

Piracy in the Gulf of Guinea: Responses under International Maritime Law

by

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Introduction

Somali pirates often come to mind when considering modern maritime piracy. Since 2012, however, effective action and intervention by the international community have greatly suppressed the threat of Somali piracy in East African waters. Many are unaware, due to under-reporting and lack of global media attention, of the current and now more prominent threat of West African piracy concentrated within the Gulf of Guinea. Recent reports and trends indicate that these waters have become the most dangerous in the world for international shipping and seafaring considering the extent in which West African piracy “threatens the safety of navigation and inflicts billions of dollars of economic losses.”¹ The period between early 2016 and March 2018 has seen an increase in crew kidnapping as a primary strategy for profit-motivated pirates in the region. Kidnapping and ransom tactics are the costliest byproduct of piracy and most concerning for humanitarian reasons.

In 2011, the UN recognized the problem of general piracy and armed robbery in the Gulf of Guinea. However, the international community and regional authorities have failed to deter this problem thus far. I will compare this situation to the successful dealings with piracy in Somalia, of which existing conditions and adaptations of law allowed for international involvement to restore order and eliminate the feasibility of the crime. Anti-piracy in the Gulf of Guinea has unfortunately been ineffective due to international law conflicting with domestic laws and politics. I will discuss several issues, such as jurisdictional limitations, ineffective criminal justice in local courts, complex local politics, and ambiguity regarding the application of piracy and terrorism laws, to demonstrate the complexity and ineffectiveness of current

¹ United Nations Security Council, *Annex to the letter dated 6 April 2016 from the representatives of Angola, China and Senegal to the United Nations addressed to the Secretary-General*, General. UN Doc. S/2016/321 (6 April 2016)

actions. I will conclude that, although both East and West African piracy emerged as a result of “weak states,” the contradictions and limitations of international law have created a sustainable climate for piracy to flourish in West Africa.

The evolution of piracy under the law has been studied extensively. In *The Enemy of All: Piracy and the Law of Nations*, Daniel Heller-Roazen considers the development of anti-piracy an exceptional subject in international law. He takes into account the uniqueness of the high seas region, the blurring distinction between criminal and political categories, and the historic definition of pirates as an “enemy of all” in this assessment. Heller-Roazen argues that despite modern technology, piracy is an ageless crime through “the process of piratical adaption.”² He does so by contrasting a 1924 *Harvard Law Review* article titled “Is the crime of Piracy Obsolete?” with statistics indicating piracy growth in the early 21st century.³ In *Sea Power: The History and Geopolitics of the World's Oceans*, former NATO Supreme Allied Commander Admiral James Stavridis agrees that “often the case in fighting transnational threats, when the international community is able to address it in a given area, it often pops up in another.”⁴ Political scientist and RAND Corporation security analyst Peter Chalk assesses both piracy and political terrorism in *Grey-area Phenomena in Southeast Asia: Piracy, Drug Trafficking and Political Terrorism*. He assesses these new age security challenges as “grey area” threats. These are threats to the stability of sovereign states, as well as their established economic institutions, by non-state actors⁵.

² Daniel Heller-Roazen, *The Enemy of All: Piracy and the Law of Nations* (New York, NY: Zone Books, 2009), 27.

³ *Ibid.*, 25.

⁴ James Stavridis, *Sea Power: The History and Geopolitics of the World's Oceans* (New York: Penguin Press, 2017), 285.

⁵ Peter Chalk, *Grey Area Phenomena in Southeast Asia: Piracy, Drug Trafficking and Political Terrorism* (Canberra Papers on strategy and defense, No. 123, 1997)

Some argue that “push factors” and sanctuaries of weakened authority create conditions in which piracy can occur and thrive. Chalk, for example, considers piracy partly a response to land-based “push factors” such as poverty, inequality and lack of opportunity. In *Contemporary Piracy and Maritime Terrorism*, Martin N. Murphy argues that the inability or unwillingness of weak states to provide adequate maritime security allows for “maritime disorder” to occur, for example, in the port of Lagos, Nigeria.⁶ Many international security experts including Murphy and Chalk agree that piracy and crime flourish when weak authority fails to deny sanctuaries, or “safe havens,” for organized criminal groups. These sanctuaries can emerge from any factors that may weaken authority, such as lack of resources/technology, corruption, and/or conflicts between international and domestic law. An example of the latter is a period in the sixteenth and seventeenth centuries in which privateering, or state-sponsored piracy, thrived within a “sanctuary” of ambiguous international norms.

This thesis will consider incentivizing “push factors” in Chapter 2, but emphasize lack of deterrence under the law. The piratical adaptation and sanctuary arguments guide my analysis. Sanctuary for Somali pirates were a result of the void of power left by the Somalia “failed-state,” but were quickly suppressed when international actors intervened and overcame legal challenges. However, conditions in West Africa have created a local sanctuary for piracy, while limitations of international law have further shielded international intervention and the restoration of authority.

I use a variety of sources for my thesis. Primary sources include news articles, public databases (primarily the International Maritime Bureau Annual Report on Piracy and Armed

⁶ Martin N. Murphy, *CONTEMPORARY PIRACY AND MARITIME TERRORISM: The Threat to International Security* (London: Routledge, 2017)

Robbery against Ships), private risk assessment and security reports, government documents and speeches, court documents and transcripts, a documentary, reports and statements from the United Nations, and international treaties such as the *United Nations Convention on the Law of the Sea* and the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*.

The thesis begins by examining the development of international maritime law in the context of piracy. Chapter one provides a brief history of anti-piracy law and a description of several international legal institutions that have been used to fight piracy, such as the 1856 Declaration of Paris, 1982 UN Convention on the Law of the Sea (UNCLOS), international definitions for piracy and relevant background information. Chapter 2 introduces the analogous economic conditions for would-be criminals and sanctuaries of weak authority that have allowed Somali piracy and piracy in the Gulf of Guinea to emerge. Chapter 3 examines the successful methods in which the international community was able to effectively suppress Somali piracy. It contrasts these methods to the current conditions and responses in West Africa, demonstrating the complexity of anti-piracy law in the Gulf of Guinea. It demonstrates that the restrictive and protective elements of international law have created jurisdictional obstacles that prevent foreign intervention in the territorial waters of West African nations. The chapter also looks at criminal justice by addressing the relationship between international maritime law and local criminal laws. Lastly, the chapter considers the relationship between pirates, local politics and law, questioning the political aims of pirates and the extent in which terrorism plays a role in West African piracy.

Chapter 1

International Maritime Law and Anti-Piracy

Origins of Maritime Law

For centuries, empires, monarchies, and principalities regulated maritime activities such as travel, fishing, military activity, trade, and other forms of commerce as part of their land-based legal systems. With the entire Mediterranean sea under control of the Roman Empire, early western maritime law developed in a comprehensive and uniform fashion. The first examples date back to the “Rhodian Sea Law” in the seventh and eighth centuries.⁷ As part of the Justinian Code the law emphasized the compensation of lost goods rather than the persecution of pirates. After the fall of the Roman Empire, local authorities and small port cities along the Mediterranean coast played a key role in developing their own civil codes and were the primary administrators and enforcers of these laws. During the Roman and medieval period, piracy was predominantly a concern of civil law, or the settlement of disputes and compensation between private citizens.

In the fifteenth century, however, improved sailing vessels, navigation devices, and cartography made it possible for western monarchies and states to search for new markets and establish global trade routes. Portuguese, Spanish, and later, English and Dutch vessels began pushing further into vast and unclaimed waters while creating interaction with unfamiliar peoples. As state building began to take shape in the seventeenth century, maritime law became public law with the emergence of national Admiralty Courts. The term “admiralty” began to refer to the jurisdiction and procedural courts of law under the office of the Admiral.⁸ Courts such as the French Admiralty Court and the English High Court of Admiralty developed the

⁷ Healy, Nicholas Joseph . "Maritime Law." *ENCYCLOPEDIA BRITANNICA*. September 08, 2000. Accessed March 04, 2018. <https://www.britannica.com/topic/maritime-law>.

⁸ *Ibid.*

authority to administer “criminal, private, procedural, and public laws relating to the sea.”⁹ For example, piracy became a criminal offense under Henry VIII’s Offense at Sea Act of 1536¹⁰ and the prosecutions of individuals suspected of piracy, or armed robbery on the high seas, were handled within these national legal frameworks.

As international conflicts at sea continued to increase, however, transnational politics and imperial pursuits greatly influenced the outcome of maritime legal disputes. The use of privateering is an example of this controversy between national interests and international law. While nations were at war, Admiralty courts began issuing “letters of marque” that allowed private citizens to legally engage in privateering, or state-sponsored piracy expeditions, against enemy vessels. Privateering thus became a legal outlet for piracy in a period of ambiguity and conflict between public “laws of war,” domestic criminal and private civil law. This issue would eventually question the authority of national Admiralty courts and demand a more collaborative international system of settling disputes at sea. At the conclusion of the Crimean War, the multilateral Declaration of Paris (1856) would advance new principles of international maritime law. Specifically, the agreement declared privateering illegal, encouraged the regulation of civilized warfare at sea, affirmed the rights to neutral shipping, and created universal jurisdiction for the pursuit of piracy.¹¹

Demand for developing maritime law meant addressing questions surrounding the legitimacy of national jurisdiction and theoretical boundaries at sea. Despite many states’ overzealous claims on “possessing” extraterritorial waters, the oceans were lawless frontiers

⁹ Ibid.

¹⁰ Michael Kempe, “‘Even in the remotest corners of the world’: Globalized Piracy and International Law, 1500–1900,” *Journal of Global History* 5, no. 3 (2010): pg 356.

