

Dangerous Waters:
*The International Community's Response to the Resurgence of
Maritime Piracy*

Georgios Drossinos

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Andrew Glencross
Supervisor of Thesis

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ACRONYMS

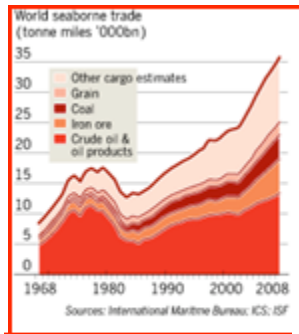
ASSeT:	Accompanying Sea Security Teams
CTF:	Combined Task Force
EU:	European Union
EU NAVCO:	EU Naval Coordination Cell
EU NAVFOR:	EU Naval Force ATALANTA
IMB:	International Maritime Bureau
ICC:	International Chamber of Commerce
ICC:	International Criminal Court
ICJ:	International Court of Justice
ICTR:	International Criminal Tribunal for Rwanda
ICTY:	International Criminal Tribunal for the former Yugoslavia
IMF:	International Monetary Fund
IMO:	International Maritime Organization
Intercargo:	International Association of Dry Cargo Shipowners
InterManager:	International Ship Manager's Association
Intertanko:	International Association of Independent Tanker Owners
ITLOS:	International Tribunal for the Law of the Sea
MSC:	Maritime Safety Committee
MSCHOA:	Maritime Security Centre – Horn of Africa
MSPA:	Maritime Security Patrol Area
MV:	Merchant Vessel
ReCAAP:	Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia
SUA Convention:	Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation
UKMTO:	UK Maritime Trade Organization
UNCLOS:	United Nations Convention on the Law of the Sea
UTC:	Transit Corridor
WTO:	World Trade Organization

INTRODUCTION

The world is currently focused on the global recession. In particular, most of the attention has gone to the financial industry. This is justifiable as the world has found itself in an economic predicament which shows no signs of abating. However, it is important not to lose sight of another issue: maritime piracy and in particular its resurgence in the Gulf of Aden. Although this may not be obvious, this maritime problem has the potential of severely damaging international trade, something which is certainly undesirable, especially in this economic environment.

International Trade Threat

The phenomenon of globalization has resulted in closer interconnectedness



among nation states. At sea, much of this integration has occurred through international trade. As the chart shows world seaborne trade has dramatically increased since the 1980s, which marked the beginning of the modern period of globalization. Alarmingly, in the period of January-September 2008, 84% of maritime attacks were directed at Merchant Vessels (MVs).¹ These two facts are

clear indicators that piracy poses a significant threat to international trade and specifically the international shipping industry

The Gulf of Aden is a vital node in the complex network that fuels international trade as it links the Mediterranean Sea, the Suez Canal and the Red Sea to the Indian

¹ ICC International Maritime Bureau (IMB), *Piracy and Armed Robbery Against Ships: Report for the period 1 January – 30 September 2008* (October 2008): 16.

Ocean. Unfortunately, this region is at great risk - a recent Chatham House report said that piracy off the coast of Somalia “threatens to drastically disrupt international trade.”² The numbers justify this austere predicament. Each year 16,000 ships pass through the Gulf of Aden to access the Suez Canal, carrying oil from the Middle East and goods from Asia to Europe and North America.³ Specifically, almost 30% of the world’s oil transits through this maritime route.⁴

Further damage will be caused by the increase in insurance premiums for ships that pass through the Gulf of Aden. If this increase becomes prohibitive and/or the danger too great, ships may avoid the Gulf of Aden and take a longer route to the West by going around the Cape of Good Hope. This is indeed a real possibility – a memo by the major international shipping associations including BIMCO, the International Association of Independent Tanker Owners (INTERTANKO) and the International Association of Dry Cargo Shipowners (INTERCARGO) warned that the “situation is now so serious that major shipping companies...transiting the Gulf of Aden and Suez Canal... will decide to redirect their ships via the Cape of Good Hope.”⁵ This would entail extra weeks of travel and fuel consumption resulting in an increase of the price of the transported goods, not to mention the increase in greenhouse gas emissions. At a time when many of the world’s economies are in severe recessions, the implications of this possibility are very serious.

Looking beyond the abysmal global economic indicators, it is also morally imperative to consider the humanitarian effects of Somali piracy.

² Roger Middleton, “Piracy in Somalia: Threatening global trade, feeding local wars” *Chatham House briefing paper* (October 2008): 3.

³ Middleton, “Piracy,” 6.

⁴ “NATO warships ready to tackle piracy off Somalia,” *AFP*, October 24, 2008, <http://afp.google.com/article/ALEqM5iQ-c-Pg2FWJhMG9ydDt1LWFVIOkg> (accessed Oct 24, 2008).

⁵ International Transport Workers’ Federation, *Joint statement: Response to Somali pirates inadequate says international shipping industry*, September 29, 2008, <http://www.itfglobal.org/press-area/index.cfm/pressdetail/2624> (accessed October 1, 2008).

Humanitarian Threat

Somalia is largely considered to be the world's greatest current humanitarian disaster, worse than Darfur and Northeast Congo. The country has not had a functioning government since the overthrow of the socialist dictator Mohamed Siad Barre in 1991. The Transitional Federal Government faces violent resistance from various Islamic extremist movements such as the al-Shabaab militia – it has basically lost control over most of the country.⁶ The situation within the country is so dire that the UN does not even have a Human Development Index for it (the only other country in Africa without an index is Liberia). Also, Somalia's life expectancy of 47.1 years is among the world's worst. A separate report by the World Bank ranks countries according to several governance indicators. Needless to say, Somalia's 2007 rankings are frighteningly poor – it ranks in the 0th percentile for political stability, government effectiveness, rule of law and control of corruption.⁷

The problem of piracy is directly affecting the country's humanitarian conditions. According to the UN Monitor Group on Somalia, the increase in piracy attacks has affected the delivery of humanitarian aid as “ship owners are increasingly unwilling to venture into Somali waters.”⁸ This is an extremely pressing matter as Somalia is dependent on food aid – according to the World Food Program it required at least

⁶ Central Intelligence Agency (CIA): The World FactBook. “Somalia,” <https://www.cia.gov/library/publications/the-world-factbook/geos/so.html> (accessed December 9, 2008).

⁷ D. Kaufmann, A. Kraay, and M. Mastruzzi. World Bank. “Governance Matters VII: Worldwide Governance Indicators, 1996-2007,” <http://info.worldbank.org/governance/wgi/worldmap.asp#> (accessed December 9, 2008).

⁸ United Nations (UN), *UN Monitor Group on Somalia* (S/2007/436), July 18, 2007: 29, <http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=S/2007/436&Lang=E> (accessed November 12, 2008).

185,000 tons of it in 2008 to stave off a devastating famine that could affect millions of Somalis.⁹

More worryingly, Jane's Terrorism and Security Monitor warns that pirates are working with the Islamists that are feeding Somalia's crisis. The London-based newsletter says that links can be traced to 2007, after Ethiopian forces invaded Somalia. Specifically, Islamic hardliners have used pirates to smuggle arms and foreign fighters into the country.¹⁰ Another humanitarian implication is the economic instability that piracy creates. A resident in Somalia quoted in an article by the BBC says that piracy makes life more expensive for ordinary people because they "pump huge amounts of US dollars" into the local economy causing fluctuations in the exchange rate.¹¹

Overall, Somali piracy is a problem that has regional and global implications and therefore needs to be dealt with swiftly and decisively. Specifically, the aim of this thesis is to analyze the international community's response to the resurgence of Somali piracy in an effort to make a theoretical and policy contribution. With regards to theory, the analysis has shown that international regime theory, not realism, is most relevant when combating this maritime problem. Despite its flaws, the current international response has been marked by an impressive and comprehensive web of efforts, all coordinated by the United Nations (UN).

The response can be broken down into two regimes: the *Protection Regime*, which is related to protecting MVs and the *Apprehension and Prosecution Regime*, which

⁹ Middleton, "Piracy," 9.

¹⁰ Martin Plaut, "Pirates 'working with Islamists,'" *BBC News*, November 19, 2008, http://news.bbc.co.uk/2/hi/in_depth/7737375.stm (accessed November 23, 2008).

¹¹ Robyn Hunter, "Somali pirates living the high life," *BBC News*, October 28, 2008, <http://news.bbc.co.uk/2/hi/africa/7650415.stm> (accessed November 17, 2008).

deals with the capture and judicial punishment of pirates. Essentially, international regime theory provides the tools to understand transnational conflicts involving stateless actors, in this case pirates. However, the analysis has also uncovered a flaw in the theory. While it helps to understand the *creation* of regimes, it does not explain how they are *maintained*. The stability of a regime is a fundamental attribute of any successful response to a transnational problem. Hopefully, this will further the paper's theoretical contribution by encouraging regime theorists to revise the theory. Nonetheless, this theory remains robust and more relevant than realism. Ultimately, the transnational nature of piracy is such that any realist-inspired solution would be limited and inefficient. With regards to policy, the paper also makes various contributions, especially with regards to the prosecution of pirates.

The thesis will arrive at its conclusion in a sequential manner. To begin, the Theoretical Framework will operationalize piracy and international law to help structure the research. Similarly, the Literature Review will help define the two theories in great depth to ensure that they are properly applied and assessed vis-à-vis this maritime problem. The Methodology will then provide ample justification as to why Somali piracy was chosen as the paper's only case study. Moreover, that section will provide a preliminary breakdown of the two regimes, as well as an analysis of sources used and potential challenges to the paper, in order to prepare the reader for the forthcoming analysis. In the two analytical sections each regime will be analyzed in great detail to understand the international response. Moreover, each theory will be tested alongside each regime to show why international regime theory is most relevant. The paper will also assess the strengths and weaknesses of each regime in an attempt to help policy

makers strengthen and prioritize their efforts when combating piracy. Finally, the Conclusion will frame the findings in a way that is applicable to other regions battling piracy and also non-maritime issues that involve stateless actors.

THEORETICAL FRAMEWORK

Defining Maritime Piracy and International Law

The resurgence of piracy off the coast of Somalia poses a direct threat to international maritime security and requires a solution. In order to better understand this problem it is necessary to define piracy. Unfortunately, doing so is no simple task. The UK's House of Commons Transport Committee in its June 2006 report on piracy observed that the "classification of violent maritime incidents can become a matter of dispute and confusion."¹²

The United Nations Convention on the Law of the Sea (UNCLOS) of 1982 attempts to reduce the confusion by defining piracy as "any illegal act of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship.... and directed on the high seas."¹³ In the convention there are also articles that define a pirate ship and outline rules of engagement. Essentially, the convention was a major step in codifying international law with regard to piracy.

Analysts observe that by using "private ends" the convention distinguishes between "terrorist acts (i.e. those politically motivated) from piratical acts (i.e. those criminally motivated), with the former falling out of the convention's scope."¹⁴ For the purposes of this thesis this definition is appropriate as acts of piracy are criminal acts.

¹² Martin N. Murphy, *Contemporary Piracy and Maritime Terrorism: The threat to international security* (New York, NY: Routledge, 2007), 12.

¹³ Oceans and Law of the Sea: Division for Ocean Affairs and the Law of the Sea, "United Nations Convention on the Law of the Sea," December 10, 1982, http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf (accessed October 21, 2008).

¹⁴ Michael Greenberg, Peter Chalk, Henry H. Willis, Ivan Khilko and David S. Ortiz, *Maritime and Liability: Risk and Liability* (Santa Monica, CA: RAND, 2006), 45.

Through a 45-minute interview with Somali pirates, a recent New York Times article concluded that piracy in Somalia is a “highly organized, lucrative, ransom-driven business.” One of the pirates stated he and others “only want money.”¹⁵ However, it is important to understand that, while not politically motivated, piracy is invariably linked to political conditions. In lawless and poverty-stricken Somalia, this connection is strikingly clear.

While identifying piratical acts as crimes is appropriate there are additional problems of operationalization. In its most basic form, a crime is “anything forbidden by law and hence [renders] the offender punishable.”¹⁶ The concept of ‘law’, specifically international law in the case of piracy, is also difficult to define. The Statute of the International Court of Justice (ICJ) identifies two sources of international law: international conventions or treaties that “[establish] rules expressly recognized by the contesting states”, and international customs, or customary international law.¹⁷

The legal problems of international relations lie specifically in the concept of customary international law, which is bound by “norms of obligations” and “jurisprudential assumptions.”¹⁸ There is a “tremendous amount of disagreement” among scholars and lawyers over the rules of customary international law.¹⁹ This dichotomy makes it clear that international conventions are best suited to deal with international issues.

¹⁵ Jeffrey Gettleman, “Somali Pirates Tell Their Side: They Want Only Money,” *New York Times*, October 1, 2008, <http://www.nytimes.com/2008/10/01/world/africa/01pirates.html> (accessed October 1, 2008).

¹⁶ Ralph De Sola, *Crime Dictionary* (New York, NY: Facts on File, Inc., 1982), 34.

¹⁷ International Court of Justice, “Statute of the International Court of Justice,” 1945, <http://www.icj-cij.org/court/index.php?p1=1&p2=1#International> (accessed October 20, 2008).

¹⁸ John H. Jackson, William J. Davey and Alan O. Sykes, Jr., *Legal Problems of International Economic Relations: Cases, Materials and Text*, 5th ed. (St. Paul, MN: Thomson/West, 2008), 176.

¹⁹ *Ibid.*, 182.

With regards to piracy, the legal challenges vis-à-vis the protection regime have been largely resolved by the UN. The United Nations Convention on the Law of the Sea (UNCLOS) has codified international law with regards to this maritime problem. Moreover, this legal framework has been exercised through various Security Council Resolutions. However, what remains to be solved is the legal landscape of the apprehension and prosecution regime. The current legal framework is fundamentally flawed and it has not helped in the fight against maritime piracy. In a report for the International Institute for Strategic Studies, Martin Murphy explains that one condition that enables piracy is “legal and jurisdictional weakness.”²⁰ It is for this reason that the thesis proposes an ad hoc tribunal. While not perfect, this tribunal will provide nation states with the legal authority to bring pirates to justice.

Ultimately, reaching agreements and coordinating action among states through conventions is still a formidable task. Ultimately, an understanding of the complexity of international law is vital to better appreciate the challenge of binding countries to agreements regarding transnational issues such as piracy. The legal landscape of piracy will be discussed in more detail in the analytical portion of this thesis.

²⁰ Murphy, *Contemporary Piracy and Maritime Terrorism*, 9.

LITERATURE REVIEW

As identified in the introduction, this thesis will analyze the international community's response to piracy through the lens of two key theories of international relations: realism and international regime theory. What follows is a review of the literature concerning the two theories and the guidelines that each theory would provide for combating piracy.

Realism

Realism is one of the fundamental theories of international relations. Although there exist several sub-categories, this thesis will consider the theory's underlying notions. Realism presupposes two conditions. First, international politics is driven by an exogenous element, which realists define as anarchy in the international system. This indicates that it uses a structural causal framework for analyzing international politics. Second, it sees sovereign states as the principal actors in the international system. Moreover, it views them in strictly hierarchical terms: entities with a monopoly on the legitimate use of violence. Based on these conditions the theory posits that states are mere rational unitary actors whose sole purpose is to ensure their national interest in an anarchic world.

Two of the foremost proponents of this theory are Kenneth Waltz and John Mearsheimer. Although they fall into two different realist sub-categories, they both argue that the anarchic structure of the international system puts states in a struggle for

survival.²¹ Waltz argues that, unlike domestic ones, international systems are “decentralized and anarchic” and believes that international politics is “politics in the absence of government.”²²

According to Mearsheimer, “great powers recognize that the best way to ensure their security is to achieve hegemony.”²³ In other words, an anarchic world necessitates a state to pursue power maximization vis-à-vis other states. Albeit more subtly, Waltz echoes this opinion: a state constantly worries that it will become dependent on another through cooperative endeavors.²⁴ Essentially, in an anarchic system self-help is the de facto course of action that states pursue. Waltz also criticizes international institutions because he does not believe non-state actors such as international organizations are influential enough to make a difference.²⁵ In other words, he, along with other realists, believes international organizations like the UN are controlled by nation states that have their own political agendas. This means that transnational organizations would not be able to speak and act in a non-partisan manner.

Realism provides a simple solution to the resurgence of piracy: nation states. Such a solution would focus on the international level. Realists believe that in an anarchic world nation states need to protect their own interests. This is no different on the high seas as there is no one in complete control outside of nations’ coastal jurisdictions, thus creating a condition of true anarchy. Therefore, realists would advocate for nation states

²¹ Sean M. Lynn-Jones, “International Relations theory” *International Affairs (Royal Institute of International Affairs 1944-)*, Vol. 78, No. 2 (April 2002): 365-366. <http://proxy.library.upenn.edu:2097/page/termsConfirm.jsp?redirectUri=/stable/pdfplus/3095687.pdf> (accessed October 20, 2008).

²² Kenneth Waltz, *Theory of International Politics* (Reading, MA: Addison-Wesley Publishing Company, 1979), 88.

²³ John J. Mearsheimer, *The Tragedy of Great Power Politics* (New York, NY: W.W. Norton & Company, Inc., 2001), 35.

²⁴ Waltz, *Theory of International Politics*, 106.

²⁵ *Ibid.*, 88.

to act independently and set up their own maritime security operations to protect their interests in the Gulf of Aden. This could take the form of sending warships to escort their own merchant ships. It is important to note that these actions would most likely be taken by states with the greatest interest in shipping, such as importers and exporters of oil. What this behavior also suggests is that states most concerned by issues of shipping would create an ad hoc coalition.

