Apr 2009.

[239] Gaskell, S. "Three Navy SEALS freed Capt. Phillips from pirates with simultaneous shots from 100 feet away". New York Daily News. New York. Apr 2009.
http://www.nydailynews.com/news/us_world/2009/04/14/2009-04-14_seals_freed_phillips_with_simultaneous_shots.html.

members present on the life boat, the probability of success without casualties would decrease significantly as the number of civilians can understandably raise the chances of innocent casualties. This was precisely the case in the French commando rescue of captured mariners aboard the yacht *Tanit*, in which one hostage and two pirates were killed in the ensuing firefight. That being said, a chance of hostages being killed is a risk which commanders should be aware of at all times.

4.4.2 Le Ponant

Another type of offensive action which can yield beneficial results is that of post-hostage intervention. When the crew members of the French luxury yacht *Le Ponant* were released following the payment of a ransom, commandos aboard several helicopters were able to disable the pirates on land, arrest many of those responsible, and recovery a sizeable portion of the ransom money.[240] Again, the operation required highly skilled military forces to successfully capture just six of twelve suspected pirates in total, in this instance a sniper aboard a French Puma helicopter shot out the engine of the pirates' vehicle.[241]

The *Ponant* incident proves that militarily-capable states with the right assets in the area can not only recover ransom from pirates after it has been paid, but also successfully apprehend or neutralize them *on land*. Moreover, this is a capability which can theoretically be shared by counter-piracy forces in the area, and not an essential component of every single naval deployment to the GOA. However, the ability of pirates to adapt quickly to new tactics in counter-piracy could suggest that hostages in future may be held for a period *after* ransom is paid to avoid this kind of incident.[242]

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[240] Lichfield, J. "French commandos seize Somali pirates after yacht hostages freed," *The Independent,* 12 Apr 2008.
http://www.independent.co.uk/news/world/africa/french-commandos-seize-somali-pirates-after-yacht-hostages-freed-808224.html
[241] Ibid.
[242] Ibid.

4.5 Failures

Failing to kill or capture pirates, whether they possess hostages or not, only serves to incentivize the act of piracy itself. As pirates gain confidence in their ability to hijack ships, collect ransoms and get away with it, the entire problem of eradicating piracy becomes more difficult. The inability of the British warship HMS *Northumberland* to successfully interdict in the hijacking of the MV *Saldanha* and the ransom of the Saudi super tanker *Sirius Star* provide clear precedents of the dangers of doing nothing to curb piracy when it is being perpetrated.

When the *Saldanha* was seized, the *Northumberland* was unable to stop the pirates, and had no choice but to observe the hijacked vessel from a distance.[243] When the pirates instructed the *Northumberland* to keep its distance, there was effectively little to be achieved in terms of hostage rescue or negotiation. According to the Navy's account, there was zero capability for mounting a rescue operation: "With no distress call heard, and with the pirates in control and the crew's life at risk, there was little we could do other than speak to the ship's master and confirm his unfortunate position."[244]

In the above case, the *Northumberland* was operating as a part of the ATALANTA Task Force, yet could achieve little more than act as a deterrent in its immediate range.[245] The lack of skilled military forces on board, as well as the political will towards granting any kind of hostage rescue meant that the *Northumberland* was only capable of communicating information on the situation to headquarters, rather than taking an active approach against the pirates post-hijacking. This is important to note, as the actual counter-piracy capability of individual vessels in the GOA will vary according to their ability and operational ROE. If the *Northumberland* was trailing the *Alabama* instead of an American vessel with a Special Forces compliment, it is entirely possible that Captain Philips would have remained in pirate custody as a hostage. This means that military vessels in the GOA must be evaluated on an

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[243] BBC.co.uk. "Pirates seize vessel off Somalia," Feb 2009.
http://news.bbc.co.uk/2/hi/africa/7904273.stm
[244] Royal Navy. "Northumberland, Pirates and the Media,"
http://www.royalnavy.mod.uk/news-and-events/rn-live/all-news/northumberland-pirates-and-the-media/*/changeNav/3533/noRedirect/1
[245] Ibid.

individual basis by task force commanders as to just what their tactical capabilities are in enforcing sound count-piracy strategy.