¹¹ John Fabian Witt, *Lincolns Code: The Laws of War in American History* (New York: Free Press, 2013) 134.

greatly outside the physical reach of national authorities. The presence of actors from diverse national and political backgrounds further complicated the matter. For these reasons, maritime law and the regulation of disputes at sea remained an issue of international scope. Jurists such as Hugo Grotius discussed the limits of jurisdiction, boundaries and international law at sea. In his publication *Mare Liberum* (“The Free Seas”- 1609), Grotius argued that the oceans are too vast to be properly controlled by a single political authority, introducing the theory of international territory at sea as well as freedom of trade and transit.¹² Similarly, Emmerich de Vattel notes that “ownership, properly defined, consists of the right to occupy a thing” and due to the inhabitable nature of the sea, “no one can establish himself in the open seas in a manner as to exclude others from passing through them.”¹³ Daniel Heller-Roazen considered the indiscriminate nature of piracy a violation of the principle of the right of every nation to use the open seas and therefore a crime that “insults all nations.” Pirates were deemed a “common enemy of all” and the crime became one of the first “crimes against humanity” under international law.¹⁴ The “universal jurisdiction” principle, therefore, grants authority to all nations to pursue and apprehend pirates found acting within international waters, regardless of national background. This collective enforcement mechanism within a shared maritime space demonstrates the evolution of maritime law to address the problem of piracy.

The United Nations Convention on the Law of the Sea (1982)

The United Nations Convention on the Law of the Sea (“UNCLOS”) is the most recent development in international maritime and modern piracy law. According to its preamble, the

¹² Kemp, “Even in the Remotest,” 356.

¹³ Heller-Roazen, *The Enemy*, 123.

¹⁴ Heller-Roazen, *The Enemy*, 10-11.

treaty was intended to create mutual understanding and settle issues related to the law of the sea. The agreement established an up-to-date legal order through the codification and progressive development of sea laws for the “strengthening of peace, security, cooperation and friendly relations among all nations.”¹⁵ Because the treaty offers a universal doctrine of international maritime law, it is described informally as the “constitution for the oceans.”¹⁶ The specific need for the development of UNCLOS must be traced back to the history of international maritime law and the gaps left by previous multilateral treaties to deal with the controversies surrounding jurisdiction, domestic policies and piracy.

Convened in 1973, UNCLOS III entailed an extensive negotiating process to correct previous uncertainties and address developing issues. The introduction of several new provisions, such as the 200-mile exclusive economic zone (EEZ), seemed to satisfy the majority of nations seeking clarity on the territorial debate. Interestingly, the conference and drafting procedures were negotiated on the basis of consensus rather than the traditional method of majority vote. This process forced nations with divergent interests to make “every effort to reach agreement on substantive matters by way of consensus” before being put to vote.¹⁷ Under this protocol, the negotiation process was deemed a great success and model for future multilateral treaty formation.

A key component of the treaty is the principle of “universal participation.” Under this principle, ratification implies the party consents to be bound by its provisions without expressing

¹⁵ UN General Assembly, *Convention on the Law of the Sea*, Part I, Article I. 10 December 1982, available at: <http://www.refworld.org/docid/3dd8fd1b4.html> [accessed 4 March 2018]

¹⁶ "United Nations Convention on the Law of the Sea of 10 December 1982 - Overview and full text."

¹⁷ UN General Assembly, *Third United Nations Conference on the Law of the Sea; Official Records*, UN Doc. A/CONF.62/30. vol. iii (New York, United Nations, 1975), p. 59–61.

any reservations or undertake actions to undermine the treaty. This package deal, the all-or-nothing concept, is a significant achievement in international multilateral treaty law, especially considering the impressive number of participants and signatories. The success is credited in large part to the successful procedures involving the consensus decision-making process, as well as a post-draft "Agreement Relating to the Implementation of Part XI." Then UN-Secretary General Cuéllar considered UNCLOS "possibly the most significant legal instrument of this century."¹⁸

UNCLOS: The Definition of International Piracy

The definition of the crime of piracy is contained in article 101 of UNCLOS, which reads as follows:

"Piracy consists of any of the following acts:

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

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

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

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

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

The United Nations Convention on the Law of the Sea (1982) thus created a strict legal definition of international piracy. This framework is vital for assessing cases of piracy when

¹⁸ "The United Nations Convention on the Law of the Sea: A Historical Perspective." Oceans and Law of the Sea. 1998. Accessed March 4, 2018. http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm.

applied in domestic courts. Recognized as customary international law, many national or “domestic” courts (such as the United States and Kenya) have adopted this framework for criminal proceedings of suspected pirates. The definition creates several principles and specific requirements for the apprehension and prosecution of international pirates. One example is the codification of the “universal jurisdiction” principle, which grants all nations jurisdiction to arrest suspected pirates on the the high seas. Nations have to meet five requirements to apply the law in criminal proceedings: a “violence” requirement, a “private ends” requirement, a “private ship” requirement, a “two ships” requirement and a “high seas” requirement.¹⁹ These strict criteria, in conjunction with other provisions of UNCLOS (such as the role of jurisdictional boundaries), have occasionally limited anti-piracy law in criminal prosecutions and the law enforcement efforts of international actors. Two of these requirements, the “high seas” requirement and the “private ends” requirement, are particularly controversial for cases of West African piracy.

Anti-piracy stipulations in international and domestic are mutually dependent. Despite international codification, piracy is considered a transnational crime and not currently applied in any international courts such as the International Criminal Court (ICC). Therefore, domestic courts are essential for implementing and administering international law. The UNCLOS definition of piracy in article 101 provides a framework that can be applied to domestic courts for this purpose. But national legislatures occasionally fail to enact laws that appropriately address piracy and to create conditions for effective prosecution.

The “High Seas” Requirement, Territorial Boundaries and Jurisdictional Limits

¹⁹Qureshi, Waseem Ahmad. “The Prosecution of Pirates and the Enforcement of Counter-Piracy Laws Are Virtually Incapacitated by Law Itself,” 19 San Diego Int’l L.J. 95 (2017)

Hugo Grotius demanded the sea to remain free from national claims, creating an international and theoretical zone void of sovereign authority. This concept was reaffirmed under the Declaration of Paris (1856) and future multilateral treaties. However, section 2, part II of UNCLOS challenges this principle by authorizing the historic claim of proximate territorial waters as national boundaries, at the discretion of a state “up to a limit not exceeding 12 nautical miles”²⁰ from a coastal baseline. These territorial boundaries set the limits between domestic and international jurisdiction, intending to protect the national sovereignty against infringement of foreigners. The boundaries are also intended to establish a reasonable national jurisdiction by creating a zone in which a State can sufficiently administer justice. In addition to a 12-mile reach, any internal waters within the coastal baselines, such as rivers, harbors, and canals, are also considered exclusive jurisdictional zones for national authorities. Under these provisions, national authorities have exclusive sovereignty and the right to police, enforce and regulate activities internal or territorial waters at their discretion. The UNCLOS framework also sets guidelines involving the presence of foreign vessels in territorial waters, allowing only for a “continuous and expeditious” form of “innocent passage.”²¹ These jurisdictional boundaries affect both the right to police and enforce laws, such as lawful arrests and seizures, and the legal basis for judicial proceedings of civil and criminal law. The boundaries have significantly impacted anti-piracy law, such as placing limitations on international intervention and jurisdiction in these zones.

²⁰ UN General Assembly, *Convention on the Law of the Sea*, pg 27.

²¹ *Ibid.*, 30.

Chapter 2

Somali Piracy (2006-14) and the Current Issue in the Gulf of Guinea

“We must take further concrete steps designed to eradicate piracy in the Gulf of Guinea, which constitutes a clear threat to the security and economic development...[of West Africa states, SC]”

- B. Lynn Pascoe, UN Under-Secretary-General for Political Affairs, **February 27, 2012**

He [Abdullah Hussain Haroon, Representative of Pakistan to the UN, SC] underlined the importance of urgently countering the phenomenon in the Gulf to “prevent the situation from getting out of hand.”

- 6723rd UN Security Council Meeting, Briefings, **February 27, 2012**

I. Trends of Modern Piracy in Africa

Maritime piracy reached headline news during a surge of reported incidents in the Gulf of Aden in 2006-2011. The notorious hijackings of the Japanese-flagged *Golden Nori* and the U.S.-flagged *Maersk Alabama* received considerable international attention. An unstable economic and political situation in Somalia caused maritime piracy to reach “unprecedented proportions” in the modern age.²² The international community recognized that Somali piracy was a serious threat to shipping industries and global trade based on the location and frequency of the attacks. Demands for a swift and firm response resulted in an unprecedented international collaboration that applied a multitude of resources; including new incident-reporting and information-sharing techniques, safer shipping practices, international and transnational agreements on effective criminal prosecution, and a colossal investment in a multinational warship fleet to police pirate-threatened waters. Although intensive and costly, the response was incredibly effective. In 2012, the number of reported attacks had dropped by nearly 300%. By 2015, just four years since the peak of annual attacks, Somali piracy was virtually eliminated.

With piracy in the international spotlight and the Somali threat in decline, attention shifted across Africa to the Gulf of Guinea (GoG). In November 2011, the United Nations sent an “assessment mission on piracy in the Gulf of Guinea” to “consider the possibility of establishing a mechanism to combat piracy in the Gulf of Guinea similar to the anti-piracy regime currently in place off the coast of Somalia.”²³ In 2012, the United Nations adopted *Resolution 2039* “expressing its deep concern about the threat that piracy and armed robbery at

²² Chalk, Peter. “Piracy off the Horn of Africa: Scope, Dimensions, Causes and Responses.” *Brown Journal of World Affairs* (2010) 89-108.