International Regime Theory

For those who consider realism excessively pessimistic, international regime theory may provide some comfort. The central question of the theory is as follows: “how is co-operation possible between states claiming sovereignty but competing for power and influence in a situation of anarchy?”²⁶ The answer is international regimes. Stephen Krasner offers a widely accepted definition of these regimes: “principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue-area.”²⁷ Robert Keohane goes a step further by saying that these principles, norms and rules are agreed upon by governments and take the form of institutions.²⁸ According to this view, this theory uses an institutional causal framework to analyze international relations. Specifically, it considers international institutions like the UN and EU as the “major sites of global governance.”²⁹ This explanation shows that there are definite similarities between regime theory and neoliberal institutionalism.

²⁶ Volker Rittberger, and Peter Mayer, eds., *Regime Theory and International Relations* (New York, NY: Oxford University Press Inc., 1993), 50.

²⁷ Stephen D. Krasner, ed., *International Regimes* (Ithaca: Cornell University Press, 1983), 1.

²⁸ Rittberger, and Mayer, *Regime Theory and International Relations*, 54.

²⁹ R.A.W. Rhodes, Sarah A. Binder, and Berta A. Rockman, eds., *The Oxford Handbook of Political Institutions* (New York, NY: Oxford University Press Inc., 2006), 612.

It is important to understand that regime theorists acknowledge the existence of anarchy, just like realists. However, they believe that regimes can reduce it. Specifically, a regime can help foster interstate collaboration and coordination in an anarchic world in several ways. First, the regime's rules and procedures provide predictability in state behavior. This is especially important in international politics, especially considering the saliency of the prisoner's dilemma. Second, it discourages free riding because no single state will be expected to provide a solution to a collective problem. Third, it provides a standardized road map for dealing with a specific issue.

However, there are obstacles to this theory. The biggest challenge for the success of regimes is the nebulosity of international law. Andrew Hurrell claims that regime theorists and international lawyers are closely linked. What he means is that a regime must provide its participants (i.e. nation states) a notion of being bound by a particular set of rules.³⁰ This assurance will provide the framework for collaboration and coordination among states. The problem, as explained in the Theoretical Framework, is that creating an international legal framework is incredibly complex because it is hard for nations to agree on an international convention. That is why the role of an institution like the UN is so important.

It is also worth noting that based on this close relationship between law, institutions and states, regime theorists would say that Waltz's criticism of international institutions is invalid. He claims that these institutions are largely ineffective because they cannot act independently of nation states and their actions are therefore constrained.³¹ Regime theorists would argue that a regime's success is in fact dependent

³⁰ Rittberger and Mayer. *Regime Theory and International Relations*, 55.

³¹ Waltz, *Theory of International Politics*, 88.

on the interdependency between an institution and a state. In other words, it is states, with the addition of laws, which create and maintain successful institutions – according to these theorists this interdependence will reduce anarchy and foster inter-state cooperation.

It is also important to understand when regimes come about. Similar to realists, regime theorists view states as rational and self-seeking. However, the behavior of states in solving global dilemmas is markedly different. Arthur A. Stein explains that states are “self-interested actors [who] rationally forgo independent decision making and construct regimes.”³² While Stein acknowledges the realist view of international politics and accepts that independent decision-making does occur, he says that there are situations in which all actors prefer joint decision-making. He refers to these situations as “dilemmas of common interests and dilemmas of common aversions.”³³ In these dilemmas, states either have a “common interest in *ensuring* a particular outcome” or a “common interest in *avoiding* a particular outcome.”³⁴ Ultimately, regimes help states to deal with these dilemmas. In the case of piracy, all states have the common interest in insuring that this illegal act is brought under greater control.

With regards to Somali piracy, this theory would argue that an international regime is needed to resolve the problem. Based on the above analysis, the regime would involve supranational organizations that would help coordinate state action. The organizations would provide a legal and operational framework for engaging and eliminating the rising problem of piracy attacks in the Gulf of Aden. However, regimes are not created overnight. Krasner explains that regime creation “occurs at times of

³² Krasner, *International Regimes*, 140.

³³ *Ibid.*, 120.

³⁴ *Ibid.*, 125.

fundamental discontinuity in the international system, such as the conclusions of major wars.”³⁵ Therefore, any ‘recommendation’ by regime theorists would have to take into consideration the degree of disruption to the international system that piracy has caused. This will help in addressing whether conditions are optimal for the emergence and functioning of a regime. Part of the analytical portion of this thesis will deal with this issue.

Challenges to the Theories

The challenge for realism is justifying the use of single nations to deal with issues that are transnational in nature, such as piracy. For international regime theorists, having a navy protect its own MVs is wasteful and inefficient. The idea of the ad hoc coalition also requires further elaboration. While this may sound like a valid substitute to a regime, such a coalition would be very unstable as there would be no central leadership and it would promote free riding, which could create multilateral disputes. Smaller nations, with smaller navies, could shrewdly decide to step aside and let bigger nations patrol. For example, even if the US was patrolling the South China Sea to protect its own vessels and successfully repelled piracy attacks, foreign vessels in the vicinity would also benefit.

However, regime theory is also not flawless. As mentioned previously, the success of a regime relies on legal framework supported by an institution. Realists claim that this dependence entails risk because if the institution does not act as impartial arbiter and enforcer, the result may be free riding. While some see institutions as mere creations of nation states, the risk of free riding is much more prevalent with realism since an

³⁵ Krasner, *International Regimes*, 357.

arbiter does not even exist. Furthermore, institutions like the UN can use their political capital and soft power to fight off a country's influence and preserve impartiality.

However, its fundamental weakness is that it does not explain how regimes are *sustained* over time. This does not only require a transnational institution but also *leadership* on the part of states within the regime. Realists would likely assert that this idea of leadership is realism in disguise since it involves nation states acting on their own. However, that is an incorrect interpretation since states showing leadership would still be acting under the auspices of the institution at the head of the regime.

Ultimately, neither theory is perfect. Somali piracy will be used as an interpretive case study to see which of the two theories is most relevant to understanding the resurgence of piracy in the Gulf of Aden. Hopefully, the insights gained from the theoretical analysis will also help generate recommendations for policy makers regarding the fight against piracy.

METHODOLOGY

Case Study Approach

This thesis will test realism and international regime theory against Somali piracy. In his overview of case study analysis, Stephen Van Evera explains that theories can be tested through experimentation, observation using large-n analysis and observation using case-study analysis.³⁶ By focusing on Somali piracy, this thesis will use Van Evera's third method.³⁷ More specifically, it will conduct what John Odell calls a "disciplined interpretive case study."³⁸

Odell explains that this type of analysis goes beyond a simple descriptive case study as it allows a researcher to construct interpretations and analyses of an event by applying theories. While a single case study is generally not enough to adequately test the universality of a theory's causal explanation, it nonetheless provides the opportunity to make a meaningful assessment of how it applies in given circumstances. This is exactly what this thesis will attempt to do – it will use Somali piracy to see whether realism and international regime theory offer the appropriate framework to resolve this maritime problem. Odell himself explains that this form of research will "interest critics as well as defenders of the theories [used]."³⁹

As with all case studies, fallacies may arise. With an interpretive case study, Odell says there is the risk of "selective reconstruction" of an event by favoring one theory and

³⁶ Stephen Van Evera, *Guide to Methods for Students of Political Science* (Cornell: Cornell University Press, 1997), 50.

³⁷ *Note*: John Odell defines a case as a "single instance of an event or phenomenon" (163).

³⁸ John Odell, "Case Study Methods in International Political Economy" *International Study Perspectives 2* (2001): 163.

³⁹ *Ibid.*

therefore dismissing the arguments against it.⁴⁰ At the onset of this thesis, both theories will be strictly regarded as equal. There is no reason or advantage to favoring a single theory because that will weaken the validity of this paper's findings. Essentially, both will go undergo an equally thorough analysis vis-à-vis the case. This will make the study as 'disciplined' as possible.

Although social scientists have questioned the validity of case studies, Van Evera argues that the case method is valid for testing theories.⁴¹ Moreover, it is worth noting that a scientific experiment involving piracy would be logistically unfeasible and potentially dangerous. Nonetheless, there are certainly other methods of analysis and Van Evera discusses some of them. He explains that single case studies can be used to test theories through congruence procedures and process tracing. While these are valid and elaborate methods of variable analysis, they are not as applicable to this paper's topic. The reason is because the correct usage of these methods requires a clear definition of the Independent Variable (IV) and Dependent Variable (DV). Essentially, this paper is not testing for which theory explains why piracy has emerged but rather which theory can provide an effective model for dealing with the problem itself. Ultimately, Odell's interpretive case study approach is a better fit for this thesis.

Why Somalia?

Besides explaining how the case study will be structured, it is also important to explain why the specific case was chosen over others to appreciate and understand the scope of the thesis, especially in light of the impact that Somali piracy has on

⁴⁰ Odell, "Case Study Methods," 164.

⁴¹ Van Evera, "Guide to Methods," 55.

international trade and the country's humanitarian crisis. Two reasons need to be addressed in detail.

Prevalence of Somali Piracy

A worrying trend has emerged over the last few years where pirates hijack a ship and take the crew hostage, in the knowledge that the ship owners will pay for their release. Pirates are not interested in the merchandise but rather the ransom. The International Maritime Bureau reports a 244% increase in hijack attacks between 2004 and 2008 and a 212% increase in hostage taking between 2004 and 2008.⁴² While ransoms used to range between tens and hundreds of thousands of dollars, they are now between half-a-million and two million dollars.⁴³ Moreover, pirates are becoming increasingly aggressive and assertive. The biggest hot spot for this new brand of piracy is Somalia.⁴⁴

The situation is very grim around the Horn of Africa. By 1998, the Gulf of Aden was the scene of two-thirds of the world's maritime abductions -- in 2000 alone there were 23 incidents of piracy.⁴⁵ Moreover, for the past 4 years, the International Maritime Bureau (IMB), a specialized division of the International Chamber of Commerce (ICC), has consistently classified Somalia among the top 5 areas at risk of piracy attacks.⁴⁶ In its

⁴² IMB, *Piracy*, 12-13.

⁴³ Middleton, "Piracy," 5.

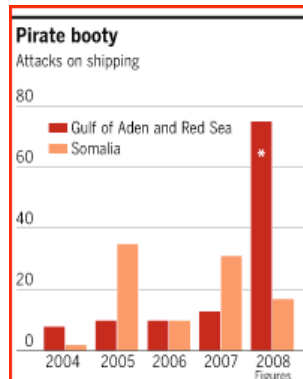
⁴⁴ Adal Rafiq, "Fear piracy more than terrorism." *ICIS Chemical Business* 273, no. 18 (May 05, 2008): 26-28. <http://proxy.library.upenn.edu:2055/ehost/detail?vid=6&hid=4&sid=4d3a490d-ca13-4e96-8d9d-c1a3e9ac0580%40sessionmgr8&bdata=JnNpdGU9ZWhvc3QtG12ZQ%3d%3d#db=keh&AN=32002217> (accessed October 25, 2008).

⁴⁵ Murphy, *Contemporary Piracy and Maritime Terrorism*, 29.

⁴⁶ International Chamber of Commerce, International Maritime Bureau, <http://www.icc-ccs.org/imb/overview.php>.

report on piracy, the IMB paints a grim and worrying picture of Somali piracy. While the number of worldwide attacks has remained largely steady since 2004, attacks by Somali pirates have increased dramatically. 63 of the 199 piracy attacks recorded worldwide in the first nine months of 2008 occurred off the coast of Somalia.⁴⁷ This is also double the number of attacks that occurred in the same period last year.⁴⁸ By comparison, the next two most piracy-prone areas are Nigeria and Indonesia, with 24 and 23 attacks respectively.⁴⁹

Unfortunately, there is more bleak data. The IMB also traces piracy attacks



Source: FT

Note: the asterisk on the red bar indicates that all attacks occurred in the Gulf of Aden.

worldwide over time. The period between 2004 and 2008 reveals a clear trend – while attacks in traditionally piracy-prone areas like Indonesia and the Malacca Straits have substantially decreased over time, those in Somalia have increased. Indonesia experienced a 67% decrease and the Malacca Straits a 92% decrease. Conversely, Somalia has seen a 1100% increase and the Gulf of Aden a 920% increase. The graph on the left provides a visual image of the problem.

Piracy in Somalia has become so prevalent that it is now in many ways “socially acceptable.” Residents in Somalia explain that pirates have become “fashionable” to the point where they are now Somalia’s new elite.⁵⁰ Even more worryingly, Somali pirates have become increasingly organized. Analysts now say that pirate gangs are made up of

⁴⁷ *Note:* Although the IMB catalogs piracy attacks separately for Somalia and the Gulf of Aden, its report says that Somali pirates are also responsible for incidents in the Gulf of Aden.

⁴⁸ “NATO warships ready to tackle piracy off Somalia,” *AFP*, October 24, 2008, <http://afp.google.com/article/ALeqM5iQ-c-Pg2FWJhMG9ydDt1LWFVIOkg> (accessed Oct 24, 2008).

⁴⁹ IMB, *Piracy*, 7.

⁵⁰ Hunter, “Somali pirates living the high life.”

three sub-groups – ex-fishermen who lead the operations; ex-militiamen who provide the muscle of the operation; technical experts who help operate the hi-tech equipment used by pirates such as satellite phones and GPS.⁵¹

Theoretical Complexity and Importance

Although the numbers are vital to establish and confirm the validity of this case, it is also worth going beyond them and consider a broader picture, especially vis-à-vis the former premier piracy hot-spot – the Malacca Straits. In other words, in contrast to the states bordering the strait (Indonesia, Malaysia, Singapore, Thailand), the Gulf of Aden is surrounded by two states with weak-to-absent governments. Although not a failed state, Yemen ranks 153rd out of 177 in the UN’s HDI rankings.⁵² According to the World Bank, the states around the Malacca Straits rank substantially higher in all the governance indicators than Somalia and Yemen.⁵³ The abysmal governance situation in the two littoral states in the Gulf of Aden shows the importance of a truly *international* and *coordinated* approach to this problem. Although an international multilateral response with elements like the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP) was part of the success story East Asia had in fighting piracy, the littoral states took a number of vital national and bilateral steps such as “upgrading patrol assets, increasing surveillance...through radar and the deployment of ships [and] the buildup of specially trained and dedicated assets that can

⁵¹ Ibid.

⁵² United Nations Development Programme. “2007/2008 Report: Human development index,” <http://hdrstats.undp.org/indicators/1.html> (accessed December 9, 2008).

⁵³ World Bank, “Worldwide Governance Indicators.”

respond to incidents.”⁵⁴ Specifically, Singapore has intensified navy and coast-guard patrols by forming Accompanying Sea Security Teams (ASSET), which are similar to armed marshals.⁵⁵ Bilaterally, two examples that stand out are the Indonesia-Singapore Coordinated Patrols and the Maritime Operation Planning Team that was established by Indonesia and Malaysia.⁵⁶ These naval patrols by Indonesia, Malaysia and Singapore have spearheaded the significant reduction in attacks.⁵⁷ Ultimately, Noel Choong, the head of the Piracy Reporting Center at the IMB in Kuala Lumpur recently said that “it will be very difficult to copycat the Somalia situation in Asia... because the governments here are more committed and have more resources.”⁵⁸

The last statement says it all – besides the multilateral response, the littoral states in East Asia led the anti-piracy efforts. Unfortunately, neither Somalia nor Yemen has the capacity to undertake any action remotely similar in nature, thoroughness and substance to those just mentioned. Between the two states there is essentially a regional power vacuum. This makes an international response extremely important but at the same time extremely complicated – foreign nations will be forced to tackle crimes in waters that are out of their jurisdiction. This matter will be especially important when it comes time to prosecuting pirates since neither states has the legal ability to hold fair trials.

Ultimately, in contrast to the Malacca Strait where a bottom-up approach took place, a top-down approach will be required in the Gulf of Aden where regional leadership is absent. The UN will need to fill the regional power vacuum by setting the

⁵⁴ Kwa Chong Guan and John K. Skogan, eds., *Maritime Security in Southeast Asia* (New York: Routledge, 2007), 27.

⁵⁵ *Ibid.*, 28.

⁵⁶ *Ibid.*, 29.

⁵⁷ Mark McDonald, “Maritime Hijackings Are Decreasing in Asia,” *New York Times*, November 18, 2008, <http://www.nytimes.com/2008/11/19/world/asia/19asiaships.html?scp=3&sq=piracy,%20east%20asia&st=cse> (accessed November 18, 2008).

⁵⁸ *Ibid.*

legal and procedural foundations for an effective anti-piracy response and managing relations between participating countries. In other words, it will be at the head of the regime. While this is only a hypothesis, based on the evidence used thus far international regime theory is already showing its relevance.

Analytical Approach

Having provided justification for the choice of a case, it is now worth providing an explanation of how the analytical sections will be approached. One of the reasons why it has been so challenging to combat the resurgence of piracy is that it is inherently stateless while its effects are transnational. Although Somali piracy is confined to a small area of the globe, its global implications are glaring, as was hopefully illustrated by the International Trade Threat section. As with any problem that involves different parties, finding a solution is extremely difficult. To better understand and appreciate the forthcoming analysis, it is important to restate the intent of this paper. The problem at hand is not Somali pirates but rather the response of the international community to piracy. This distinction is key, as this paper's aim is not to lay out an agenda for the overall stabilization of Somalia but rather to break down and critically analyze the current response to this problem.

