

LAWLESSNESS IN A FAILED STATE: THE CASE FOR ERADICATING PIRACY IN SOMALIA

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I. Introduction: The Threat of Piracy in Perspective

On December 16, 2008, the UN Security Council unanimously passed Resolution 1851 authorizing states to mount land-based operations in Somalia against pirate strongholds.¹ This reflects the deep concern of all United Nations members with respect to the unacceptable level of violence at sea perpetrated by Somali pirates. As noted by then-Secretary Condoleezza Rice in her statement in support of the Resolution before the Council's vote, "[B]ecause there has been no existing mechanism for states to coordinate their actions, the result has been less than the sum of its parts. The United States envisioned a contact group serving as a mechanism to share intelligence, coordinate activities and reach out to partners; and that it could work quickly on that initiative. Also limiting was the impunity; piracy currently paid, and pirates paid little for their criminality."²

The effort to combat piracy, not only off the coast of Somalia, but in other areas of the Indian Ocean, the Gulf of Aden, the Gulf of Oman, the Arabian Sea, and the Red Sea, has been the subject of great U.S. concern for years, although accentuated in recent months. In November 2008, the Saudi supertanker *Sirius Star* with \$100 million worth of crude aboard, was seized by Somali pirates and held for more than two months until January 9, 2009, when a three million dollar ransom was paid.³ Somali pirates held a Ukrainian cargo ship, the *MV Faina*, seized in late September 2008 with 33

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¹ UNSC Res. 1851 (2008).

² UN Doc. 9541, 16 Dec. 2008, at 10.

³ See *Pirate Washes Ashore with Cash*, at <http://news.bbc.co.uk/go/pr//fr/-/2/hi/africa/7824353.stm> of 12 January 2009.

tanks and other weaponry aboard, for a similar period until ransom was paid.⁴ These incidents are not unique. In 2008 alone, there were more than 100 reported pirate attacks in the busy shipping lanes off eastern and southern Somalia.⁵

II. The Legal Dimension for Combating Piracy

There is no question that the increase in acts of piracy emanating from Somali territory over the past year is a reflection of the near state of anarchy plaguing that nation. Nevertheless, nearly all member states, in passing Security Council Resolution 1851, underscored that actions to combat this dangerous phenomenon must conform to international law standards, including the Law of the Sea Convention.⁶

The standards for addressing the international crime of piracy, and the available enforcement mechanisms, are not in dispute. Piracy, at its core, encompasses “illegal acts of violence, detention, or depredation committed for private ends by the crew or passengers of a private ship or aircraft in or over international waters against another ship or aircraft or persons or property on board. (Depredation is the act of plundering, robbing or pillaging.)”⁷ The 1982 Law of the Sea Convention would add “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,” and “any acts of inciting or intentionally facilitating [such acts].”⁸

In international law, piracy is a crime that can be committed only on or over international waters, including the high seas, exclusive economic zone, in international airspace and in other places beyond the territorial jurisdiction of any nation.⁹ The same acts committed within the internal

⁴ *Id.*

⁵ *Id.*

⁶ See SC Doc. 9541, *supra* note 2, at 2-3.

⁷ Sec. 3.5.2, ANNOTATED SUPPLEMENT TO THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, 222-223 (1999).

⁸ Sec. 101, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, *opened for signature* 10 Dec. 1982, 21 I.L.M. 1261 (hereinafter LOS Convention). Art. 15 of the CONVENTION ON THE HIGH SEAS (hereinafter High Seas Convention), defines piracy in essentially identical terms. See 13 U.S.T. 2312, 450 U.N.T.S. 92, Geneva, 29 April 1958.