²³ United Nations Security Council, “Report of the United Nations Assessment Mission on Piracy in the Gulf of Guinea (7 to 24 November 2011).” 9 January 2012. MS S/2012/45, pg 2.

sea in the Gulf of Guinea pose to international navigation, security and the economic development of states in the region.”²⁴ The council and participating members agreed that piracy was becoming enough of “a serious threat” to demand actions “countering the threat and addressing the underlying causes.” Although the 2011 assessment mission report correctly identified that piracy in the region was “not a new phenomenon” and was perhaps overlooked by the international community, the report declared that “since 2010, incidents of piracy and armed robbery in the area have risen significantly.”²⁵ The UN Security Council also declared in 2012 that the attacks were becoming “more violent and systematic.” *Resolution 2039* (2012) not only identified the issue, but was the first of many international and regional attempts (discussed in Chapter 3) to bolster “regional coordination and logistical support to regional security initiatives” to fight West African piracy.²⁶

The effective suppression of Somali piracy resulting in a worldwide decline in annual attacks should not be overlooked. Recent headlines such as “Safety on the High Seas” (CNBC) and “Maritime piracy in 2017 reached a 22-year low” (International Chamber of Commerce) strike optimism for global maritime security but fail to consider the adaptive nature of piracy. Six years have now passed since the UN Security Council identified an “urgent need to devise and adopt effective and practical measures to counter piracy in the Gulf of Guinea” in *Resolution 2039* (2012), but piracy continues to trouble the region and international community.²⁷ A January 2018 statement by International Maritime Bureau director Pottengal Mukundan confirms: “Although the number of attacks is down this year in comparison with last year, the

²⁴ United Nations Security Council, *Resolution 2039* (2012). 6727th Meeting, S/RES/2039, 29 February 2012, pg 1.

²⁵ United Nations Security Council, “Report of the United Nations Assessment Mission,” pg 3.

²⁶ Onuoha, Freedom C. “Piracy and Maritime Security in the Gulf of Guinea: Nigeria as a Microcosm.” African Centre for Strategic Research and Studies, June 12, 2012. Accessed April 22, 2018. pg 4

²⁷ United Nations Security Council, *Resolution 2039* (2012), pg 1.

Gulf of Guinea and the waters around Nigeria remain a threat to seafarers.”²⁸ The region now represents one-sixth of global piracy incidents within the 2017 review period.²⁹ Additionally, concerned regional experts indicate that the number of attacks are frequently underestimated. Since early 2018, they have increased and pirates are shifting to more problematic tactics such as kidnapping. This chapter compares the conditions of piracy in Somali to those in the Gulf of Guinea to underscore the flexible nature of piracy that, as the next chapter will explain, makes it harder for the international community to respond with a “one-for-all” antidote against piracy.

II. Conditions of Somali Piracy

Despite modern technology, the rise of Somali piracy in the twenty-first century revealed a shockingly insecure and venerable reality of global trade on the high seas. The rise of this phenomenon can be attributed to multiple factors. Poverty and economic hardship in Somalia created what piracy scholars call land-based or ‘push’ factors that encourage young men to resort to a lifestyle of criminality at sea.³⁰ Foreign intrusion in local fishing hampers legitimate employment opportunities for Somalis, while fueling anti-western sentiment and recourse. In addition, local political instability created conditions that weakened authority and law enforcement, allowing pirates to be uncontested and finding a sanctuary to thrive in. These conditions, combined with the convenient geography of the Gulf of Aden as a bottleneck for global trade routes, cultivated a prime opportunity for the illegal industry to succeed.

²⁸ "Maritime Piracy and Armed Robbery Reaches 22-year Low, Says IMB Report." International Chamber of Commerce. January 10, 2018. Accessed April 15, 2018. <https://iccwbo.org/>.

²⁹ ICC International Maritime Bureau. "IMB Piracy and Armed Robbery against Ships -2017 Annual Report." Report, January 2018. Accessed April 20, 2018. <https://www.icc-ccs.org/>.

³⁰ Chalk, Peter. "Piracy off the Horn of Africa: Scope, Dimensions, Causes and Responses." *Brown Journal of World Affairs* 16:89-108.

The severity of the Somali issue was described as reaching “epidemic proportions” not “seen since the Barbary wars of the nineteenth century.”³¹ Piracy data collected by the International Maritime Bureau (IMB) distributed in quarterly and annual reports provide valuable quantitative insight for regional and global piracy trends. These reports reveal the rapid growth and scale of Somali piracy between 2007 and 2011. In 2007, for example, there were 51 attempted or successful pirate attacks in waters adjacent to Somalia, already putting Somalia on the map as a major piracy global hotspot.³² Yet that number would multiply to 216 in the calendar year of 2009. The peak of the phenomenon occurred in 2011, in which the IMB reported 237 attacks attributed to Somali pirates.³³ Based on this figure, an attack would occur roughly every 35 hours.

Two decades of civil war and political instability in Somalia created destructive humanitarian conditions that enabled and encouraged the rise of piracy. The collapse of the socialist regime in 1991 resulted in a fragmented state in which multiple factions claimed authority. Subsequent civil wars resulted in a humanitarian crisis involving violence, displacement, famine, lawlessness, and general poverty.³⁴ In response to claims that Somalia had become “the world’s most utterly ‘failed state’,”³⁵ the UN Security Council authorized intervention of multiple peacekeeping and humanitarian aid missions between 1992 and 1995.

³¹ Surbun, Vishal. (2010). “The developing jurisprudence to combat modern maritime piracy: a crime of the high seas?” *The Comparative and International Law Journal of Southern Africa*. 43. 1-22.

³² ICC International Maritime Bureau. “IMB Piracy and Armed Robbery against Ships -2011 Annual Report.” Report, January 2012. Accessed April 20, 2018. <https://www.icc-ccs.org/>. pg 5-6

³³ Ibid.

³⁴ Chalk, “Piracy off the Horn of Africa,” pg 94.

³⁵ Failed states can no longer perform basic functions such as education, security, or governance, usually due to fractious violence or extreme poverty. Within this power vacuum, people fall victim to competing factions and crime, and sometimes the United Nations or neighboring states intervene to prevent a humanitarian disaster. “Failed States.” *Global Policy*. Accessed April 15, 2018. <https://www.globalpolicy.org>

With an estimated three million people “threatened with starvation,”³⁶ desperate coastal populations suffering from poverty and famine began “resorting to illegal activities to obtain basic needs.”³⁷ For a region accustomed to armed conflict, weaponry was cheap and readily available; an AK-47 machine-gun could regularly be exchanged for three cows.³⁸ Piracy offered lucrative returns for these struggling communities; the ransom of one hijacked ship meant “the potential to earn US\$1-2 million.”³⁹ Elliot Anderson has examined how the influx of this ransom money created capital injections that benefited local Somali shopkeepers and businesses. He credits piracy for creating a unique illegal industry, reforming the Somali coastal economy, and for enabling families to put food on the table.⁴⁰

Lack of authority and political fragmentation in the Somali “failed state” left the coastlines unregulated by domestic forces, meaning piracy and other criminal activity would not be contested. Insecurity and piracy in Somali waters were first recognized by the International Maritime Bureau in the 2005 annual report. Captain Pottengal Mukundan, Director of the IMB, indicated that Somali pirates were becoming “increasingly audacious” and cited “the utter lack of law enforcement infrastructure in the area... leaving far too many vessels and mariners unprotected.”⁴¹ After three more years of weak and unstable governance, Somalia would be upgraded to the most significant piracy “hot spot” in the world in modern history. The

³⁶ Nincic, Donna. “Maritime Piracy in Africa: The Humanitarian Dimension,” *African Security Review* 18, no. 3 (2009) pg 11

³⁷ Anderson, Elliot A. (2010) "It's a Pirate's Life for Some: The Development of an Illegal Industry in Response to an Unjust Global Power Dynamic," *Indiana Journal of Global Legal Studies*: Vol. 17 : Iss. 2 , Article 9. Pg 320

³⁸ Bossaso, Nairobi. “Horn of Africa: The Path to Ruin,” *The Economist*, August 9, 2006. <http://www.economist.com/node/7270000>

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ “IBM report finds piracy declining 2015,” iccwbo.org, July 19, 2005. <https://iccwbo.org/media-wall/news-speeches/imb-report-finds-piracy-declining/>

fragmentation of governance not only allowed piracy to occur but often encouraged it through corruption and complacency. Local leaders were sometimes investing in piracy endeavors for personal financial reasons.⁴² The benefit of piracy to local economies and communities gave statesmen in coastal Somalia greater reason to deny its illegality.

The devastation of coastal fisheries, caused by the absence of a maritime authority to bar foreign fishers, is often linked to the rise of Somali piracy. A “non-functioning government and the complete lack of naval force” allowed foreign fishing vessels to illegally fish within Somali territorial waters. The illegal dumping of toxic waste by foreign governments, causing significant environmental degradation, further explains the depletion of these offshore fisheries.⁴³ Lacking other channels of enforcement or recourse, Somali fishermen began taking matters into their own hands through vigilante justice: equipping themselves and attacking foreign fishing expeditions in an attempt at driving them away from the coast.⁴⁴ Scholars disagree on how important these fishermen vigilantes were in the formation of Somali pirate gangs. Nonetheless, degradation of fisheries contributed to anti-foreign sentiment and piracy activities offered new employment for an increasing number of struggling fishermen.

The geographic importance of the Gulf of Aden and Horn of Africa for international shipping created waters “conducive to pirate activity.”⁴⁵ Shipping lanes leading into the Red Sea are among the busiest in the world; the Suez Canal strategically connects the Mediterranean Sea and Indian Ocean. In addition to high volume, the Gulf of Aden and Horn of the Africa act as a natural bottleneck for inbound and outbound ships which creates a high density of traffic.