Although this thesis does not presume to explain all the problem's complexities, it has identified the main players involved in the fight against Somali piracy. A visual representation would be helpful:

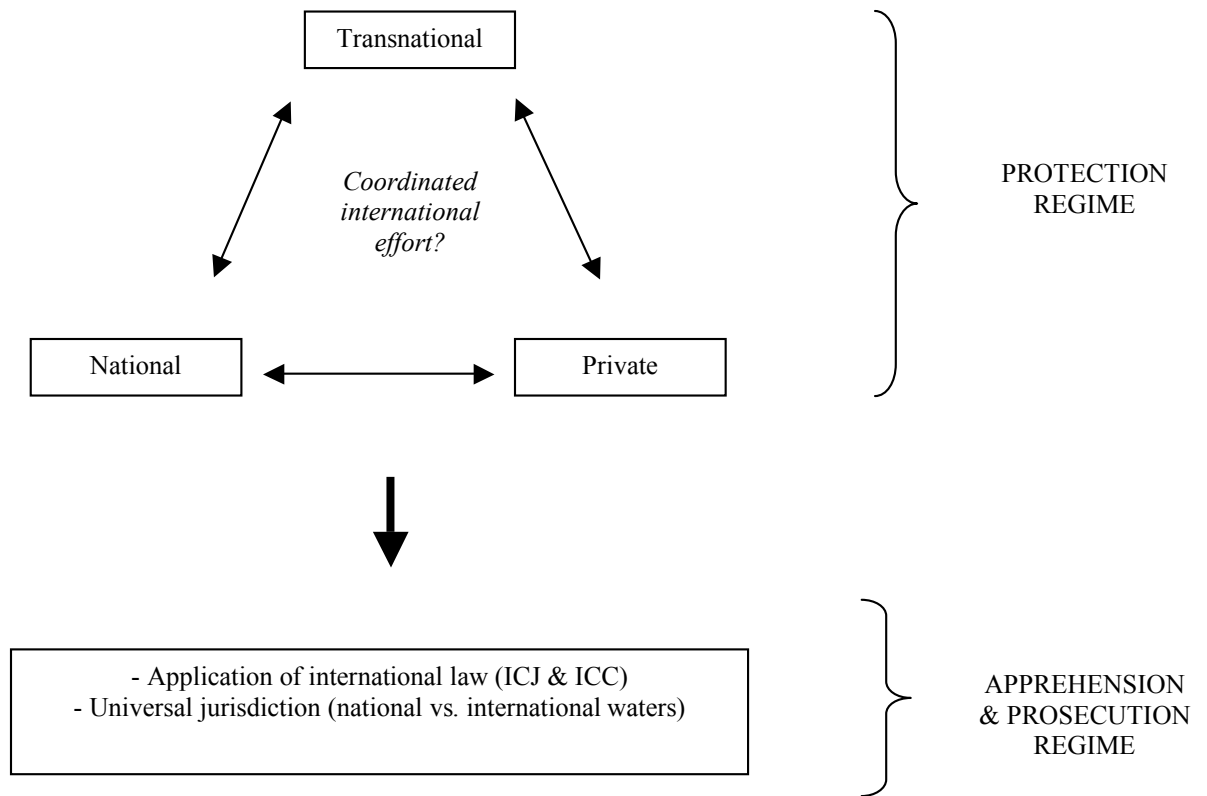


FIGURE 1: REGIMES

Source: Georgios Drossinos

The preliminary research has revealed that there are currently two regimes operating in the fight against Somali piracy. The *Protection* regime is composed of players operating at a transnational, private and national level and is related to how shipments can be protected. The *Apprehension & Prosecution* regime involves the application of international law to apprehend and punish pirates.

Although these two regimes may provide a preliminary indication that international regime theory may provide the best solution, no conclusions can be made yet. The two forthcoming analytical sections will each analyze one regime in three ways:

- Provide additional structure to each regime by breaking down its various categories.
- Assess each regime's effectiveness.
- Evaluate which of the two theories, if any, is a better fit for the regimes' successful implementation.

A possible outcome of the analysis is that each theory only works best in one of the regimes. For example, given the complexity of international law, a realist approach may be more efficient to prosecute pirates (apprehension & prosecution regime). If this were the case, extreme judgment and care should be taken in the application of this approach to avoid a Guantanamo redux. Secondly, the analysis may well show that the current regimes indicating a coordinated international effort are wrong, in which case a complete new framework would be needed, either under the guidance of the two current theories or perhaps even different ones.

Ultimately, the aim of the analysis is to make a meaningful contribution to international relations theory and, at the very least, provide readers and policy makers with a meaningful breakdown and assessment of the current international response to piracy. Hopefully, the insights gained will contribute towards the creation of a standard blueprint for combating piracy and insights on how to deal with other stateless phenomena.

Sources

While identifying an analytical approach is crucial, a valid analysis will originate above all from appropriate resources. With regards to academic sources, databases will be

utilized to weigh the current debate among scholars surrounding the issue of piracy, maritime security and transnational cooperation. Specific attention will be paid to proponents of realism and international regime theory. Governmental sources will also be critical because they will allow a close examination of current policy decisions behind this issue. Specifically, resolutions and related documents of organizations such as the United Nations (UN), International Maritime Organization (IMO) and European Union (EU) will be closely analyzed. Documents published by private organizations like the IMB will also not be overlooked as they will provide critical information on the international shipping industry and statistics on piracy attacks.

To further substantiate the analysis on the shipping industry, interviews to people involved in this sector will be conducted. While few interviews will not be representative of the entire industry, they will still provide meaningful information on the role of the private sector in the regimes mentioned above. They could also offer insight on the link between lobbyists and the sector. Specifically, questions will be asked regarding the use of private security by the shipping companies. These questions could offer first-hand insight on the willingness of the private sector to actively collaborate with national and transnational actors – this could add weight to either realism or international regime theory vis-à-vis the two regimes.

Finally, as Somali piracy is a current matter, news articles will be closely followed. Although not scholarly sources, news publications are essential to thoroughly understand the complexities of the ongoing struggle. However, given the existence of a media bias, the use of news publications will be regionally diverse in an attempt to obtain objective information. Further along those lines, while use of news *analysis* will not be

ignored its use will be limited as the ultimate aim of this thesis is to provide its own analysis on the policy debate surrounding piracy.

Conclusion and Challenges to the Methodology

This thesis will attempt to provide as comprehensive an analysis of Somali piracy as possible and attempt to make a meaningful contribution to the academic and policy debate by identifying which of the theories, if any, provide the most appropriate framework for dealing with this threat to maritime security.

Moreover, this thesis will also attempt to stimulate further debate on dealing with other stateless actors. After having concluded the interpretive case study to assess the merits and faults of the two theories, it will endeavor to broaden the analysis and generate insights on the potential problem of maritime terrorism. This thesis operationalized piracy by using the definition set forth by the UNCLOS, which limits its definition to criminal acts. However, it would not be surprising if it broadened its definition to acts of terrorism in the near future. Some already warn that “pirates can become agents of international terrorism.”⁵⁹ However, currently this problem has not fully materialized. When speaking about recent attacks, Admiral Mike Mullen, the Chairman of the Joint Chiefs of Staff, said he had not seen “any connection to al-Qaeda or to terrorists.”⁶⁰

One potential criticism of the methodological approach is the lack of emphasis on the internal situation in Somalia. In its July 2007 report, the Monitor Group on Somalia had “no doubt” that the increase in piracy attacks is “caused by the climate of lawlessness

⁵⁹ Middleton, “Piracy,” 10.

⁶⁰ Andrew England, Robert Wright, and Demetri Sevastopulo, “Pirates seize another ship in Gulf of Aden,” *Financial Times*, November 17, 2008, <http://www.ft.com/cms/s/0/e10892ba-b4a8-11dd-b780-0000779fd18c.html> (accessed November 17, 2008).

that currently prevails on the mainland of Somalia.”⁶¹ Based on such a conclusion, some may argue that more analysis on Somalia is needed to help direct the debate on combating piracy in the right direction. While this is a valid argument, a specific domestic analysis of Somalia is beyond the scope of this paper. It is important to remember that the primary aim of this thesis is not to provide a solution to Somalia’s lawlessness but rather to analyze the international community’s response to piracy through the lens of two key theories of international relations. Moreover, the severe effects that piracy is having on international trade and Somalia’s humanitarian crisis means that a short-term solution is required, which is something that the international community has the ability provide. Contrastingly it would be foolish to think that short-term stabilization can be achieved in a country that has been largely lawless for almost two decades. Similar thinking is the reason NATO and US forces are still struggling in Afghanistan. However, it is the hope of the author that this thesis will also foster a substantive debate on the current state of Somalia’s humanitarian and political crisis.

The use of news articles also needs further justification. Although they have been mentioned as sources, their use will be limited. This is because Somali piracy is an issue that is currently unfolding. Given the length of this project, following the media consistently will not be feasible as it will not allow the thesis to make a decisive conclusion. Although major development will not be entirely ignored, with respect to this paper time has largely stopped as of January 8, 2009 – on that day the US announced the creation of Combined Task Force 151 (CTF 151), a multinational naval task force coordinated by the US Navy’s Fifth Fleet. Moreover, by then announcements had been made in the media that the EU had also put together its own mission to combat piracy off

⁶¹ UN, *UN Monitor Group on Somalia*, 29.

the coast of Somalia. As part of the EU mission, Britain, France, Greece, Sweden, Spain, Belgium and The Netherlands will contribute at least 10 warships and three aircrafts. The EU will also deploy armed guards among vulnerable cargos such as food aid shipments to Somalia.⁶² It is also noteworthy to mention that other countries such as China, India, Russia and Malaysia began patrolling the area around that period.

Regardless of the outcome of the analysis, one thing is certain: urgent, decisive and unrelenting action is required in the Gulf of Aden because what is currently unfolding is a cat-and-mouse game between naval forces and Somali pirates. Besides forcing ships to reroute through the Cape of Good Hope, if their conquests continue in the Gulf pirates may be encouraged to also start targeting other regions of the Indian Ocean closer to the Cape of Good Hope. If this were to unfold, the international community would face an incredibly complicated predicament and would have the daunting task of protecting two maritime routes, which together cover an area of millions of square miles. Ultimately, the international community is facing a challenging problem that requires a short-term solution. While the success of anti-piracy efforts in the Malacca Straits is indication that piracy is not undefeatable, the stark distinction between piracy in the straits and the Gulf of Aden calls for a fundamentally different approach.

⁶² "Cruise ship will evacuate to avoid pirate attack," *New York Times*, December 9, 2008, http://www.nytimes.com/aponline/world/AP-Piracy.html?_r=1 (accessed December 9, 2008).

PROTECTION REGIME

This part will analyze the *Protection* regime which, in the context of this paper, is understood to be the mechanism through which merchant vessels (MVs) are protected. This regime is incredibly important because it constitutes the very *raison d'être* of the current anti-piracy response – its objective is not to stabilize Somalia but to safeguard international trade and the delivery of humanitarian aid to the Horn of Africa. The first way to do that is by providing protection to MVs. The *Apprehension & Prosecution* regime is the second step in deterring piracy and protecting trade- it will be analyzed in the next section.

The forthcoming analysis will provide a detailed breakdown of the regime, an assessment of its merits and faults and an evaluation of which of the two theories, if any, are a better fit for the regime's successful implementation.

A breakdown of the regime reveals that the structure presented in the paper's Methodology was flawed. The original structure classified the regime's actors into three categories: transnational, national and private. However, further evidence, in particular interviews with industry executives and representatives from intergovernmental and private organizations, altered the makeup of the regime. The analysis showed that the 'national' category was not relevant, thus weakening the applicability of realist doctrine vis-à-vis maritime piracy. All actions, including those organized by single navies are dependent on the UN. The analysis showed that the UN is responsible for creating the regime, strengthening the argument that international regime theory is the most relevant theory when combating this maritime problem.

Moreover, this finding answered the fundamental question of whether there is a *coordinate* international effort. Although the regime has lost one of its components, the current structure is an impressive system that coordinates the sharing of information, the organization of vessel transits and the deployment of military assets in the Gulf of Aden.

Tripartite Regime

To go beyond the analysis provided in the Methodology it is first necessary to break down the original structure of the regime.

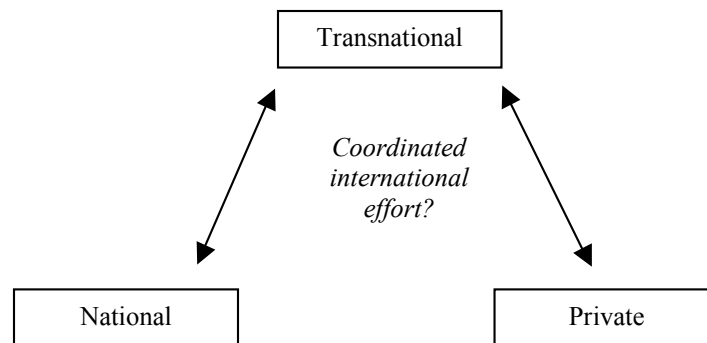


FIGURE 2: ORIGINAL PROTECTION REGIME

Source: Georgios Drossinos

The transnational category is composed of non-state actors that operate across national boundaries. These actors include the UN, Combined Task Forces (CTFs) and European Union (EU). The national category includes nation states. A number of countries, including China and India, sent their own warships to patrol the area at risk. Finally, the private category represents the private shipping industry, which includes shipping companies and lobby groups. For example, independent international shipping

associations like the International Chamber of Commerce (ICC) and International Association of Dry Cargo Shipowners (Intercargo) represent and protect the interests of private corporations.

Based on these findings, a tripartite structure was created. However, the preliminary research, and hence the structure, did not address the interaction between the three categories. The questions that remained unanswered were: *Is there a truly coordinated international effort and, if so, is that the best way forward?* In other words, the rudimentary structure did not offer insight on the applicability, as well as merits and faults, of each theory. For example, a regime whose primary force was at the ‘national’ level would represent a realist approach, which may or may not represent the best solution. Consequently, any policy contribution would be limited.

The use of primary sources showed that a coordinated international effort is currently in place. These sources provided the needed depth to the preliminary analysis and, ultimately, provided the answers to the questions and the foundations for the altered regime, which is coordinated by the UN and supported by the private shipping industry. Due to the UN’s coordination role and the absence of a ‘national’ category, the regime falls in line with international regime theory.

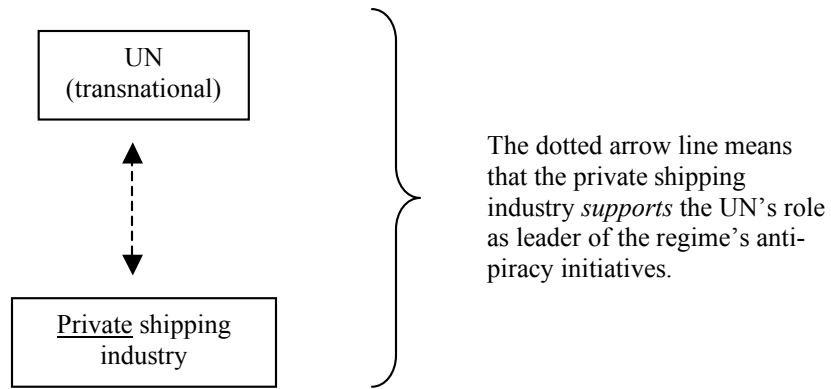


FIGURE 3: REVISED PROTECTION REGIME

Source: Georgios Drossinos

However, this regime is clearly incomplete, primarily because more needs to be said about how the two actors operate. Moreover, there are more players in the transnational categories besides the UN. At this point it is necessary to analyze the transnational and private categories separately.

Transnational Actors

Transnational actors are non-state actors which operate across national boundaries. Critics of these actors, above all realists, claim that these actors are ineffective because they cannot act independently of nation states and their actions are therefore constrained. Regardless of their strengths and weaknesses, these actors have taken center stage in the fight against pirates. The primary actors have been the United Nations (UN), the European Union (EU), the UK Maritime Trade Organization (UKMTO) and the Combined Task Forces (CTFs).

The UN has been involved in the fight against piracy through its International Maritime Organization (IMO), the United Nations Convention on the Law of the Sea (UNCLOS) of 1981 and the resolutions it has passed over the course of 2008 that relate to piracy. Although not featured in the press, it is important not to overlook the IMO and UNCLOS because their objective is to provide the basis for a UN-led effort to promote maritime security. The convention has 320 articles and nine annexes and its aim is, according to its preamble, to “settle...all issues relating to the law of the sea” including the definition and pursuit of pirates.⁶³ Although its wording is generic and leaves ample room for interpretation, it is a UN convention and therefore provides some kind of international preliminary legal framework for dealing with pirates. This is the reason why its definition of piracy is used by this paper. It defines the act as “any illegal act of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship.... and directed on the high seas.”⁶⁴

The IMO’s main task, according to its website, is to “develop and maintain a comprehensive regulatory framework for shipping and its remit today includes safety, environmental concerns...maritime security and the efficiency of shipping.”⁶⁵ Most of its efforts related to piracy are handled by the Maritime Safety Committee (MSC), which is the IMO’s “senior technical body on safety-related matters.”⁶⁶ It has written numerous conventions regulating shipping and serves as an information hub for its 168 member states. For example, it produces “monthly and annual summaries highlighting the high-

⁶³ United Nations Convention on the Law of the Sea.