⁹ Sec. 3.5.2, *supra* note 7.

waters, territorial sea or national airspace of a country are within that nation's domestic jurisdiction.¹⁰

The U.S. law addressing the international crime of piracy emanates from the U.S. Constitution, which provides: "The Congress shall have Power . . . to define and punish piracies and felonies committed on the high seas, and offenses against the Law of Nations."¹¹ Congressional exercise of this power is set out in Titles 18 and 33 of the United States Code.¹² The U.S. law makes criminal the international offense in section 1651 of Title 18, where it states: "Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterward brought into or found in the United States, shall be imprisoned for life."¹³

U.S. statutes further authorize the President to deploy "public armed vessels" to protect U.S. merchant ships from piracy and to instruct the commanders of such vessels to seize any pirate ship that has attempted or committed an act of depredation or piracy against any foreign or U.S. flag vessel in international waters.¹⁴ These sections also authorize issuance of instructions to naval commanders to send into any U.S. port any vessel which is armed or the crew of which is armed, and which shall have "attempted or committed any piratical aggression, search, restraint, depredation, or seizure, upon any vessel," U.S. or foreign flag, or upon U.S. citizens; and to retake any U.S. or foreign vessel or U.S. citizens unlawfully captured on the high seas.¹⁵

While U.S. law makes criminal those acts proscribed by international law as piracy, other provisions of U.S. municipal law describe related conduct. For example, federal statutes make criminal arming or serving on privateers,¹⁶ assault by a seaman on a captain so as to prevent him from

¹⁰ Modern piracy is addressed by Petrie, *Pirates and Naval Officers*, NAV. WAR COLL. REV., May-June 1982, at 15. See also Ellen, *Contemporary Piracy*, 21 CAL. WEST. INT'L L. J. 123 (1990).

¹¹ Art. I, sect. 8, U.S. CONSTITUTION

¹² See 18 U.S. CODE 1651-1661 (1996) (piracy), 33 U.S. CODE 381-384 (1996) (regulations for the suppression of piracy), and 18 U.S. CODE 1654 (1996) (privateering).

¹³ 18 U.S.C. 1651 (1996).

¹⁴ 33 U.S.C. 381-384 (1996).

¹⁵ *Id.*

¹⁶ 18 U.S.C. 1654 (1996).

defending his ship or cargo,¹⁷ unlawfully departing with a vessel within the admiralty jurisdiction,¹⁸ corruption of seamen to unlawfully depart with a ship,¹⁹ receipt of pirate property,²⁰ and robbery ashore in the course of a pirate cruise.²¹

Under provisions of the High Seas Convention²² and the Law of the Sea Convention,²³ a pirate vessel or aircraft encountered in or over international waters may be seized and detained only by a nation's warships, military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service.²⁴ U.S. warships seizing pirate vessels or aircraft are guided by U.S. Navy Regulations and the fleet commanders basic operational orders.²⁵ Under this guidance, U.S. authorities may also arrange with another nation to accept and try the pirates and dispose of the pirate vessel or aircraft, since every nation has jurisdiction under international law over acts of piracy.²⁶

III. The United Nations' Effort to Stem Somali Piracy

The United Nations Security Council has been concerned with the disintegration of Somali government control over its territory since the late 1980's. It has also addressed piracy arising from that state in Council resolutions since 1992.²⁷ This past year, 2008, the Security Council has gotten serious about addressing the piracy issue *directly* and not just in the context of the crisis inland in Somalia. In May 2008, in Resolution 1814, for example, it called upon member states "to take action to protect shipping

¹⁷ 18 U.S.C. 1655 (1996).

¹⁸ 18 U.S.C. 1656 (1996).

¹⁹ 18 U.S.C. 1657 (1996).

²⁰ 18 U.S.C. 1660 (1996).

²¹ 18 U.S.C. 1661 (1996).

²² Art. 21, High Seas Convention, *supra* note 8.

²³ Art. 107, LOS Convention, *supra* note 8.

²⁴ *Id.*

²⁵ See Sec. 3.5.3.1, ANNOTATED SUPPLEMENT, *supra* note 7.