⁴² Anderson, “It’s a Pirate’s,” pg 337.

⁴³ Chalk, “Piracy off the Horn of Africa,” pg 98.

⁴⁴ Nincic, “Humanitarian Dimension,” pg 9.

⁴⁵ Stavridis, *Sea Power*, pg 279.

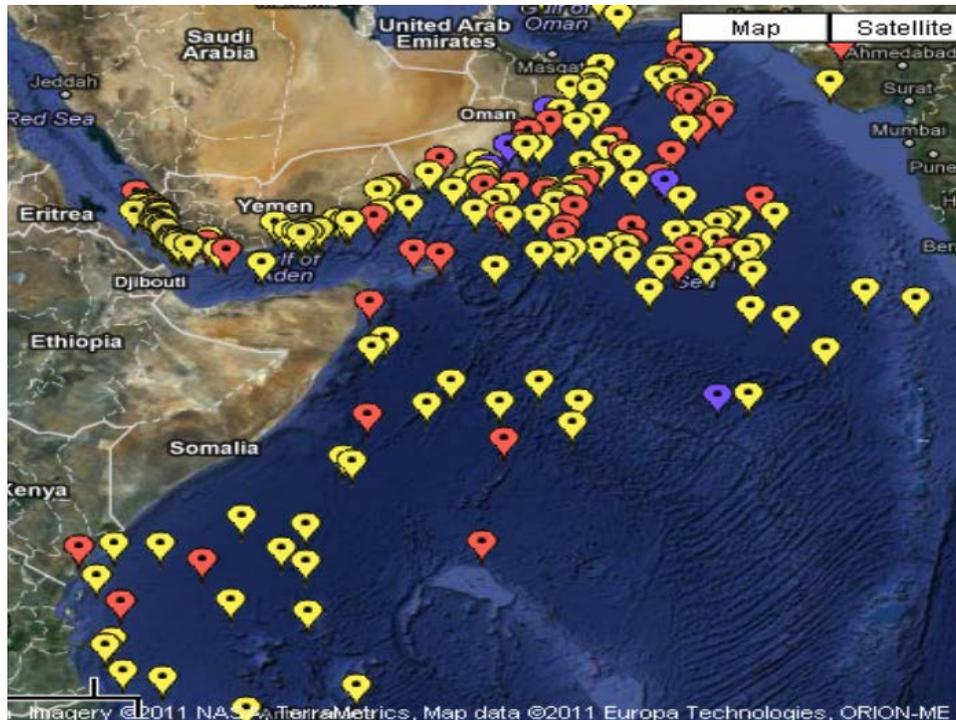
Figures amount to 22,000 ships passing through the Gulf of Aden annually, and roughly 12% of the world's petroleum sources.⁴⁶ Struggling Somali communities watched “hundreds of billions worth of commodities” sail past their coasts annually. Highly adaptive and organized pirates divided into reconnaissance, attack and holding teams onboard high-speed fishing skiffs had no trouble locating potential targets despite being situated several hundred miles offshore.⁴⁷ Pirates identified unarmed merchant ships and boarded with the intention of capturing the entire vessel and crewmembers for ransom. Once under control, pirates would usually guide captured ships into Somali “safe-haven” ports and establish communication with shipping companies to receive payment.⁴⁸ For many ship owners and insurance companies, simply paying ransoms became the quickest and safest way to release crewmembers and their vessels. In turn, this complacency fueled the piracy industry in coastal Somalia, as gangs were known to “rely on kidnapping and hostage taking to help generate funding to purchase operational activities.”⁴⁹

⁴⁶ Chalk, “Piracy off the Horn of Africa,” pg 96.

⁴⁷ Ibid., 91.

⁴⁸ Stavridis, *Sea Power*, pg 279.

⁴⁹ United Nations Security Council, *UN Resolution 2383 (2017)*. 8088th Meeting, S/RES/2383, 7 November 2017



Somali piracy was an act of desperation driven by major push factors of unemployment and poverty. Some scholars argue that Somalis had “some legitimate grievances”⁵⁰ due to foreign intrusion and environmental degradation of coastal fisheries, and consider them the “robin hoods of the sea.”⁵¹ A unique illegal industry emerged as pirates carefully selected passing targets, captured, and ransomed crew members and the vessel through negotiation. Ransom money generated large profits that flowed into the local economies and back into future pirate campaigns. The lack of political authority in coastal Somalia allowed for the pirate organizations to establish bases, venture into international waters and retreat back to safe havens. Somali piracy thrived between 2007 to 2011 under this model until the international community was able to intervene effectively.

⁵⁰ Stavridis, *Sea Power*, pgs 279.

⁵¹ Anderson, “It’s a Pirate’s,” pg 330.

II. Conditions of Piracy in the Gulf of Guinea

In a broad sense, the current motivations and operations of West African pirates appear similar to their East African counterparts in Somalia. Land-based push factors such as a lack of economic opportunity, desperation, and hardship drive the ascent of piracy. Criminal gangs are well organized and target high-value assets, causing a disruption in international shipping and commodities markets. However, there are significant differences between East and West African conditions of piracy. The history, tactics, behaviors and location of GoG attacks differ dramatically from Somali examples.

The Gulf of Guinea has been a noteworthy hotspot for piracy and maritime insecurity since 2003 and perhaps longer. However, the United Nations only first acknowledged the issue in 2011, because Somali piracy drew greater attention. West Africa is an important player, however, for commodities markets such as oil. A large majority of attacks are concentrated near the oil-rich Niger Delta region and waters adjacent to the Port of Lagos, one of Africa's largest and busiest ports. For this reason, Nigerian internal and territorial waters contain a bulk of the Gulf of Guinea piracy, which has important implications for the enforcement of anti-piracy law. Nigeria was first recognized by the IMB as a piracy hotspot prior to the generalization of the "Gulf of Guinea" piracy issue. However, overlapping pirate activities and outreaching pirate gangs pose a broad threat to vessels calling ports in other West African Nations such as Benin, Togo, Ghana, Cameroon and the Ivory Coast. With consensus that "the waters off the coast of West Africa are some of the most dangerous in the world to transit,"⁵² the United Nations and IMB began using the "Gulf of Guinea" label in 2011 as an umbrella term for all threats occurring within the "hotbed" region.

⁵² Kane-Hartnett, Liza. "Featured Story: Piracy in West Africa." Oceans Beyond Piracy: Reducing Violence at Sea. Accessed April 15, 2018. <http://oceansbeyondpiracy.org>.

Trend analyses are particularly complicated and frequently debated in the case of GoG piracy. In 2016 and 2017, incidents of GoG piracy were reported annually to be 42 and 36 attacks respectively, indicating a significant increase from the 2015 figures. Furthermore, the first two months of 2018 have already reported 17 incidents in the region, nearly half of 2016's annual figure.⁵³ At first glance, GoG piracy trends seem trivial compared to the annual figures of Somali piracy, which exceeded 200 for several years. However, analysts indicate current reports do not provide the full picture, as underreporting and non-reporting of incidents of GoG piracy hamper a full understanding of the problem. By some estimates, only one-third of attempted attacks are properly reported to authorities.⁵⁴ For one, small-scale encounters, squirmishes and pirate sightings are often overlooked. Additionally, reporting incidents has been unattractive for private shipping companies due to potential costs such as rising insurance premiums and the likelihood that investigations could delay ships at port or in transit. Furthermore, it is well known that nothing "meaningful" will come of the post-incident investigations.⁵⁵ But underreporting makes it difficult to assess the true magnitude of the issue and properly analyze trends overtime. In response, the IMB in 2017 adopted a new mechanism known as the "Community of

⁵³ Bergman, Jamey. "Gulf of Guinea Piracy Evolving, Crew on Moving Vessels 'easiest Targets'." *Tanker: Shipping and Trade*. February 27, 2018. Accessed April 15, 2018. <http://www.tankershipping.com/news/>.

⁵⁴ Luce, Dan De. "Why Is It So Hard to Stop West Africa's Vicious Pirates?" *Foreign Policy*. September 23, 2016. Accessed April 15, 2018. <http://foreignpolicy.com/2016>.

⁵⁵ *Ibid.*

Reporting” to adjust for under-reporting issues. An alarming figure estimated 95 attempted pirate attacks in 2017,⁵⁶ advocating that West African waters are in fact the most dangerous in the world and certainly a significant issue.

TABLE 10: Total incidents received by IMB v/s Community of Reporting (CoR) incidents for Gulf of Guinea Region, January – December 2017

Period	Level I	Level II	Level III	Total	% Underreporting
IMB 2017 (Jan – Dec)	18	7	11	36	62%
CoR 2017 (Jan – Dec)	34	14	47	95	

Maritime insecurity in the GoG region has historically been a complex issue. Opposed to the systematic and well-defined Somali ransom-based piracy operations, criminal maritime activity in West Africa has occurred in much greater variety during the past several decades. Piracy is part of a long list of economically-motivated crimes such as drug trafficking, illegal oil bunkering, pipeline vandalism, poaching, and illegal fishing.⁵⁷ The discovery of oil reserves within the past 25 years has made the region an important provider of oil to global markets, accounting for almost 30 percent of US petroleum products and almost 40 percent of European imports.⁵⁸ Nigeria alone exports 2.3 million barrels per day and is the sixth largest producer of crude oil in the world.⁵⁹ Significant foreign investment in offshore and inshore drilling and port infrastructure has turned the coastal zone in the GoG into “an economic lifeline to coastal and landlocked West African countries, and is of strategic importance to the rest of the world.”⁶⁰

⁵⁶ ICC International Maritime Bureau. "IMB Piracy and Armed Robbery against Ships -2017 Annual Report." pg 12

⁵⁷ Onuoha, “Nigeria as a Microcosm,” pg 4.

