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W. Michael Reisman
Yale Law School

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Essay

Combating Piracy in East Africa

W. Michael Reisman[†] & Bradley T. Tennis^{††}

I. INTRODUCTION

The sharp spike in pirate attacks in the Gulf of Aden and off the coast of East Africa over the last three years has renewed international interest in the suppression of maritime piracy.¹ While international efforts to curb piracy in the region have met with some success, a permanent solution requires that local governments take primary responsibility for its suppression. Superficially, the situation in East Africa shares a number of characteristics with a spate of pirate attacks perpetrated roughly a decade ago on vessels traversing the Strait of Malacca. In each case, pirates and armed robbers took advantage of a narrow channel, heavily used in ocean-faring commerce. Although small-scale robberies remain a persistent problem in the South China Sea, attacks on ships traversing the Malacca Strait have diminished dramatically following the establishment of a coordination agreement between governments in the region. There are surely lessons to be learned from the largely successful attempts to control piracy in Southeast Asia, but the nature of the situation in East Africa cautions against simply duplicating the Southeast Asian approach. The scope of the problem in Somalia, combined with the relative weakness of regional governments, suggests that a successful

[†] Myres S. McDougal Professor of International Law, Yale Law School.

^{††} Yale Law School Class of 2011.

1. There is some debate on the appropriate definition of piracy in international law—specifically, the difference between piracy and armed robbery at sea. *See, e.g.*, MARTIN N. MURPHY, *SMALL BOATS, WEAK STATES, DIRTY MONEY* 7-21 (2009). This Essay is primarily concerned with the efficacy of existing international efforts to stem maritime piracy and so will simply adopt the definition of piracy endorsed by the International Maritime Organization. *See* United Nations Convention on the Law of the Sea art. 101, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

regional cooperation agreement will require international legal and financial support.

II. CHARACTERIZING EAST AFRICAN PIRACY

Although piracy on the high seas has been a persistent feature of seafaring commerce for centuries, the number of reported acts of piracy began to dwindle in the nineteenth and twentieth centuries; however, in the last few decades of the twentieth century, the rate of piratical attacks sharply increased worldwide.² In 1984, the International Maritime Organization (IMO) began providing statistics on reported acts of piracy and armed robbery at sea in response to increased international interest in the suppression of piratical acts. After reaching a peak of 471 incidents in 2000,³ the annual rate of piratical attacks generally declined through 2006, during which the IMO reported just 241 attacks.⁴

Since 2006, the annual rate of pirate attacks has again been rising precipitously, driven largely by the rapid expansion of pirate activity in the East African region.⁵ The IMO reported thirty-one incidents of piracy in the region in 2006,⁶ sixty in 2007,⁷ and one hundred and thirty-four in 2008.⁸ At

2. See Samuel Pyeatt Menefee, *An Overview of Piracy in the First Decade of the 21st Century*, in LEGAL CHALLENGES IN MARITIME SECURITY 441, 443 (Myron H. Nordquist et al. eds., 2008); see also Thomas A. Clingan, Jr., *The Law of Piracy*, in PIRACY AT SEA 168, 168 (Eric Ellen ed., 1989) (“Having enjoyed a fairly long period during which recorded acts of piracy were few and far between, we are now thrust into a new era in which, for various reasons, piracy has in fact become rampant in many parts of the globe.”).

3. INT’L MARITIME ORG., MSC/CIRC.991, REPORTS ON ACTS OF PIRACY AND ARMED ROBBERY AGAINST SHIPS, ANNUAL REPORT—2000, at 1 (2001), available at http://www.imo.org/includes/blastData.asp/doc_id=915/991-col.pdf.

4. INT’L MARITIME ORG., MSC.4/CIRC.98, REPORTS ON ACTS OF PIRACY AND ARMED ROBBERY AGAINST SHIPS, ANNUAL REPORT—2006, at 1 (2007) [hereinafter ANNUAL REPORT 2006], available at http://www.imo.org/includes/blastData.asp/doc_id=8028/98.pdf.

5. See INT’L MARITIME ORG., MSC.4/CIRC.133, REPORTS ON ACTS OF PIRACY AND ARMED ROBBERY AGAINST SHIPS, ANNUAL REPORT—2008, at annex 4 (2009) [hereinafter ANNUAL REPORT 2008], available at http://www.imo.org/includes/blastData.asp/doc_id=11376/133.pdf.