²⁶ Art. 19, High Seas Convention, *supra* note 8; Art 105, LOS Convention, *id.*

²⁷ See e.g., UNSC Res. 733 (1992); UNSC Res. 1356 (2001); UNSC Res. 1425 (2002); UNSC Res. 1725 (2006); UNSC Res. 1744 (2007); UNSC Res. 1772 (2007); UNSC Res. 1801 (2008); UNSC Res. 1811 (2008), and the statements of the Security Council President, in particular those of 13 July 2006 (S/PRST/2006/31), 22 December 2006 (S/PRST/2006/59), 30 April 2007 (S/PRST/2007/13), 14 June 2007 (/PRST/2007/19), and 19 December 2007 (S/PRST/2007/49).

involved with . . . United Nations authorized activities . . .”²⁸ This was followed by Resolution 1816 in June 2008, which called upon all nations “to combat piracy and armed robbery at sea off the coast of Somalia.”²⁹

On October 7, 2008, in Resolution 1838, the Security Council ratcheted up its direction to states with maritime interests. What made this resolution significant was its specific call for “States interested in the security of maritime activities to take part actively in the fight . . . , in particular by deploying naval vessels and military aircraft. . .”³⁰ This resolution further advised all states to issue guidance to their flag shipping on appropriate precautionary measures to protect themselves from attack or actions to take if under attack or threatened with attack when sailing in waters off the coast of Somalia.³¹ On December 2, 2008, after Somali pirates’ seized the Saudi super-tanker *Sirius Star*, the Security Council, in an unprecedented provision in Resolution 1846 under Chapter VII of the Charter (authorizing all necessary means), determined that for a period of 12 months, warships of member nations were permitted to enter Somali territorial waters for the purpose of repressing acts of piracy consistent with such action permitted on the high seas.³²

The December 2, 2008, Resolution, when paired with the December 16, 2008 UN Security Council Resolution (1851), weaves a tight pattern around piracy activities in the waters of the Indian Ocean and Gulf of Aden off the coast of Somalia. In Resolution 1851, moreover, the Security Council went one step beyond authorizing member nations to enter territorial waters, when it extended that right to the Somali landmass for the purpose of suppressing piracy. The Resolution provides that states and regional organizations can “undertake all necessary measures ‘appropriate in Somalia’, to interdict those using Somali territory to plan, facilitate or undertake such acts.”³³

²⁸ Para. 11, UNSC Res. 1814 (2008)

²⁹ Para 7, UNSC Res. 1816 (2008).

³⁰ Para 2, UNSC Res. 1838 (2008).

³¹ Para 6, *id.* See also, IMO Res. A-1002 (25) which requested that member states of the International Maritime Organization issue similar guidance to all vessels flying their national ensigns.

³² Para 10a, UNSC Res. 1846 (2008).

³³ Para 6, UNSC Res. 1851 (2008).

Having dealt with the jurisdictional issues related to operations, the Council next addressed the criminal jurisdiction concerns affecting all nations who happened to take individuals engaged in piracy into custody. In Resolution 1851, states and regional organizations were asked to conclude special agreements with countries willing to take custody of pirates and who were willing to embark law enforcement officials³⁴ on-board from the latter countries to facilitate the investigation and prosecution of persons detained.³⁵ Following passage of Resolution 1851 on December 16, 2008, U.S. and allied leaders who are represented in the Combined Maritime Force agreed to enhance the entire ongoing counter-piracy effort in the USCENTCOM area of responsibility.

IV. Congressional Support for Anti-Piracy Initiatives

On February 4, 2009, the House Transportation and Infrastructure Committee in the House held a lengthy hearing on *International Piracy On the High Seas* in their Subcommittee on the Coast Guard and Maritime Transportation. The hearing, the first held by the Subcommittee on this subject, was precipitated by a Congressional Research Service (CRS) report dated December 3, 2008, that focused attention on economic and humanitarian threats posed by pirates to the global seafaring community and the smooth flow of international trade.³⁶ The specific focus of that CRS report was that, given the marked increase of pirate attacks, the cost of transporting cargo in international waters could rise dramatically because of the sharp increase in ocean marine insurance for ships transiting the Gulf of Aden. The CRS report found that commercial shippers could require a special war risk insurance premium costing an additional tens of thousands of dollars per day, and that these additional costs could adversely impact international trade during the current global economic downturn..³⁷

The Subcommittee hearing on February 4 provided a comprehensive examination of piracy, to include its prevalence, its current and potential impact on shipping, and the nature and effectiveness of the international efforts being implemented to combat this threat. The hearing established that the international community has mounted a multi-faceted response in

³⁴ Known as “shipriders.”

³⁵ Para. 3, UNSC Res. 1851.