⁶⁴ Ibid.

⁶⁵ International Maritime Organization (IMO), About IMO page, <http://www.imo.org/>.

⁶⁶ International Maritime Organization (IMO), Introduction, http://www.imo.org/TCD/mainframe.asp?topic_id=59.

risk areas.”⁶⁷ It has also passed resolutions on the issue of piracy, in particular Resolution A.1002(25) in November 2007: ‘Piracy and armed robbery against ships in waters off the coast of Somalia’. This resolution uses the UNCLOS’ definition of piracy. It calls upon governments in the region to “conclude a regional agreement to prevent, deter and suppress piracy and armed robbery against ships” and calls upon all other governments to assist these efforts.”⁶⁸ This prompted the Security Council to take action, beginning with Resolution 1816 in June 2008. In fact, the resolution mentions Resolution A.1002(25) and calls on all member states to work with the organization. The IMO went a step further and in October 2008, during a meeting with industry representatives, it called for “sustained coordination” between naval forces operating in the area and for “clear rules of engagement.”⁶⁹ Essentially, the IMO is the UN’s maritime arm whose stated aim is to regulate shipping. With regards to piracy, its actions revolve above all around coordination.

Perhaps the most discussed UN actions have been the resolutions it has passed in 2008 with regards to piracy. The international response was precipitated with the entry into force of UN Security Council Resolution 1816 on June 2, 2008. The resolution authorized for six months naval vessels of member states cooperating with the Transitional Federal Government of Somalia (TFG) to enter Somali territorial waters and use “all necessary means to repress acts of piracy.”⁷⁰ The resolution also urged “all states to cooperate with each other, with the IMO and...with the relevant regional

⁶⁷ North of England P&I Association, *Loss Prevention Briefing: Piracy – Gulf of Aden* (October 2008): 3.

⁶⁸ International Maritime Organization (IMO), *Piracy and armed robbery against ships in waters off the coast of Somalia; Resolution A.1002(25)* (November 29, 2007): 7.

⁶⁹ North of England, *Loss Prevention Briefing*: 3.

⁷⁰ United Nations (UN) Security Council. “Resolution 1816 (2008),” June 2, 2008, <http://www.un.org/News/Press/docs/2008/sc9344.doc.htm> (accessed February 2, 2009).

organizations.”⁷¹ Specifically, the resolution urged all states to “render assistance to vessels” and work with interested organizations to ensure that vessels “receive appropriate guidance and training on avoidance, evasion, and defensive techniques.”⁷² Resolution 1838 introduced on October 7, 2008 further encouraged states to take part in the fight against piracy in conformity with the provisions of resolution 1816. The resolution also expressed the UN’s intention to consider renewing the authority to enter Somali waters provided by resolution 1816 beyond December 2008.⁷³ Indeed, on December 2, 2008 it adopted Resolution 1846 unanimously, which extended the six-month period in resolution 1816 to an additional twelve months.⁷⁴ The resolution calls on member states to share information through bilateral channels or the UN and to coordinate their anti-piracy efforts with the IMO.⁷⁵ The UN also passed Resolution 1851.⁷⁶

Ultimately, the UN resolutions provide member states with the *supranational authority* to deploy military assets in the region, including inside Somali territorial waters, to protect MVs. As mentioned in the Theoretical Framework, each resolution reaffirms that this authority should be exercised using the guidelines spelled out in UNCLOS, which “sets out the *legal framework* applicable to combating piracy and

⁷¹ UN Resolution 1816.

⁷² Ibid.

⁷³ United Nations (UN) Security Council. “Resolution 1838 (2008),” October 7, 2008, <http://un.org/News/Press/docs/2008/sc9467.doc.htm> (accessed February 2, 2009).

⁷⁴ United Nations (UN) Security Council. “Resolution 1846 (2008),” December 2, 2008, <http://un.org/News/Press/docs/2008/sc9514.doc.htm> (accessed February 2, 2009).

⁷⁵ Ibid.

⁷⁶ *Note:* On December 16, 2008 the UN Security Council also passed Resolution 1851 that authorized states to use “land-based operation in Somalia...to interdict those using Somali territory to plan, facilitate or undertake” acts of piracy. This resolution is different because it gives nations the authority to *pursue* pirates on land – the previous three resolutions only gave states the authority to deploy military assets in the region to protect merchant vessels. Therefore, resolution 1851 is more closely related to the Apprehension & Prosecution regime and will be analyzed in the next section.

armed robbery at sea, as well as other ocean activities.”⁷⁷ Despite the aforementioned weaknesses of UNCLOS, these UN resolutions are the closest thing to the codification of international maritime law.

Essentially, the IMO, UNCLOS and resolutions are all closely linked and reinforce each other – the result is a harmonization of international standards on how to protect MVs. A visual representation of their relationship is helpful at this point:

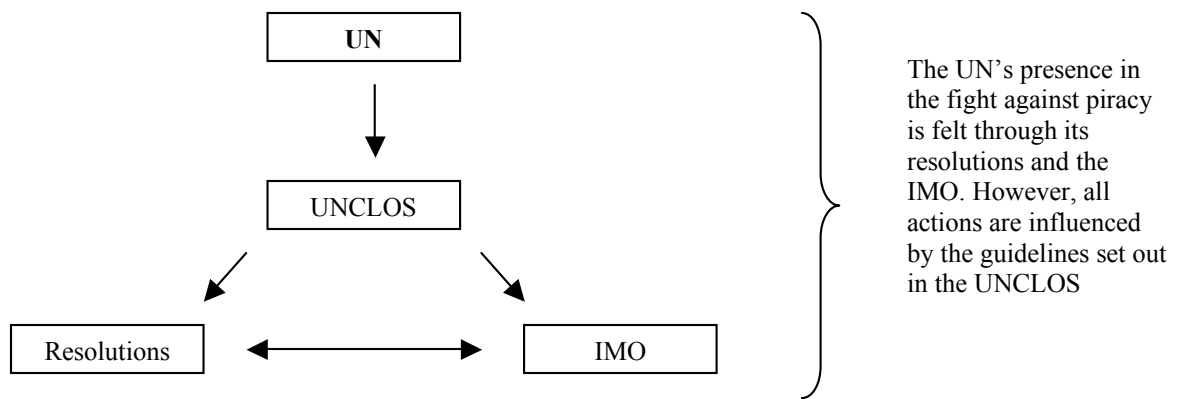


FIGURE 4: ROLE OF UN

Source: Georgios Drossinos

The EU is an economic and political association of 27 countries. Some argue that it is not a transnational actor in the same way that the UN is, especially because it is frequently placed on a par with countries. However, its decisions and actions, especially with regards to piracy, are not a reflection of a single state's agenda but rather a collection of them. Therefore, its actions can and should be considered as transnational. The EU has been criticized at times for not carrying its weight with regards to coalition missions in the Middle East. For example, the US is currently contributing more military

⁷⁷ United Nations (UN) Security Council, “Resolution 1851 (2008),” December 16, 2008, <http://www.un.org/News/Press/docs/2008/sc9541.doc.htm> (accessed February 2, 2009).

assets than the EU in anti-terrorism operations in Afghanistan. However, with the issue of piracy, it has taken center stage. In September 2008 the Council of the EU established the EU Naval Coordination Cell (EU NAVCO) to support surveillance and protection operations led by certain member states in the Somali region. This cell ran the Maritime Security Centre – Horn of Africa (MSCHOA), an information coordination center “dedicated to safeguarding legitimate freedom of navigation in the light of increasing risk of pirate attacks.”⁷⁸ According to the Official Journal of the European Union, EU NAVCO would “support UN Security Council resolution 1816.”⁷⁹ Later that year, in November, the EU took a major step forward and announced the union’s first ever naval operation – EU Naval Force ATALANTA (EU NAVFOR). The operation, which was welcomed by the UN and reached Initial Operational Capability on December 13, 2008, seeks to provide protection to MVs and the UN World Food Programme (WFP). Specifically, the operation will identify vessels that are especially vulnerable to pirate attacks and, where possible, will provide protection. Since its creation, the activities of EU NAVCO have been transferred to EU NAVFOR.⁸⁰

The aim is to have close cooperation between EU NAVFOR and MSCHOA to create a “*coordinated* military presence in the region.”⁸¹ The way the cooperation works is that merchant vessels, including those from outside the EU, register with MSCHOA and provide the centre with information on their shipment and transit details for the Gulf of Aden. By collecting this information, the centre is able to provide vessels with

⁷⁸ Maritime Security Centre – Horn of Africa (MSCHOA), EU NAVFOR Somalia, “About The Maritime Security Centre – Horn of Africa,” <http://www.mschoa.org/About.aspx>.

⁷⁹ European Union (EU), *Council Joint Action 2008/749/CFSP; Official Journal of the European Union* (September 20, 2008): 252/40.

⁸⁰ MSCHOA, “About.”

⁸¹ Maritime Security Centre – Horn of Africa (MSCHOA), EU NAVFOR Somalia, “Council of the European Union,” <http://www.mschoa.org/EUCouncil.aspx>.

information on how they can participate in Group Transits, which are organized by passage speed. Then, using this information, the centre builds a picture of vulnerable shipping and coordinates with EU NAVFOR, as well as other groups that will be explained later, so that warships are deployed when and where they are most needed. Ultimately, the center acts as the *collection* and *coordination* point and EU NAVFOR as the *action* point.

It is important to note that EU NAVFOR's 'reach' is limited to the UKMTO Transit Corridor (UTC), which transits through the Maritime Security Patrol Area (MSPA), a non-marked geographic area in the Gulf of Aden that was established in August 2008 by CTF 150, a multinational naval task force coordinated by the US Navy.⁸² This geographic area is a specified patrol zone in the Gulf of Aden that is not marked or defined by navigational marks. When a vessel registers with MSCHOA they receive a document with details on safe transiting, which provides information on how to participate in Group Transits and includes strong recommendation to conduct passage within the UTC so that the vessel can receive protection from EU NAVFOR.⁸³ The MSPA's creation is in "support of an IMO call for international assistance to discourage attacks on commercial vessels transiting the Gulf of Aden."⁸⁴

The above analysis mentioned the UKMTO and CTF 150. These, along with CTF 151, are other actors which need to be analyzed to better understand this regime. The UKMTO was established in Dubai in October 2001 as an extension of the Royal Navy's operations in the region. Its categorization as a transnational actor may seem erroneous

⁸² Maritime Security Centre – Horn of Africa (MSCHOA), EU NAVFOR Somalia, "Advice to Masters," <http://www.mschoa.org/Secure/AntiPiracyAdvice.aspx#goa>.

⁸³ Council of the European Union, *Initial guidance to the international maritime community operating in the Gulf of Aden; J3/GOA/MSCHOA* (December 8, 2008).

⁸⁴ MSCHOA, "Advice."

since it is part of the Royal Navy. The reason for this is because although its primary aim is to assist with UK interests in the area, it also collaborates with other countries and organizations to deal with issues like piracy. Specifically, in the shipping community it is best known for its voluntary reporting scheme for ships of any flag or ownership transiting through the Gulf of Aden.⁸⁵ This allows the organization to monitor a vessel's transit progress.

The last transnational actors that need mentioning are the military assets, which are the Combined Task Forces (CTFs).⁸⁶ These are multinational task forces that patrol international waters to “conduct both integrated and coordinated operations” to “help set the conditions for security in the maritime environment.”⁸⁷ Although these forces are coordinated by the US Navy, the command of the forces is rotational. The two relevant task forces are CTF 150 and 151. CTF 150 operates in the Gulf of Aden, Gulf of Oman, the Arabian Sea, Red Sea and the Indian Ocean. Since its creation, it has been commanded by Canada, France, Germany, the Netherlands, Pakistan and the UK.⁸⁸ This force primarily deals with counterterrorism operations but it has also provided assistance with anti-piracy patrols. However, with the growing number of piracy attacks, a new task force was created in January 2009, CTF 151, which will solely focus on counter-piracy missions in various areas, including the Gulf of Aden.⁸⁹ More than 20 nations are

⁸⁵ UK Maritime Trade Operations (UKMTO) – Dubai, *Information: Merchant vessel voluntary reporting scheme*.

⁸⁶ *Note: Although EU NAVFOR is also a military asset, it was analyzed in the section on the EU and so it will not be mentioned in this section.*

⁸⁷ US Naval Forces Central Command, US Fifth Fleet, Combined Maritime Forces, “Combined Maritime Force,” <http://www.cusnc.navy.mil/mission/rhumblines.html>.

⁸⁸ United States Navy, “Combined Task Force 150,” <http://www.cusnc.navy.mil/command/ctf150.html>.

⁸⁹ United States Navy, “New Counter-Piracy Task Force Established,” http://www.navy.mil/search/display.asp?story_id=41687.

contributing to the force, which is under the command of the US Navy.⁹⁰ This will allow CTF 150 to fully devote its resources to counterterrorism missions. Like EU NAVFOR, these two task forces are also transnational actors because they represent multiple nations acting on a single agenda.

Before presenting the complete structure of the regime, it is necessary to analyze its second category.

Private Actors

The private actors involved are the shipping companies and trade associations. The main associations that operate on a global scale are the International Chamber of Shipping, the International Shipping Federation, BIMCO, the International Association of Dry Cargo Shipowners (Intercargo), the International Association of Independent Tanker Owners (Intertanko), the International Ship Manager's Association (InterManager) and the International Transport Workers' Federation. These lobby groups exist to represent the interests of private shipping companies. On October 31, 2008 the Presidents and Chairmen of all the groups wrote an open letter to governments calling for more action against criminal acts of piracy in the Gulf of Aden. This letter clearly showed the connection between the private shipping industry and the UN. The letter began with a "call upon all governments, individually, and collectively through the United Nations" to ensure the safety of navigation in the Gulf of Aden.⁹¹ Moreover, it mentioned that the freedom to navigate safely is an "abiding principle of...UNCLOS."⁹² The letter also outlined three actions that the private industry viewed as "essential short term steps

⁹⁰ United States Navy, "New Counter-Piracy Task Force Established."

⁹¹ Intertanko, "Open letter to governments on criminal acts of piracy in the Gulf of Aden." November 5, 2008, <http://www.intertanko.com/templates/Page.aspx?id=45167>.

⁹² Ibid.

toward a lasting solution” – two of them were directly related to the UN.⁹³ Firstly, it called for a greater number of warships in the region whose *command* and *coordination* would be under the “auspices of a United Nations mandate.”⁹⁴ Secondly, it called for stronger UN Security Council resolutions (on top of the existing resolutions 1816 and 1838) with “more explicit text on action required against” pirates.⁹⁵ The importance of this letter should not be understated – the leading international trade associations repeatedly called for the UN to assume a leadership and coordination role in the fight against piracy. In other words, they are supporting the UN. This is the reason for the dotted line between the transnational and private categories in the regime’s previous visual representation.

The last private actor is the IMB, part of the ICC’s Commercial Crime Services division. It operates the Piracy Reporting Centre whose stated objective is to be the 24-hour “point of contact for the shipmaster to report an actual or attempted attack or even suspicious movements” anywhere in the world.⁹⁶ Like the UKMTO and MSCHOA, it has the task of collecting and disseminating information but it is a private organization unlike the first two. It is important to understand that these three centers are not in competition. As will be explained shortly, they each have different roles, which together create a comprehensive mechanism for sharing information on piracy attacks, organizing Group Transits and deploying military assets.

⁹³ Intertanko, “Open letter to governments.”

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ ICC Commercial Crime Services, “IMB Piracy Reporting Centre,” http://www.icc-ccs.org/index.php?option=com_content&view=article&id=30&Itemid=12.

Consolidation

The major actors in the protection regime are the UN, EU, UKMTO, CTF 151, IMB and the international trade associations. Although it may not be obvious at first sight, all these actors are related. Together they form the legal, logistical and military foundation for the regime.

The legal component is centered on the UN since it provides states with the legal authority to deploy military assets and protect MVs, with the support of the private shipping industry. This is a fundamental component of the regime because legal authority must be bestowed upon warships before they can be deployed. Given the difficulties of defining international law, as explained in the Theoretical Framework, the UN's role should not be overlooked.