6. ANNUAL REPORT 2006, *supra* note 4, at 1.

7. INT’L MARITIME ORG., MSC.4/CIRC.115, REPORTS ON ACTS OF PIRACY AND ARMED ROBBERY AGAINST SHIPS, ANNUAL REPORT—2007, at 1 (2008), available at http://www.imo.org/includes/blastData.asp/doc_id=9837/115.pdf.

8. ANNUAL REPORT 2008, *supra* note 5, at 1.

the time of this writing, IMO reports for 2009 are available only through June, but they suggest that the piracy problem in Somalia is continuing to worsen. Including attempted acts as well as those actually committed, the IMO reported seventeen incidents in January, ten in February, thirty-five in March, forty-four in April, thirty-one in May, and seventeen in June.⁹ Assuming that this rate is maintained, in 2009 there will be as many attacks in the East Africa region as there were worldwide in 2008.¹⁰

While the sheer number of incidents that have occurred off the eastern coast of Africa is itself significant, the novel character of the attacks makes the situation even more troubling. Whereas pirate activity in most areas of the world is typified by small-scale theft against ships at anchor in territorial waters,¹¹ attacks in East Africa are often carried out against large commercial vessels sailing hundreds of miles from the Somali coast and frequently result in the target vessel being hijacked and held for a ransom. The following paragraphs explore these differences in greater detail.

Nearly eighty percent of attacks worldwide in 2008 were conducted within twelve nautical miles of the shore, and in the vast majority of these the target vessel was stationary.¹² In East Africa, we find just the opposite: in 2008, forty-seven attacks were committed against steaming ships compared to a mere ten attacks while the target was at anchor.¹³ Moreover, while many of the incidents in international waters near Somalia have in fact occurred fairly close to land, attacks have also been carried out far from the coastline.¹⁴ In

9. See INT'L MARITIME ORG., MSC.4/CIRC.130, REPORTS ON ACTS OF PIRACY AND ARMED ROBBERY AGAINST SHIPS, ACTS REPORTED DURING JANUARY 2009 (2009), available at <http://www.imo.org> (follow "Circulars" hyperlink; then follow "MSC.4" hyperlink). Subsequent months' reports are also available via the IMO hyperlink path.

10. The IMO reported 306 attacks in 2008. ANNUAL REPORT 2008, *supra* note 5, at 4.

11. See *id.* at 2, annex 2.

12. The target vessel was confirmed to be steaming in only twenty-two percent of reported incidents. See *id.* at 2, annex 2.

13. *Id.*

14. For example, in late 2008 the MV Faina was seized over two hundred nautical miles from the shore. See Jeffrey Gettleman & Mohammed Ibrahim, *Somali Pirates Get Ransom and Leave Arms Freighter*, N.Y. TIMES, Feb. 5, 2009, at A6. Attacks this far from land are typically carried out from a "mother ship" from which pirates launch small skiffs when a target vessel is sighted. See Roger Middleton, *Piracy in Somalia: Threatening Global Trade, Feeding Local Wars* 4 (Chatham House, Briefing Paper No. AFP BP 08/02, Oct. 2008).

response, the International Maritime Bureau's Pirate Response Center has recommended staying six hundred nautical miles from the coastline when traveling past the East African coast in its most recent set of guidelines for avoiding pirate attacks.¹⁵ But even this extensive buffer may not be enough: in April 2009, a fishing trawler was hijacked 630 nautical miles southeast of Mogadishu.¹⁶

Second, hijacking—defined here as a pirate attack that results in the seizure of the target vessel—is very rare outside of East Africa: the IMO reports that in 2008 forty-four vessels were hijacked in East African waters as compared with just seven in other regions.¹⁷ This trend shows no signs of abating: in the first four months of 2009, there were twenty-five hijackings in East Africa and only three elsewhere in the world.¹⁸ Moreover, when a hijacking does occur outside of East Africa, the goal rarely seems to be ransom.¹⁹ Instead, attackers frequently kill or maroon the crew and seize the ship in order to create a “phantom vessel” useful for other criminal activities.²⁰ Hostage-taking is also disproportionately common in East African pirate attacks: In 2008, 703 crewmen were taken hostage in the region while only seventy-one hostages were taken elsewhere in the world.²¹ Consequently, pirate attacks to secure ransom payments have systematized in East Africa to a degree unseen in the rest of the world.