According to Raman, there are three components necessary for a sound counter-piracy strategy: protection of civilian vessels such as tankers and freighters transiting the gulf, identifying and neutralizing the pirate motherships which serve as the range-extending 'hub' of immediate pirate activity, and finally the pursuit and destruction of pirate havens within Somali territory.[246] Almost every state with military assets in the GOA can complete the first two requirements, and the USA, with perhaps the French and British military respectively can theoretically carry out the third. However, as the strategic reality of piracy repression has shown, protecting civilian vessels effectively in an ocean space of 1.1 million square miles with little more than a score of naval vessels is understandably difficult to execute. Furthermore, the *Tabar's* precedent highlights how destroying motherships – assuming they can be found – can result in unnecessary civilian casualties. Likewise, the potential to strike on land has only been employed on rare occasions, albeit with relative success.

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[246] Raman, B. Op. Cit.

4.6 Non-State Responses to Piracy

4.6.1 Civilian Shipping

Addressing the problems of piracy is also going to require the victims of piracy to revise approaches towards self-defence when transiting through the GOA. What has occurred has been the continuous improvisation of measures designed to counter attacking pirates. Methods of deterrence include means of physically repelling pirates through electrified fencing, the use of fire hoses and Magnetic Acoustic Devices (commonly referred to as 'sonic cannons') which all serve to defeat the ability of pirates to scale the freeboards of ships.[247] Likewise, the practice of 'Operational Security' in terms of strict communications discipline between shipping traffic can help prevent Somali radiomen from listening in on the locations and heading of any civilian ships in transit through the GOA.[248] While these tactics are certainly not foolproof, nor are they a long-term solution, they can at least serve to delay pirates sufficiently that a nearby coalition warship might respond to their distress calls in time to prevent a boarding.

The costs of re-routing shipping from the GOA around the longer route of the Cape of Good Hope poses a challenge to the global economy due to the obvious increases in shipping costs, which means that the GOA is an absolutely crucial corridor for international shipping transiting from East to West and vice versa.[249] Shipping companies and their affiliated organisations such as the IMB have an important role in advising ships transiting through the GOA of the dangers in the journey, together with potential self-defence measures which captains might employ. Likewise, the peripheral benefits of organisations such as the IMB in terms of data-gathering of ships attacked, attacks repelled, what measures were successful and what were overcome with little difficulty are of utmost importance in adapting as rapidly as possible to piracy as it evolves.

4.6.2 Private Security and Private Military Contractors

Private Military Contractors (PMCs) and Private Security Contractors (PSCs) can have a pivotal role to play in providing protection services for shipping in the GOA. While unable to

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[247] Lennox, P. Op. Cit. P14.
[248] Ibid.
[249] Ibid.

actively hunt pirates and carry out offensive operations due to the potential violation of a basket of International Laws and arms embargoes against Somali, contractors can ensure that shipping companies with sufficient interest in protecting their valuable cargoes, and the finances to hire them, can transit the GOA in relative safety.[250] Contractors are able to offer a range of services, from simple security watch to 183 foot civilian ship modified to provide effective protection services for any shipping companies transiting the GOA like US PMC *Xe/Blackwater* offers in their portfolio,.[251] Utilising such a range of services would certainly provide a far surer means of protection against pirate attacks in the GOA, but has several limitations.

Firstly, the problem of capacity means that no matter how tactically-effective a PMC vessel or PSC detail on board a ship might be, there are almost certainly insufficient numbers to provide adequate protection for all interested shipping companies, let alone those who could afford the expensive contracted services. Secondly, in ternational maritime laws as well as that of human rights law would effectively restrict PMCs and PSCs from possessing a free mandate against pirates and could restrict their operations as much, if not more, than ROE does for formal naval forces.[252]

Private contractors thus provide an attractive service and can certainly prevent pirate attacks for *individual* ships, but will ultimately never be capable of replacing state navies in the GOA in terms of capability, mobility and sheer force strength. However, utilising these services could likely become attractive to states themselves, potentially enabling PMCs and PSCs to contract directly with governments, thereby protecting ships based on nationality rather than commercial shipping companies' preference. The caveat of this approach however lies in the simple consequence that some civilian traffic which cannot afford a contractor and does not belong to a state which is contracting on their behalf would suffer from the decrease in formal state military interventions in the GOA. Lastly, the highly-convoluted composition of most civilian ships would make nationality-based approaches flawed from the outset. A Maltese ship owned by a German company, crewed by Thai sailors and captained by a Russian would pose an entirely new set of problems as to just