⁵⁸ Anyimadu, Adjoa. "Maritime Security in the Gulf of Guinea: Lessons Learned from the Indian Ocean." Africa 2013/02, July 2013. Accessed April 15, 2018. Chatham House: Royal Institute of International Affairs. pg 4.

⁵⁹ "Economy: Nigeria." The World Factbook. April 09, 2018. Accessed April 15, 2018.

<https://www.cia.gov/library/publications/the-world-factbook>.

⁶⁰ Anyimadu, “Lessons Learned,” pg 2.

Despite recent economic growth and new connections to global commodities markets, widespread poverty and unequal distribution of wealth among a largely uneducated population create devastating socioeconomic conditions. Although signs indicate a growing middle class, it is estimated that 62% of Nigeria's 170 million people still live in "extreme poverty."⁶¹ Similar to Somalia, trying economic conditions such as these among GoG nations create the motivation for criminal activities targeting control over resources, making "resource-insurgency" a major political threat in the region.⁶²

Despite the lack of accurate data, regional experts claim that GoG piracy is not only on the rise, but becoming more problematic due to the changing tactics of pirates towards kidnapping. Historically, the principal motivation of piracy in the GoG has been the robbery and theft of crude oil and refined petroleum products.⁶³ Acting in local waterways and ports, pirates are rushed to offload stolen goods and evade into the complex estuaries and internal waterways in small, high-speed boats. Recently, however, pirate tactics have been shifting towards kidnapping, a more lucrative and less logistically demanding heist. An article from February 2018 posted in *Tanker: Shipping and Trade*, a knowledgeable industry newsletter and forum, warns of "piracy evolving" and "becoming a more significant problem" in the GoG region, as criminals are "shifting focus to human crews."⁶⁴ Unlike Somali pirates, who would mainly hijack entire ships and guide them to "safe haven" ports in Somalia, GoG pirates are learning the effectiveness of "snatch and grab" kidnapping in their regional environment. This model involves removing hostages from vessels and oil infrastructure and bringing them back via

⁶¹ "Economy: Nigeria." The World Factbook.

⁶² Onuoha, "Nigeria as a Microcosm," pg 4.

⁶³ Ofosu-Boateng, N.R.L. "Methodological Responses to Contemporary Maritime Piracy in the Gulf of Guinea." *Open Journal of Social Sciences*, 5, (2017) pgs 241.

⁶⁴ Bergman, "Gulf of Guinea Piracy Evolving."

speedboats into pirate havens in the vast Niger Delta region to demand ransom. Based on the 2017 IMB Piracy Annual Report, 65 of the 75 global crew kidnappings occurred in Nigeria. These kidnapping tactics are more costly than stolen cargo due to high ransom demands and significant insurance premium hikes. More problematic to the seafaring community are the increasing threats to shipping crews that put human lives at stake. Furthermore, in addressing crew kidnapping trends, analysts indicate it is “likely that these will develop further throughout 2018.”⁶⁵ So far, this seems to be the case; late January and early February 2018 saw two large tankers attacked and their crews taken hostage.

The motivations behind GoG piracy are different compared to Somali piracy. Despite functioning state authorities, there is political instability that seems to encourage the spread of piracy. Similar to Somalia, the region is unstable, militarized and prone to civil conflict, which contributes to the proliferation of the sales of small arms and light weapons.⁶⁶ Considering the widespread use of violent criminal activities motivated by internal politics and “resource-insurgency,” scholars have more quickly labelled West African piracy operations as “maritime terrorism.” Militant and radical groups in the Niger Delta region are known to be more directly involved in the financing of piracy operations for political gains. Former NATO Supreme Allied Commander James Stavridis notes that the general rise of outlaw operations is “coupled with the rise of Islamic radical groups like Boko Haram.”⁶⁷ Certainly, perpetrators of piracy in the region have greater anti-authority rhetoric. Similar to Somalia, however, is the anti-foreign sentiment among pirates. Niger delta gangs claim that oil and other multinational corporations exploit the

⁶⁵ Bergman, “Gulf of Guinea Piracy Evolving”

⁶⁶ Onuoha, “Nigeria as a Microcosm,” pg 4.

⁶⁷ Stavridis, *Sea Power*, pg 285.

wealth of natural resources that rightfully belongs to the people of Nigeria. These groups justify their actions to kidnap, steal, and ransom for money as an act of social justice.

Another significant difference between the Somali and GoG piracy models is the physical location of the attacks. The majority of the Somali attacks took place in either busy, oceangoing shipping lanes designated as international waters or the Somali exclusive economic zone (EEZ), which are specific jurisdictional zones in maritime law defined by UNCLOS. Since these cases occur several hundred miles from shore, (further discussed in chapter 3) greater legal authority is granted to international actors to respond with anti-piracy measures such as apprehension and enforcement mechanisms. In contrast, as demonstrated by the figures and maps below, GoG piracy is a much more localized issue. Attacks occur more frequently within the domestic territorial waters of West African nations (less than 12 miles from shore) and even within the internal waters of ports, rivers and delta waterways of these countries. For this reason, the response and involvement of international actors is limited by established international maritime law. Instead, greater authority and responsibility have fallen upon local West African governments to protect high-valued foreign assets such as ships, drilling operations and people, against the threats of piracy.

Figure 3a



Figure 3b

West African Piracy and Armed Robbery (August 1995 – March 2014)	
Location of incident	
In international waters	158
In territorial waters	296
In port areas	389

Source: <http://gisis.imo.org/Public/PAR/Reports.aspx?Name=RegionalAnalysis>

Domestic and international political situations differ significantly between Somali and GoG piracy. The notion of Somalia as a “failed state,” meaning that it was not functioning as an adequate political authority, had great implications for the feasibility of anti-piracy responses by the international community and the United Nations. However, West African nations in the GoG region contain functioning government entities that claim authority and are granted responsibility

to suppress criminal activities within their territories, such as piracy. This has created more complex situations in international politics. Although recognized internationally as legitimate entities, many of these governments are notorious for corruption, as well as lack the funds, infrastructure and judicial systems necessary to suppress piracy and guarantee maritime security.

Chapter 3

Complexities of Law, Justice, Politics and Terrorism

Part I: The Successful Responses to Somali Piracy and Applicability in GoG

In his book *Sea Power: The History and Geopolitics of the World's Oceans*, Admiral James Stavridis, the NATO Supreme Allied Commander charged with tackling Somali piracy, cites four “key factors” for the success of the campaign. Each one of these key factors responded to the specific physical and legal conditions of Somali piracy that create a sanctuary for pirates. International intervention led to the restoration of authority both on the seas and in domestic courtrooms. Specifically, Stavridis cites (1) effective law enforcement created by international naval intervention in both international and Somali-territorial waters, (2) adequate defensive mechanisms created by shipping industry initiatives such as private security, (3) successful prosecution and administration of criminal justice by gaining access to local courts and applying an appropriate international legal framework for trial proceedings, and (4) land-based prevention through nation and infrastructure-building in Somalia.⁶⁸ This chapter examines the first three of these responses in depth and explains why they were effective in suppressing piracy off the coast in Somalia but have failed in the Gulf of Guinea. Comparing the conditions in Somalia and GoG demonstrates why West African anti-piracy campaigns suffer from significant physical and legal setbacks that hamper the application of the Somali model unto the GoG region.

(1) Creating Effective Law Enforcement

The international legal regime, *The United Nations Convention on the Law of the Sea* (UNCLOS), defines unlawful piracy as an attack on the “high seas.” The “high seas” are international zones beyond the established territorial waters of a state. As described in Chapter 2, Somali pirates most frequently operated in shipping lanes hundreds of miles offshore and well within international waters. Because these attacks on the “high seas” thus fit the legal definition

⁶⁸ Stavridis, *Sea Power*, pgs 277-285.

of unlawful piracy, state courts that had adopted the UNCLOS criteria could proceed with courtroom trials (discussed in the next section). In addition, the “universal jurisdiction” principle allows foreign and multinational navies to actively patrol international waters, lawfully seize vessels, and apprehend pirates caught in the act. During the peak of Somali piracy, this allowed for “Combined Task Force 151,” an international naval coalition “consisting of warships from the twenty-eight nations of NATO, the European Union, and a loose coalition of Gulf State navies” to police and protect maritime traffic from piracy.⁶⁹ Other international players, such as Russia, China, India, Pakistan and Iran, also contributed to the anti-piracy campaign.⁷⁰ This unprecedented and colossal international force created a sufficient pool of resources, such as long-range aircraft, radar, communication and well-trained personnel, to ensure effective law enforcement in the Horn of Africa.

The predominant location of attacks within the local territorial waters of West African states, however, makes anti-piracy law more complex. The location of this piracy “hotspot” significantly limits the international response and challenges the “high seas” definition of piracy under international law. As shown in Figure 3, less than a quarter of incidents occurred in international waters between 1995 and 2014. These attacks, therefore, do not constitute the guidelines of international piracy under UNCLOS requirements and instead fall under local jurisdiction. Only if the domestic laws of each individual nation define them as properly and sufficiently as piracy, can perpetrators be prosecuted.⁷¹ In regards to law enforcement, international navies have no authority to police, seize or apprehend pirates acting within these territorial waters. Instead, local West African nations have the sole legal authority and

⁶⁹ Stavridis, *Sea Power*, pgs 279.

⁷⁰ *Ibid.*, 280.