Finally, piracy in East Africa is distinguished by the size and nature of the ships targeted for attack. For example, in late 2008, pirates based in Somalia seized the *Sirius Star*, a Saudi oil tanker carrying \$100 million worth

15. INTERNATIONAL MARITIME BUREAU PIRACY RESPONSE CENTER, BEST MANAGEMENT PRACTICES TO DETER PIRACY IN THE GULF OF ADEN AND OFF THE COAST OF SOMALIA 6 (Feb. 2009), available at <http://www.icc-ccs.org/images/stories/pdfs/bmp.pdf>.

16. See INT'L MARITIME ORG., MSC.4/CIRC.136, REPORTS ON ACTS OF PIRACY AND ARMED ROBBERY AGAINST SHIPS, ACTS REPORTED DURING APRIL 2009, at annex 1 (2009), available at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D25553/136.pdf.

17. See ANNUAL REPORT 2008, *supra* note 5, annex 2.

18. See the reports cited in notes 9-14 *supra*. During this period, hijackings comprised more than eighty percent of successfully committed acts of piracy in East Africa. In the rest of the world, hijackings accounted for just seven percent of all reported acts of piracy.

19. See Menefee, *supra* note 2, at 449.

20. Middleton, *supra* note 14, at 11.

21. ANNUAL REPORT 2008, *supra* note 5, annex 2.

of crude.²² In early 2009, a \$3 million dollar ransom was paid for the ship's release.²³ Just one month later, a \$3.2 million ransom was paid for the MV Faina, a freighter captured the previous September while hauling thirty-three Soviet T-72 tanks and a cargo of weapons and ammunition.²⁴ While piracy in other areas of the world also has a significant financial impact and threatens the safety of mariners, the factors outlined in the preceding paragraphs render piracy in East Africa a particularly grave danger.

III. THE INTERNATIONAL COMMUNITY'S RESPONSE

International efforts to suppress piracy in the region have generally taken the form of supplying naval forces to detect and interdict pirate attacks. However, the long term suppression of piracy in the region requires that governments take over responsibility for securing their own coastline and suppressing pirate activity in their territorial waters. Noting the dramatic reduction in pirate activity in Southeast Asia following the conclusion of the Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships (ReCAAP), governments in the region have begun to implement a similar system for coordinating anti-piracy efforts. However, the East African and Middle Eastern states that would be parties to such an agreement do not have resources, financial or legal, commensurate with the scope of the Somali pirate threat. This Part will examine the effectiveness of international security fleets and motivate the necessity for increased local involvement in the suppression and prosecution of piracy.

There are currently a number of international fleets dedicated to combating piracy in the region. In January 2009, the United States Naval Forces Central Command established Combined Task Force 151 (CTF 151) to conduct anti-piracy missions off the Somali coast.²⁵ In the past year, the North Atlantic Treaty Organization (NATO) has also deployed fleets to the region to

22. See Mohammed Ibrahim & Graham Bowley, *Pirates Say They Freed Saudi Tanker for \$3 Million*, N.Y. TIMES, Jan. 9, 2009, at A6.

23. *Id.*

24. See Gettleman & Ibrahim, *supra* note 14.

25. LAUREN PLOCH ET AL., CONG. RESEARCH SERV., R40528, PIRACY OFF THE HORN OF AFRICA 19 (2009).

conduct anti-piracy operations. Operation Allied Provider was launched in October 2008 to provide security for World Food Program deliveries of food aid to Mogadishu.²⁶ This operation was terminated in December 2008 after the European Union established Operation ATALANTA to fulfill the same role.²⁷ In March 2009, NATO initiated Operation Allied Protector, tasked generally with disrupting pirate attacks against vessels traversing the region.²⁸

These multinational fleets have engaged in a number of distinct anti-piracy missions. For example, CTF-151 has established a “Maritime Security Patrol Area,” a stretch of ocean in the Gulf of Aden patrolled by coalition warships. Although a useful service, this provides protection only in a small area of the Gulf of Aden.²⁹ This idea might be extended by creating escorted convoys of merchant ships, but given the high volume of commercial traffic through the region, such a system may prove too costly to administer.³⁰ Rather than organizing corridors or convoys, the international community might also simply increase the naval presence in the region. However, given the rapidity of the attacks (as few as fifteen minutes might elapse between the first indications of a pirate attack and the boarding of the target vessel)³¹ and the vast expanse of ocean threatened by Somali pirates, it is unlikely that a military vessel will reliably be in range to stop an attack in progress.³² Attempting to interdict against pirate attacks on the high seas is at worst an ineffective and at best an extremely inefficient solution.