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[250] Middleton, R. Op. Cit. 11.
[251] Seper, J. "Blackwater joins the fight against sea piracy", *The Washington Times,* December 4, 2008.
[252] Ibid.

who is responsible for protecting the cargo and crew. Nonetheless, arming civilian ships has proven successful in its own right.[253] Indeed, the *Maersk Alabama* was again attacked by pirates in November 2009, but the attack was successfully repulsed by armed guards.[254] While potentially creating incentive for escalation during pirate hijack attempts, as Middleton warns, it cannot be denied that employing private security on board ships with a reasonably high risk of pirate attack is effective.[255]

Finally, the legal complications of employing armed guards on a civilian ship are noteworthy, as incentivising this practice would contravene International Laws on war considerably. The Geneva Convention is quite clear on the requirements of combatants in an engagement to distinguish themselves from non-combatants, and the same applies on the oceans.[256] Employing PMC's in this fashion is highly illegal, even if it does occasionally yield positive results, as in the case of the second attack against the *Maersk Alabama*. Any utility which PMC's acting outside of any national or coalition counter-piracy strategy must be carefully considered in the broader context of the illegality of doing so. *Blackwater's* own vessel is comparatively improved over embedding armed guards on a civilian ship, but the capability for individuals to fight pirates for profit runs dangerously close to the practices of privateers of old, which ultimately resulted in a complete lack of order at sea. If even a fraction of this chaos were to emerge in the GOA, the economic and human rights consequences could be catastrophic.

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[253] Baldauf, S. "Maersk Alabama fends off another Somali pirate attack," *Christian Science Monitor.* Nov 2009.
[254] Ibid.
[255] Middleton, R. Op. Cit.
[256] *United Nations*. 'Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)'. Geneva. 1978.

Chapter 5 – Conclusions

It has become evident in the past four years of counter-piracy operations that there is room for strategic improvements. Moreover, the link between International Law and the enforcement or strategic manifestation thereafter is certainly crucial in the context of GOA piracy. As already highlighted, International Law is a slow, time-consuming process which cannot by necessity be so uniquely-customised in composition to suit the GOA's legislative and enforcement needs exactly.[257] As such it is far more pragmatic to advocate for strategic revisions of counter piracy approaches in all aspects, from defensive deterrence operations to offensive strikes on land, as International Law is cumbersome and slow to change, thereby proving to be far harder to reconceptualise and operationalise. Ending piracy in the GOA permanently will almost certainly require a broader intervention on land to address the systemic failure of Somalia.[258] But in the ocean space of the GOA, there are aspects of piracy enforcement which can be improved whilst not violating current International Law. The three categories or levels of piracy enforcement as mentioned in chapter four can all be improved to not only increase the effectiveness of deterrence measures but also in the destruction of pirate mother ships and skiffs without resorting to risky VBSS tactics which often yield no results. Finally, in the actual problem of the pirate ports themselves, there exists some room for improvement in addressing the literal root of the problem without overly threatening violation of law or risk to the warships and crew. Furthermore, exploring new strategic approaches towards dealing with pirate ports in Puntland must be addressed. Lastly, civilian measures can be ratcheted up to ensure a heightened sense of awareness and security when countering boarding by pirates. Ultimately the current approaches by state navies have not only erred on the side of caution in light of International Law, but erred too far to the defensive. International Laws on piracy unnecessarily obfuscate piracy repression, but current approaches by navies and civilians alike do possess significant room for improvement despite this.

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[257] Meija, M. & Mukherjee, P.K. Op.Cit. p322-323.
[258] Lehr, P. Op. Cit.