⁷¹ Anyiam, Herbert. "The Legalities of Gulf of Guinea Maritime Crime with Suggested Solutions." Center for International Maritime Security. July 17, 2014. Accessed April 12, 2018. <http://cimsec.org/>.

responsibility to regulate this criminal activity. This reality is particularly troublesome when considering that piracy impacts international shipping, global commodities markets, and foreign actors. International security experts such as Martin N. Murphy recognize that piracy and crime flourish when weak states fail to deny useful sanctuaries, or “safe havens,” for organized criminal groups.⁷² The maritime security and anti-piracy measures taken by local West African nations have proven to be greatly ineffective, providing pirates with sanctuaries in which to thrive. This ineffectiveness is categorized by weak governance in both law enforcement and court systems (discussed in a later section).

Scholars and international shippers often blame weak governance within law enforcement for contributing to maritime insecurity in the region. Critics point out that several local states, predominantly the Nigerian government, are both unwilling (highly corrupt) and unable (lack of resources and infrastructure) to lead proper anti-piracy campaigns and contain pirates within their own waters and jurisdiction. Historically prone to bribes and payoffs, the Nigerian government consistently ranks among the most corrupt in the world. In a 2006 global corruption index, it scored a 2.2 out of 10 (0- highly corrupt, 10- very clean). Murphy makes a strong case for the relationship between corruption and piracy, claiming “forces nominally responsible” for containing piracy are often “in a league with pirates,” allowing organized criminal pirates to often “enjoy the support of those in power.”⁷³ Similarly, West African maritime security analyst Herbert Anyiam believes that bribery and collusion between pirates and port authorities and officials “charged with upholding the law” are a major factor in supporting rather than suppressing GoG piracy.⁷⁴ Despite Nigerian president Muhammadu Buhari’s promises to clean

⁷² Murphy, *CONTEMPORARY PIRACY*, pg 41, 86

⁷³ Murphy, *CONTEMPORARY PIRACY*, pgs 40-41

⁷⁴ Anyiam, “Suggested Solutions.”

up the corruption, many critics argue that West African governments simply do not have the resources, naval capacity or infrastructure to provide proper surveillance and an effective anti-piracy response. These critics demand local nations to invest “more heavily in modern technology,” such as surveillance devices, aircraft and high-speed boats, and take greater responsibility in securing their internal waters and port facilities. Using quantitative data, Freedom C. Onuoha makes a strong case. He notes that due to on-shore regional political insecurity, West African nations invest greatly in land-based armies while neglecting “maritime security forces such as navy, air force and coast guards.”⁷⁵ This lack of attention leaves these segments “ill-equipped and underfunded to perform” sufficient anti-piracy operations.⁷⁶

Although Somali attacks predominantly took place in international waters that could be lawfully policed, the pirates would occasionally retreat with captured vessels and crew into Somali territorial waters. Using “safe haven” ports outside of international jurisdiction, the under functioning Somali authorities would do nothing to stop the pirate activities. This dilemma was addressed and resolved through a firm decision by the United Nations Security Council. Using the classification of Somalia as a “failed-state” as justification, the UN Security Council adopted Resolution 1816 (2008) to allow an alteration to the UNCLOS jurisdictional guidelines. The resolution declared that “States cooperating with the country’s transitional Government would be allowed, for a period of six months [this period was officially renewed several times, SC] to enter the territorial waters of Somalia and use “all necessary means” to repress acts of piracy and armed robbery at sea.”⁷⁷ The international community accepted the decision despite some

⁷⁵ Onuoha, “Nigeria as a Microcosm,” pg 9

⁷⁶ Ibid.

⁷⁷ United Nations Security Council, *Resolution 1816 (2008)*. 5902th Meeting, S/RES/2039, 02 June 2008. pg 3

objections to sovereignty infringement. Consent from the Somali Transitional Federal Government (TFG) for assistance against unruly pirate gangs was a key factor in the acceptance.

In the Gulf of Guinea, however, no similar resolutions allowing direct international participation seem likely. Weak but functioning West African governments have shown little interest in allowing foreign navies to police their waters. Concession of authority to lawfully seize domestic vessels suspected of piracy would greatly infringe upon the sovereignty of their governments and threaten national security. The United Nations and foreign actors have therefore desperately pressured and encouraged West African nations to step up their local anti-piracy initiatives. In August 2013, for example, the President of the Security Council pleaded for “States of the region to counter the threat of piracy.” The statement formally “recognizes the primary responsibility of States” under international law to address piracy in their territorial waters and “stresses that the coordination of efforts at the regional level is key.”⁷⁸ The UN also encourages the international community to assist in “capacity-building” in West African nations to “improve their infrastructure and ensure their ability to more effectively carry out joint (regional) enforcement, monitoring and patrolling at sea.”⁷⁹ Since *Resolution 2039* (2012), which first addressed the issue of GoG piracy, many foreign governments have contributed indirectly through the process of “capacity building.” The international community has offered funds, such as the IMO West and Central Africa Maritime Security Trust Fund, and cooperative naval and coast guard training exercises, such as 2018 Obangame Express in which 31 nations participated. Foreign governments also make contributions to modern technology and naval weaponry to indirectly bolster regional anti-piracy initiatives. Despite these efforts, however, piracy in the

⁷⁸ United Nations Security Council, *Presidential Statement*. 7016th Meeting, S/PRST/2013/13, 14 August 2013. pg 2

⁷⁹ United Nations Security Council, *Annex to the letter dated 6 April 2016*, pg 3

region continues to rise. International critics forced to sit on the sidelines continue to ask what more can be done to ensure the effective protection of their vessels and citizens.

(2) Defensive Mechanisms and Shipping Industry Initiatives

Admiral James Stavridis briefly discusses the use of defensive mechanisms led by the international shipping industry as another key factor in the elimination of Somali piracy. He emphasizes two mechanisms in particular: cooperation in reporting/information sharing techniques and the use of onboard private security forces. These mechanisms require voluntary initiative by the international shipping community and private shipping companies and therefore are generally outside the scope of this legal argument. However, the use of pirate security teams as a feasible response to GoG piracy has been obstructed by local laws.

For vessels transiting international waters during the height of Somali piracy, armed private security contractors became effective means of last-resort defense. Shipping companies began employing teams of two to six private security personnel, generally well-armed and trained. It became an acceptable practice in international waters despite liability concerns and the legal ambiguity surrounding rules of engagement.⁸⁰ Stavaris boasts that “no ship embarking an armed security detail has ever been successfully hijacked,” as pirates often avoided further confrontation with ships that returned fire.⁸¹ On the other hand, the statutes regulating the carry of live firearms on merchant vessels in West African nations block the use of private security teams. Critics looking for a quick solution to GoG piracy, such as maritime security analyst Mikhail Voytenko, therefore demand that these nations make laws more flexible to allow for

⁸⁰ Stavridis, *Sea Power*, pgs 284.

⁸¹ Stavridis, *Sea Power*, pg 284.

private security. However, the argument is somewhat hypocritical considering most nations develop laws regulating the carry of firearms across borders and within their territories.

(3) Criminal Justice in Court

Stavaris notes that “the hardest part of the operation was actually what occurred after we caught a pirate.”⁸² Successful criminal conviction has been a challenge in many cases of modern piracy, and even initially for Somali suspects. In assessing the prosecution of pirates, Waseem Ahmad Qureshi observes that in general “the number of prosecutions and convictions of pirates is very low compared to the number of incidents of piracy reported and to the numbers of pirates apprehended.”⁸³ Although UNCLOS provides a legal framework that clarifies definitions and conditions of anti-piracy law, it does not establish courts with international jurisdiction. Article 105 reads “The Courts of the State which carried out the seizure may decide upon the penalties to be imposed.”⁸⁴ To facilitate judicial proceedings, piracy must be clearly defined and outlawed in domestic legal systems and then legal action must be taken (and carried through) against suspects. A major flaw in UNCLOS is that it does not contain a legislative requirement forcing all states to create domestic laws to suppress piracy.⁸⁵ Legal scholars view the inclusion of piracy into domestic legislation as “imperative” for effective prosecution, as universal jurisdiction alone is insufficient.⁸⁶ The lack of legislation that reconciles domestic and international laws and other weaknesses in judicial procedure have weakened the response to Somalia and West African piracy.

⁸² Ibid.

⁸³ Qureshi, “The prosecution of pirates,” 123.

⁸⁴ UN General Assembly, *Convention on the Law of the Sea*, 61.

⁸⁵ Qureshi, “The prosecution of pirates,” 115.

⁸⁶ Ibid.

Many suspects of Somali piracy were lawfully captured in international waters by foreign States. These ethnic Somalis usually carried no papers, and evidence such as weapons and scaling ladders were often disposed of prior to boarding, creating problems for the probable cause of international arrest under universal jurisdiction.⁸⁷ Because many claimed to be innocent fishermen, suspects often had to be “caught in the act” in order to be adequately prosecuted.⁸⁸ Based on Article 105, the next question became what to do with the suspects. The incapacity of the “failed-state” Somalia government to offer a functioning judicial system meant the transfer of suspects back to domestic Somali courts was not a viable option. Arresting States were therefore forced to incur significant costs to transport, conduct domestic trials, and imprison the suspects. In addition, arresting States had to take into consideration international human rights treaties regarding international custody, as the failure to do so invalidated convictions on multiple occasions.⁸⁹ Faced with these challenges, foreign forces were often obliged to “catch and release” pirates, creating a system in which the lack of criminal justice offered no form of deterrent.