There are also significant legal concerns inherent in the suppression of piracy in East Africa by foreign states. Acts of piracy have long been held subject to universal jurisdiction.³³ However, while international law provides a definition for piracy³⁴ and provides states authority to detain and try pirates,

26. *Id.* at 20.

27. *Id.*

28. *Id.*

29. See Middleton, *supra* note 14, at 10.

30. See PLOCH ET AL., *supra* note 25, at 26.

31. See Middleton, *supra* note 14.

32. See MURPHY, *supra* note 1, at 106.

33. Pirates have long been held *hostis humani generis*, and so could be apprehended on the high seas by vessels of any state and tried and punished by any jurisdiction into which they were brought. See P.W. Birnie, *Piracy Past, Present, and Future*, in *PIRACY AT SEA*, *supra* note 2, at 132; MURPHY, *supra* note 1, at 12.

34. UNCLOS, *supra* note 1, art. 101.

the substantive aspects of prosecutions for piracy are generally conducted under the local law of the capturing state.³⁵ This proves problematic for several reasons. First, the United States and the European Union, which provide the majority of the international naval presence in the region, lack experience in conducting enforcement targeting piracy or prosecuting piracy cases.³⁶ For example, before the capture of Abduwali Abdukhadir Muse and his subsequent arraignment in federal court in the Southern District of New York,³⁷ the most recent piracy case tried in United States courts was in 1861.³⁸

There are also concerns about the human rights implications of prosecution by a state participating in the formation of Coalition navies.³⁹ Even setting aside prosecution, merely capturing pirates may open the apprehending state to unexpected human rights proceedings. For example, the United Kingdom Foreign Office, worried that handing pirates over to local Islamic authorities might violate their human rights or that captured pirates may try to claim asylum, directed the Royal Navy to refrain from detaining pirates.⁴⁰

The suppression of piracy by foreign states is thus problematic as both a pragmatic and a legal matter. In the long term, regional governments must take primary responsibility. Following the model of ReCAAP, signed by sixteen Asian nations and in force since 2006,⁴¹ the IMO has to that end

35. UNCLOS, *supra* note 1, art. 105. This focus on local substantive law is reinforced by the provisions of the Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention), which provides that states enact domestic law to criminalize, for example, “seiz[ing] or exercis[ing] control over a ship by force.” SUA Convention art. 5, Mar. 10, 1988, 1678 U.N.T.S. 221 (referring to an offense specified in Article 3(1)(a)).

36. See MURPHY, *supra* note 1, at 107.

37. See James Bone, *Somali Pirate Abduwali Abdukhadir Muse in US for Maersk Alabama Hijack Trial*, TIMES (LONDON), Apr. 22, 2009, available at http://www.timesonline.co.uk/tol/news/world/us_and_americas/article6143653.ece.

38. See *The Savannah Privateer: Trial for Piracy—Great Throng in Court*, N.Y. TIMES, Oct. 24, 1861.

39. See MURPHY, *supra* note 1, at 107 (noting that human rights appeals are a significant drain on the prosecuting state’s resources and may “place the final outcome of a prosecution in some doubt”).

40. See Marie Woolf, *Pirates Can Claim UK Asylum*, TIMES (LONDON), Apr. 13, 2008, available at <http://www.timesonline.co.uk/tol/news/uk/article3736239.ece>; see also MURPHY, *supra* note 1, at 107.

41. See James Kraska, *Developing Piracy Policy for the National Strategy for Maritime Security*, in LEGAL CHALLENGES IN MARITIME SECURITY, *supra* note 2, at 331, 369-70.

sponsored the creation of the Djibouti Code of Conduct, a regional cooperation agreement adopted by seventeen regional governments in January 2009, nine of which have subsequently signed the agreement.⁴² Among other things, the agreement calls for the construction of a Maritime Rescue Coordination Centre in Mombasa, Kenya, a Sub-Regional Coordination Center in Dar es Salaam, Tanzania, and a regional information center in Sana'a, Yemen.⁴³

Some commentators have credited ReCAAP and other regional agreements for the substantial reduction in pirate activity in the South China Seas, but there are reasons to believe that such an agreement will meet with less success in East Africa. For instance, the Strait of Malacca, long the center of piracy in Southeast Asia, is a narrow channel between continental Malaysia, Singapore, and Indonesia.⁴⁴ Pirate activity in Southeast Asia therefore occurred primarily within easy reach of the maritime enforcement organizations of stable, industrialized nations. Piracy in East Africa, on the other hand, occurs over a vast area of the Indian Ocean. However, it is the absence of a stable, functioning government in Somalia that will ultimately prove fatal to a regional cooperation agreement.