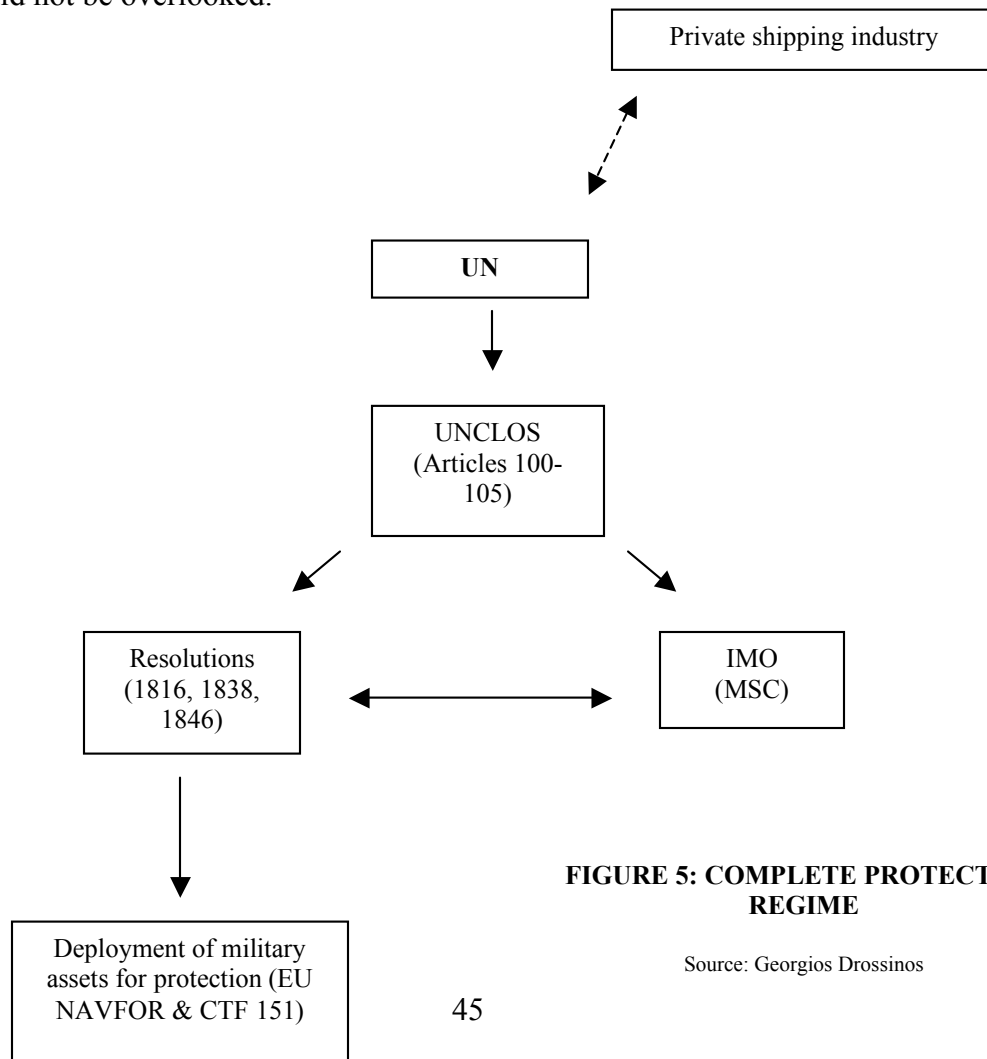


FIGURE 5: COMPLETE PROTECTION REGIME

Source: Georgios Drossinos

Figure 5 is in fact the *complete* protection regime. It builds up from the rudimentary regime outlined in Figure 3 and the insights from Figure 4. It also adds a third component: the deployment of military assets. It shows how the UN is at the center of the protection regime because it is the only actor that can provide *legal authority* for the deployment of military assets and concurrently generate *international consensus* around that provision of authority. In other words, the UN has the ability to provide guidance and leadership in a multilateral fashion and create international standards to guide state behavior when protecting vessels. It is important to remember that all four piracy-related resolutions were adopted *unanimously*. More importantly, this regime is proof that international regime theory is a relevant theory to understand this maritime issue.

As was explained in the literature review, this theory explains how cooperation is possible between states in a global system that is anarchic. The solution, according to the theory, is the construction of regimes which, according to Stephen Krasner, are “principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue-area.”⁹⁷ Arthur A. Stein defines the issue-area at hand (i.e. piracy) as a dilemma of common aversion.⁹⁸ And when faced with such a dilemma actors have a “common interest in avoiding a particular outcome,” in this case piracy attacks.⁹⁹ As a result of this common interest, Stein argues that actors prefer joint-decision making and hence create a regime to deal with it.

⁹⁷ Krasner, *International Regimes*, 1.

⁹⁸ *Ibid.*, 120.

⁹⁹ *Ibid.*, 125.

Robert Keohane takes the theoretical analysis a step further and argues that these principles, norms and rules that Krasner talks about take the form of institutions.¹⁰⁰ This makes sense because, in the case of the protection regime, we see that the UN transmits principles, norms and rules through the UNCLOS, IMO conventions and Security Council resolutions. This is a very important point – the literature review mentioned that in order for regimes to succeed, and hence for the theory to be relevant, they must provide its participants with a notion of being bound by a particular set of rules.¹⁰¹ Not surprisingly, the theory considers international institutions like the UN as the “major sites of global governance.”¹⁰² Ultimately, the UN lays the *legal* and *normative* foundations for the placement and deployment of military assets, the regime’s third component. This confirms the insight that was obtained by the analysis of the anti-piracy initiatives in the Malacca Strait – the weakness of Somalia and Yemen means that, unlike in the Strait where the littoral states lead the maritime security operations, a more expansive international approach would be needed in the Gulf of Aden, which would require the coordination that only an international body could provide.

However, we must look further to understand the logistical and military foundations of the regime. In other words, the *operational mechanism* through which information is shared among actors and military assets are deployed efficiently begins once resolutions are passed. The following sequential structure provides an overview of this mechanism.

¹⁰⁰ Rittberger, and Mayer, *Regime Theory and International Relations*, 54.

¹⁰¹ *Ibid.*, 55.

¹⁰² Rhodes, Binder and Rockman, *The Oxford Handbook of Political Institutions*, 612.

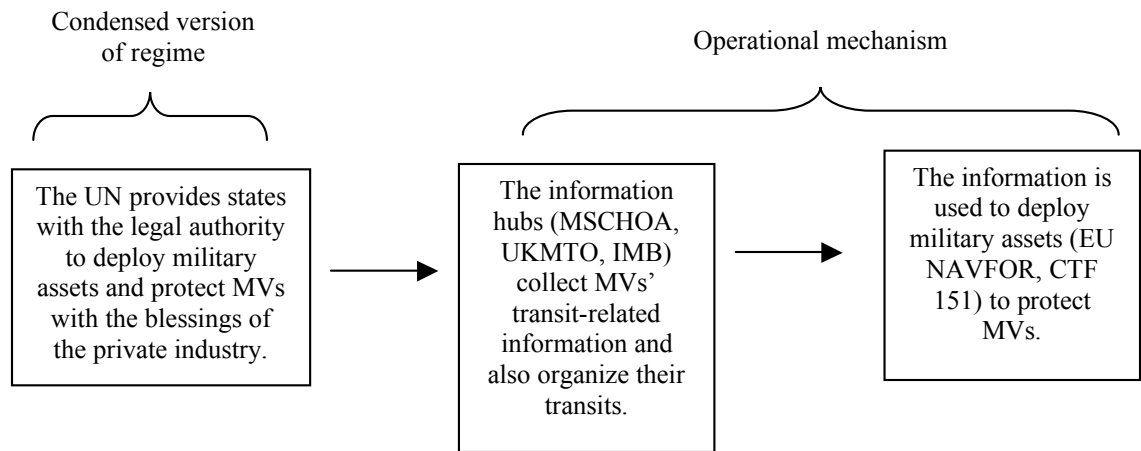


FIGURE 6: OPERATIONAL MECHANISM

Source: Georgios Drossinos

What is not clear from this figure are the specifics of the mechanism involved in the collection of and usage of transit-related information that the MSCHOA, UKMTO and IMB have at their disposal. There are a number of unanswered questions: *Do these groups share information? When a vessel is about to transit through the Gulf of Aden, which centre should the captain contact? Which group deploys the warships? Ultimately, what is the process of going from the UN resolutions to the deployment of military assets?*

Additional detail was obtained through phone calls and email exchanges with representatives from MSCHOA, IMB and North of England P&I Association Ltd, a mutual marine liability insurer. The overarching message is that these centers have a “very close relationship...share information in real time and have permanent link[s] through different watchkeeping capabilities.”¹⁰³ However, despite the flow of transit information between the centers, there is also some degree of separation in terms of their

¹⁰³ JOC Coordinator at MSCHOA, (mschoa@yahoo.com). Re: Question about piracy in the Gulf of Aden. February 5, 2009. Email to: Georgios Drossinos (drossgeo@sas.upenn.edu).

roles. In other words, the IMB center acts as a *repository* of information by keeping records of piracy activity from around the world. Contrastingly, the MSCHOA and UKMTO play a direct, and more regional, role in helping *coordinate* safe passage through the Gulf of Aden by gathering transit information. Based on the conversations and email exchanges, the two centers play slightly different roles because they are involved in different stages of the transit process. Vessels report future transits to the MSCHOA so that they can receive information on Group Transits and military assets, such as EU NAVFOR forces, can be informed of planned transits and deployed accordingly. Once a vessel is in transit through the Gulf of Aden, then it turns primarily to the UKMTO which provides monitoring progress and, if needed, will attempt to direct any available warships to the vessel under attack. In fact, the MSCHOA website says that in the event of an attack, a vessel should contact the UKMTO.¹⁰⁴ One of the industry executives interviewed provided records of email correspondence between one of his vessels and the UKMTO once the vessel had begun transiting through the Gulf of Aden. Unfortunately, no representative that was contacted was authorized to provide specific details on how warships are deployed. However, the impression is that the UKMTO is the center with direct contact with the military assets. Although it is not mandatory, Colin Gillespie of North of England said in an email that it is extremely important for vessels to register with both the MSCHOA and UKMTO.¹⁰⁵

¹⁰⁴ Maritime Security Centre – Horn of Africa (MSCHOA), EU NAVFOR Somalia, “Contact us,” <http://www.mschoa.org/secure/Contacts.aspx>.

¹⁰⁵ Colin Gillespie, Risk Management Executive at North of England P&I Association Ltd, (colin.gillespie@nepia.com). Re: Question about piracy in the Gulf of Aden. February 5, 2009. Email to: Georgios Drossinos (drossgeo@sas.upenn.edu).

A detail visual representation of the operational mechanism would be helpful at this point:

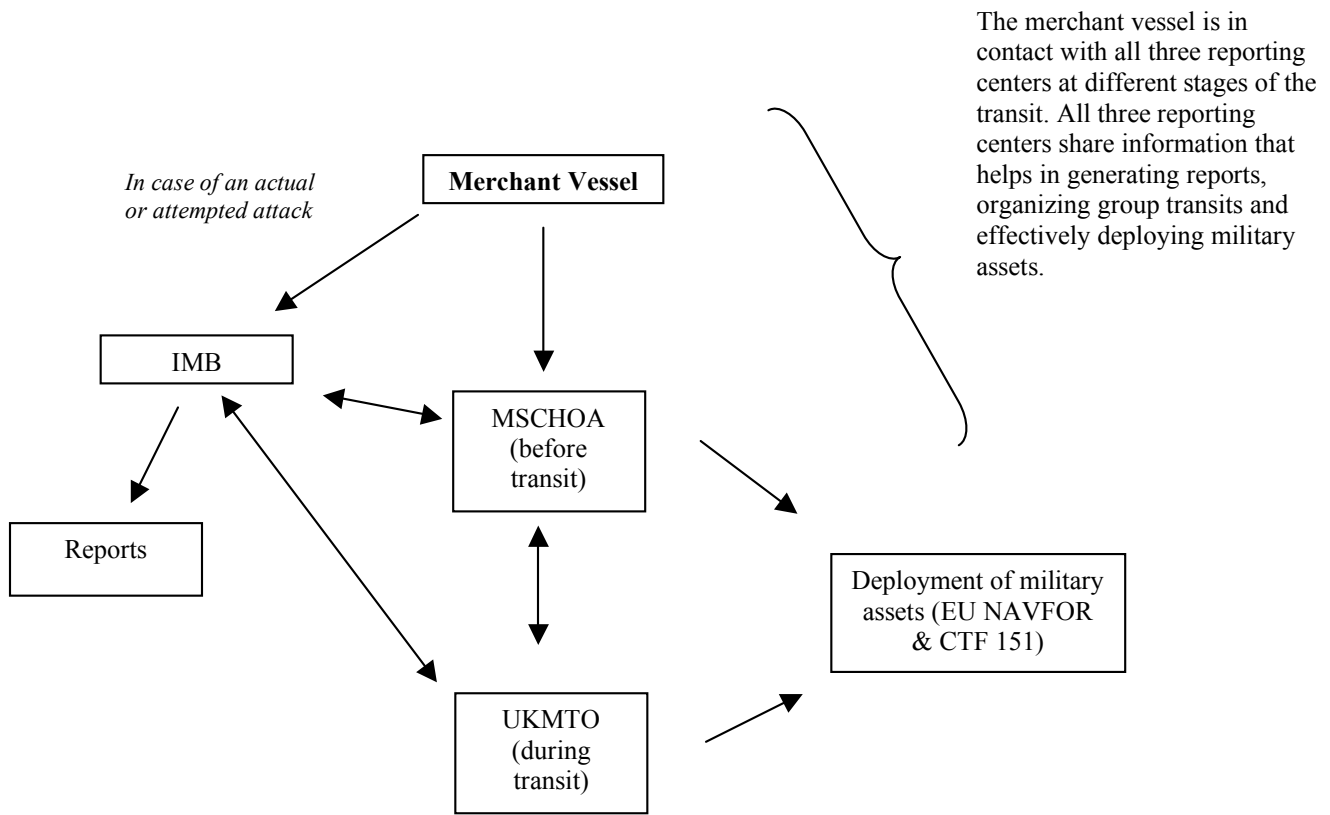


FIGURE 7: DETAILED OPERATIONAL MECHANISM

Source: Georgios Drossinos

Evaluation

Ultimately, the regime and operational mechanism proved the hypothesis presented in the Methodology, which stated that, unlike in East Asia, anti-piracy efforts in the Gulf of Aden would require a top-down approach led by the UN. However, from a policy perspective, it is still too early to make a fair assessment of the regime's effectiveness. This is because most of the initiatives, from the creation of MSCHOA to

the deployment of warships in the area, were implemented beginning in mid-2008. In fact, EU NAVFOR became operational only on December 13 and the UN resolution 1846 was also passed that same month. Moreover, CTF 151 was only announced in January. What this means is that more time will be needed to see the effects of this regime. As explained before, and as can be seen in Figure 7, the IMB is the repository for all piracy attacks and it generates reports from this data. Therefore, its reports should be used to assess the regime's effectiveness. Unfortunately, the annual piracy report for 2008 is its most recent report, which will not reflect any effects from the various initiatives. Instead, we will have to wait for its first and second quarterly reports for 2009.

However, it is still possible to make a preliminary judgment on the regime – it has certainly created an elaborate system that ensures the sharing of information, the organization of vessel transits and the deployment of military assets in the region. The details provided by the representatives of MSCHOA, IMB and North of England all emphasized the strong sense of collaboration and coordination that exists among all organizations. Moreover, the numerous resolutions that have been passed are proof that the UN is fully committed to combating the problem of piracy. Most importantly, as was explained above, the UN provides the authority and international consensus for the deployment of military assets.

Nevertheless, there was a little more skepticism from the private sector. To clarify, the private industry supports the UN as the central actor in the regime, as was shown in the letter written by the lobby groups. In other words, there is a strong mutual will among all interested parties to combat the problem of piracy and to have a clear allocation of responsibilities. However, that same letter also showed the sector's concern

over the increasing number of pirate attacks in the Gulf of Aden and called for more decisive action. The two interviews that were conducted in December 2008 and January 2009 helped to clarify this point.

Dimitris Korkodilos, CEO of Andriaki Shipping Co. Ltd. whose ships have transited through the region, welcomed a coordinated effort lead by the UN. He called for more action by the international community and a greater use of naval forces like the EU NAVFOR. He also seemed more hopeful for a successful international response than the lobbyists. When asked directly about realism, he said that having each country helping its own vessels would not be an effective solution. Essentially, he believes that a successful multinational effort is possible.¹⁰⁶

Diamandis Caloghiros, Managing Director of Z & G Halcoussis Co. Ltd., showed more skepticism. He is a strong advocate of military force and believes in its coordinated use. However, he has a love-hate relationship with transgovernmental organizations, in particular due to an unpleasant experience with the UN World Food Programme – some years ago one of his ships transported wheat on behalf of the programme to Eritrea, which he claims was rotten. While he admits that the UN can provide the necessary authority and coordination for the effective and legitimate use of force, he believes they have not done enough. Specifically, he believes that the UN should pass a resolution that bans all non-merchant vessels, especially fishing boats, from the UTC corridor – he says this would dramatically increase the safety of the passage because currently pirates are easily able to hide among fishing boats. As will be analyzed shortly, this issue has not been considered by the UN. He also acknowledged the importance of sharing information. In fact, it became clear that he views the UKMTO as a critical component of

¹⁰⁶ Dimitris Korkodilos, personal interview, December 19, 2008.

the initiatives to ensure safe navigation through the area. Moreover, even though it is voluntary, his company is registered with MSCHOA.

It must also be said that he would have no problem in sending his ships through the Gulf of Aden, especially because new insurance policies have been created to cover incidents related to piracy. He explained that traditionally vessels would have hull & machinery insurance which covers the boat and protection and indemnity insurance which covers the ship's cargo. Now there is also war risks insurance that provides protection from piracy.¹⁰⁷ He explained that one of his company's bulk-carriers transported 46,200 tons of urea through the Gulf and, while doing so, did not even participate in one of EU NAVFOR's Group Transits. Ultimately, although he acknowledged the severity of the problem, his words reflected more skepticism than urgency with regards to the various initiatives.¹⁰⁸

Given the unprecedented rise in maritime hijackings in 2008, this skepticism can be understood. However, this should not detract from the promising nature of the regime. As explained before, most of the initiatives have been implemented very recently, which means that their effects have not been felt yet. In other words, the private sector is basing its judgment on 2008, which was a year of construction and consolidation for the regime. 2009 will be the test year and it will be interesting to see what the industry's players have to say in the coming months.

From a theoretical perspective, supporters of realism would disagree with this evaluation by arguing that this regime would be undone simply if a country acted without a UN mandate by stationing its warships outside areas sanctioned by the UN. Nation

¹⁰⁷ Diamandis Caloghiros, personal interview, January 12, 2009.