Responding to this challenge, the international community found a solution by entering legal extradition agreements allowing the transfer of suspects into the custody of fully-functioning, regional East African states such as Kenya. Initial trials set a precedent that under universal jurisdiction, Kenyan magistrates’ courts may “proceed with piracy prosecutions against non-nationals captured outside the country.”⁹⁰ Furthermore, the Merchant Shipping Act (2009)

⁸⁷ Stavridis, *Sea Power*, pg 282.

⁸⁸ Ibid.

⁸⁹ Qureshi, “The prosecution of pirates,” 120.

⁹⁰ Roach, J. Ashley. “Countering Piracy off Somalia: International Law and International Institutions.” *The American Journal of International Law* 104, no. 3 (2010): pg 417.

fully adopted international legal definitions of piracy that allowed for effective prosecution.⁹¹

Under these conditions, Kenya soon “became a primary destination for the prosecution of pirates captured off the coast of Somalia.”⁹² The domestic courts of Mauritius, Tanzania, and Seychelles would also play a role in prosecuting Somali pirates.⁹³ Despite criticism that Kenyan Courts became a “pirate dumping-ground,” these extradition agreements offered a solution to the lack of criminal justice in Somalia and the Courts maintained acceptable international standards of piracy prosecution.

In West African states, however, the lack of legislative and judicial capacity to bring pirates to justice continues to be a major issue. The sidelined international community has continuously urged these nations to update anti-piracy legislation to allow for effective judicial proceedings. In April 2016, the statement from the President of the Security Council demonstrates this message, calling “upon States in the region to criminalize piracy and armed robbery at sea under their domestic law” and “formulate a legal framework against piracy.”⁹⁴ But the problem of corruption continues to have a significant impact on local piracy hearings. This corruption fits more broadly the issue of complex and unstable regional politics, which undermine law and order.

Part II: Considerations

⁹¹ Ibid., 422.

⁹² Thuo Gathii, James. "Kenya's Piracy Prosecutions." *The American Journal of International Law* 104, no. 3 (2010): pg 416

⁹³ Ibid., 411.

⁹⁴ United Nations Security Council, *Presidential Statement*. pg 3

The “Private Ends” Requirement and Terrorism

An additional question that arises while discussing the political challenges to West African piracy is its relationship to terrorism. The “private ends” requirement in UNCLOS has created considerable legal debate over the application of anti-piracy law, as well as the role of terrorism and social justice in modern piracy. The international community, for example, drew a connection between Somali pirate profits and terrorist funding to justify the costs of intervention and guarantee of maritime security. The social and political conditions in GoG facilitate an even stronger connection, even direct involvement, between radical groups and piracy. The term “resource-insurgency” has been used to describe the political nature of West African piracy. This debate also questions the sufficiency of the “private ends” requirement and therefore the application of UNCLOS.

Defining terrorism has proven to be a challenge for international law. Although the international community has not agreed on a definition, NATO forces define an act of terrorism as any use of force “in an attempt to coerce or intimidate governments or societies.”⁹⁵ In regards to piracy, Martin N. Murphy makes a clear distinction between terrorists and pirates based on their objectives. He classifies pirates as “common criminals” who are motivated by private economic gain, whereas “terrorists” strive for public coercion through violence and intimidation. Under this distinction, cooperation between pirates and terrorists does not lead to terrorism unless it intends to coerce the public or a government. Furthermore, even the classification of a group or individual as “terrorist” is insufficient to determine that an act of piracy is terrorism, even if it is used to generate revenue for political causes. In *Kidnap and Ransom*, Richard

⁹⁵ "NATO's Military Concept for Defence against Terrorism." North Atlantic Trade Organization. August 19, 2016. Accessed April 15, 2018. <https://www.nato.int/cps>.

Clutterbuck also discusses the relationship between the common crime and terrorist. He agrees that “some definition is needed which differentiates between... ‘criminal’ and ‘political’ groups” based on their “primary aim.”⁹⁶ He implies that all terrorists are criminals under the law, but certainly not all criminals are terrorists. Clutterbuck notes, however, that “their aims, as well as their activities, often overlap.”⁹⁷

Consensus in the international community classified pirates gangs in Somalia as criminal but not terrorist. This assessment was based on the identity of pirates, their objectives, and to what extent these objectives were political in nature. It was soon determined that Somali pirates were impoverished ethnic Somalis who claimed no explicit ties to any political authority. The crimes were economically-motivated; desperate pirates indiscriminately attacked passing ships and demanded lucrative ransom payments to sustain themselves and their families. But Murphy acknowledges that, although separate entities, terrorists and common criminals occasionally find reason for cooperation. It was a suspected pirate-terrorist financial relationship in Somali that began to trouble foreign states. Despite the lack of concrete evidence, many nations justified intervention and the cost of policing waters off East Africa, fearing that profitable ransoms funded Al Shabaab and other local terrorist groups. The *International Convention for the Suppression of the Financing of Terrorism (1999)* was drawn upon when considering the regulation of pirates. In *Resolution 2383 (2017)*, which emphasizes a commitment to the suppression of Somali piracy, the UNSC notes that piracy “exacerbates instability in Somalia by introducing large amounts of illicit cash that fuels additional crime, corruption and terrorism.”⁹⁸

⁹⁶ Richard Clutterbuck, *Kidnap And Ransom: The Response* (London: Faber and Faber, 1979) pg 27

⁹⁷ Ibid.

⁹⁸ United Nations Security Council, *UN Resolution 2383 (2017)*.

The extension of political instability onto the sea, what Murphy calls “maritime disorder,” and the increase in kidnapping tactics has sparked debate over the role terrorism and political objectives play in GoG piracy. Nigerian political scientist Freedom C. Onuoha uses the term “resource-insurgency” to describe the situation of maritime insecurity in Nigeria. The term demonstrates that criminal and terrorist activities overlap significantly. In an attempt to uphold this distinction, Murphy notes that terrorist organizations occasionally deviate towards economic crimes as a means for financing political objectives.⁹⁹ In the GoG, political and economic objectives drive one another in a region prone to power struggle, corruption and poverty. Those in power dominate the means of income and production, yet severe economic inequality creates incentive for social and political uprising that demands radical change and social justice. Radical militant groups such as the Niger Delta Avengers target offshore oil platforms, claiming that the oil companies and multinationals exploit Nigerian wealth.¹⁰⁰ These groups also use strong anti-government rhetoric and demand independence from the government of Nigeria. Clutterbuck notes that “political terrorists dedicated to liberation and equality are often unable to resist the temptation to embezzle some of the proceeds of ransoms.”¹⁰¹ Despite “Strike Force” guerrilla teams aiming the outright destruction of oil-related property and infrastructure,¹⁰² criminal activities considered piracy are used to satisfy both economic and political objectives of these groups. These activities include oil bunkering, theft of petroleum products, and kidnapping for ransom.

⁹⁹ Murphy, *CONTEMPORARY PIRACY*, pgs 76-77

¹⁰⁰ Agbinibo, Mudoch. "ENOUGH OF THIS INJUSTICE." Niger Delta Avengers. June 09, 2016. Accessed April 15, 2018. <http://www.nigerdeltaavengers.org/2016>.

¹⁰¹ Clutterbuck, *Kidnap and Ransom*, pg 27.

¹⁰² Agbinibo, "ENOUGH OF THIS INJUSTICE."

A case can be made that the evolution of piracy tactics in the GoG demonstrates that pirates are becoming more inclined to chase private economic gains. Murphy contends that terrorist groups occasionally transition into fully criminal organizations.¹⁰³ Likeminded scholars and analysts agree that prior to recent trends, the principal method of piracy in the GoG was the “theft of crude oil and refined petroleum products.”¹⁰⁴ Recent deviation towards taking human hostages for ransom payments demonstrates that pirates have found an easier and more lucrative alternative for generating income. In addition, the target has changed drastically from oil related infrastructure, in which original political grievances were contained, to general merchant shipping. Perhaps this change indicates that profit-making drives piracy as an economic crime in the GoG.

The possible connections between terrorism and piracy do not necessarily alter the effectiveness of criminal justice in the GoG. International jurists have widened the definition of piracy as an act committed for “private ends.” It is now also possible to persecute pirates if it can be determined they acted for public means. Under *The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 1988*, the law “goes one step further than the UNCLOS by including political offenses within the scope of piracy.”¹⁰⁵ In addition, this Convention creates a legislative requirement upon ratification, meaning parties have to implement these provisions into domestic law. Therefore, any attacks against vessels and oil infrastructure are defined under international law as piracy regardless of the motive.

The lack of enforcement, however, exposes the complexity of local politics and unfair treatment of political actors. Government officials and politicians have been known to grant

¹⁰³ Murphy, *CONTEMPORARY PIRACY*, pgs 76-77

¹⁰⁴ Ofosu-Boateng, “Methodological Responses,” pg 241.

¹⁰⁵ Qureshi, “The prosecution of pirates,” pg 99.

amnesty to individuals of insurgent forces and militant groups in exchange for cease-fire agreements. The Nigerian government, for example, granted militant leader Oweizide Ekpemupolo amnesty of all previous crimes, even though his organization has openly claimed responsibility for numerous attacks on oil platforms and commercial ships. Ekpemupolo's treatment demonstrates the recurring theme that local politics and corruption often interfere with pirate criminal justice, creating impunity and hampering accountability. Murphy and Clutterbuck agree that a distinction must remain between political and economically-motivated crimes to deter piracy and theft and keep crime equitable under the law.

Lastly, Somali piracy demonstrates that political objectives and terrorism have great implications on the international community's urgency to suppress groups responsible for piracy. The term "terrorism" tends to be a trigger word for international intervention. Foreign governments were quick to step in when they became suspicious about piracy profits and al-Shabab funding. Additionally, the connection was used to justify billions of dollars spent on the campaign. On the other hand, extremist and militant groups directly partake in piracy to fund their political objectives in the Gulf of Guinea. As instances of kidnapping increase, it will be interesting to see if the international community again pulls the terrorist card in West Africa, creating a greater sense of urgency for addressing piracy in the region.