³⁶ Cong. Res. Rep. R40081, *Ocean Piracy and Its Impact on Insurance*, Dec. 3, 2008.

³⁷ *Id.*

the Gulf of Aden-Indian Ocean Region, and that the United States is taking an active role in this effort through its leadership in Task Force 151. However, as Subcommittee Chair Elijah Cummings stated in his opening remarks, “given the size of the ocean area that international forces must patrol and their limited manpower, international naval powers are unlikely to be able to protect every ship passing the Horn of Africa from pirates.”³⁸

The Hearing identified recent actions by the U.S. Government to respond to this threat, including the national strategy document, *Countering Piracy off the Horn of Africa: Partnership and Action Plan*³⁹ (hereinafter National Strategy), issued by the National Security Council with the President’s approval in December 2008. The National Strategy recognizes that lasting solutions to the piracy problem require significant improvements in governance, rule of law, security and economic development in Somalia.⁴⁰ The Strategy is realistic, however, in recognizing that, in light of the current threat there are steps that can be taken in the near term to deter, counter, and reduce the risk of attacks by Somali pirates. The Strategy calls for preventative and precautionary measures that include: (1) establishing a senior level Contact Group of nations that have the political will, operational capability, and resources to combat piracy off the Horn of Africa; (2) strengthening and encouraging the use of the Maritime Security Patrol Area (MSPA) in the Gulf of Aden; (3) updating Ship’s Security Assessment and Security Plans to harden commercial shipping against pirate attacks; and (4) establishing strategic communications plans to emphasize the destructive effects of piracy on trade, human and maritime security, and to encourage the rule of law.⁴¹

The second prong of the National Strategy addressed at the Hearing on February 4 looks to interrupt and terminate acts of piracy through effective ant-piracy operations. These operations are designed to interdict vessels used by pirates, and where possible to intervene in acts of piracy. The National Strategy also calls for identifying, disrupting and eliminating

³⁸ Statement of the Honorable Elijah Cummings, Subcommittee on the Coast Guard and Maritime Transportation, Hearing on “International Piracy on the High Seas”, Feb. 4, 2009, at 1.

³⁹ National Security Council, *Countering Piracy off the Horn of Africa: Partnership and Action Plan*, The White House, Wash. D.C., December 2008 (hereinafter National Strategy).

⁴⁰ *Id.*, at 6.

⁴¹ *Id.*, at 8.

pirate bases in Somalia, and, to the extent possible, impacting pirate revenue.⁴²

The final prong of the National Strategy addressed at the February 4 hearing on *International Piracy on the High Seas* relates to the requirement to hold pirates accountable for their crimes. All participants agreed during the hearing with the statement in the National Strategy that piracy is flourishing because it is highly profitable and nearly consequence-free.⁴³ For this reason, developing the capacity to capture and successfully prosecute these criminals is critical to combating piracy. To that end, the National Strategy supports the development of agreements and arrangements with states in Africa and around the world that will allow pirates to be captured, detained, and prosecuted.⁴⁴

V. The Operational Response by the Multi-National Combined Maritime Force

The Combined Maritime Force (CMF), comprised of ships and assets from more than 20 nations and commanded by a U.S. flag officer from USNAVCENT, has its headquarters in Manama, Bahrain. On January 8, 2009, the CMF formally established Combined Task Force (CTF) 151 for counter-piracy operations.⁴⁵ Previously, in August 2008, the CMF created the Maritime Security Patrol Area in the Gulf of Aden to support international efforts to combat piracy. At that time, the only organization within the multi-national Combined Maritime Force tasked with counter-piracy operations was Combined Task Force (CTF) 150, which had been established at the onset of Operation Enduring Freedom in Afghanistan.⁴⁶

The mission of CTF 150, however, was focused on the deterrence of all destabilizing activities at sea in the region, with a focus on drug smuggling and weapons trafficking. Piracy, although destabilizing, was not a major focus. Moreover, several of the navies of the 20 nations whose assets participated did not have the authority to conduct counter piracy missions. It was for this reason that CTF 151, with its sole focus on piracy,

⁴² *Id.*, at 10.

⁴³ *Id.* at 12.