¹⁰⁸ Ibid.

states would be part of the national category, which was removed from the final version of the regime. Essentially, realists argue that in an anarchic world only nation states can protect their own interests – they do not believe in the merits of cooperation and transnational institutions. Therefore, in a realist world, each nation would deploy military assets *only* to protect MVs carrying its flag.

There was evidence that states were taking things into their own hands. The BBC reported the Indian navy began patrolling the Gulf of Aden last year and in November destroyed a suspected Somali pirate vessel.¹⁰⁹ Moreover, in its first operation beyond the Pacific, China has also sent warships to the Gulf of Aden to protect Chinese vessels from pirate attacks.¹¹⁰ These were very important initiatives as both China and India are two of the world's fastest growing economies that are becoming increasingly reliant on international trade. These missions are not part of any overarching operation like EU NAVFOR and CTF 151 and therefore closely resemble realist behavior. However, what the articles fail to show or explain is that these individual efforts still depend on information supplied by the three reporting centers. The reason is because all merchant vessels are strongly encouraged to follow the UTC, which has been established by the CTF 150 and is managed by the MSCHOA and UKMTO. What this means is that all warships, whether they act alone or in a larger task force, depend on these centers to provide them with information on when and where in the corridor the vulnerable MV will transit. Moreover, because there are other warships in the region, acting alone without any coordination would be a waste of resources. According to an email exchange with

¹⁰⁹ “India 'sinks Somali pirate ship',” *BBC News*, November 19, 2008, http://news.bbc.co.uk/2/hi/south_asia/7736885.stm (accessed November 20, 2008).

¹¹⁰ “China begins anti-piracy mission,” *BBC News*, December 26, 2008, <http://news.bbc.co.uk/2/hi/asia-pacific/7800401.stm> (accessed December 26, 2008).

MSCHOA representative, “all warships...even 3rd party nations like Russians, Chinese etc. receive transit information from MSCHOA.”¹¹¹ For example, even though a Chinese destroyer will have direct contact with a Chinese MV, it will need to know from the MSCHOA and UKMTO whether the vessel will participate in a group transit and at what time. It will also need to know from the centers if it will be deployed where that vessel will transit, as there may be other warships already at the location.¹¹² .

There is more evidence that realism is not the correct approach. It has become clear from their 111 attacks in 2008 that Somali pirates have targeted all types of merchant vessels, from livestock carriers to vehicle carriers, carrying flags from around the world.¹¹³ In 2008 alone, pirates attacked ships registered in 50 different countries.¹¹⁴ Clearly, *all* MVs going through the Gulf of Aden are at risk. As explained earlier, there is presently no evidence of a link between the attacks and terrorist motives. In other words, the attacks are not discriminatory- they are purely criminal and affect ships from all nations as well as all countries dependent on international trade. Therefore, countries should have an interest in collaborating to protect all ships transiting through the area.

Ultimately, while it is true that a nation could disregard a UN directive, the analysis, including the conversations and interviews conducted, show that a realist approach would be logistically unfeasible and would result in the waste of precious resources. The problem of piracy stretches across geographical boundaries and affects all

¹¹¹ JOC Coordinator at MSCHOA, (mschoa@yahoo.com). Re: Question about piracy in the Gulf of Aden. February 5, 2009. Email to: Georgios Drossinos (drossgeo@sas.upenn.edu).

¹¹² *Note:* Warships supplied by 3rd party nations were not included in the figures because the majority of military assets that are deployed are part of coalitions (i.e. EU NAVFOR and CTF 151).

¹¹³ ICC International Maritime Bureau (IMB), *Piracy and Armed Robbery Against Ships: Annual Report, 1 January – 31 December 2008* (January 2009): 6, 16.

¹¹⁴ *Ibid.*,18.

kinds of stakeholders. This means that a multilateral response guided by UN-generated consensus is essential.

Conclusion

Having analyzed the case vis-à-vis both theories it is fair to say that international regime theory is most relevant. Moreover, by not favoring one theory prematurely this approach avoided the risk of “selective reconstruction” identified by John Odell.¹¹⁵ As was explained, the protection regime shows the relevancy and application of international regime theory. While there is no way of knowing whether policy makers actually used this theory to put together the current response, this analysis shows how international relations theory can be used to understand and analyze the behavior of actors in the face of a complicated problem. Additionally, if forthcoming IMB reports show that the regime has caused a significant reduction in piracy in the Gulf of Aden then policy makers should use the insights from the theory to construct a similar regime to tackle piracy in other areas such as West Africa and the South China Sea. The reason for this is because Nigeria has not seen much improvement in anti-piracy operations between 2003 and 2005 and is now the place with the second-most incidents of piracy. Although the numbers for Vietnam are not as high as in Nigeria, it has seen a rise in incidents since 2006.¹¹⁶

The remainder of the analysis will analyze the *Apprehension & Prosecution* regime, once again with relation to the two theories. This is the second component of the response – while protecting merchant vessels should be the first priority, the apprehension and prosecution of pirates has the potential to increase the deterrent effect of the international

¹¹⁵ Odell, “Case Study Methods,” 164.

¹¹⁶ IMB, *Piracy*, 5-6.

community's response. However, as will be explained, this regime depends much more on the nuances and subtleties of maritime and international criminal law, which will pose analytical and policy challenges.

APPREHENSION AND PROSECUTION REGIME

The *protection* of MVs is essential to ensure their safe passage through the Gulf of Aden and, ultimately, the Suez Canal. The protection regime built around the UN and put into action through the various information centers and military assets, is meant to protect ships from attacks. In its annual and quarterly reports, the IMB includes data for both actual and attempted attacks. The IMB does not define attempted attacks but it is clear that these are attacks thwarted by preemptive actions. With regards to the current protection regime, these actions include an MV's participation in Group Transits and the presence of military assets, both of which are organized by the three centers.

This protection regime is based on preemption and therefore does not deal with actual attacks, which amounted to 68% of the total number of worldwide attacks. In other words, the protection regime does not provide a mechanism for pursuing and apprehending pirates. It would seem that an international response confined to just this regime would be dangerously limited – indeed, the research has uncovered a second component to the international community's response to piracy, the *Apprehension & Prosecution* regime. This regime is the second *raison d'être* of the anti-piracy response and is meant to deal with actual attacks. Like the protection regime, it has been created by the UN to help foster inter-state collaboration and therefore shows the relevance of international regime theory when combating this maritime problem. Paradoxically however, as the analysis will demonstrate, the construction of this regime shows that the *protection* regime is paramount.

A breakdown of the regime reveals that the apprehension mechanism is riddled with bureaucracy and limitations, while the prosecution mechanism is primitive at best.

Any system faced with such conditions would ordinarily require drastic changes. However, upon closer examination, it appears that only the prosecution mechanism needs to be revised. The apprehension component works best with its current ‘flaws’. The reason for this argument is that the international community’s response should rely *primarily* on protecting MVs to fight piracy rather than pursuing pirates and then attempting to prosecute them. The forthcoming analysis will provide a detailed breakdown of the regime, an explanation of this paradoxical finding and an evaluation of international regime theory vis-à-vis the existing practices that constitute the current apprehension and prosecution regime.

The preliminary analysis did not introduce sharp distinctions between apprehension and prosecution given that it bundled both components together. The structure that was introduced in the Methodology was therefore incorrect. The reason is because it did not take into full consideration the nuances and subtleties of international maritime law. Specifically, the lack of depth in the preliminary analysis did not uncover the different legal tools that the UN provides for the apprehension and prosecution of pirates. Moreover, it did not analyze the ICJ and ICC closely enough to uncover their incompatibility in relation to the prosecution of pirates. Ultimately, although part of the same regime, the apprehension and prosecution of pirates are very different and need to be analyzed separately.

Apprehension

It is easy to underestimate the difficulty of apprehending pirates. While they have become increasingly sophisticated, it is hard to imagine what difficulties a modern

destroyer would have in successfully pursuing a skiff. However, this claim fails to understand, and appreciate, the administrative, legal and bureaucratic difficulties of such an endeavor.

The apprehension component of the regime is currently composed of two parts: UNCLOS and UN Security Council Resolutions 1846 and 1851.¹¹⁷ Both the convention and resolutions fall under the auspices of the UN. UNCLOS sets the stage for all actions taken to apprehend pirates. Besides providing a definition of piracy and pirate ships, it sets out guidelines regarding the capture of pirates. It states that all countries “shall cooperate... in the repression of piracy.”¹¹⁸ Specifically, Article 107 states that only warships, military aircraft or vessels on government duties have the authority to seize pirates. Moreover, Article 106 states that ships are liable for seizure without adequate grounds.¹¹⁹ With regards to the actual seizure of pirates, Article 105 states that in areas “outside the jurisdiction of any State, every state may seize a pirate ship” and “arrest the persons and seize the property on board.”¹²⁰ Furthermore, the courts of the State which carried out the arrest have the authority to “decide upon the penalties to be imposed” on the pirates.¹²¹ However, there are significant limitations to the rules of engagement, which are outlined in Articles 110 and 111. Under Article 110, when wishing to engage a suspected pirate ship, a warship must first send an officer-led party to board a suspected pirate ship to verify the suspicions. In other words, the warship cannot just open fire. Any inspection has to be carried out “with all possible consideration.”¹²² Only after this

¹¹⁷ *Note:* SUA Convention was adopted by IMO in 1988. A protocol was added in 2005 but it has yet to enter into force – only 18 parties have signed on to it so far.

¹¹⁸ United Nations Convention on the Law of the Sea.

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Ibid.

examination does a warship have the “right of hot pursuit.”¹²³ However, the right of pursuit under Article 111 is also limited because the pursuit can only be commenced after a visual or auditory warning signal is sent to the foreign ship. Furthermore, the right of pursuit “ceases as soon as the ship pursued enters the territorial sea of its own State.”¹²⁴ Essentially, from the moment that a warship spots a suspicious ship to the moment it begins its pursuit, it has to go through a series of checkpoints which slow down the apprehension process and remove the element of surprise. The legal basis of apprehension is complicated and, as a result, there have been very few attempts by warships to capture pirates.¹²⁵

These limitations are also reflected by the directives issued by resolutions 1846 and 1851.¹²⁶ Resolution 1846 urges countries to take “all necessary means” which include “deploying naval vessels and military aircraft, as well as seizing and disposing of boats, vessels, arms and related equipment used for piracy.”¹²⁷ However, the nature of these ‘necessary means’ is constrained – each resolution reaffirms that “international law, as reflected in [UNCLOS]...sets out the legal framework applicable to combating piracy.”¹²⁸ As is typical with UN resolutions, each clause needs to be looked at carefully to spot hyperbolism. In addition to reiterating and reinforcing all that is said in resolution 1846, resolution 1851 also allows states to engage in “land-based operations in Somalia... to interdict those using Somali territory to plan, facilitate or undertake” acts of

¹²³ United Nations Convention on the Law of the Sea.

¹²⁴ *Ibid.*

¹²⁵ Paul Reynolds, “Rules frustrate anti-piracy efforts,” *BBC News*, December 9, 2008, <http://news.bbc.co.uk/2/hi/africa/7735144.stm> (accessed January 18, 2009).

¹²⁶ *Note*: Resolutions 1816 and 1838 are more relevant for the protection regime, as their primary aim was to kick-start the anti-piracy response by encouraging greater collaboration among nation states.

¹²⁷ UN Resolution 1846.

¹²⁸ UN Resolution 1851.

piracy.¹²⁹ Although this is a positive step forward, the resolution provides little to no detail on how to engage pirates while at sea.

These limitations in the resolutions have far-reaching consequences because they affect all protection operations in the region, including those involving EU NAVFOR and CTF 151. The same applies to apprehension operations. In fact, this component of the regime is structurally identical to the protection regime. This is because both regimes are regulated by the UN, proving the relevance of international regime theory. Moreover, the same military assets that are deployed to protect MVs are also used when apprehending pirates. In fact, there is more to this relationship than meets the eye.

Another *seemingly* flawed aspect of UNCLOS is that it does not allow for warships to board MVs once pirates are on board. This prohibition is also mentioned in both resolutions. Once the pirates have captured a vessel then a warship does not have the legal authority to take it back. It is then up to negotiations between the ship's owners and pirates to settle the issue. This was proven anecdotally by the BBC's correspondent Jonah Fisher. In a series of articles he recounted his experiences aboard Royal Navy frigate HMS Northumberland as it was patrolling the Gulf of Aden as part of EU NAVFOR. During his sojourn, an MV was hijacked. The HMS came to the scene too late and was forced "to watch as the Saldanha, [a Greek-owned MV]... drifted past the bridge windows and on towards the Horn of Africa."¹³⁰

This aspect is one reason why protection is a far more important component of efforts to tackle piracy than apprehension. As explained previously, once an MV is in transit the UKMTO is responsible for monitoring its route. In the event of a potential

¹²⁹ UN Resolution 1851.

¹³⁰ Jonah Fisher, "Somali pirate patrol: Day four," *BBC News*, February 22, 2009, <http://news.bbc.co.uk/2/hi/africa/7904874.stm> (accessed February 25, 2009).

attack, if the MV is not in the vicinity of a warship, the UKMTO is responsible for directing military assets its way. Since engaging a pirate vessel requires a whole list of checkpoints, the closer the warship is to the distressed MV, the higher the possibility that it will have the time to properly engage the pirates and therefore *prevent* the attack from occurring. It must be understood that the location of the ship is determined by the protection regime. The IMB, MSCHOA and UKMTO all work together by collecting and sharing information to ensure that military assets are deployed effectively where there is the biggest threat of a pirate attack. It is fair to say that the operational mechanism that takes place in apprehension operations depends on the operational mechanism of protection missions.

More than just depending on the protection mechanism, the apprehension of pirates is also far more risky and dangerous. There are specific reasons why strict rules of engagement are required. With regards to attacking a pirate ship, without examination there is no way of knowing whether the suspected vessel is carrying pirates or fishermen because both use near-identical skiffs. Therefore, a potential consequence of prematurely sinking a skiff could be the death of innocent civilians. Surely, any such event would have far-reaching consequences and could very well put the entire anti-piracy effort under heavy scrutiny. There is more to the problem involving fishermen. The UKMTO introduced a revised transit corridor effective from February 1, 2009. However, just like its predecessor, the corridor does not prevent fishing inside it. This is because banning fishermen from parts of the Gulf of Aden would only serve to alienate them and potentially turn them into enemies. This danger should not be taken lightly – the BBC reports that the leaders of pirate gangs are usually former-fishermen with intimate

knowledge of the sea.¹³¹ According to the one of the people interviewed, the international community has not seriously considered banning fishing in the corridor.¹³²

There are also important reasons why boarding a hijacked ship is dangerous. Firstly, one war ship would not be enough. The boarding of a ship is far more complicated than simply protecting it. A more robust force, including helicopters, would be needed to ensure that any attack mission would be effective and guarantee the safety of the warship's crew. Currently, warships are not deployed in groups to ensure that they can cover as large a surface area as possible. Therefore, the creation of such a 'robust' force would misallocate warships and potentially leave other MVs at risk of being attacked. Secondly, the private shipping industry is not in favor of naval forces boarding a hijacked ship in an attempt to take it back. Ship owners would rather pay the ransom than risk the loss of their crew members and the loss of the vessel's cargo and potentially the vessel itself. This danger is real since pirates are well armed and have shown copious temerity. A confrontation between armed pirates and an armed navy crew could have dire consequences. In the case of the Sirius Star, the hijacked Saudi supertanker, a \$3 million ransom was paid, which constituted only 3% of the total value of oil that it was carrying. Had naval forces intervened, the results could have been catastrophic – in the exchange of gun fire people could have died and the oil tanks could have been damaged, resulting in an oil spill, which could have cost the owner of the MV its reputation and a bill in excess of \$3 million. Specifically, the open letter to governments on piracy attacks by the major shipping lobby groups did not advocate direct military action. While it called for

¹³¹ Hunter, "Somali pirates living the high life."

¹³² Diamandis Caloghiros, personal interview, January 12, 2009.

the establishment of a legal mechanism to bring arrested pirates to justice, it did not call for a warship's crew to board a hijacked MV.¹³³

Ultimately, the cost-benefit analysis shows that a limited apprehension mechanism is the safest option. Without these limitations, the potential dangers would be far too great for both warships and MVs. Therefore, it is absolutely essential that the protection regime be as effective as possible so that the issue of apprehension does not arise so frequently. Although current data has not been released yet, the previous section argued that the protection regime is impressive and shows how far interstate collaboration can go under the leadership of an institution like the UN. However, this conclusion did not take into consideration the insights gained from the analysis on apprehension operations. There is now demonstrably much more at stake in the success of the protection regime than initially thought.