At the most basic level, piracy in East Africa is the result of the weakness of the Somali and other regional governments and the absence of other significant economic opportunities.⁴⁵ Improved cooperation and coordination are empty promises unless regional governments are able to effectively police their own territorial waters. Though Yemen has been able to contribute a number of vessels to Coalition navies,⁴⁶ the fact that Yemen remains the principal supplier of illegal arms to Somalia⁴⁷ suggests that the Yemeni navy will be unable to meaningfully deter pirate activity without international support. More critically, the Somali government and private

42. See PLOCH ET AL., *supra* note 25, at 25.

43. *Id.*

44. See, e.g., *id.* at 19 (advocating the adoption of similar regional agreements in East Africa).

45. The United Nations Monitoring Group on Somalia has concluded that ransom payments from piracy attacks have become the most lucrative sector of the Somali economy. Monitoring Group on Somalia, *Report of the Monitoring Group on Somalia Pursuant to Security Council Resolution 1811* (2008), para. 266, U.N. Doc. S/2008/769 (Dec. 10, 2008).

46. See PLOCH ET AL., *supra* note 25.

47. See Monitoring Group on Somalia, *supra* note 45, para. 106.

actors have met with little success in establishing a maritime security force in the region.⁴⁸ An internationally supported force may prove more successful. No such program has been officially implemented to date, though on July 28, 2009, the European Union announced its intention to train a local Somali anti-piracy force.⁴⁹

It is also crucial that local governments take a leading role in the prosecution of pirates captured either by regional security forces or international fleets. To that end, Kenya has signed agreements with both the European Union and United States in early 2009 to receive pirates captured in East African waters.⁵⁰ Furthermore, the Djibouti Code of Conduct calls on signatories to ensure that local law provides an avenue for prosecuting suspected pirates.⁵¹ However, the sheer scale of the piracy problem in the region may overwhelm the local justice systems' financial and legal capabilities: the commander of CTF-151 recently reported that over one hundred pirates had been turned over to governments for prosecution since the force's inception.⁵² This suggests that international legal and financial assistance be necessary to strengthen local jurisdictions' prosecutorial capacity as well.

IV. CONCLUSION

The suppression of pirate activity in East Africa will require, in the long term, nothing less than the establishment of a functioning Somali government. Still, short term efforts to affect the balance between the potential costs of engaging in piracy and the potential rewards may be able to control, if not entirely eradicate, pirate activity in East Africa. While international efforts to deter piracy in the region have proven somewhat helpful in this regard,

48. See Middleton, *supra* note 14, at 11.

49. See *EU To Train Somali Piracy Force*, BBC NEWS, July 28, 2009, available at <http://news.bbc.co.uk/2/hi/africa/8171922.stm>.

50. See *Germany Mulls Legal Recourse for Nine Seafaring Suspects*, DER SPIEGEL, Mar. 6, 2009, available at <http://www.spiegel.de/international/world/0,1518,611734,00.html>.

51. See Jacquelyn S. Porth, *Legal Experts Take Action To Prosecute Pirates*, AMERICA.GOV, Feb. 27, 2009, <http://www.america.gov/st/peacesec-english/2009/February/20090227144346sjhtrop0.3818781.html>.

52. See PLOCH ET AL., *supra* note 25, at 20.

ultimately local governments should and must take a leading role in controlling pirate activity in East Africa. The establishment of a regional cooperation agreement like ReCAAP is a step in the right direction. However, the lack of a functional government in Somalia and the relative weakness of other regional governments, combined with the broader geographical region subject to attack, will limit the Djibouti Code's effectiveness. International support to strengthen both enforcement and local prosecutorial capacity is necessary before an East African regional agreement will be able to replicate the successes of ReCAAP.