5.1 Improving the Military Approach

Piracy in the 21st century is largely considered 'beneath' navies, in the sense that it is largely treated as a police/criminal action more than a military one.[259] However, as Captain van Rooyen (Ret.) of the South African Institute of International Affairs (SAIIA) highlights, navies are largely providing a token effort to "still the critics", meaning that many of the states involved in piracy repression operations often do not put a full amount of tactical and strategic attention to it.[260] Because counter-piracy is a coast guard problem, legally-speaking, navies involved in the GOA generally do not treat it seriously, even though navies do possess a coast guard capability by necessity.[261] Finally, the military approach can be approved in all sectors through the addressing of the "Maritime Domain Awareness" (MDA), in that communications between warships, positions of fleets and vessels as well as the ability to confidently identify and track individual vessels leaving the coast of Somalia. [262] Thus information, just like conventional warfare, is key.

5.1.1 Deterrence Measures for Shipping Protection

Improving the doctrines employed by warships providing even the most rudimentary deterrence-level support in counter-piracy operations would go a long way to increasing the force-projection of the deployments of large, expensive vessels. This can be achieved by encouraging greater inter-navy communications, which would in turn allow for better situational awareness as to just which vessel is where. If CTF 151 vessels were to communicate with their EUNAVFOR equivalents to establish clearly separate areas of patrol, it would streamline the range and effective of deterrence procedures. Indeed, while limited communications procedures are standard for NATO vessels, this practice could in theory be extended to the number of individual vessels. If language and tactical differences can be overcome, the GOA could be patrolled through overlapping areas of operation by each warship which, although predominantly defensive in posture, would maximise their deterrence effect. Indeed, even if a Chinese warship, which generally only protects Chinese shipping offensively, was communicating to EUNAVFOR and CTF 150/151 vessels, it would

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[259] Van Rooyen, F. Interview. (Notes in possession of Author).
[260] Ibid.
[261] Ibid.
[262] Ibid.

be theoretically almost as effective a deterrent in non-offensive posture than its respective Western vessels.[263] Thus there is no sense in having two warships of the same effective posture operating in the same ocean range.

Van Rooyen points out that military organisations tend not to share *any* pertinent intelligence beyond their own active units, meaning that a lot of useful intelligence on pirate positions, practices and events is missed by other task forces and warships in the area.[264] If a specific 'high command' comprised of all nationalities with a naval presence in the GOA could be formulated, it would both preserve tactical secrecy of various navies whilst still ensuring that vital information on GOA pirate activity can reach the most relevant warships and commanders in the area concerned. Moreover, states which may not have a naval presence in the area, yet still have some intelligence utility to add can easily append into a high command. States with orbiting satellites, aircraft, target-trackers or UAV assets operating in the area can provide valuable eyes on the ocean which other militaries might not possess.

Furthermore, this form of military intelligence is neither hostile nor particularly controversial in use, which means that states who lack the political will to take the fight to the pirates on an offensive scale can still be seen to be 'doing something', except in a truly useful fashion for all. International Law is typically quite unhelpful in classifying when a pirate event is, by definition, a pirate event, and the legalities of pursuit, but providing better linkages in the intelligence-gathering process would circumvent problems of International Law entirely, as it would merely augment the deterrence measures *before* piracy occurs. In this sense, the establishment of a multinational high command is feasible, useful and relatively easy to establish. Given the current joint operations command frameworks employed by AFRICOM and CMF, creating an extra 'layer' purely aimed towards greater strategic collaboration is not completely unthinkable.[265]

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[263] Upadhyaya, S. Op. Cit. Pp01-03.
[264] Van Rooyen, F. Op. Cit.
[265] Fage, J. Op. Cit.

5.1.2 Offensive Measures

Fighting mother ships with large, sophisticated warships is not tactically difficult, but identifying a legitimate pirate ship from a fishing vessel is. With increased intelligence measures, the ability to actively intercept and arrest or destroy pirate vessels becomes far more accurate and effective. Instead of employing VBSS on suspected vessels, greater MDA enables navies capable of taking offensive action to do so with greater confidence. The *Tabar's* attack on a mother ship, for example, could well have been better executed if the hostage's presence could be verified beforehand through small target trackers, better radio communications with eye witnesses and so on.[266]

Because of the nature of this LIC, eliminating mother ships from the GOA would require a comparatively small strike force compared to that necessary for patrol. Thus, the current USN attempts at offensive action could remain the 'tip of the spear' in actively fighting pirates on the seas. Maintaining this capability is not only crucial for increasing the disincentivisation of piratical activities, but also in employing effective intelligence information to the optimal degree.