⁴⁴ *Id.*

⁴⁵ VAdm. Wm. Gartney, *New Counter-Piracy Task Force Established*, www.navy.mil/local/cusnc, 8 Jan. 2009,

⁴⁶ *Id.*

was established. This would allow CTF 150 assets and the nations supporting this mission to remain focused on drugs and weapons trafficking, while at the same time providing tailored training and operations for the counter-piracy requirement in CTF 151.⁴⁷

The unclassified Execute Order (EXORD) for Combined Task Force (CTF) 151 was published by the Commander, Combined Maritime Force on 30 December 2008.⁴⁸ The mission of CTF 151 is clear:

3. (U) CTF 151 is to conduct counter piracy operations in the CMF battlespace under a mission-based mandate to actively deter, disrupt and suppress piracy in order to protect global maritime commerce, enhance maritime security and secure freedom of navigation for the benefit of all nations.

The EXORD for CTF 151 mirrors the prior authorizations described above provided in UN Security Council Resolutions. It provides that ships of nations cooperating in the counter-piracy operations may board and search vessels where there are reasonable grounds for suspecting the vessel is engaged in piracy; may seize and dispose of these vessels, arms and equipment used in the commission of piratical acts, and detain those suspected of engaging in piracy with a view to prosecution by competent law enforcement authorities.⁴⁹ While the EXORD authorizes entry into the Somali territorial seas by participating warships,⁵⁰ it nowhere provides CTF personnel the authority to enter the land territory of Somalia as provided in UN Security Council Resolution 1851 on December 16, 2008.

Despite this limitation, CTF 151 has deployed highly trained U.S. Navy Visit, Board, Search, and Seizure (VBSS) Teams as well as the Coast Guard's elite Law Enforcement Detachment (LEDET) 405 aboard the command ship USS San Antonio.⁵¹ The role of LEDET 405 is to supplement and train the VBSS Teams in various Maritime Interdiction

⁴⁷ *Id.*

⁴⁸ (U) CFMCC CENT P 301133Z Dec. 08 (Subject: CTF 151 EXORD) (hereinafter EXORD).

⁴⁹ Para. 2.D, EXORD.

⁵⁰ Para. 2.E.1, EXORD.

⁵¹ See testimony of RAdm. Wm. Baumgartner, USCG, *Hearing on International Piracy on the High Seas*, before the House Subcommittee on Coast Guard and Maritime Transportation, Feb. 4, 2009, at 6.

Operations mission areas, including maritime law, boarding policies and procedures, evidence collection and preparation, and tactical procedures.⁵²

VI. Observations and Conclusions

The rapid escalation of armed attacks off the Horn of Africa in the Gulf of Aden and the Indian Ocean has prompted an unprecedented counter-piracy response within the National Security Council, the U.S. Congress, the United Nations and within the multinational Combined Maritime Force operating out of Manama, Bahrain. The December 2008 national strategy document *Countering Piracy off the Horn of Africa: Partnership and Action Plan*, issued by the National Security Council, while recognizing that lasting solutions to the piracy problem require significant improvements in governance, rule of law, security and economic development in Somalia, is realistic in recognizing that there are steps that can be taken in the near term to deter, counter, and reduce the risk of attacks by Somali pirates.

The United Nations has similarly begun to seriously examine the dangerous conditions in the Gulf of Aden and the Indian Ocean off Somalia's coast. In December 2008, the Security Council unanimously passed two sweeping resolutions that authorized the warships of the multinational Combined Maritime Force to both enter the territorial waters of Somalia and the land territory of that state when necessary to destroy pirate strongholds. These actions and this authority are unprecedented and reflect the United Nations' deep commitment to deal effectively with this threat to international peace and security.

The establishment of Combined Task Force 151 in January 2009 reflects the United States' and allied nations commitment to provide a choke hold around the actions of pirates in the waters of the Indian Ocean and Gulf of Aden off the coast of Somalia. In the Navy's commitment of its VBSS Teams and the Coast Guards' assignment of its LEDET Unit, moreover, the U.S. military has committed its best.

There is no question that piracy will continue in the highly vulnerable shipping lanes of the Gulf of Aden as long as the rewards outweigh the risk. With the establishment of CTF 151, that equation may be changing.

⁵² *Id.*