National Sovereignty versus Universal Jurisdiction

Jurists as early as the Romans considered "open" (international) and "closed" (territorial) waters and the legal implications of each.¹⁰⁶ Vattel noted "it is no easy thing" to determine at

¹⁰⁶ Heller-Roazen, *The Enemy*, pg 124

which point the restricted waters near land become free and common waters.¹⁰⁷ Numerous contemporary scholars have responded to the current struggle between universal jurisdiction on the high seas and the protection of sovereignty. Due to current conditions of piracy, some advocate amending current international law and the UNCLOS code. These alterations would affect the rights, duties and jurisdiction of coastal states and foreign actors.

A notable argument calls for adjusting the “high seas” requirement of international piracy and applying universal jurisdiction to any navigable water on earth, including territorial and internal waters, appealing to the notion that “civilization ends at the waterline.” The Kenyan Appellate Court, Judge David Maraga notes that “[e]very state has interest of bringing to justice perpetrators of International Crimes including piracy, genocide, apartheid and human trafficking.”¹⁰⁸ These actions relate to a contemporary topic of international law concerning international “crimes against humanity.” In the Pinochet case involving torture and international law, Lord Millett notes crimes that demand universal jurisdiction are “so serious and on such a scale that they can justly be regarded as an attack on the international legal order.”¹⁰⁹ The sovereignty of a state therefore may be obliged to administer criminal justice upon an individual. These universal crimes “cannot be considered purely the internal matters of sovereign states.”¹¹⁰ Under a similar argument the International Criminal Court has developed jurisdiction to try such offenses in recent years but does not currently handle cases of piracy. Article 17 of the Rome Statute grants jurisdiction to the ICC for cases in which “the State is unwilling or unable

¹⁰⁷ Ibid.

¹⁰⁸ Zeldin, Wendy. "Kenya: Appellate Court Rules Kenyan Courts Do Have Jurisdiction over Offenses Committed on High Seas." Library of Congress: Global Legal Monitor. October 25, 2012. Accessed April 15, 2018. <http://www.loc.gov/law/foreign-news/article/>.

¹⁰⁹ Birdsall, Andrea. *The international politics of judicial intervention: creating a more just order*, Routledge, London (2009) pg 69

¹¹⁰ Ibid.

genuinely to carry out the investigation or prosecution.”¹¹¹ Very similar language has been used to criticize the response to piracy by regional authorities in the GoG. The elimination of the “high seas” requirement would expand the reach of international jurisdiction under this argument.

Article 100 of UNCLOS mandates that all states “cooperate to the fullest possible extent in the repression of piracy,”¹¹² but there are several issues with this obligation. This duty applies to the current definition of piracy which is limited to activity on the “high seas.” Article 17, however, affirms the right of foreign vessels to innocent passage through the territorial waters of a coastal state.¹¹³ An argument can be made that coastal states should have a legal obligation or duty under international law to protect the “freedom of innocent passage” from infringement since international jurisdiction is limited in these regions. Yet even if article 100 was adjusted to all navigable waters, however, issues arise regarding the enforcement, accountability and definition of an obligation on an individual state to act “to the fullest possible extent.”

Elimination of the “high seas” requirement is controversial and unlikely. The original guideline for delineation of territorial waters was a 3-nautical mile belt based on the “cannon shot” rule. The length of one cannon shot determined the portion, or breadth, of an ocean that a sovereign state could defend from shore.¹¹⁴ This guideline was later expanded to a limit of 12-nautical miles and codified in future multilateral treaties such as UNCLOS. With the introduction of modern technology allowing for greater surveillance and enforcement, arguments are made that the delineation boundaries of state territorial waters should actually be expanded, not

¹¹¹ UN General Assembly, *Rome Statute of the International Criminal Court*, A/CONF.183/9, 17 July 1998

¹¹² UN General Assembly, *Convention on the Law of the Sea*, pg 60.

¹¹³ *Ibid.*, 30.

¹¹⁴ Heller-Roazen, *The Enemy*, pg 125

rescinded. The expansion of universal jurisdiction regarding piracy thus contradicts this call for increasing the boundaries of territorial waters and exposes the discrepancy in the capabilities of nations to properly regulate their waters. The struggle between foreign intervention and national sovereignty demonstrates why interested nations are currently taking an indirect “capacity-building” approach to bolster maritime security.

Perhaps an outcome for the expansion of universal jurisdiction may be to adjust the “high seas” requirement of the piracy definition while keeping current restrictions on the physical law enforcement capacity (i.e. exclude the right of seizure) of foreign states within delineated territorial waters. This system would assist weak states only with issues involving criminal justice. West African states with ineffective legal systems could “refer” suspects to international or mixed tribunals designed to prosecute pirates under the standards of international maritime law. The ICC is an example of an international court that works on a referral basis, accepting cases when “a state is unwilling or unable to carry out the investigation or prosecution.”¹¹⁵ Additionally, extradition treaties transferring suspects to domestic courts of foreign nations, following the example set by Kenya in Somali piracy, would assist West African nations in taking effective legal action.

¹¹⁵ UN General Assembly, *Rome Statute*, pgs 12-23.

Conclusion

“Are there, in this world, any parties, any forces, sensible, responsible and influential enough to radically change the situation in the Gulf of Guinea?”

- Mikhail Voytenko, Maritime Security Analysis, **February 2, 2018**

The evolution of international maritime law has led to the state-sponsored protection of neutral shipping and innocent passage at sea. Codification provides clarity for states regarding their duties and rights as members of the international regime. Piracy law was created to deter crime and protect the infringement of innocent passage. The law developed uniquely to address the common use of the maritime region and its nature as an uninhabitable space. Since ancient times, piracy has been deemed to be a crime that challenged political and economic organizations and therefore affected all of humanity. Pirates were seen as international criminals acting “against the law of nations” and “community of human beings.”¹¹⁶ International lawmakers developed the principle of universal jurisdiction, allowing governments to enforce anti-piracy in international waters.

The delineation provisions of UNCLOS have created a struggle between preserving national sovereignty and affirming international jurisdiction. The current situation in the Gulf of Guinea exemplifies this struggle as limitations of international law have contributed to the creation of a sanctuary for piracy. Despite weak domestic authority in Somalia, the international community was able to intervene and undermine pirate safe havens partly because international law was adjusted to address the local situation. In West Africa, however, piracy has persevered, and is now increasing and becoming more problematic. The weakness and inability of domestic authorities to manage internal and territorial waters combined with the inability of the international community to intervene lawfully have hampered the suppression of piracy in the Gulf of Guinea.

The sanctuary or “safe haven” predicament in international security demonstrates that weak authority allows for piracy to occur when incentivized by land-based push factors. In the

¹¹⁶ Heller-Roazen, *The Enemy*, pg 123-124

GoG, states with weak authority are unable and unwilling to capture pirates and hold them accountable. A lack of resources, infrastructure, surveillance technology, legislative/judicial incapacity, volatile politics, and corruption account for this incapacity. The stubborn existence of privateering in the sixteenth and seventeenth centuries, despite animosity towards piracy by political authorities, demonstrates that sanctuaries for piracy can also derive from ambiguity in international maritime law itself. The scenario also demonstrates the imperfections of international law in general and the constant need for evolution and adaptation. The Gulf of Guinea is a contemporary example of a sustained pirate sanctuary.

Somali piracy responses have taught us that domestic and international law must rely on each other for anti-piracy law to be effective in court. UNCLOS definitions of piracy have proven to be the legal backbone for the prosecution of international pirates. International codes, however, are theoretical and insufficient, unless applied to domestic legislation and courtrooms. Domestic systems have the primary role and responsibility of administering justice in cases of international piracy. Kenya and other East African states effectively adopted international standards for anti-piracy law and took on this role while the Somali government was absent. West African nations, conversely, have been criticized for insufficient anti-piracy law and weak court systems. A legislative requirement upon States that ratify UNCLOS would address this issue by forcing international piracy standards into domestic law. Yet even the United States, which has not ratified the treaty itself, has applied UNCLOS anti-piracy provisions to domestic courts by recognizing it as customary international law. Therefore, West African states could also take greater initiative in creating domestic legal frameworks to ensure maritime security.

On February 1st, Panama-flagged tanker *Marine Express* was hijacked by pirates while at anchor off the coast of Benin. The very next day, in an emotional monologue, maritime security

analyst and blogger Mikhail Voytenko demanded: “Are there, in this world, any parties, any forces, sensible, responsible and influential enough to radically change the situation in the Gulf of Guinea?”¹¹⁷ Piracy remains a menace and concern for many reasons. It affects commerce and bears costs upon international markets. Inherent violence and kidnapping methods threaten members of the seafaring community. Despite the immediate need to restore order and authority, we must also address the root causes of piracy. After all, modern piracy is a crime perpetrated by desperate, underprivileged members of society responding to poor living conditions and lack of land-based opportunity. Even Admiral James Stavridis, a self-proclaimed “pirate hunter,” recognizes that combating piracy requires “additional work ashore by the international community” addressing poverty, inequality and other conditions “that lead young men to take up a dangerous and chaotic lifestyle.”¹¹⁸

¹¹⁷ Mikhail, Voytenko. "Another Tanker Hijack, a New Twist in GoG Piracy?" *Maritime Bulletin*. February 02, 2018. Accessed April 15, 2018.

¹¹⁸ Stavridis, *Sea Power*, pg 279.

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