International Law, however, would define the problem of attacking mother ships to be that of the coastal police or coast guard.[267] If the Somali government, or TFG, possessed any modicum of authority, budget and incentive, these branches of law enforcement could theoretically be established. However, the TFG's authority as state government is not particularly resolute within Somalia's borders, which has dire impacts for any treaties of hot pursuit, prosecution and attack which signatory states such as the United States may have signed.

This advocacy for offensive attacks against mother ships and skiffs is not a universally-held endorsement. James Kraska and Brian Wilson of the *World Policy Institute* argue that the post-capture judicial procedures are more important than the destruction of mother ships:

> "Coordination, not kinetic action aimed at destroying pirate mother ships and coastal havens, will solve the piracy problem. In other words, piracy will not fade until effective deterrents — namely

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[266] DeshGujarat.com. Op. Cit.
[267] Van Rooyen, F. Op. Cit.

prosecution and punishment — are in place. And with Somalia unable to provide such deterrents, it falls to the international community to make progress in this area."[268]

What Kraska and Wilson overestimate, however, is the breadth of UNCLOS laws on piracy and the significance of prosecution as a deterrent to piracy. Given that Somali pirates by and large originate from the world's most failed state, it is feasible to expect that threat of prosecution and imprisonment is preferable to a miserable existence on land in Somalia. More critically, the authors' interpretation of UNCLOS' definition on piracy conveniently omits the requirement that it occur on the high seas.[269] Thus, any prosecution and punishment which they argue will solve the piracy problem cannot ever be enforced as 90% of piracy occurring in the GOA is not defined as such according to UNCLOS definition.[270] Until International Law changes in conceptualisation to incorporation the problems of definition, as well as jurisdiction when multinational-crewed vessels are involved, Kraska and Wilson are advocating an extremely nebulous 'solution' based on a too-loose interpretation of International Law.

The purpose of piracy repression in the GOA should not be aimed solely at the lofty goal of deterring Somalis from an act which has precious few disadvantages, but rather incorporate the very possible practice of destroying mother ships as they exit ports of origin in Puntland. The 'kinetic action' employed against mother ships, when combined by good, collaborative intelligence gathering, can yield far more positive results for piracy repression than sheer deterrence through pirate conviction. If a mother ship can be identified, tracked and intercepted the moment it either attempts to deploy pirate skiffs or enters high seas/international waters, pirates will be deprived of their capability to roam far out to sea, thereby inhibiting the range of operations. Once properly identified and recorded as a pirate vessel, the legal complications in mistakenly attacking or boarding an innocent vessel are significantly reduced. Moreover, this would have the additional benefit of minimising the ocean space which requires naval patrols considerably as fewer mother ships operate in the GOA, thereby aiding the entire counter-piracy process.

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[268] Kraska, J & Wilson, B. "Fighting Pirates: The Pen and the Sword," *World Policy Institute.* 2008. P47.
[269] Ibid.
[270] Wander, KA. Op. Cit. P7.

The final component of counter-piracy operations, that of targeting the pirate havens themselves, is a far more complex problem. While outright attack by combined forces would quite possibly yield significant civilian and hostage casualties, the capability is certainly held by the larger forces present in the GOA. But there are alternative measures which could be employed in conjunction with the above improvements to counter-piracy on the sea. Captain van Rooyen suggests the historical practice of blockading the ports, depriving the pirates' ease of access and the general impunity from consequences which they have thus far enjoyed the moment they enter friendly waters.[271] Blockades could well be acceptable in terms of International Law if negotiated through the TFG and UN, despite the TFG's questionable grip on power. The major obstacle to this is the considerable length of time and number of warships required to blockade the several major ports which pirates employ, as well as the potential danger which they would face when stationed so close to hostile territory. But modern warships possess a significant range advantage over any weaponry which pirates have at their disposal, which would certainly imply the feasibility of blockades.