Currently, despite being riddled with bureaucracy, all warships have closely followed the UN's directives with regards to apprehending pirates. This goes to show how essential the role of the UN has been in providing legitimacy to state action. Once again, this is clear proof that international regime theory is a valuable tool when exploring such complicated issues of transnational crimes committed by non-state actors. However, there is one weakness to the theory that the previous section overlooked: *leadership*. Any system is as strong as its weakest link. With regards to a regime, an institution is required to create it but it is the actions of individual states that keep the regime alive. In the case of the protection regime, if not enough states commit warships to the Gulf of Aden then all coordination efforts by the UN and the information centers will not be as effective as they could be. Unfortunately, thus far not enough nations have

¹³³ Interntako, "Open letter to governments."

shown the right amount of commitment and leadership. Specifically, there are currently 10-15 warships in the region, which need to cover an area equal to one million square miles.¹³⁴ This is undoubtedly a daunting, and virtually impossible, task. Although there are various estimates, the 'world's' navy consists of about 2000 ships. Therefore, the current deployment of warships in the Gulf of Aden constitutes 0.6% of the world's naval power.¹³⁵ Derek Reveron, associate professor at the Naval War College, states that most of the world's navy ships are based "outside of important operating areas."¹³⁶ Although the argument is not for all 2000 warships to be stationed in the Gulf of Aden, there definitely needs to be more, especially because the area is vital to international shipping. Currently, China, Germany, Japan and Russia have deployed few to no warships in the area. These are countries with some of the world's largest fleets and therefore they need to do more. Moreover, most of these countries are especially dependant on exports and should have an active interest in protecting a vital international shipping lane. States should consider deploying a larger number of smaller vessels which still have attacking capabilities but are less costly to operate and also make the most of naval aircrafts to conduct reconnaissance. The UN could very well increase pressure but it is essentially the responsibility of individual states to take a part in this problem which affects all countries.

The leadership that is required should not be compared to realist behavior.

Realists believe that countries act out of self-interest because of the world's anarchic nature. Their actions would be completely independent and their purpose would be power

¹³⁴ Jonah Fisher, "Somali pirate patrol: Day two," *BBC News*, February 22, 2009, <http://news.bbc.co.uk/2/hi/africa/7902685.stm> (accessed February 25, 2009).

¹³⁵ Derek S. Reveron, "How many countries does it take to make a thousand-ship Navy?" *BNET*, Autumn 2007, http://findarticles.com/p/articles/mi_m0JIW/is_4_60/ai_n21118687 (accessed March 2, 2009).

¹³⁶ *Ibid.*

maximization vis-à-vis other states. In contrast, the leadership that is called for here would involve state behavior under the auspices of the UN. The ultimate goal is to strengthen the existing anti-piracy protection regime, which accords with international regime theory, by putting more military assets at the disposal of the various information centers. This problem also shows that international regime theory itself is not a perfect model for dealing with a transnational, non-state issue such as piracy.

Looking back at the theory of international regimes, Krasner and Keohane argue that in order for a regime to be created, the right conditions are needed in the form of a “fundamental discontinuity in the international system” and an institution is required that embodies the “principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue-area.”¹³⁷ In the case of the protection regime, the resurgence of piracy was striking enough to encourage the UN to become directly involved. However, the theory fails to explain in detail how a regime is maintained – it simply assumes that actors’ expectations will converge on a given issue and therefore they will be encouraged to collaborate with one another to resolve the issue. As logical as this may seem, it is by no means guaranteed.

Ultimately, the international community is faced with a dilemma. Its *primary* tool for combating piracy is a protection regime that, although functional, is essentially ‘understaffed’. The major naval powers need to set an example by committing more military assets to the region. The creation of CTF 151 by the US Navy in January 2009 is a step in the right direction. The US has already found 20 nations willing to participate. The hope is that this force, along with the smaller EU NAVFOR mission, will grow in

¹³⁷ Stephen D. Krasner, ed., *International Regimes* (Ithaca: Cornell University Press, 1983), 1.

size over the next few months so that decisive deterrent action can be taken against pirates.

Prosecution

Even though protection should take precedence over apprehension, it is still necessary to have a mechanism to punish those pirates that are captured. Although they may not be numerous, not prosecuting them would only encourage others to persist in piracy. For this reason, the prosecution mechanism is the other component of this second regime. Unfortunately, this mechanism is near inexistent – to date no pirates have been successfully prosecuted. French authorities are still prosecuting pirates that were apprehended by commandos in April 2008.¹³⁸ In September 2008, the Danish Navy captured 10 pirates but had to release them eventually because legal experts in Copenhagen were “uncertain whether they could be prosecuted in Denmark.”¹³⁹ Even when there is a bilateral agreement between states the legal process can be daunting. The US and Kenya signed a memorandum of understanding in January which allows the US Navy to transfer captured pirates to Kenya for prosecution. The problems are the logistics involved with such an understanding – the US Navy must capture the pirates and arrange their transfer to Kenya, which in turn has to house the pirates while building their case.¹⁴⁰ This process inevitably takes the US warship off course, during which time it cannot provide assistance to MVs. Concurrently, witnesses have to be assembled, which in MVs

¹³⁸ Jacquelyn S. Porth, “Peace & Security: Legal Experts Take Action to Prosecute Pirates,” <http://www.america.gov/st/peacesec-english/2009/February/20090227144346sjhtrop0.3818781.html&distid=ucs>.

¹³⁹ Corey Flintoff, “Prosecuting Pirates: No More Walking The Plank,” *NPR*, January 9, 2009, <http://www.npr.org/templates/story/story.php?storyId=99169738> (accessed March 2, 2009).

¹⁴⁰ Porth, “Peace & Security: Legal Experts Take Action to Prosecute Pirates.”

consist of a multinational crew. Moreover, the nature of pirates has legal implications – as they are stateless actors they have to be prosecuted as individuals, which complicates legal proceedings considerably. As will be argued shortly, the current maritime legal framework has been set up to deal with bilateral disputes involving nation states, not stateless actors. Moreover, acts of piracy are often perpetrated in international waters which raises the issue of jurisdiction. Handing over pirates to Somalia’s transitional government is also not an effective option because of the near inexistent legal system.

Ultimately, there is no “international legal system for people accused of piracy.”¹⁴¹ Kenneth Randall, dean of the University of Alabama law school, says that there is “no international criminal court that has jurisdiction over pirates.”¹⁴² Action by individual states and bilateral agreements can only go so far – what is needed, according to this expert, is a standardized international system which all countries can abide to and benefit from. Randall claims that the United Nations “needs to step up to the plate and help to define the prosecution of pirates...[and perhaps]...even establish an international tribunal.”¹⁴³

The reality is that there exists an international mechanism for prosecuting issues revolving around the sea. The problem is that, as it stands, this mechanism provides too few details about the prosecution of pirates. As with the protection and apprehension of pirates, it is the UN that coordinates the prosecution mechanism.

¹⁴¹ “Q&A: Somali piracy,” *BBC News*, January 9, 2009, <http://news.bbc.co.uk/2/hi/africa/7734985.stm> (accessed March 2, 2009).

¹⁴² Flintoff, “Prosecuting Pirates: No More Walking The Plank.”

¹⁴³ *Ibid.*

UNCLOS provides nation states with four ways to settle “disputes concerning the interpretation or application” of the convention.¹⁴⁴ The International Tribunal for the Law of the Sea (ITLOS), the International Court of Justice (ICJ), an arbitral tribunal constituted in accordance with Annex VII of the convention and finally a special arbitral tribunal constituted in accordance with Annex VIII of the convention.¹⁴⁵ ITLOS is a specialist international tribunal that deals with maritime issues. However, since beginning its mandate in 1996, it has only dealt with 15 cases, *all* of which involved two states and none of which included disputes associated with piracy. Although the tribunal is “open to entities other than States Parties,” thus far it has not shown its capability to deal with disputes that involve multiple states as well as stateless actors.¹⁴⁶ A similar issue is encountered with the ICJ. Although its mandate is not specifically related to maritime issues, it is the principal judicial organ of the UN and therefore could potentially provide copious amounts of legitimacy to prosecute pirates. The problem is that it can only settle legal disputes between states and has no jurisdiction to try individuals, or pirates in this case.¹⁴⁷ The next legal option provided by UNCLOS is creating an arbitral tribunal. Annex VII of the convention states that any party “may submit [a] dispute to the arbitral procedure... [and] shall be entitled to nominate four arbitrators.”¹⁴⁸ The arbitral tribunal consists of five members and each party has a right to appoint one arbitrator – the other three are appointed by agreement between the parties.¹⁴⁹ Although this form of tribunal is meant to deal with specific issues and can accommodate more than two parties, it is

¹⁴⁴ United Nations Convention on the Law of the Sea.

¹⁴⁵ Ibid.

¹⁴⁶ International Tribunal for the Law of the Sea (ITLOS), “Proceedings and Judgments – Competence,” http://www.itlos.org/start2_en.html.

¹⁴⁷ International Court of Justice (ICJ), “Frequently Asked Questions,” <http://www.icj-cij.org/information/index.php?p1=7&p2=2>.

¹⁴⁸ United Nations Convention on the Law of the Sea.

¹⁴⁹ Ibid.

unclear from the annex whether it can deal with stateless actors such as pirates. Although Article 105 of the convention provides states with the authority to seize pirates, the annex provides little detail as to how the tribunal would deal with such stateless actors. Finally, the special arbitral tribunal has one significant limitation – it can only deal with disputes relating to fisheries, protection and preservation of the maritime environment, maritime scientific research and navigation.¹⁵⁰

Ultimately, the fundamental problem of UNCLOS vis-à-vis the problem of piracy is that the overwhelming majority of its articles, from limits of territoriality to the right to fish on the high sea, involve states rather than stateless actors. This becomes apparent when looking at the wording of Article 287 a second time. The four aforementioned ways can be used to settle “disputes concerning the interpretation and application” of the convention.¹⁵¹ Upon closer analysis, this clause means that upon the violation or misinterpretation of the convention by one state (the defendant) the state that is affected (the plaintiff) can bring the first state to court. This is exactly what happens within the World Trade Organization (WTO) with regards to issues involving international trade where there exists an elaborate dispute resolution process for litigation between two or more states. Consequently, this wording seems to exclude the prosecution of piracy because an act of piracy does *not* represent a violation of the convention – it is simply a reflection of several of the articles. While the convention provides detail on the apprehension of pirates, it is very unclear with regards to prosecuting them. There seems to be a fundamental gap in UNCLOS and in the overall prosecution mechanism.

¹⁵⁰ United Nations Convention on the Law of the Sea.

¹⁵¹ Ibid.

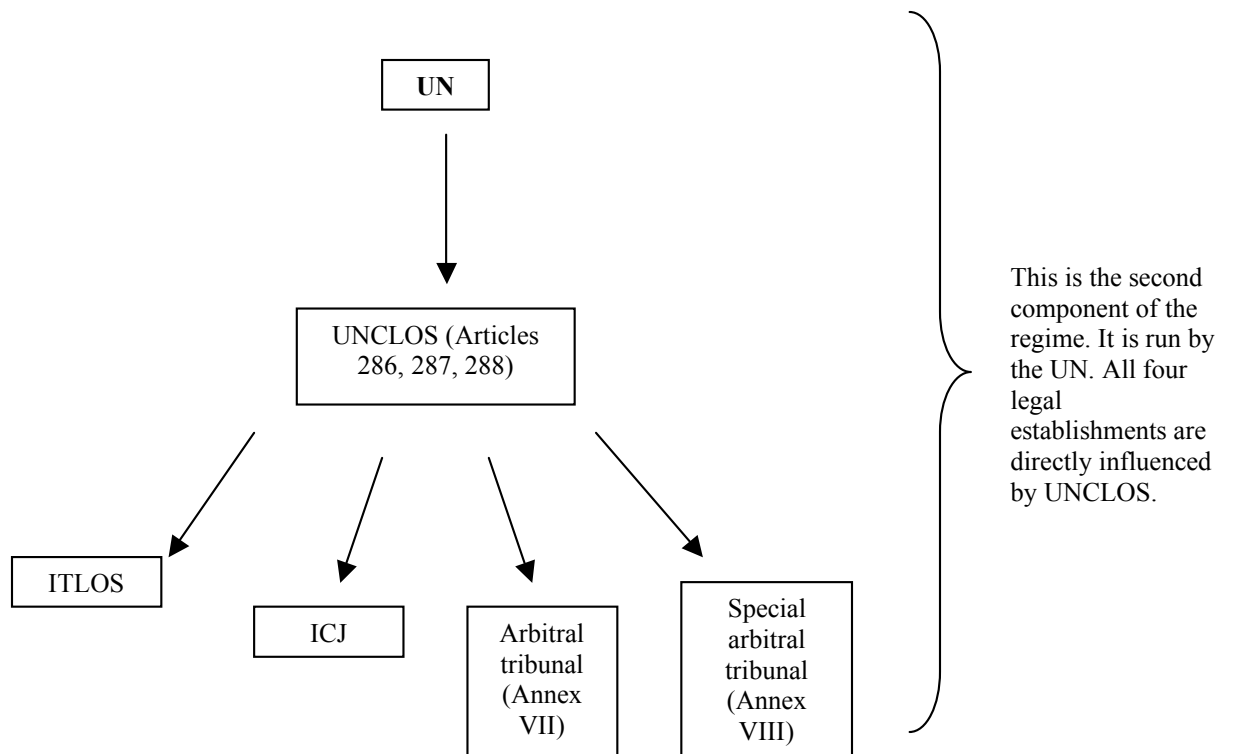


FIGURE 8: PROSECUTION COMPONENT

Source: Georgios Drossinos

Both components of the regime are not perfect. However, even though protection should take precedence over this regime, the capability of apprehension and prosecution needs to exist. For the reasons outlined before, the apprehension mechanism should stay as it is even though it has limitations. This is not the case for the prosecution mechanism – it is not limited but rather fundamentally flawed and therefore needs reform. It is worth mentioning once again that the few pirates that are apprehended *must* be prosecuted to increase the deterrent effect of the international anti-piracy response.

There are several potential solutions. To begin with, Articles 286, 287, 288, Annex VII and Annex VIII could be amended so to avoid any confusion regarding the prosecution of stateless actors. However, this presents a significant bureaucratic

challenge, as the amendments would need to be ratified by each of the 157 countries that have ratified the convention.¹⁵² Similar problems were encountered with the 2005 amendments to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention). The amendments were accepted in 2005 but have yet to enter into force.¹⁵³ Another potential way to strengthen UNCLOS would be to join it with the SUA Convention. This Convention originally came into force in March 1988. It provides states with more authority when dealing with maritime threats and provides more detail regarding the prosecution of individuals. However, this convention is geared towards terrorist acts on vessels, not criminal acts such as piracy.¹⁵⁴ In fact, the amendments in 2005 were motivated by the September 11 attacks. As a result, merging two conventions that deal with two separate maritime problems would be incredibly difficult. However, both resolution 1846 and 1851 reference the SUA Convention in several clauses. Both resolutions urge states to “implement the SUA Convention.”¹⁵⁵ However, both of them also reference UNCLOS, which is incompatible with the SUA Convention since it only deals with piracy. According to the IMO, the reason for this ambiguity, and seeming inaccuracy, is to leave as many doors open for states when dealing with pirates. In other words, some pirate attacks could indeed escalate into something greater and therefore necessitate the implementation of the SUA Convention.

¹⁵² “Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as at 16 March 2009,” http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea.

¹⁵³ “18 States sign 2005 SUA Protocols,” http://www.imo.org/Newsroom/mainframe.asp?topic_id=1472&doc_id=7790.

¹⁵⁴ United Nations, *Convention for the suppression of unlawful acts against the safety of maritime navigation* (March 10, 1988): 223.

¹⁵⁵ UN Resolution 1851.

Essentially, it comes down to interpretation of a pirate attack.¹⁵⁶ However, this approach is misguided because ambiguity does not promote swift and decisive action by member states. Moreover, the main purpose of the two resolutions is to provide guidelines regarding the *apprehension* of pirates, not their *prosecution*. In other words, the fundamental flaw in the prosecution mechanism is not only the gap in UNCLOS but also the lack of a UN resolution that is solely aimed at providing guidelines for prosecuting pirates. For this reason, this thesis proposes that the UN Security Council pass a resolution to create an ad hoc tribunal for acts of piracy committed in the Gulf of Aden.

The ad hoc tribunal would follow the format of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY). Both of these were created through resolutions. The one difference is that this tribunal would be prosecuting individuals for different crimes than those committed in Rwanda and the former Yugoslavia. In this thesis, piracy has been defined as a crime in its most basic form.

As this court would not be permanent, it would not make ITLOS obsolete. Ideally, the two legal bodies would work with one another. Moreover, the court should be created in such a way where it is built upon UNCLOS but is not hindered by its aforementioned ambiguity. This should not be difficult to accomplish as this court would not be permanent and would have the sole purpose of prosecuting pirates, meaning that not all of the convention would be relevant. Also, it would *assign* itself the jurisdiction to prosecute pirates, automatically reducing ambiguity. It would establish exactly what the private industry wants: a body with “legal jurisdiction to bring arrested criminals to

¹⁵⁶ International Maritime Organization (IMO), personal communication, March 3, 2009.

justice and subsequent punishment.”¹⁵⁷ Its ad hoc nature has another advantage – the court could be terminated if the anti-piracy protection effort is strong enough to put an end to most attacks. While the court would not be as bound by UNCLOS as ITLOS, it would still be under the auspices of the UN. Moreover, the pirates would be imprisoned in the country where the tribunal is based.

Some may question the usefulness of the tribunal by recalling that the International Criminal Court (ICC) deals with individuals, not states. However, the court would not be suitable for the prosecution of these individuals as it only has jurisdiction over “genocide, crimes against humanity and war crimes.”¹⁵⁸ Although the Rome Statute, the treaty that established the court, states that the jurisdiction of the court shall extend to the “crime of aggression,” the court does not currently have the ability to exercise its jurisdiction over this type of crime.¹⁵⁹ The reason is because member states must first “adopt an agreement setting up a definition of aggression and the conditions under which the Court could exercise its jurisdiction.”¹⁶⁰ Moreover, even if an agreement is reached, prosecuting pirates will be a challenge unless China, India, Russia and the US, all significant players in the anti-piracy response, sign and ratify the Rome Statute. For example, what would be the legal basis for prosecuting a pirate by the ICC if it was captured by any of the above navies? For this reason, an ad-hoc tribunal would be the most effective short-term solution for the prosecution of pirates.

¹⁵⁷ Interntako, “Open letter to governments.”

¹⁵⁸ International Criminal Court (ICC), “Frequently Asked Questions,” http://www.icc-cpi.int/NetApp/App/MCMSTemplates/Index.aspx?NRMODE=Published&NRNODEGUID={D788E44D-E292-46A1-89CC-D03637A52766}&NRORIGINALURL=/Menus/ICC/About+the+Court/Frequently+asked+Questions/&NRCACHEHINT=Guest#id_6.

¹⁵⁹ “Rome Statute of the International Criminal Court,” July 17, 1998, <http://untreaty.un.org/cod/icc/statute/romefra.htm> (accessed March 31, 2009).

¹⁶⁰ ICC, “Frequently Asked Questions.”

The single biggest obstacle to the creation of such a tribunal would be its potential cost. The annual budgets of the ICTR and ICTY each exceed \$90 million.¹⁶¹ These are very large amounts but it must be understood that the tribunal proposed will be much smaller since few pirates have been captured so far. Moreover, the tribunal will not last as long. Based on statistics provided by the IMB, it took 6 years to drastically reduce incidents of piracy in the Malacca Straits.¹⁶² Contrastingly, the ICTR is now in its 15th year. One of the reasons is the nature of the tribunals – the piracy tribunal is only part of a larger effort to stop pirates while the ICTR is responsible for prosecuting perpetrators of genocide, crimes against humanity and war crimes in relation to a conflict that already took place. As with all crimes of such scale, prosecution takes a long time. Another example is with the Khmer Rouge. It took 10 years to bring Kaing Guek Eav to trial, almost 30 years after the regime fell.¹⁶³

Moreover, the annual budget for the Special Court for Sierra Leone is estimated at \$22 million, which is substantially lower than \$90 million.¹⁶⁴ While this is still a large number, the BBC reported that Somali piracy had cost the private industry up to \$30 million between January and October 2008.¹⁶⁵ These numbers could very well increase if something is not done. Lastly, given that international trade affects all nations, if each one participates in the funding then the costs per state will be minimal.

Ultimately, this court would answer Kenneth Randall's call for an international criminal court to deal with pirates. Those who oppose the tribunal fail to read between the

¹⁶¹ Michael P. Scharf, "The Special Court for Sierra Leone," <http://www.asil.org/insigh53.cfm>.

¹⁶² IMB, *Piracy*, 5.

¹⁶³ "Landmark Khmer Rouge trial starts," *BBC News*, February 17, 2009, <http://news.bbc.co.uk/2/hi/asia-pacific/7893138.stm> (accessed March 20, 2009).

¹⁶⁴ Michael P. Scharf, "The Special Court for Sierra Leone."

¹⁶⁵ "Somalia piracy 'costs up to \$30m'," *BBC News*, October 2, 2008, <http://news.bbc.co.uk/2/hi/africa/7647631.stm> (accessed January 23, 2008).

lines and understand the flawed nature of the current prosecution regime, which would be incapable of bringing even the few pirates that are caught to justice. Once again, although protection should be the backbone of all anti-piracy efforts, an effective prosecution mechanism is required for a truly comprehensive international response. The Gulf of Aden is incredibly important for international trade and any additional step that would increase the deterrent effect of the international community's response should be welcomed.

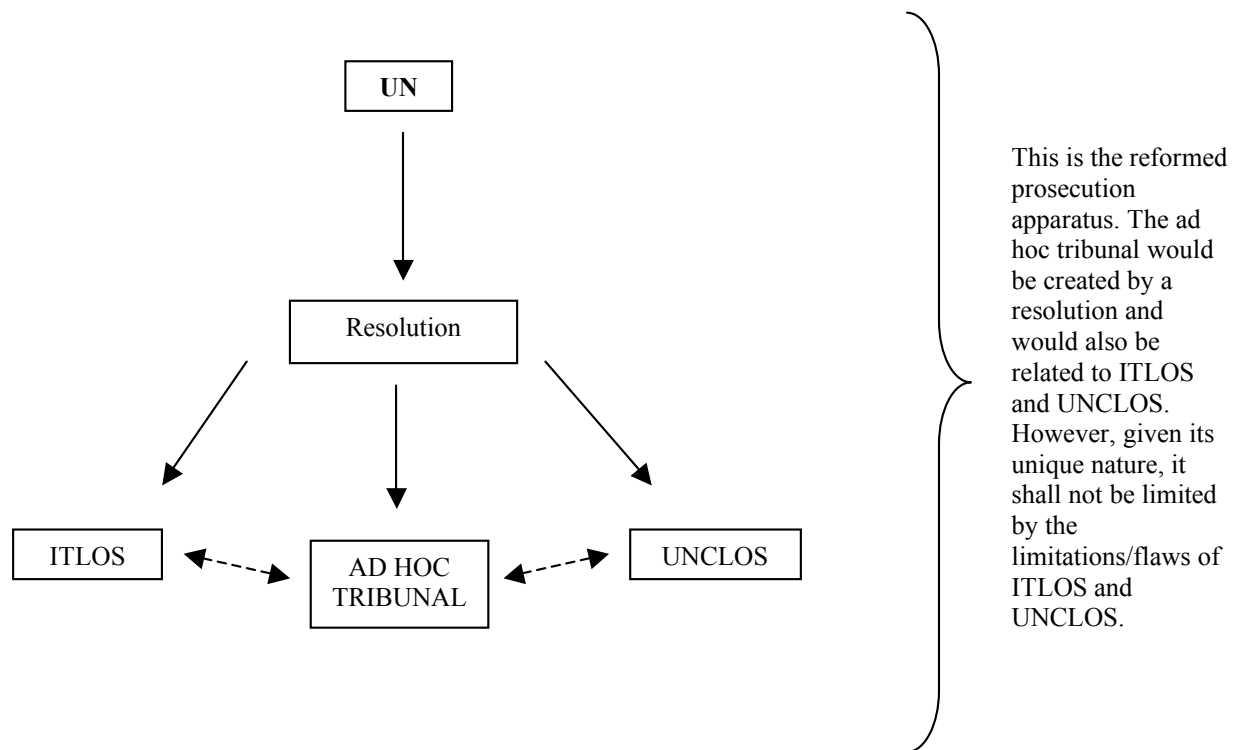


FIGURE 9: REFORMED PROSECUTION COMPONENT

Source: Georgios Drossinos

With regards to the theories, this form of prosecution also falls under the auspices of the UN. Therefore, international regime theory is once again more relevant than

realism for explaining how states should respond to the new security threat posed by the resurgence of international piracy. A realist prosecution framework would involve each state only prosecuting the pirates that it apprehends. However, this approach would be a mistake. Given the complicated and ambiguous legal landscape outlined above, a single state would have difficulties in establishing jurisdiction over a case, setting up a local court, bringing in witnesses and obtaining a conviction in its civilian courts. Even if states were successful in this endeavor, the result would be a myriad of national courts with no coordination between them. Since the problem of piracy is inherently transnational, this approach would be excessively costly, bureaucratic and inefficient. Given the scope of the problem it is necessary to have a standardized approach to ensure efficiency, validity and fairness in all trials.

One additional realist approach to prosecuting pirates would be to use a military tribunal instead of a civilian one, akin to the one at Guantanamo. This would be possible because pirates are captured by military assets. However, despite its feasibility, such a tribunal would certainly provoke international and domestic condemnation and would therefore be counter-productive. It is hard to imagine any nation after the Guantanamo Bay debacle that would attempt another such legal endeavor.

Conclusion

The findings of this section were unexpected, primarily because they focused to a large degree on the protection regime, which was covered previously. The first finding was that the international community's response to the resurgence of piracy should primarily be focused on protecting MVs. Although it is necessary to maintain a functional

apprehension and prosecution regime, it cannot form the backbone of anti-piracy operations. That is why *all* UN member states with sufficiently large naval forces and a considerable stake in shipping going through the Gulf of Aden should be urged to pledge military assets for the protection regime.

The second finding was the applicability of international regime theory. In both regimes, the UN has been involved extensively. In fact, it is the institution that has created both of them (it would also be responsible for creating the ad hoc tribunal). Although the current prosecution mechanism is ineffective, realist behavior would not offer anything better. However, the analysis did uncover a weakness within international regime theory due to the fact that it does not provide an explanation on how regimes can be maintained. It is essential to understand that, while the protection regime is based on states working together, that cooperation is only possible if individual states contribute sufficient military assets. Hopefully, this insight will encourage regime theorists to take a second look at the theory and make necessary changes to include the significance of leadership by individual countries.

CONCLUSION

At its fundamental level, the aim of this thesis was to inform the reader on a complicated transnational problem that involves stateless actors. Too many times scholars and policy makers brush away issues which at first may seem trivial but in reality deserve greater attention. In the case of piracy, some may well be tempted to look over a bunch of criminals racing around the Gulf of Aden in skiffs in search of money. However, that would be a mistake – Somali piracy is a phenomenon that needs to be dealt with decisively and swiftly because it has the potential of severely distorting international trade and aggravating the humanitarian disaster in Somalia.

At a theoretical level, the paper has hopefully shown the reader how international relations theory can be used to understand global issues. Specifically, regimes built around supranational coordination and international cooperation are essential for dealing with this maritime threat. However, some may point to four limitations. Firstly, the paper analyzed a single case, which some may argue limits its depth. However, Somali piracy is the most severe form of piracy currently and the paper does recommend that regime theory also be applied to other piracy-infested areas such as the West coast of Africa.

Secondly, there was a lack of emphasis on the internal situation in Somalia. This is an important criticism to address because it points to a fundamental aspect of this paper: *long versus short-term* solutions to stopping Somali pirates. The problem of piracy is inherently domestic. As long as Somalia is largely lawless, many people's livelihoods will continue to depend on piracy. Therefore, these critics would argue, the real solution is to bring political and economic stability to Somalia. However, the problem with this

solution is that it is *long-term*. It would be dangerous to think that Somali stabilization can be achieved swiftly. The debacle in Afghanistan and the persistent problems in Iraq are just two examples that show the difficulties of nation-building. Moreover, it is important to remember that this thesis analyzed Somali piracy not through the lens of Somali's lawlessness but rather through the international community's response to stop it in order to protect international shipping, which can be accomplished in the short-term through the two regimes.

Thirdly, it did not deal with terrorism, which some see as a significant threat. While terrorism is certainly a danger, the Methodology explained that there is currently no connection between Somali piracy and terrorism. Therefore, anti-piracy efforts should continue to ensure that this evolution does not take place. However, this issue should be monitored closely – if pirates were to turn to terrorism, that may provide scholars and policy makers with interesting insights on the creation of terrorist organizations. Lastly, some may raise the question of whether the paper's insights can be applied to non-maritime problems. This point requires particular attention.

The answer to the question is that the insights gained from regime theory have laid the groundwork for future research concerning the creation of regimes to deal with stateless phenomena that occur beyond the sea. The fundamental aspect that needs to be understood about stateless quagmires is that a solution to them requires coordination and cooperation, not unilateralism. In the 21st century we are faced with a great number of problems that are inherently stateless, which inevitably have embroiled countless nations.

Most interestingly, not all stateless actors are inherently damaging. However, if not managed appropriately, they have the potential of creating disaster. The current

global recession was in large part created by financial markets – it originated with the bursting of the housing bubble and then spread to the banking sector and eventually the credit market, which resulted in the evaporation of credit for consumers and businesses. The result has been economic contraction in the developed economies, tampered growth in the developing ones and a long list of financial instruments and techniques which financiers themselves never quite understood, let alone the government and public: derivatives, mortgage-backed securities, collateralized debt obligations, credit default swaps and short selling.

While financial markets may seem starkly different from Somali piracy, both phenomena have several things in common. They both involve international politics – the current economic debacle has resulted in the rise of protectionism and has also begun to test bilateral and multilateral relations. European nations, in particular Germany and France, have resisted “American calls for even greater government spending.”¹⁶⁶ The Czech prime minister, the current holder of the EU presidency, went even further and condemned the American economic recovery plan as a “way to hell.”¹⁶⁷

Furthermore, just like pirates, financial markets operate across boundaries and therefore any attempt to stabilize and regulate them will need to be transnational in nature. Specifically, these attempts will need to take the form of a global system of financial regulation led by a transnational actor, most likely the International Monetary Fund (IMF), whose current role, among other things, is to “foster global monetary

¹⁶⁶ Steven Erlanger and Nicholas Kulish, “Sarkozy and Merkel Try to Shape European Unity,” *New York Times*, March 30 2009, <http://www.nytimes.com/2009/03/31/world/europe/31europe.html?ref=global-home> (accessed March 31, 2009).

¹⁶⁷ “Czech PM attacks Obama spending,” *BBC News*, March 25, 2009, <http://news.bbc.co.uk/2/hi/europe/7963359.stm> (accessed March 31, 2009).

cooperation [and] secure financial stability.”¹⁶⁸ In other words, using international regime theory, the IMF would strengthen this role and become the international financial regulator that would perform a number of regulatory tasks, including optimizing the pricing and rating of various financial products such as collateralized debt obligations that eluded even the smartest of investors and ensuring that leveraging by financial institutions is kept within sustainable levels. In fact, a recent joint letter by the EU called for a “new global financial architecture that would create transnational oversight and regulation.”¹⁶⁹ There have also been increasing calls for the creation of a global currency. China has suggested that the IMF’s Special Drawing Rights could be used as a reserve currency, which are now based on the dollar, euro, sterling and yen.¹⁷⁰

Another option would be to create a consortium of all the world’s central banks with a rotating presidency. The danger with this plan though is that a rotating presidency will increase inconsistent leadership. Moreover, central banks are essentially agents of states and therefore will represent their own agenda. Ultimately, despite the ambitious regime involving the IMF, this may well be the optimal time to create it. Krasner explains that regime creation “occurs at times of fundamental discontinuity in the international system.”¹⁷¹ Policy makers should use the upcoming G20 summit to create a “blueprint for future reform of the world financial system.”¹⁷² Most importantly, the institution does not necessarily have to be the IMF – any institution, whether new or old, with a global mandate and membership base would do.

¹⁶⁸ International Monetary Fund, “About the IMF,” <http://www.imf.org/external/about.htm>.

¹⁶⁹ Erlanger and Kulish, “Sarkozy and Merkel Try to Shape European Unity.

¹⁷⁰ Katie Hunt, “Will the US dollar remain king?” *BBC News*, March 26, 2009, <http://news.bbc.co.uk/2/hi/business/7965518.stm> (accessed March 31, 2009).

¹⁷¹ Krasner, *International Regimes*, 357.

¹⁷² “Q&A: The G20 summit,” *BBC News*, March 30, 2009, <http://news.bbc.co.uk/2/hi/business/7921385.stm> (accessed March 31, 2009).

This proposal is undoubtedly ambitious but that is what regime theory would propose and it could very well provide the needed stability by providing global standardized financial norms and rules, just like the UN has done with regards to the protection of MVs. However, there are those, such as Dani Rodrik of Harvard University that call for “national regulation, not the global sort.”¹⁷³ He argues that countries should have a choice in how much financial stability they have, a more realist argument. For example, he argues that America may want less financial stability to help promote financial innovation.¹⁷⁴ However, his argument is unconvincing because it was financial innovation that caused much of the current crisis.

An international regime is also needed to defeat terrorism. The difficulty with dealing with this stateless phenomenon is that terrorist cells and groups continually evolve and adapt to situations. As an example, al-Qaeda is largely decentralized and has “autonomous underground cells in some 100 countries.”¹⁷⁵ Moreover, it is connected with other terrorist organizations, including the Egyptian Islamic Jihad and Lashkar-e-Taiba, which is based in Pakistan. Moreover it has close ties with the Taliban, a fundamentalist movement based in Afghanistan that has regained power and influence in recent years.¹⁷⁶ This is why a regime built around coordination and collaboration is needed.

Part of the current international response has taken the form of an INTERPOL-UN regime. Currently, INTERPOL provides information to national law enforcement agencies to pursue and apprehend suspected terrorists through the “Interpol-United

¹⁷³ Dani Rodrik, “Economic focus: A Plan B for global finance,” *The Economist*, March 14, 2009, 80.

¹⁷⁴ *Ibid.*

¹⁷⁵ Council on Foreign Relations, “al-Qaeda,” <http://www.cfr.org/publication/9126/#5>.

¹⁷⁶ *Ibid.*

Nations Security Council Special notice” initiative.¹⁷⁷ Among other things, INTERPOL has developed best practices to prevent and suppress terrorism, evaluates countries’ capacities to combat terrorism and helps combat the financing of terrorism.

Ultimately, George W. Bush’ largely unilateral ‘War on Terror’ is the opposite of what should be done. The war was ill-conceived, named and executed. The problem of terrorism cannot be solved unilaterally. Fortunately, the Obama administration has shown a greater willingness to work with the international community to deal with this threat. Hopefully, this will help strengthen the regime that is currently in place. Ultimately, international regime theory can be used to understand stateless problems in the international system that go well beyond maritime piracy.

¹⁷⁷ INTERPOL, “Terrorism – INTERPOL-UN Security Council Special Notices,” <http://www.interpol.int/public/ICPO/IntLiaison/UN/terrorism.asp>.

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