In conjunction with the above, employing financial tracking measures, or even heavy taxation, upon known money which enters neighbouring states which originates from pirate havens can be considered.[272] Following the source of the money would also have the added benefit of aiding the intelligence process of identifying pirates and their leaders.

In conjunction with an efficient patrol space by 'defensive posture' warships, such as CTF 150, and the active and effective targeting of mother ships by more actively offensive states, all of whom would enjoy an optimal MDA due to increased intelligence cooperation, blockading ports would thus apply a level of pressure upon pirates such as may well provide not only the disincentivisation which is preferred by Kraska & Wilson, but literally deprive Somali pirates of their means of operations. Finally, all of the above would not directly violate or contradict International Law.

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[271] Van Rooyen, Op. Cit.
[272] Ibid.

5.2 – Improving the Civilian Approach

Commercial shipping sailing through the GOA can improve their odds at avoiding pirate attacks through both offensive and passive means. Offensively, the employment of PMC or PSC operators can have a measurably increase to a ships' security, as the second attempted hijacking of the *Alabama* clearly proves, but it is not an option which every shipping company can afford, as the costs involve, while hefty on an individual vessel, would be prohibitive if attempting to equip a fleet with armed guards. Legal issues aside, it can be considered an option, but a rather short-sighted one. Moreover, the risk of escalation can result in contrary effects in that, should a PMC or PSC fail to counter boarding, the risk of hostage deaths in retaliation can increase considerably. The use of acoustic devices and electrified fencing, combined with increased crew standing watch while sailing through the Gulf, and thorough counter-boarding training all have measured results. Non-lethal or passive measures are completely compliant with International Laws and are comparatively cheaper to employ than private contractors.[273] But, as Cmdr. Upadhyaya points out, many shipping companies remain heedless to IMO and IMB warnings, possibly as a result of the relatively low chance of pirate attack. [274]

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[273] Upadhyaya , S. Op. Cit. Pp02.
[274] Ibid. Pp04-05.

5.3 Conclusion

There are profound challenges facing International Law, which in turn affects many components of counter-piracy operations in the GOA. The question of jurisdiction or just *who* is responsible for the prosecution of pirates, as well as who is willing to take the responsibility will remain a challenge in the post-capture process. The problem clearly distinguishing pirate vessels, skiffs and mother ships, from civilian shipping is as simple as finding a needle in a haystack. Gone are the days of pirates brazenly flying the *Jolly Roger* when embarking on a pirate attack. Instead, commanders are faced with the challenge of responding to pirate attacks before boarding occurs, following which either a lack of tactical capability in hostage rescue or political will prevents them from further action. VBSS procedures are not usually successful, as pirate skiffs resemble those of honest fishermen, and they waste precious time in deploying speedboats loaded with marines to board and search just one boat out of thousands. International Laws prevent more aggressive action, and for good reason, as the *Tabar* example highlights.[275]

There would appear to be a causal relationship between International Law and the Strategic response thereof in the GOA. The definitional ambiguity of what a pirate is, how to track them, arrest or attack them, and how to prosecute all feed into state navies erring firmly on the side of caution except for the most clear-cut cases of interdiction or self-defence. With the bulk of warships patrolling the area in a simple deterrence measure, states can be seen to be 'doing their bit' to fight piracy, even though they really are not achieving any lasting containment. But International Law need not be a constraining factor. Indeed, by creating far more collaborative intelligence networks through a high command structure or some other fashion, as well as other non-controversial, safe measures, fighting piracy can be improved considerably. As the UN Secretary-General rightfully mentioned, piracy is not a 'water-borne disease', and any attempts to fight it on the ocean must be matched with a concerted effort on land, but there does still remain sufficient strategic potential to minimise piracy-effects on the international shipping lane considerably.[276] When it comes to countering piracy in the GOA, improving intelligence networks, and heightening MDA is a

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[275] DeshGujarat.com. Op. Cit.
[276] Barno, R. "Xenophobia, Civil Society and Piracy, " *Institute for Security Studies*, Dec 2009.
http://www.issafrica.org/index.php?link_id=22&slink_id=9209&link_type=12&slink_type=12&tmpl_id=3

good step forward while still complying with a frustratingly inefficient set of International Laws on piracy.

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